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Editorial

In this issue of the *Journal*, attention is devoted to a variety of themes related to human rights in particular states and in Africa more generally. Specific states covered are Kenya, Nigeria, Sudan, Tanzania and Uganda. Some of the novel themes include the right of indigenous peoples to self-determination, discussed against the background of the UN Declaration on the Rights of Indigenous Peoples; the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; and the adoption by the SADC Parliamentary Forum of a Model Law on HIV for Southern Africa.

Some of the contributions in this issue are based on papers presented at the annual conference of partner faculties involved in and students registered for the LLM (Human Rights and Democratisation in Africa). This meeting took place at the Centre for Human Rights, University of Pretoria, on 8 and 9 December 2008. The main themes of the conference were democratisation and recent elections in Africa, and the role of human rights law in addressing poverty.

A new addition to this issue is an overview of developments during 2008, in particular in three thematic areas of interest to readers: international criminal justice in Africa, and human rights developments in the African Union; and under the ambit of sub-regional economic communities. In addition, activities of the African Committee of Experts on the Rights and Welfare of the Child are once again reviewed.

It is indeed a cause for concern that the relationship between the African Court on Human and Peoples' Rights and the African Court of Justice has not yet been finalised. Although both these institutions have adopted draft or interim Rules of Procedure to deal with the issue, they are yet to meet to engage in discussions on this matter. We urge the two bodies to bring these efforts to finality as soon as possible.

The editors convey their thanks to the following independent reviewers, who so generously assisted in ensuring the quality of the *Journal*: Divine Afuba, Jean Allain, Cecile Aptel, Gina Bekker, Chacha Bhoke, Trynie Boezaart, Kealeboga Bojozi, Erika de Wet, Curtis Doebbler, John Dugard, Patrick Eba, Geoff Gilbert, Waruguru Kaguongo, Muhammed Ladan, Jeremy Levitt, Sandra Liebenberg, Freddy Mnyongani, Caroline Nicholson, Kalkidan Obse and Karen Stefiszyn.

The role of the judiciary in the promotion of democracy in Uganda

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Summary

The article examines the role of the judiciary in the promotion of democracy in Uganda. The article recognises the fact that the democratisation process requires the involvement of many stakeholders, including the judiciary, the legislature and the executive. However, it is argued that the judiciary has a stronger constitutional responsibility for securing the integrity of democracy through the protection of fundamental human rights and the resolution of electoral disputes. It is argued that courts can be utilised as arenas in the struggle for democratisation and the rule of law. Judges must feel compelled to select those values and principles from the Constitution which best promote democracy. Through their boldness, judges can push the government so that it may move forward on the journey of democracy. Judges must accept an aggressive law-making function regarding all categories of human rights.

1 Introduction

It is now recognised that democracy and the observance of human rights lay the foundation for political stability and socio-economic progress.¹ In terms of democracy and the exercise of judicial power,

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¹ See eg D Lake & M Baum 'The invisible hand of democracy: Political control and the provision of public services' (2001) 34 *Comparative Political Studies* 587; A Sen *Poverty and famines* (1981); D Stasavage 'The role of democracy in Uganda's move to universal primary education' (2005) 43 *Journal of Modern African Studies* 153.

Uganda has had a chequered history.² During British colonialism (1894-1962), the judiciary did not exercise powers independent of the colonial regime.³ For most of Uganda's post-colonial history, military or quasi-military regimes have dominated the political space. Although the independence Constitution⁴ clearly spelt out the division between the executive, legislative and administrative functions of government, it was replaced by the 1966 interim Constitution and subsequently the 1967 Constitution, which curtailed judicial power. During this period, personal liberty was violated since in a majority of cases, valid detention orders could not be questioned in any court of law.⁵

During the period between 1971 and 1980, Uganda was under direct military rule and witnessed horrendous human rights violations at the hands of President Idi Amin and other state agents. The first Ugandan chief justice was murdered and executive and judicial powers were militarised. President Amin was the supreme law and all legislative, executive and judicial powers vested in him and his military council. No action could be instituted against government for injuries sustained as a consequence of the maintenance of public order and security.

In 1980, multi-party elections were held. The period from 1980 to 1985 witnessed an increased number of human rights violations. Though some judges attempted to uphold the rule of law, their judgments and orders were frequently disobeyed.⁶

In January 1986, following a five year-long protracted bush war, YK Museveni was sworn in as President of Uganda. He promised that his National Resistance Movement (NRM) was not a mere change of the guard but a fundamental change. He promised that the new focus

² This is captured by the Preamble to the Constitution, which recalls Uganda's 'history which has been characterised by political and constitutional instability' and the 'struggles against the forces of tyranny, oppression and exploitation'.

³ J Oloka-Onyango 'Judicial power and constitutionalism in Uganda: A historical perspective' in M Mamadani & J Oloka-Onyango (eds) *Uganda: Studies in living conditions, popular movements and constitutionalism* (1994).

⁴ As Paul observes, independence constitutions in Anglophone Africa 'were like negotiated treaties. They were often more the product of *ad hoc* bargaining in London than the reflection of popular demands and manifestations of indigenous political culture ... Once independent, the regime could change the Constitution to suit local needs, and not surprisingly, to tighten its control over the political system.' See JCN Paul 'Some observations on constitutionalism, judicial review and the rule of law in Africa' (2001) 35 *Ohio State Law Journal*.

⁵ Eg, in *Re Ibrahim* (1970) EA 162, Jones Ag J stated that 'one cannot look behind a valid detention order, as it must be assumed that a minister ought to be, and is deeply concerned about the liberty of the subject, and only issues a detention order after considering all the information before him. In coming to a conclusion he weighs all the evidence and acts (not merely on the advice of a police officer only). In particular he has the interests of the state in mind and he is assumed to have acted judicially in arriving at the conclusion.'

⁶ See eg *F Kityo v Attorney-General* (1983) HCB 56 and *Re: Buregyeya* (1985) HCB 99 where the High Court decided that the detention orders issued against the applicants were defective. For a detailed discussion of most of the cases during the 1960s and 1970s, see Oloka-Onyango (n 3 above).

would include the restoration of democracy and the rule of law.⁷ Compared to the systematic abuses of the past under the NRM government, there has been relative progress in the field of democratisation and the observance of human rights. There is now a functioning judiciary whose independence is guaranteed by the Constitution of the Republic of Uganda, which was promulgated in 1995. There are instances where the judiciary challenged executive, administrative and legislative action. However, from 1986 up to mid-2005, political parties and organisations were banned and, as Barya has observed, this served to stifle political debate and violate the rights of those in the political opposition.⁸ Following donor pressure and internal agitation, the NRM government, through a referendum opened up political space to opposing political parties and organisations. Indeed, there has since been competition for power through parliamentary and presidential elections.

Against this background, the article examines the role of the judiciary in the promotion of democracy in Uganda. It recognises that the democratisation process requires the involvement of many stakeholders, including the judiciary, the legislature and the executive. However, it is argued that the judiciary has a stronger constitutional responsibility to secure the integrity of democracy, especially through the protection of fundamental human rights and the resolution of disputes over electoral rules and ensuring that the parties abide by these rules. The courts may be utilised as arenas in the struggle for democratisation and the rule of law.

The article is divided into four sections. The first is this introduction. Secondly, the article revisits the nexus between democracy, human rights and the exercise of judicial power. The third section examines attempts by the courts to promote democracy and human rights, especially after the promulgation of the 1995 Constitution. The fourth section analyses some of the limitations to the exercise of judicial power in Uganda. The final section contains concluding remarks.

2 Democracy, human rights and judicial power: Revisiting the nexus

2.1 Democracy and human rights

In spite of the wide use of the concept democracy, there is no widely-accepted comprehensive and universal definition for it. There are

⁷ On the initial policies of the NRM after the bush war, see NRM *The ten point programme* (1990).

⁸ JJ Barya 'International support to no-party democracy in Uganda' in J de Zeeuw & K Kumar (eds) *Promoting democracy in post-conflict societies* (2006).

various interpretations of democracy.⁹ Some commentators consider democracy within the broader social, economic, political, gendered and cultural context.¹⁰ For the purposes of this article, democracy may be taken to mean the form of government in which the supreme power is vested in the people and for the people. Democracy demands that the government should be open, accountable and participatory. The state is administered according to the will of the people who have delegated their sovereign political power to leaders elected by them. The people take part directly or indirectly in the formulation of policies by means of secret, free and fair elections of representatives who remain in office for a specific length of time. The Constitution of Uganda exalts the role of the people in the democratisation process. It provides that all power belongs to the people who shall exercise their sovereignty in accordance with the Constitution.¹¹ The Constitution further provides that the people shall be governed through their will and consent, which shall be expressed 'through regular, free and fair elections of their representatives or through referenda'.¹²

Elections are therefore an indispensable pre-requisite for democracy.¹³ On the importance of elections for democracy, Geist observes as follows:¹⁴

An election addresses the issue of periodic reaffirmation of or alteration in the presentation of the public in the institutions of policy making and governance. Elections confer legitimacy on governance by providing a chance for the citizenry to alter the composition of the government. They can also provide channels for citizen input on policy issues directly, through referenda, or in the extreme case to alter the nature of the government itself, through constitutional exercises.

⁹ On the discourses on democracy, see eg AH Birch *The concepts and theories of modern democracy* (1993); BO Nwabueze *Democratisation* (1993); S Issacharoff *et al The law of democracy: Legal structures of the political process* (2001); T Sono 'Comments on democracy and its relevance to Africa' (1992) 3 *African Perspectives: Selected Works* 29; D Ronen 'The challenges of democracy in Africa: Some introductory observations' in D Ronen (ed) *Democracy and pluralism in Africa* (1986).

¹⁰ See eg U Baxi 'Universal rights and cultural pluralism: Consumerism as a site of state formative practices' (2000) 21 *Cardozo Law Review* 29. On poverty eradication as a democracy issue, see B Twinomugisha 'A critique of Uganda's poverty eradication action plan' in K Matlosa *et al The state, democracy and poverty eradication in Africa* (2008) 298.

¹¹ Art 1(1) of the Constitution. See also the Preamble to the Constitution.

¹² Arts 1(2) & (4) of the Constitution.

¹³ The first post-independence elections were held in 1980 after the fall of Idi Amin. In the period 1993 to 1994, the Constituency Assembly elections were held to elect delegates to debate the Report of the Constitutional Commission and promulgate the Constitution. In 1996 presidential and parliamentary elections were held. These were followed by the 1997-1998 local council elections and the 2000 referendum on political systems. In 2001 and 2006, presidential and parliamentary elections were conducted. The 2006 elections were held under a multi-party dispensation.

¹⁴ G Judith 'Political significance of the Constituency Assembly elections' in HB Hansen & M Twaddle (eds) *From chaos to order: The politics of constitution making in Uganda* (1994).

In determining whether an election is free and fair, it is crucial to look at the entire electoral process, not the polling exercise on polling day alone. The electoral process commences with the enacting of the relevant laws and ends with the declaration of the results. Government employees and officials involved in the electoral process must be competent, honest, open, transparent and impartial in the implementation of the electoral laws and the conduct of the electoral process. The Chairperson and other commissioners of the Electoral Commission must be non-partisan and competent to deal with the situation.¹⁵ The entire election process must be free of bribery, violence, coercion or anything intended to subvert the will of the people. Fairness and transparency must be adhered to in all stages of the electoral process. Elections should be conducted regularly in a free and fair manner.

It should be noted that democracy is not merely the right to vote and seize power. It also entails respecting, promoting and protecting fundamental human rights and freedoms. The nexus between democracy and human rights has been emphasised at various fora. For example, the United Nations High Commissioner for Human Rights (UNHCHR) recognises that ‘democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing’,¹⁶ and that ‘democracy fosters the full realisation of all human rights and *vice versa*’.¹⁷ The UNHCHR also stresses that democracy includes ‘the rule of law, including legal protection of citizens’ rights, interests and personal security, and fairness in the administration of justice and the independence of the judiciary’.¹⁸ The UNHCHR also calls upon states¹⁹

to consolidate democracy through the promotion of pluralism, the protection of human rights and fundamental freedoms, maximising the

¹⁵ Presently, the President with the approval of parliament appoints the Chairperson and members of the Electoral Commission (art 60(1) of the Constitution). Given that the ruling party has a majority in parliament, all the nominees by the President are usually approved. The Constitution accords the Commission independence, which shall ‘in the performance of its functions, not be subject to the direction or control of any person or authority’ (art 62 of the Constitution). However, because of the partisan nature of the Commission as exhibited in past elections, there have been calls for the amendment of the Constitution to ensure that the Chairperson is a retired judge with members appointed in consultation with the major and credible political parties in the country.

¹⁶ UNHCR ‘Promotion of the right to democracy’ Commission on Human Rights Resolution 1999/57 [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.RES.1999.57.En?Opend](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.1999.57.En?Opend) (accessed 13 February 2009).

¹⁷ n 16 above, para 1.

¹⁸ n 16 above, para 2(c).

¹⁹ UNHCHR ‘Promoting and consolidating democracy’ Commission on Human Rights Resolution 2000/47 [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.RES.2000.47.En?Opend](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2000.47.En?Opend) (accessed 13 February 2009). This has been stated by the United Nations General Assembly in ‘Promoting and consolidating democracy’ A/RES/55/96 [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.RES.55.96.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.RES.55.96.En?Opendocument) (accessed 13 February 2009).

participation of individuals in decision making and the development of competent and public institutions, including an independent judiciary, effective and accountable legislature and public service and an electoral system that ensures periodic, free and fair elections.

Among the fundamental human rights and freedoms relevant for the promotion and consolidation of democracy, the UNHCHR emphasises 'freedom of thought, religion, belief, peaceful assembly and association, as well as freedom of expression, freedom of opinion, and free, independent and pluralistic media'.²⁰ The New Partnership for Africa's Development (NEPAD)²¹ also reaffirms Africa's commitment to the promotion of democracy and its core values, which include the enforcement of the rule of law, individual and collective freedoms, the inalienable right of individuals to participate by means of free, credible and democratic political processes in periodically electing their leaders for a fixed term of office, and 'adherence to the separation of powers, including the protection of the independence of the judiciary'.²² The Heads of State and Government noted that one of the tests by which the quality of democracy is judged is the respect and protection of human rights, especially for the vulnerable and disadvantaged such as women and children.²³ The principles of the African Union (AU) also include respect for democratic principles, human rights, the rule of law and good governance.²⁴

2.2 Judicial power

A democratic society should have a system of accountability where holders of public office, such as legislators, electoral officials and political leaders, are accountable and answerable to the public for their decisions and actions. Public officials must be kept in check to guard against bad governance and this calls for the separation of powers between the executive, legislature and judiciary. In a constitutional democracy, the doctrine of separation of powers permits dialogue between the three branches of government — the legislature, judiciary and executive — in order to achieve the goals set by the authors of the Constitution.²⁵ The judiciary has the power to determine whether the legislature and the

²⁰ n 19 above, para 1(b). See also Commission Resolutions 2001/41, 2002/46 & 2003/36.

²¹ NEPAD 'Declaration on Democracy, Political, Economic and Corporate Governance' AHG/235 (XXXVIII) Annex I, para 7.

²² As above.

²³ n 21 above, para 10. For an elaborate discussion of NEPAD's goals of democracy and good governance, see AMB Mangu 'Assessing the effectiveness of the African Peer Review Mechanism and its impact on the promotion of democracy and good governance' (2007) 7 *African Human Rights Law Journal* 355 361.

²⁴ Art 4(m) of the AU Constitutive Act.

²⁵ N Barber 'Prelude to the separation of powers' (2001) 60 *Cambridge Law Journal* 59 71; P Kurland 'The rise and fall of the doctrine of separation of powers' (1986) 85 *Michigan Law Review* 592 603.

executive are performing their duties in accordance with the Constitution. Judicial power is the authority given to the courts to declare and interpret the law.²⁶ Judicial power acts as a deterrent to the abuse of people's democratic rights. The judiciary must use its power to sanction excesses committed by the legislature and the executive so as to promote 'a just, free and democratic society'.²⁷

The judiciary can and should play a fundamental role in the promotion of democracy.²⁸ Judges, especially of the higher courts, occupy a special position in a democratic society. The Constitution provides that judicial power is derived from the people and shall be exercised 'in the name of the people and in conformity with the law and with the values, norms and aspirations of the people'.²⁹ The Constitution establishes courts as the bastion in the defence of the people against oppressive and unjust laws and practices. The courts must protect fundamental human rights and freedoms which, as pointed out above, are a cornerstone of democracy. The Constitution permits any person who claims that his or her human right or freedom has been infringed or is threatened, to apply to a competent court for redress.³⁰ The courts must view their role in terms of securing a better society for all people, even if this means overstepping the traditional dividing line between the political branches of government and the judiciary. The courts must keep the government faithful to the goals of democracy.³¹ As Maina observes, the independence of the judiciary calls for innovation on the part of the judges, who 'should not wait for each and everything to be delivered to them in the form of laws and by-laws. They require imagination in the process of dispensing justice'.³² Judges should therefore be able to embrace the concept of judicial activism by moving away from the practice of defining their role narrowly and technically. Judges should interpret the Constitution and other relevant laws so as to promote democracy and human rights.

The independence of the judiciary is paramount in the promotion and sustenance of democracy and is guaranteed by the Constitution. The Constitution created an independent and impartial judiciary with the mandate to interpret, protect and enforce the Constitution. According to the Constitution, the courts shall, in the exercise of judicial power,

²⁶ JR Nolan *et al* (eds) *Black's law dictionary* (1990) 849.

²⁷ Objective I of the Constitution.

²⁸ A Barak *The judge in a democracy* (1989); J Dugard 'Judging the judges: Towards an appropriate role of the judiciary in South Africa's transformation' (2007) *Leiden Journal of International Law* 20.

²⁹ Art 126(1) of the Constitution.

³⁰ Art 50 of the Constitution.

³¹ On the importance of the judiciary, especially the Supreme Court as the guardian of the Constitution and the promoter of good governance and democracy in Nigeria, see eg the judgment of Mustapher JSC in *AG Abia v AG Federation* (2006) 16 NWLR (Pt 1005) 265 454 (Supreme Court).

³² CM Peter *Human rights in Tanzania: Selected cases and materials* (1997) 484.

'be independent and shall not be subjected to the control or direction of any person or authority'.³³ The Constitution further provides that 'no person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions'³⁴ and all organs and agencies of the state shall accord to the courts necessary assistance to enable them discharge their functions.³⁵ The primary objective of guaranteeing the independence of the judiciary is to ensure the effective maintenance of law and constitutional order so that there is no necessity or justification for a resort to extra-judicial means in the resolution of political disputes.³⁶

3 Promoting democracy and human rights through judicial review

In this article, judicial review refers to the power of a court to review a law or an official act of a government official in order to determine whether such law or act conforms to the Constitution or the basic principles of natural justice. The judiciary has powers of judicial review of executive and legislative acts to ensure that they comply with the Constitution. Through judicial review, the judiciary discharges its function of protecting and enforcing the Constitution. The process of judicial review also provides checks on the executive and the legislature when litigants bring cases to court. In a constitutional democracy such as Uganda, courts are the final protectors and arbiters of constitutional interpretation. Courts are given powers to interpret and enforce the Constitution. Through judicial review, the courts determine the validity of executive and legislative action to ensure that these arms of government operate within the bounds established by the Constitution. The power of judicial review not only fits into a democratic society but also helps protect democracy and human rights.

The Constitution has entrusted the judiciary with the task of construing the provisions of the Constitution in order to promote a 'just, free and democratic society'.³⁷ Thus, where a litigant challenges a law on the basis that it has been passed without authority or unconstitutionally or is in conflict with a relevant constitutional provision, the courts have a duty to determine whether the law passed is valid or not. Through judicial review, the judiciary is able to adjudicate the dispute in question and provide the applicable remedies to the victims.

³³ Art 128(1) of the Constitution.

³⁴ Art 128(2) of the Constitution.

³⁵ Art 128(3) of the Constitution.

³⁶ PT Mukubwa 'Ruling from the grave: Challenging antiquated constitutional doctrines and values in Commonwealth Africa' in J Oloka-Onyango (ed) *Constitutionalism in Africa* (2001) 288.

³⁷ n 27 above.

According to the Constitution, any question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.³⁸ Thus, a person who alleges that ‘an Act of parliament or any other law or anything in or done under the authority of any law’ or any act or omission by any person or authority is inconsistent with or in contravention of a provision of the Constitution, may petition the Constitutional Court to that effect.³⁹ In the next section, I consider major post-1995 decisions that concern the promotion of democracy and human rights in Uganda.

3.1 Upholding freedom of assembly and association: The case of *Ssemogerere and Others v The Attorney-General*⁴⁰

From 1986 to 2000, Uganda was under a movement-based system of governance — a single or one-party state of sorts. The argument, espoused by President Museveni, against political parties was that they are divisive and are not suitable for underdeveloped countries like Uganda. Although the 1995 Constitution recognised these parties, they existed only in name. The political parties were prohibited from opening and operating branch offices; holding delegates conferences or public rallies; sponsoring or offering a platform to or in any way campaigning for or against a candidate for any public elections; and carrying out any activities that may interfere with the political system in force.

In a bid to further stifle the operations of political parties in the country, parliament passed the Political Parties and Organisations Act, which provided *inter alia* that no party or organisation could open branches below the national level. Political parties and organisations were barred from holding public meetings except for national conferences, executive committee meetings and seminars at the national level.⁴¹ The Act provided that a political party or organisation should not hold more than one national conference in a year.⁴² While presenting the Bill to parliament, the Minister of Justice and Constitutional Affairs stated that the Bill was ostensibly aimed at bringing back full multi-party activities, but added that ‘the movement system of government which the people of Uganda chose to govern them for the next five years should operate without hindrance from organisations subscribing to other political systems’.⁴³ During the debate, proponents of political pluralism vehemently opposed the Bill, arguing that it was a

³⁸ Art 137(1) of the Constitution.

³⁹ Arts 137(3)(a) & (b) of the Constitution.

⁴⁰ Constitutional Petition 5 of 2002.

⁴¹ Secs 18(1)(a)-(d).

⁴² Sec 18(2).

⁴³ Parliament of Uganda: Parliamentary Debates (Hansard) Official Report, 1st session, second meeting; Issue 6; 3 April 2002 to 16 May 2002 2045-6.

denial of their freedoms to assemble and associate since it would deny them a national outlook and affect their ability to mobilise and recruit members.⁴⁴ They contended that this was tantamount to a complete ban on political parties, and promised court action.⁴⁵

Indeed, they lived up to their promise, and in *Paul K Ssemogerere and 5 Others v Attorney-General*,⁴⁶ they (the political party leaders) challenged the constitutionality of sections 18 and 19 of the Political Parties and Organisations Act on the grounds that they impinge on their political rights and freedoms. The agreed issues were (1) whether or not sections 18 and 19 of the Act imposed unjustifiable restrictions or limitations on activities of political parties and organisations; (2) whether or not the sections rendered political parties and organisations non-functional and inoperative; (3) whether the sections were inconsistent with article 75 of the Constitution, which prohibits the establishment of a one-party state; and (4) whether or not the sections are inconsistent with articles 2, 20, 29, 43, 71 and 73(2) of the Constitution.

The Constitutional Court unanimously declared the sections unconstitutional and therefore null and void. The Court held that the sections in question imposed unjustifiable restrictions or limitations on the activities of political parties and organisations contrary to article 73(2) of the Constitution. In his judgment, Mpagi-Bahigeine JA pointed out that the limitations on fundamental rights and freedoms under article 43 of the Constitution

... shall not exceed what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in the Constitution. What is reasonably justifiable in a free and democratic society is not a concrete or precise concept but the test is objective. Courts have to take into account what obtains elsewhere in societies regarded as democratic. A democratic society is where people have a say in the governance of their affairs and there is observance of fundamental human rights and freedoms.

The Court agreed with the petitioners that sections 18 and 19 rendered the parties and organisations non-functional and inoperative and in effect established a one-party state in favour of the movement-based organisation. The Court was emphatic that fundamental rights and freedoms may not be subject to a vote and they do not depend on an outcome of any election. The Court observed as follows:

The freedoms to assemble and associate in as far as this petition is concerned do not only concern the right to form a political party but also guarantee the right of such a party once formed to carry on its political activities freely. Such an association is a highly effective means of communication. It stimulates public discussion and debate of the issues concerning the country, often offering constructive criticism of government programmes

44 As above.

45 As above.

46 As above.

and alternative views. The right to freedom of association lies at the very foundation of a democratic society and is one of the basic or core conditions for its progress and development.

Uganda's transition from a movement-based system to a multi-party arrangement evolved slowly.⁴⁷ The case discussed above illustrates the point that, through review of legislative and executive action, courts can play an important role in shaping the political developments in a country. The courts may be a feasible arena for the political opposition to challenge unconstitutional measures taken by the ruling regime to restrain their activities. The case has had an impact on the operation of political parties in the country in that, under the multi-party dispensation, the parties may now hold delegates' conferences and political rallies and carry out grassroots recruitment and mobilisation.

3.2 Promoting freedom of expression and access to information: The case of *Charles Onyango Obbo and Another v The Attorney-General*⁴⁸

The Constitution guarantees every person the right to 'freedom of speech and expression which shall include freedom of the press and other media'.⁴⁹ The media draws the public attention to areas where they should demand accountability. It helps to bring to the attention of the public excesses of mismanagement. The media constitutes a vital political space and freedom of expression is crucial in the fight for democracy.⁵⁰ In addition to informing, entertaining and educating, the media plays a fundamental role as watchdog over government. In any case, freedom of expression is one of the core essentials of a functional democracy. As the court observed in the Nigerian case of *State v Ivory Trumpet Publishing*.⁵¹

Freedom of speech is, no doubt, the very foundation of every democratic society, for without free discussion, particularly on political issues, no public education or enlightenment, so essential for the proper functioning and execution of the processes of responsible government, is possible.⁵²

Freedom of the media entails freedom to seek, receive and impart information and ideas. The Constitution also guarantees citizens of Uganda

⁴⁷ On 28 July 2005, Uganda held a referendum to decide whether the country should remain under the movement system or should move to a multi-party system of government. Though the voter turnout was low, 90% voted in favour of a return to multi-party politics.

⁴⁸ Constitutional Appeal 2 of 2002. The Constitutional Court had dismissed the case on technicalities.

⁴⁹ Art 29(1)(a) of the Constitution.

⁵⁰ On the nexus between democracy and media freedom, see B Twinomugisha 'Is there media freedom in Uganda?' (1998) *East African Journal of Peace and Human Rights* 1.

⁵¹ (1984) 5 NCLR 736.

⁵² n 51 above, 747.

the right of access to information in the possession of the state 'except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right to the privacy of any other person'.⁵³

Access to information promotes accountability in the political and other spheres and enhances the realisation of other human rights. However, there have been violations of freedom of expression and access to information generally, and media rights in particular. Some media houses have been closed for allegedly reporting negatively against the government and criminal cases have been brought by the state against journalists. Consequently, as guardians of human rights and freedoms in a democratic society, the courts have been called upon to review laws that impinge on media freedoms. For example, in *Charles Onyango Obbo and Another v The Attorney-General*,⁵⁴ the appellants (practising journalists) were charged before the magistrate's court with the publication of false news contrary to section 50 of the Penal Code. The story in *The Monitor* newspaper quoted the *Indian Ocean Newspaper* that the late President Laurent Kabila had paid Uganda in gold. The magistrate's court acquitted them of the charges. However, they petitioned the Constitutional Court for a declaration that section 50 of the Penal Code was unconstitutional and that it was erroneous to prosecute them.

The Constitutional Court unanimously declared that the Director of Public Prosecution's action in prosecuting the appellants was not inconsistent with the Constitution. By a majority of four to one, the Court declared that section 50 is not inconsistent with the Constitution. There was one issue on appeal: whether section 50 of the Penal Code contravened article 29 of the Constitution, which guarantees protection of freedom of expression, which includes freedom of the press. The appellants argued that the majority justices of the Constitutional Court erred in finding that section 50 is not demonstrably justifiable in a free and democratic society within the meaning of article 43 of the Constitution. In his judgment, Mulenga JSC stressed that the right to freedom of expression 'is not confined to categories, such as correct opinions, sound ideas or truthful information',⁵⁵ and that 'everyone is free to express his or her views [even if these views] are opposed or objected to by society or any part thereof, as "false" or "wrong"'.⁵⁶ The judge stressed the view that a democratic society chooses to tolerate

⁵³ Art 41 of the Constitution. See also *Paul K Ssemogerere & 2 Others v Attorney-General*, Constitutional Appeal 1 of 2002, where sec 121 of the Evidence Act that gave the state unfettered discretion whether to release official information on grounds of national security was declared unconstitutional since it contravened art 41 of the Constitution.

⁵⁴ As above.

⁵⁵ n 48 above, 21.

⁵⁶ As above.

the exercise of the freedom even in respect of the so-called alarming statements. On the role of freedom of expression in a democracy, the judge cited the case of *Edmonton Journal v Alberta* (AG),⁵⁷ where the court stated as follows:⁵⁸

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and inhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasised.

The Supreme Court held that section 50 was unconstitutional since it infringed upon the freedoms of expression and access to information. In my view, by decriminalising the publication of false news, the Supreme Court established a higher threshold for limiting media freedom, which is critical in the democratisation process.

3.3 Promotion of electoral democracy

3.3.1 The 2001 presidential election

The elections were held under an individual/personal merit arrangement and the real contest was between the incumbent President Museveni and a retired colonel, Kiiza Besigye, who was his personal doctor in the five-year bush war that brought Museveni to power. These elections were arguably controversial. Intimidation, the harassment of candidates' agents, voters and supporters, abusive language, hooliganism, destruction of property, and the involvement of military and high-ranking government officials in the electoral process characterised the campaign.⁵⁹ However, the Electoral Commission (Commission), which is constitutionally empowered to organise, conduct and supervise elections,⁶⁰ declared candidate Museveni the winner of the presidential elections. The loser challenged the results in the Supreme Court pursuant to the Electoral Commission Act⁶¹ and the Presidential Elections Act.⁶²

It should be noted that, according to the Presidential Elections Act, any aggrieved candidate may petition the Supreme Court for an order

⁵⁷ (1989) 2 SCR 1326. He also cited *Lingen's* case 12/1984/84/131, where the European Court of Human Rights observed that 'freedom of expression ... constitutes one of the essential foundations of a democratic society and one of the basic conditions of its progress and for each individual's self-fulfilment'.

⁵⁸ As above.

⁵⁹ Uganda Electoral Commission *Report on the Presidential Election* (2001); S Makara *et al Voting for democracy in Uganda: Issues in recent elections* (2003).

⁶⁰ On the functions of the Electoral Commission, see arts 61(1)(a)-(f) of the Constitution.

⁶¹ Cap 140 Laws of Uganda.

⁶² Cap 142 Laws of Uganda.

that a candidate declared elected as President was not validly elected.⁶³ The petition should be lodged in the Supreme Court registry within ten days after the declaration of the election results.⁶⁴ The Supreme Court 'shall inquire into and determine the petition expeditiously and shall declare its findings not later than 30 days from the date the petition is filed'.⁶⁵ The Supreme Court may, after inquiries, dismiss the petition; declare which candidate was validly elected or annul the election.⁶⁶ According to the Act, the declaration of a candidate shall only be annulled on any of the following grounds:⁶⁷

- (a) non-compliance with the provisions of this Act, if the court is satisfied the election was not conducted in accordance with the principles laid down in those provisions and that the noncompliance affected the results in a substantial manner;
- (b) that the candidate was at the time of his or her election not qualified or was disqualified for election as President;
- (c) that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his knowledge and consent or approval.

Thus, in *Col (Rtd) Dr Besigye Kiiza v Museveni Yoweri Kaguta and the Electoral Commission*,⁶⁸ the petitioner alleged that certain principles relating to the registration of voters were not complied with. He argued that the Commission neither displayed the register of voters within 21 days, nor published the list of the polling stations in each constituency at least 14 days before the nomination of candidates.⁶⁹ He alleged that the Commission did not supply him with the register when requested to do so. He also alleged that the Commission did not control the distribution and use of ballot boxes and papers, which resulted in the stuffing of ballot boxes with pre-ticked votes. The petitioner also averred that the Commission allowed people younger than 18 years to vote. It was also alleged that the military and the Presidential Protection Unit (PPU) and para-military personnel interfered with the petitioner's campaigns. He also alleged that candidate Museveni committed various illegal practices 'personally or with his or her knowledge and consent or approval'.⁷⁰ The sum total of his argument was that the entire electoral process was not conducted under conditions of freedom and fairness.

All the judges agreed that there was intimidation by the army and other organs and officials of the government. By a majority of three to

⁶³ Sec 57(1) of the Act.

⁶⁴ Sec 57(2) of the Act.

⁶⁵ Sec 57(3) of the Act.

⁶⁶ Secs 57(5)(a)-(c) of the Act.

⁶⁷ Sec 57(6) of the Act.

⁶⁸ Election Petition 1 of 2001 (Supreme Court Uganda).

⁶⁹ See secs 18-25 of the Electoral Commission Act and sec 27 of the Presidential Elections Act.

⁷⁰ Sec 57(6)(c) of the Act.

two, the Court found that Museveni was liable for the illegal practices and offences committed by the army officials who were his agents. However, Odoki CJ held that there was no evidence adduced to prove that candidate Museveni knew and consented to or approved the illegal acts complained of. Mulenga JSC was also of the view that proof that an elected candidate committed an illegal practice or other practice cannot annul an election. The majority of the Court held that, although there were extensive election malpractices, they did not affect the results of the election in a substantial manner and thus the election could not be annulled. Though the petitioner lost the election petition, it revealed the gross abuse of election management in Uganda. The judges observed that the Commission abdicated its statutory responsibility of organising free and fair elections.

3.3.2 The 2006 presidential election

The 2006 presidential elections were conducted under a multi-party system of governance. The main candidates were (again) the incumbent President Museveni and Kiiza Besigye. There were, however, challenges to Besigye's nomination. It was alleged that he had changed his name and used another person's names to gain entry to university, a claim that the Commission dismissed. Besigye was also detained at the time of his nomination on charges of treason and rape and the question was whether he could be nominated when there were pending charges against him. Curiously, the Attorney-General advised that Besigye should not be nominated because, although not yet proven guilty, he was not at the same level of innocence as other candidates. However, the Commission dismissed the Attorney-General's advice and nominated him. In *Asol Kabagambe and Faraj Abdullah v Electoral Commission*,⁷¹ the petitioners contested the nomination of Besigye. The Attorney-General argued that the Commission could not nominate Besigye since he (the Attorney-General) had advised against it. However, the Constitutional Court held that, as an independent body, the Commission was not obliged to accept the advice of the Attorney-General. The Court upheld the nomination. Museveni won the election with a margin of 69% against Besigye's 37%.⁷² Like in the 2001 presidential election, there was widespread intimidation, lack of freedom and transparency, unfairness and violence. There were other gross malpractices, such as multiple voting. Besigye again went to court for a review of the conduct of the presidential election.

⁷¹ Constitutional Petition 1 of 2006.

⁷² It should be noted that using elections as a test, Museveni's popularity has been dwindling over the years. In 1996, he scored 75%, in 2001 he got 69% while in 2006 it was 59%. There are fears within the ruling establishment that should he stand in 2011, he may score less than 50%, inevitably leading to a re-run of the election.

Thus, in *Rtd Col Kiiza Besigye v The Electoral Commission and Yoweri Kaguta Museveni*,⁷³ he asked the Court to annul the presidential elections and order a re-run or, alternatively, order a re-count of the votes cast. The petitioner argued that the conduct of the election contravened provisions of the Constitution, the Electoral Commission Act and the Presidential Elections Act. It was argued that non-compliance with the requirements of the Presidential Elections Act affected the results in a substantial manner. It was also alleged that candidate Museveni personally committed electoral offences such as the use of abusive, malicious, mudslinging, insulting, derogatory and defamatory statements against the petitioner and linking him to terrorists. As was the case with the 2001 presidential elections, the Court unanimously found that the Commission had not complied with the relevant provisions of the Constitution and the electoral laws by deleting voters' names from the register and wrongly counting and tallying of the results. The Court was of the view that the principle of free and fair elections was compromised. However, by a majority of five to two, the Court dismissed claims of illegal practices against candidate Museveni. The Court condemned the continued involvement of the security forces in the elections where they have committed acts of intimidation and violence. In spite of these malpractices, by a majority of four to three, the Court held that it had not been proved to the satisfaction of the Court that the failure to comply with the relevant provisions and principles of the law affected the results of the presidential election in a substantial manner.

3.3.3 A critique of the ruling of the Court

It should be noted that in both the 2001 and 2006 presidential petitions, the Supreme Court applied two tests to decide whether the alleged malpractices affected the results in a substantial manner. The first test, known as the qualitative test, examined the non-quantifiable malpractices. The Court found that these malpractices were massive and overwhelming. The Court did not examine whether such malpractices affected the outcome of the election in a substantial manner. The Court proceeded with the quantitative test, by looking at the quantitative aspect of the malpractices. In doing this, the Court resorted to arithmetic to obtain the difference in figures between the votes of the respondent and the petitioner. Since the difference was big, the Court decided that, even if there were to be a re-run of the elections, the petitioner would not win. In my view, the Court's reasoning was wrong. The word 'substantial' should not be restricted to arithmetic considerations. The Court should have considered both the quantitative and qualitative aspects of the election in order to arrive at a well-reasoned conclusion. The Court should have looked beyond

⁷³ Presidential Election Petition 1/2006.

mathematical differences in the votes and holistically considered all forms of malpractices. As Tumwine Mukubwa correctly observes:⁷⁴

The qualitative test should be the one employed for purpose of safeguarding the purity of the electoral process. It is only this test which will ensure free and fair elections, clean up the electoral process; rid it of negative images and effects brought about by unacceptable actions by players in the electoral process whose purpose is to gain undue advantage. The judicial approval of the qualitative test will enable lawyers and the courts to crusade for electoral democracy by guaranteeing free and fair elections.

All the justices unanimously concluded that the elections were not free and fair. The judges found that the Commission did not comply with the law and there was intimidation, disfranchisement of voters and multiple voting. The Court decided that the elections were not validly conducted in all respects. It is mind-boggling how, in spite of these findings, the Court could simply hand over the elections to a loser. In my view, to prove that the results of the presidential elections were affected in a substantial manner, all that the petitioner had to show was that both the Constitution and the electoral laws had been substantially violated. The petitioner clearly proved that voters were disfranchised and that their constitutional rights were deliberately violated. The Supreme Court should have nullified the elections and ordered a re-run.

It should be noted that, by virtue of the fact that judges are human, they may fear for their lives and those of their families and thus may restrain themselves from passing decisions that may infuriate the executive which has instruments of coercion such as the army, the police and other security apparatus. For example, before the 2001 presidential elections, President Museveni had on a number of occasions warned in the media that he and other 'freedom fighters' fought the bush war (1980-1985) and would not easily hand over power to the opposition. A few weeks before the presidential election, the President is reported to have said:⁷⁵

I am not ready to hand over power to people or groups of people who have no ability to run a nation ... Why should I sentence Ugandans to suicide by handing over power to people we fought and defeated? It's dangerous despite the fact that the Constitution allows them to run against me ... At times the Constitution may not be the best tool to direct us politically for it allows wrong and doubtful people to contest for power.

It would therefore seem that, in spite of the glaring electoral malpractices in the 2001 and 2006 presidential elections, the majority justices of the Court were reluctant to annul the elections for fear of what would happen. For example, the learned Chief Justice, Benjamin Odoki, observed that the outcome of the 2001 presidential election

⁷⁴ P Tumwine Mukubwa *Free and fair democratic elections* (2004).

⁷⁵ *The East African* 12 February 2001.

petition would have far-reaching consequences on the peace, stability, unity and development of Uganda.⁷⁶

4 Limitations on the exercise of judicial power

4.1 Limitation on the power of the courts

The judiciary lacks direct power to enforce its own judgments. In accordance with the doctrine of separation of powers, the Constitution does not endow the judiciary with legislative powers. Parliament has the power to make laws 'on any matter for the peace, order, development and good governance of Uganda'.⁷⁷ The court may declare certain legislation or some of its provisions unconstitutional, but parliament may not repeal the Act or the invalidated provisions. For example, in *Uganda Association of Women's Lawyers and 5 Others v Attorney-General*,⁷⁸ the petitioners challenged the constitutionality of sections 4, 5, 21, 22 and 26 of the Divorce Act on the grounds that they promote gender discrimination. The Constitutional Court unanimously held that the sections were inconsistent with the equality and non-discrimination provisions of the Constitution and were in effect null and void. In spite of demands by civil society and legal practitioners for parliament to repeal the relevant sections, nothing has been done. However, it may be argued that, since courts in Uganda are guided by the supremacy of the Constitution, the sections are deemed to have been repealed by the Court's judgment.

The court could also be overruled through the process of constitutional amendment by the legislature, especially where the ruling party commands a majority in parliament. For example, after the Constitutional Court had nullified the Referendum and Other Provisions Act because parliament had passed it without a quorum, parliament hurriedly passed the Constitution (Amendment) Act 13 of 2000, validating the earlier nullified Act. This Act was debated, passed and assented to by the President in one day. Following the Constitutional Court judgment there was an uproar from the executive and members of parliament belonging to the NRM. President Museveni alleged that the judiciary was biased and that power belonged to the people and not the judiciary and said:⁷⁹

⁷⁶ As above.

⁷⁷ Art 79 of the Constitution.

⁷⁸ Constitutional Petition 2 of 2002.

⁷⁹ 'Museveni rejects referendum ruling' *The Daily Monitor* 28 June 2004 1. The President has recently called for the auditing of judgments to ensure that they reflect the aspirations of the people. At an annual judges' conference, the President proposed that an agency should be established to audit biased judicial decisions. In my view, there is no need for a judicial audit. Auditing judgments is a deliberate attempt by the executive to usurp the powers of the judiciary and interfere with its independence. Where a litigant is dissatisfied with a judgment, he or she may appeal or seek judicial review.

We restored constitutionalism and the rule of law. That is why judges can rule like this against the government. There were times when, if a judge made such a ruling, he would not live to see tomorrow. The ruling will not work. It is simply unacceptable. Judges say article 74 [on change of political systems] is dead. The movement system is not dead. We are all here.

There were demonstrations by the ruling NRM sympathisers protesting the ruling of the Constitutional Court and some judges stayed away from their chambers for some days.⁸⁰ Such interference with the independence of the judiciary was really uncalled for. If the executive was not satisfied with the decision of the Constitutional Court, the proper procedure was to appeal against such decision, but not to resort to jungle justice.

4.2 Restrictive legislative provisions

A petitioner challenging the results of a presidential election is required to lodge the petition within ten days after the declaration of the results.⁸¹ The ten day requirement is too short, unfair and restrictively unrealistic as it limits the petitioner's capacity to gather and assemble the necessary evidence in support of his or her petition. In the 2006 presidential election petition, the justices of the Supreme Court had to accept more and additional affidavits and evidence as the hearing progressed. This was against the usual restrictive rules of civil procedure which prohibit additional evidence from being adduced after the closure of the proceedings. The Court wasted considerable time perusing some affidavits that were hurriedly but poorly drafted. The law should be amended to enlarge the time in which the petitioner can gather evidence and file the petition.

The Supreme Court must also 'determine the petition expeditiously'⁸² and declare its finding within 30 days from the date of filing the petition. It is true that the public expects a presidential election petition to be disposed of quickly. But this should not be at the expense of a quality judgment, which will be respected by all stakeholders in the election process. In my view, the 30-day limit is too short, given that the judges have to hear the parties, study the voluminous affidavits, research and write their judgment. Perhaps that is why the judges had to reserve the

⁸⁰ As above. Recently, the High Court released accused persons in a treason trial on bail. A section of the security forces called the Black Mamba (with masked faces) invaded the High Court premises in a bid to re-arrest the accused. The judicial officers, including the principal judge, were literally forced to stay in the High Court building with the accused until after the Black Mamba had left. The advocates for the accused had no alternative but to request the presiding registrar to send them back to Luzira prison for fear that they may be captured at night. Following this sad state of affairs, the entire judiciary and all advocates, for the first time in the history of the country, went on a sit-down strike for a week until the President had to issue a written apology promising that such an incident would not happen again.

⁸¹ Sec 57(2) of the Presidential Elections Act.

⁸² Sec 57(3) of the Act.

reasons for the judgment to a future date, although it took almost a year to give the reasons. Judges should be left to regulate the procedure and the time in which the ruling should be delivered.

It should also be noted that the law bars the courts from convicting any person of a criminal offence when hearing an election petition.⁸³ The law does not penalise a person who commits an electoral offence by way of disqualifying him or her from holding a public office for a given period. In my view, the law should be amended to permit courts to penalise those who abuse the electoral process as a deterrent to others.

4.3 Low level of judicial activism

Judicial activism motivates judges to depart from strict adherence to precedent 'in favour of progressive and new social policies which are not always consistent with the restraint expected of appellate judges'.⁸⁴ Through judicial activism, judges creatively and purposively interpret constitutional provisions in order to enhance the promotion of democracy and human rights. Critics of judicial activism argue that the concept permits judges who are unelected to usurp the power of the elected branches of government (the legislature and executive), thereby undermining democracy and the rule of law. It is true that judges are unelected, but according to the Constitution they derive their power from the people and are certainly mandated to check the excesses of the executive and the legislature. The role of a judge as a law-maker cannot be overemphasised. Through judicial activism, judges influence the direction of the law. This occurs where the judges' interpretation goes beyond mere words and matters mentioned in the law. Judges are mandated to breathe life into the provisions of the Constitution in order to enhance the promotion of democracy and human rights. Judges must be proactive and far-sighted in their interpretations of Acts of parliament. Indeed, there are instances where the courts have creatively interpreted constitutional and other legal provisions in a bid to enhance the protection of human rights. For example, they have permitted public interest litigation contrary to the restrictive rules of procedure that require a litigant to have a personal interest in the subject matter.⁸⁵ The Constitutional Court has also purposively interpreted

⁸³ See eg sec 57(7) of the Presidential Elections Act.

⁸⁴ Nolan *et al* (n 26 above) 847.

⁸⁵ See eg *The Environmental Action Network (TEAN) v Attorney-General and National Environment Authority*, Misc App 39 of 2001. For a discussion of cases where the court has relaxed *locus standi* requirements in accordance with art 50(2) of the Constitution, see BK Twinomugisha 'Some reflections on judicial protection of the right to a clean and healthy environment in Uganda' (2007) 3 *Law, Environment and Development Journal* 3 <http://www.lead-journal.org/content/07244.pdf> (accessed 27 February 2009).

the right to freedom from cruel, inhuman and degrading treatment and declared corporal punishment unconstitutional.⁸⁶

However, in other instances the courts have construed constitutional provisions narrowly and restrictively. For example, in *Ssemogerere and Others v The Attorney-General*, the petitioners challenged the constitutionality of the Constitution (Amendment) Act,⁸⁷ but the Constitutional Court declared that it had no jurisdiction to interpret one provision of the Constitution against another or others on the grounds that once the correct procedure for enacting a constitutional amendment is complied with, its provisions become part and parcel of the Constitution, and the Court does not have jurisdiction to challenge such an amendment. The Constitutional Court abdicated its responsibility to promote democracy and human rights by denying itself jurisdiction. Another example is *Susan Kigula and 416 Others v Attorney-General*,⁸⁸ where the petitioners challenged the constitutionality of the death penalty on the grounds that it violated the right to life and subjected them to cruel, inhuman and degrading treatment. The Constitutional Court held that the death penalty was an exception to the right to life under the Constitution and therefore constitutional. The Supreme Court confirmed the ruling of the Constitutional Court and held that it was not the duty of the court, but parliament which passes enabling laws, to impose a method of execution other than hanging. Here the Supreme Court squandered an opportunity to creatively interpret the relevant constitutional provisions and declare the death penalty unconstitutional.⁸⁹

5 Conclusion

This paper had one major objective: to examine the role of the judiciary, especially the Constitutional Court and the Supreme Court, in the promotion of democracy in Uganda. The paper started on the premise that the judiciary has a strong constitutional responsibility to secure the integrity of democracy, especially through the protection of fundamental human rights and freedoms and the resolution of disputes over electoral rules and ensuring that the parties abide by the rules. Judicial review acts as a possible deterrent to the abuse of democratic rights and freedoms. The judiciary can and should play a fundamental role in the promotion of democracy. Democracy and human rights are interdependent and are mutually reinforcing. In protecting fundamental human rights and freedoms, the judiciary enhances democratisation in the country. The Constitution has entrusted to the judiciary the task

⁸⁶ *Simon Kyamanywa v Uganda*, Constitutional Reference 10 of 2000.

⁸⁷ Act 13 of 2000.

⁸⁸ Constitutional Petition 6/2003 (CC).

⁸⁹ For an elaborate discussion of how the death penalty conflicts with human rights in Africa, see L Chenwi *Towards the abolition of the death penalty in Africa* (2007).

of construing constitutional provisions and of safeguarding human rights. Thus, the judiciary must exercise its constitutional powers to ensure the promotion of democracy and human rights in the country.

There are instances where the judiciary has boldly challenged executive and legislative action in defence of democracy, including the protection of fundamental human rights. In other instances, especially regarding the resolution of presidential election disputes, the Supreme Court abdicated its responsibility to promote democracy. It is unfortunate that the Supreme Court abdicated its responsibility by endorsing fraudulent presidential elections.⁹⁰ The decisions by the Supreme Court and any other court that does not respect the will of the people may throw the country back to its violent past. People may resort to civil disobedience, as recently happened in Kenya and Zimbabwe, where President Kibaki and President Robert Mugabe were fraudulently declared winners!⁹¹

Judges must feel compelled to select those values and principles from the Constitution which best promote democracy. Judges can overcome limitations to the exercise of judicial power if they accept an aggressive law-making function regarding all categories of human rights. In short, they must embrace judicial activism. Through their boldness, judges can push the legislature and the executive so that these arms of government move forward on the journey of democracy.

⁹⁰ It should be noted that the Supreme Court has handled other cases, especially concerning parliamentary elections, where the appellants alleged that elections were conducted contrary to the provisions of the Constitution, the Electoral Commission Act and the Parliamentary Elections Act and that the non-compliance affected the results in a substantial manner. See eg *Kakooza John Baptist v The Electoral Commission & Another*, Electoral Petition Appeal 11 of 2007. See also *Amama Mbabazi v Garuga Musinguzi*, Election Petition Appeal 1 of 2001; *Abdu Katuntu v Kirunda Kivejinja*, Election Petition Appeal 24 of 2006; *Mukasa Anthony Harris v Bayiga Michael Philip Lulume*, Election Petition Appeal 18 of 2007; *Gola Nicholas Davis v Loi Kageni Kiryapawo*, Election Petition Appeal 19 of 2007; and *Joy Kabatsi Kafura v Anifa Kawoya Bangirana and Electoral Commission*, Election Petition Appeal 25 of 2007.

⁹¹ Incidentally, civil disobedience is recognised as being in defence of the Constitution (arts 3(1) & (2) of the Constitution).

Correcting the historical asymmetry between rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

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Summary

On 10 December 2008, the United Nations General Assembly unanimously adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The Optional Protocol ensures that, just like victims of civil and political rights violations, victims of economic, social and cultural rights violations have access to remedies at the international level. This article examines the Optional Protocol, starting with the historical background and its content, highlighting some of the main issues of controversy.

1 Introduction

The Universal Declaration of Human Rights, 1948 (Universal Declaration) adopts a holistic approach, recognising the interrelatedness and indivisibility of human rights. It recognises that economic, social and cultural rights are indispensable for everyone's dignity and the free development of their personality. The international community is,

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therefore, required to 'treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis'.¹ The Universal Declaration was a major step forward in the advancement of civilisation at the international and national levels.² It continues to be a source of inspiration to national and international efforts to promote and protect human rights and fundamental freedoms.

'Dignity and justice for all of us', the theme of the 2008 year-long campaign of the United Nations (UN) leading up to the 60th anniversary of the Universal Declaration could not have been more fitting, as this period witnessed a major step towards greater international social justice.³ The 60th anniversary of the Universal Declaration was marked by a milestone: the achievement of an international complaints mechanism for claiming socio-economic rights – the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (CESCR).⁴ This Optional Protocol brings about greater coherence in the human rights system, thus making human rights whole.⁵

Historically, economic, social and cultural rights have often been neglected. They have received less protection through enforcement mechanisms than civil and political rights. Unlike CESCR, 1966, the International Covenant on Civil and Political Rights, 1966 (CCPR) was adopted together with an Optional Protocol (OP1-ICCPR), establishing a procedure for individual complaints.⁶ For over 30 years, victims of civil and political rights violations have had the opportunity to lodge complaints with the Human Rights Committee, the supervisory body of CCPR. The individual complaints procedure under CCPR has helped victims of human rights violations and resulted in the clarification of the rights in CCPR. The Human Rights Committee has created a significant body of case law, requested interim measures, made declarations of violations, and recommended compensation to individual victims.

Victims of economic, social and cultural rights violations, on the other hand, have not had this benefit at the international level. This neglect of economic, social and cultural rights has observably been due to the general perception of these rights as programmatic, having

¹ World Conference on Human Rights: Vienna Declaration and Programme of Action, Part I, para 5, UN doc A/CONF 157/23, 12 July 1993.

² A Eide & A Rosas 'Economic, social and cultural rights: A universal challenge' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2001) 3.

³ On 10 December 2007 (Human Rights Day), the UN Secretary-General launched a year-long campaign to mark the 60th anniversary of the Universal Declaration.

⁴ Optional Protocol, Optional Protocol to CESCR or OP-ICESCR.

⁵ 'Human rights made whole', statement by Louise Arbour, then UN High Commissioner for Human Rights, <http://www.policyinnovations.org/ideas/commentary/data/000068> (accessed 15 January 2009).

⁶ The First Optional Protocol to the International Covenant on Civil and Political Rights, 1966, which establishes an individual complaints procedure for victims of civil and political rights violations.

to be realised gradually, and of a more political nature and not capable of judicial enforcement.⁷ However, the UN Committee on Economic, Social and Cultural Rights (ESCR Committee), academics and other writers have been influential in dispelling myths about economic, social and cultural rights.⁸ Courts have increasingly been willing to apply and enforce economic, social and cultural rights, even in countries where these rights are stated as mere principles to guide state policy.⁹ In addition, Pennegård has pointed out that the difference between civil and political rights and economic, social and cultural rights cannot be interpreted in a strict sense because, although the obligations they impose on governments may seem different at first sight, a more in-depth analysis often reveals a close connection and interrelationship between various human rights.¹⁰

The monitoring of the implementation of economic, social and cultural rights has, therefore, for several decades, been limited to the ESCR Committee's consideration of state reports and other information submitted to it, mostly by non-governmental organisations (NGOs).¹¹ However, UN human rights bodies, governments, civil society and experts have been at work to remedy this long-term gap in human rights protection under the international system, by way of an Optional Protocol to CESC.

Following years of difficult negotiations, the Optional Protocol to CESC has finally been adopted. This article captures some of the key discussions during the development process of the Optional Protocol.¹² However, before examining the content, it is important to first consider the historical background to the Optional Protocol to CESC.

⁷ A Eide 'Economic, social and cultural rights as human rights' in Eide *et al* (n 2 above) 14; M Craven 'The UN Committee on Economic, Social and Cultural Rights' in Eide *et al* (n 2 above) 470; H Steiner *et al* *International human rights in context: Law, politics, morals* (2007) 263-264.

⁸ See generally Eide *et al* (n 2 above).

⁹ See generally R Gargarella *et al* *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006); J Squires *et al* (eds) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005); Y Ghai & J Cottrell (eds) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004).

¹⁰ A Pennegård 'Overview over human rights: The regime of the UN' in G Alfredsson *et al* (eds) *International human rights monitoring mechanisms* (2001) 27-28.

¹¹ Arts 16 & 17 of CESC require states to submit reports on the measures which they have taken and the progress made in achieving observance of the rights in CESC.

¹² It should be noted that throughout the sessions of the Open-Ended Working Group on an OP-ICESC, though some states sustained their positions on various issues, the position of other states changed at various sessions. Hence, this article tries to capture the latest position of states as contained in the reports of the Working Group.

2 Historical background

This section traces the journey from 1990, when the ESCR Committee started discussing the desirability and modalities of an individual complaints procedure for economic, social and cultural rights through an Optional Protocol to CESC. ¹³ Subsequently, the 1993 Vienna Declaration and Programme of Action urged the UN Commission on Human Rights (UNCHR), the predecessor to the Human Rights Council, in co-operation with the ESCR Committee, to continue work on an Optional Protocol to CESC. ¹⁴ In an analytical paper, the Committee submitted that there were strong reasons for the adoption of a complaints procedure in respect of CESC. ¹⁵ Consensus was reached within the ESCR Committee on the need for an individual complaints procedure in 1996. The ESCR Committee then finalised a draft Optional Protocol, which was presented to the UNCHR in 1997. ¹⁶ In the same year, the UNCHR requested the Secretary-General to transmit the text to states, inter-governmental organisations and NGOs for their comments. This process took three years. There was very little enthusiasm at this stage due to a lack of political consensus on the text, particularly among states. Most member states did not submit comments while NGOs strongly supported the draft Optional Protocol. The few states that submitted comments in favour of an Optional Protocol were Croatia, Cyprus, the Czech Republic, Ecuador, Finland, Georgia, Germany, Lebanon, Lithuania, Mauritius, Mexico, Norway and Portugal; while Canada and Sweden expressed doubts on its desirability. ¹⁷

There was, however, some progress in 2001. The UNCHR organised, together with the International Commission of Jurists, a two-day workshop on the justiciability of economic, social and cultural rights, with particular reference to an Optional Protocol to CESC. In the same year, the UNCHR decided to appoint an independent expert to examine the question of a draft Optional Protocol and the comments made on it by states, inter-governmental organisations and NGOs as well as the report of a workshop held in 2001 on the justiciability of economic,

¹³ For additional reading on the historical background and benefits of the OP-ICESCR, see L Chenwi & C Mbazira 'The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) 7(1) *ESR Review* 9.

¹⁴ Vienna Declaration and Programme of Action, para 75.

¹⁵ 'Contribution du Comité des droits économiques, sociaux et culturels' UN Doc A/CONF 157/PC/62/Add.5, 26 March 1993, annex II.

¹⁶ Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, contained in UN Doc E/CN 4/1997/105, 18 December 1996.

¹⁷ W Vandenhoele 'An Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' para 36, Working paper at the Expert Seminar on *An Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* organised by the Institute for Human Rights, Catholic University of Leuven, Belgium, 30 November 2001, <http://www.law.kuleuven.be/humanrights/ebib/Proceedings30112001.doc> (accessed 15 January 2009).

social and cultural rights.¹⁸ The independent expert was required to report back to the UNCHR at its 58th session.

The independent expert, Hatem Kotrane, held a series of consultations with UN bodies and states and, in 2002, submitted his first report, in favour of the adoption of an Optional Protocol.¹⁹ The mandate of the expert was renewed in order to allow him to study in greater detail the nature and scope of state parties' obligations under CESC, the question of the justiciability of economic, social and cultural rights, and questions as to the benefits and practicability of a complaints mechanism under CESC and the issue of complementarity between different mechanisms.²⁰ In his second report, the independent expert recommended that the UNCHR establish, at its 59th session, an Open-Ended Working Group (OEWG) with the mandate to consider options regarding the elaboration of an Optional Protocol to CESC.²¹

In 2003, the UNCHR established the OEWG.²² The UNCHR requested the Working Group to meet for a period of ten working days, prior to the 60th session of the Commission, with a view to considering options regarding the elaboration of an Optional Protocol, in the light of, amongst others, the report of the ESCR Committee on a draft Optional Protocol, comments and views submitted by states, intergovernmental organisations, including UN specialised agencies, and NGOs, and the reports of the independent expert. The OEWG held five sessions — in 2004 (23 February to 5 March), 2005 (10 to 20 January), 2006 (6 to 16 February), 2007 (16 to 27 July) and 2008 (4 to 8 February 2008 and 31 March to 4 April 2008).

At the end of its first session, the OEWG did not reach consensus on whether to start drafting an Optional Protocol.²³ At its second session in 2005, the OEWG gave the Chairperson, Catarina de Albuquerque, a mandate to prepare a report containing elements of an Optional Protocol with a view to facilitating the discussions. The Elements Paper addressed a range of issues, including the scope of the rights to a communication procedure, admissibility criteria, standing, proceedings on the merits, friendly settlement of disputes, interim measures, views,

¹⁸ See generally Resolution 2001/30 of 20 April 2001, UN Doc E/CN.4/2002/50.

¹⁹ Report of the Independent Expert on the Question of a Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/2002/57.

²⁰ Resolution 2002/24 of 22 April 2002, UN Doc E/CN.4/RES/2002/24.

²¹ Report by Mr Hatem Kotrane, Independent Expert on the Question of a Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/2003/53, para 76.

²² Resolution 2003/18 of 22 April 2003, UN Doc E/CN.4/2003/L.11/Add.3.

²³ Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its First Session, UN Doc E/CN.4/2004/44, 15 March 2004 (Report of the First Session of the OEWG) para 76.

follow-up procedures, reservations, inquiry procedure, inter-state procedure, the Optional Protocol and domestic decisions on resource allocation, the relationship of the Optional Protocol with existing mechanisms, and international co-operation and assistance.²⁴ The Elements Paper allowed for a focused discussion on the main elements of an individual communications procedure at the third session of the OEWG.

Following the third session of the OEWG, the debate shifted from whether economic, social and cultural rights should be subject to a complaints procedure to what the specific nature and modalities of such a procedure should be. The Human Rights Council, at its first session, renewed the mandate of the OEWG for a further two years so that it could elaborate on an Optional Protocol.²⁵ The Human Rights Council requested the Chairperson of the OEWG to prepare a draft Optional Protocol to be used as a basis for future negotiations. The Council also requested the OEWG to meet for ten working days each year, and directed that a representative of the ESCR Committee should attend these meetings as a resource person. Between 2007 and 2008 several drafts were discussed.

Though the journey has been riddled with obstacles and setbacks, revolving mainly on continuing doubts about the justiciability of economic, social and cultural rights, a milestone in the history of universal human rights has been achieved. The OEWG completed its mandate in April 2008 with the transmission of the draft Optional Protocol to the Human Rights Council, which subsequently adopted it by consensus in June 2008. The Human Rights Council recommended that the UN General Assembly adopts the Optional Protocol.²⁶ In November 2008, the Third Committee of the UN General Assembly approved by consensus a draft resolution on the adoption of the Optional Protocol to CESCR, recommending its adoption and, similar to the Human Rights Council Resolution, that it be opened for signature in 2009.²⁷ The General Assembly adopted by consensus the Optional Protocol on 10 December 2008, the day of the 60th anniversary of the Universal

²⁴ Elements for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/2006/WG.23/2, 21 November 2005 (Elements Paper).

²⁵ Resolution 1/3 of 29 June 2006, para 1.

²⁶ Resolution on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc A/HRC/8/L.2/Rev.1/corr.1, 18 June 2008.

²⁷ Resolution A/C.3/63/L.47, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, contained in UN Doc A/63/435, 28 November 2008. See also Third Committee Recommends General Assembly Adoption of Optional Protocol to International Convention on Economic, Social and Cultural Rights', UN Doc GA/SHC/3938, 18 November 2008. Fifty-two member states co-sponsored the Resolution.

Declaration.²⁸ The Optional Protocol will be open for signature this year (2009) and will come into force after ten ratifications.²⁹

3 Contents of the Optional Protocol

The Optional Protocol reaffirms the universality, indivisibility and inter-relatedness of all human rights.³⁰ It refers to the principles of equality and non-discrimination as embodied in the UN Charter, 1945, the Universal Declaration, CCPR and CESC.³¹ The listed grounds of discrimination are ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.³²

The Optional Protocol further considers it appropriate to enable the ESCR Committee to carry out the functions in the Optional Protocol as a means of furthering the achievement of the purpose of CESC and the implementation of the provisions therein.³³ Hence, article 1 of the Optional Protocol recognises the competence of the ESCR Committee to receive and consider communications alleging violations of the economic, social and cultural rights set forth in CESC by a state party to the Protocol. The ESCR Committee has the discretion to, if necessary, ‘decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance’.³⁴ This provision was included because of the need to add in a threshold that would allow the ESCR Committee not to deal with complaints of minor importance.

The Optional Protocol also provides for the possibility of interim measures in ‘exceptional circumstances’,³⁵ allows for the friendly settlement of disputes,³⁶ creates an inter-state complaints procedure³⁷ and

²⁸ ‘Closing a historic gap in human rights’ UN press release <http://www.unhcr.ch/hurricane/hurricane.nsf/0/D39BD9ED5406650FC125751C0039FE08?opendocument> (accessed 15 January 2009).

²⁹ See art 18(1) OP-ICESCR.

³⁰ Preambular para 3. In drafting the Preambular paragraphs, inspiration was drawn from the Preambles of the OP1-ICCPR and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (OP-CEDAW).

³¹ Preambular para 1.

³² Preambular para 2.

³³ Preambular para 5.

³⁴ Art 4. The inclusion of this provision was proposed by the United Kingdom, Canada and New Zealand, supported by Australia, Denmark, Ireland, Japan, Norway, Poland, Sweden and the United States (see Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Fifth Session, UN Doc A/HRC/8/7, 6 May 2008, para 22 (Report of the Fifth Session of the OEWG) para 59.

³⁵ Art 5.

³⁶ Art 7.

³⁷ Art 10.

an inquiry procedure,³⁸ and provides for follow-up mechanisms.³⁹ It requires state parties to 'take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee'.⁴⁰ This provision ensures that the rights and safety of those who use the communication procedure are guaranteed and protected. This provision is identical to article 11 of Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (OP-CEDAW). Its inclusion was not the subject of much discussion; it had, actually, not been discussed prior to the fourth session of the OEWG.⁴¹

The subsequent paragraphs consider, in more detail, the discussions around some of the provisions of the Optional Protocol: who can bring a complaint and the rights that are covered, admissibility criteria and the standard of review to be applied in considering communications, international co-operation and assistance and the establishment of a fund.

3.1 The rights covered

Communications must relate to a violation of any of the economic, social and cultural rights.⁴² The main questions raised during the discussions related to whether the procedure should apply to all of the rights recognised in CESCER or only to some; and whether states should be allowed, on ratification, to choose the rights that would apply to them.

Various approaches were proposed, including: a *comprehensive approach*, allowing for communications under any of the rights in CESCER;⁴³ a *limited approach*, limiting the procedure to parts II and III of CESCER; and an *à la carte approach* (including the *opt-out or reservation approaches*), allowing states to choose the rights or levels

³⁸ Arts 11 & 12.

³⁹ Art 9 (follow-up of the views of the ESCR Committee), and art 12 (follow-up to the inquiry procedure).

⁴⁰ Art 13.

⁴¹ The states that supported the inclusion of protection measures included Australia, Belgium, Canada, Chile, Egypt, France, Germany, Iran, Mexico, the Netherlands, New Zealand, Portugal, South Africa, Switzerland and the United States (see Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Fourth Session, UN Doc A/HRC/6/8, 30 August 2007, para 119 (Report of the Fourth Session of the OEWG); and Report of the Fifth Session of the OEWG, para 103).

⁴² Art 2.

⁴³ The ESCR Committee favours a comprehensive approach (see Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Third Session, UN Doc E/CN.4/2006/47, 14 March 2006 (Report of the Third Session of the OEWG) para 32.

of obligations that would apply to them. All existing communication procedures under the international system adopt the comprehensive approach. Hence, the *à la carte* approach is unprecedented within the UN human rights treaty-based system.

However, a number of states supported the *à la carte* approach at various sessions, arguing that a selective approach would enable a larger number of states to become parties to the Protocol and allow states to limit the procedure to those rights for which domestic remedies exist.⁴⁴ Poland and the United Kingdom preferred another version of an *à la carte* approach, the 'opt-in approach', arguing that the approach would allow states to add further rights at a later stage while not preventing other states from accepting petitions, and that opt-out from certain rights might send the signal that these rights were less important.⁴⁵ The arguments for an opt-out clause related to the non-justiciability of economic, social and cultural rights, the competence of the ESCR Committee and the difference in the situations of states. For instance, in states where economic, social and cultural rights have not yet been made justiciable, they would be able to freely determine the provisions and obligations arising from CESC that they are ready to assume.

A majority of states supported a comprehensive approach.⁴⁶ Their support for the comprehensive approach was based on the following: that an *à la carte* approach would establish a hierarchy among human rights, disregard the interrelatedness of provisions of CESC, amend the substance of CESC, disregard the interest of the victims, and defy the purpose of the Optional Protocol to strengthen the implementation of all economic, social and cultural rights.⁴⁷ Those that supported a comprehensive approach therefore saw the *à la carte* approach as a

⁴⁴ The states are Australia, China, Denmark, Germany, Greece, Japan, the Netherlands, New Zealand, Poland, the Republic of Korea, Russia, Switzerland, Turkey, the United Kingdom and the United States (see Report of the Fourth Session of the OEWG, para 37).

⁴⁵ Report of the Fourth Session of the OEWG, para 38.

⁴⁶ Angola, Argentina, Azerbaijan, Belgium, Bolivia, Brazil, Burkina Faso, Chile, Congo, Costa Rica, Croatia, Cuba, Ecuador, Egypt, Ethiopia, Finland, France, Guatemala, Italy, Iran, Liechtenstein, Madagascar, Mexico, Nigeria, Norway, Morocco, Peru, Portugal, Senegal, Slovenia, Spain, South Africa, Spain, Sweden, Switzerland, Uruguay and Venezuela (see Explanatory Memorandum, Annex II to the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights prepared by the Chairperson-Rapporteur, Catarina de Albuquerque, UN Doc A/HRC/7/WG.4/2, 23 April 2007, paras 4 & 15 (Explanatory Memorandum)); Report of the Fourth Session of the OEWG, para 33. It should be noted that France initially supported an opt-out approach, but was later persuaded to support the comprehensive approach; and Norway took a retrogressive step at the 5th session of the OEWG by shifting from supporting a comprehensive approach to an *à la carte* approach at the 5th session of the OEWG.

⁴⁷ Report of the Fourth Session of the OEWG, para 33.

way of introducing a hierarchy of rights.⁴⁸ It was further argued that the approach would undermine the integrity and independence of the rights in CESC, as it would allow states to 'opt out' of the obligation to provide effective remedies to particular rights or components of rights in CESC.⁴⁹ This would also reinforce the idea that some rights are different in nature and require a lesser level of protection than others do, and would ignore the importance of maintaining a unitary and indivisible framework of human rights obligations. Furthermore, such an approach would contradict the principle enunciated clearly by the CESC Committee that 'effective remedies' should be made available to all rights recognised in CESC, even if such remedies may not always be judicial.⁵⁰ It was noted during the discussions that, based on experience from the European system, an *à la carte* approach has not helped in promoting a full understanding of the provisions of the European Social Charter, 1961, resulting in the creation of different charters for different countries.⁵¹

It should be noted that though Egypt was, generally, in favour of a comprehensive approach, it indicated at the fourth session of the OEWG that it would be able to accept the exclusion of part I of CESC from the Optional Protocol.⁵² Australia, Greece, India, Morocco, Russia and the United States also favoured excluding part I of CESC.⁵³ This exclusion would mean that the right to self-determination would not be subject to the communications procedure. The right to self-determination is also included in CCPR and is already formally subject to individual complaints under the OP1-ICCPR. The position of the ESCR Committee has always been that, in addition to its civil and political dimensions, this right has economic, social and cultural dimensions that merit protection under the Optional Protocol.⁵⁴ The exclusion of this right would, therefore, deny victims their rights to cultural, economic and social self-determination.

The Optional Protocol does not make reference to any of the parts of CESC, as it requires that a communication must allege a violation of 'any of the economic, social and cultural rights set forth in

⁴⁸ Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Second Session, UN Doc E/CN.4/2005/52, 10 February 2005 (Report of the Second Session of the OEWG), para 37.

⁴⁹ Joint Submission of the NGO Coalition to the 2006 Open-Ended Working Group to Consider Options for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, January 2006; see also Report of the Third Session of the OEWG, para 33.

⁵⁰ L Chenwi 'First reading of the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2007) 8(4) *ESR Review* 22-23.

⁵¹ Report of the Second Session of the OEWG, para 52.

⁵² Report of the Fourth Session of the OEWG, para 35.

⁵³ Report of the Fourth Session of the OEWG, para 36.

⁵⁴ Chenwi & Mbazira (n 13 above) 11.

the Covenant'. Hence, it remains open whether the ESCR Committee interprets this to include or exclude the right to self-determination or at least some components of the right.

3.2 Standing

Communications can be submitted by (1) individuals, (2) groups of individuals, or (3) other persons on their behalf, claiming to be victims of a violation.⁵⁵ With regard to the latter group, consent has to be obtained unless the author of the communication can justify acting on the victims' behalf without such consent. This exception was inspired by article 2 of OP-CEDAW. Its inclusion was proposed by Brazil, Chile, Portugal, Uruguay and the NGO Coalition,⁵⁶ amongst others, as an alternative to the requirement of express consent that was being proposed by some states.⁵⁷ The difference between the Optional Protocol to CESC and OP1-ICCPR is that the latter does not explicitly refer to groups having standing, as it uses the terminology 'individuals'.⁵⁸ However, in practice, the Human Rights Committee has allowed communications from a group acting on behalf of a victim or from groups whose members were individual victims.⁵⁹ Hence, the Optional Protocol to CESC has reinforced this practice by granting standing to groups.

During the discussions, there was the question of whether to allow NGOs to submit collective communications, which resulted in the inclusion of a provision on collective complaints in earlier drafts. It allowed international NGOs with consultative status before the UN Economic and Social Council (ECOSOC) to submit communications alleging unsatisfactory implementation by any state of the right in CESC.⁶⁰ This procedure had no victim requirement and the elements of the procedure were derived from the example of the European Social

⁵⁵ Art 2.

⁵⁶ The NGOs' campaign for the complaints procedure for economic, social and cultural rights has been mobilised mainly through the NGO Coalition for an Optional Protocol (NGO Coalition). For more information on the NGO Coalition and its work, see <http://www.opicescr-coalition.org> (accessed 15 January 2009).

⁵⁷ Belarus, Burkina Faso, China, Egypt (on behalf of the African Group), Ethiopia, Morocco and Russia proposed that individuals must give prior 'expressed' consent before communications can be brought on their behalf. However, Ecuador, Peru and the NGO Coalition opposed this submission, arguing that it might be difficult to obtain express consent in certain cases (see Report of the Fourth Session of the OEWG, para 43). It should be noted that at the 5th session of the OEWG, Egypt (on behalf of the African Group) together with Finland, Italy, Lichtenstein, Mexico, the Netherlands, Portugal and NGOs supported the retention of the exception to the consent requirement (see Report of the Fifth Session, para 37).

⁵⁸ Art 1 OP1-ICCPR.

⁵⁹ E de Wet 'Recent developments concerning the Draft Optional Protocol to the International Covenant on Economic Social Cultural Rights' (1997) 13 *South African Journal on Human Rights* 514 533.

⁶⁰ Art 3 of the Draft OP-ICESCR, UN Doc A/HRC/6/WG 4/2, 23 April 2007.

Charter's collective complaints mechanism. However, the provision did not receive much support. Since NGOs do have standing under article 2 when acting in a representative capacity for victims, there was substantial consensus during the discussions that the provision be deleted.⁶¹ The unwillingness of the OEWG to include a provision on collective complaints echoes the practice of the Human Rights Committee, which is to the effect that NGOs cannot submit a communication in the public interest without having to act on behalf of individuals or groups of individuals.⁶²

An important point worth noting with regard to article 2 is that the Optional Protocol is silent on whether or not the NGOs acting on behalf of victims must have consultative status before the UN ECOSOC before they can submit a communication.

3.3 Admissibility criteria

National remedies that are accessible and effective are the primary means of protecting economic and social rights.⁶³ Accordingly, similar to other human rights treaties at both the international and regional level, in order for a communication to be considered by the ESCR Committee, all available domestic remedies have to be exhausted, unless where the application of such remedies is unreasonably prolonged.⁶⁴ The exception to the exhaustion of local remedies rule that a communication may be declared admissible if local remedies are 'unlikely to bring effective relief', which is contained in OP-CEDAW, for instance, has been left out.⁶⁵ In an earlier draft, 'unlikely to bring effective relief' was also an exception, but its deletion was proposed by Burkina Faso, Ecuador, Egypt (on behalf of the African Group), Poland and the United States.⁶⁶

The exhaustion of domestic remedies requirement provides a state with an opportunity to redress any wrongs that it may have committed — to remedy the alleged violation — before the case is brought to the ESCR Committee. It also prevents the ESCR Committee from becom-

⁶¹ The states that called for its deletion included Algeria, Australia, Belarus, Burkina Faso, China, Colombia, Ecuador, Egypt (on behalf of the African Group), Greece, India, Japan, Morocco, Nigeria, Norway, the Republic of Korea, Russia, Senegal, Tanzania, the United Kingdom, Ukraine, the United States and Venezuela (see Report of the Fourth Session of the OEWG, para 47).

⁶² De Wet (n 59 above) 533.

⁶³ See S Liebenberg 'The protection of economic and social rights in domestic legal systems' in Eide *et al* (n 2 above) 55; ESCR Committee General Comment 9 on the domestic application of CESCR, para 4, UN Doc E/C 12/1998/24, 3 December 1998.

⁶⁴ Art 3.

⁶⁵ See art 4(1) of OP-CEDAW; see also art 2(d) of the Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2007 (not yet in force).

⁶⁶ Report of the Fourth Session of the OEWG, para 59.

ing a tribunal of first instance for cases for which an effective domestic remedy exists.⁶⁷

A practical question arises with regard to this requirement in situations where economic, social and cultural rights are not provided for as justiciable rights. Would this mean that domestic remedies are not available? Viljoen observes that ‘a remedy is “available” if it can be utilised as a matter of fact and without impediment’.⁶⁸ Where economic, social and cultural rights are not justiciable, access to courts in order to seek direct enforcement and protection of these rights becomes difficult. The African Commission on Human and Peoples’ Rights (African Commission) is of the view that where courts are prevented from taking up cases, local remedies become non-existent and that if a right is not well provided for in domestic law, there cannot be effective remedies or any remedies at all.⁶⁹ In addition, in the Inter-American system, where domestic legislation does not afford due process of law for the protection of rights, the requirement to exhaust domestic remedies is not applicable.⁷⁰

However, domestic remedies are not limited to judicial remedies. Economic, social and cultural rights may be subject to judicial or quasi-judicial remedies such as national human rights commissions, the ombudsman or administrative complaints.⁷¹ The provision in the Optional Protocol to CESC is similar to that in the OP1-ICCPR,⁷² and the Human Rights Committee has explained that the requirement to exhaust ‘all available domestic remedies’ in the latter ‘not only refers to judicial but also to administrative remedies’.⁷³ The Human Rights Committee has also pointed out that if administrative remedies are

⁶⁷ Viljoen has elucidated on the purpose of the requirement to exhaust domestic remedies when discussing the protective mandate of the African Commission (see F Viljoen *International human rights law in Africa* (2007) 336).

⁶⁸ Viljoen (n 67 above) 336. See also T Zwart *The admissibility of human rights petitions: The case law of the European Commission of Human Rights and the Human Rights Committee* (1994) 188, stating that ‘a remedy is considered available only if the petitioner can make use of it in the circumstances of his case’.

⁶⁹ See *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 49-5; *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 37 & 41 (*SERAC* case).

⁷⁰ Art 46(2) of the American Convention on Human Rights 1969.

⁷¹ A Rosas & M Scheinin ‘Implementation mechanisms and remedies’ in Eide *et al* (n 2 above) 452. See also Report of the Second Session of the OEWG, para 43. In fact, at the 5th session of the OEWG, some states proposed that the list of remedies be specified instead of simply referring to ‘domestic remedies’. These included Denmark, Greece, New Zealand, Poland and the United Kingdom, who wanted the list of remedies to be mentioned — ‘judicial, administrative and other’ remedies (see Report of the Fifth Session of the OEWG, para 47). This proposal did not receive much support as it was seen as unnecessary.

⁷² See art 5(2)(b) of OP1-ICCPR.

⁷³ See, eg, *Brough v Australia*, Communication 1184/2003, UN Doc CCPR/C/86/D/1184/2003, 27 April 2006, para 8.6.

the only remedies available, they have to be exhausted.⁷⁴ The ESCR Committee, in dealing with the domestic application of CDESCR, has observed that⁷⁵

[t]he right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a state party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate.

It is important to note that the particular circumstance of the individual case would be relevant in any determination of whether domestic remedies are in fact available.⁷⁶ Where no domestic remedies exist, a petitioner would be able to take a communication straight to the international level.⁷⁷

In addition to the exhaustion of domestic remedies requirement, communications have to be submitted within one year after the exhaustion of such remedies, unless the author of the communication can show that it was not possible for him or her to submit the communication within this time frame.⁷⁸ Initially, the time limit was six months, but it was felt by a number of states and the NGO Coalition that this was particularly restrictive given the potential complexity of economic, social and cultural rights claims and the impact it may have on access to justice for victims of violations of these rights.⁷⁹

Article 3 further elaborates other grounds on which a communication may be declared inadmissible. These are where the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the state party concerned, unless those facts continued after that date; where the same matter has already been

⁷⁴ See generally *SS v Norway*, Communication 79/1980, UN Doc CCPR/C/15/D/79/1980, 2 April 1982.

⁷⁵ ESCR Committee General Comment 9, para 9. It should be noted that parliamentary procedures do not, however, qualify as judicial or quasi-judicial remedies, even though they might end up providing redress to a complainant (see Report of the Second Session of the OEWG, para 92).

⁷⁶ The European Court of Human Rights, eg, has on several occasions emphasised that 'the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case'. Hence, 'the court must take realistic account not only of the existence of formal remedies in the legal system of the contracting state concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant' (see, eg, *Van Oosterwijck v Belgium*, Application 7654/76, para 35, 6 November 1980; and *Isayeva v Russia*, Application 57950/00, 24 February 2005, para 153).

⁷⁷ See Report of the Second Session of the OEWG, para 43.

⁷⁸ Art 3(2)(a) OP-ICESCR.

⁷⁹ The Netherlands, Peru, South Africa and Spain, eg, proposed extending the time limit to one or three years (see Report of the Fourth Session of the OEWG, para 61).

examined by the ESCR Committee or has been or is being examined under another procedure of international investigation or settlement; where it is incompatible with the provisions of CESC; where it is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media;⁸⁰ where it is an abuse of the right to submit a communication; or where it is anonymous or not in writing.⁸¹

Some states had proposed the inclusion of the requirement that regional remedies must be exhausted first before a complaint can be lodged with the ESCR Committee, as a means of ensuring that the communications procedure under CESC would not undermine existing procedures in regional human rights systems.⁸² It was also noted that regional mechanisms were better positioned to take into account a state's level of development.⁸³ However, a number of states as well as the NGO Coalition opposed the proposal arguing that such a criterion, combined with the prohibition to admit matters already examined, would prevent victims from accessing the system and introduce a hierarchy between international and regional mechanisms.⁸⁴ It was also argued that regional mechanisms differed widely and none corresponded fully with a complaints procedure under CESC.⁸⁵ This criterion has not been included in the Optional Protocol. This exclusion is plausible, as regional mechanisms should play a complementary role to UN mechanisms rather than provide a basis for denying complaints from regions where regional remedies are available.

3.4 Interim measures

The capacity to prescribe interim measures is one of the most important functions of any judicial or quasi-judicial body adjudicating complaints. For any complaints mechanism to be fully effective, it must be able to perform a pre-emptive function — to stop harm before it can occur, or to stop an ongoing harm from continuing, or at least mitigating the effects of that harm. In fact, all UN communication procedures make provision for interim measures either in the rules of procedure of the respective committees or in a treaty provision. Compliance with interim

⁸⁰ This criterion is derived from art 56(4) of the African Charter on Human and Peoples' Rights, 1982 (African Charter), a proposal that was put forward by the NGO Coalition (see Report of the fourth Session of the OEWG, para 61).

⁸¹ Art 3(2)(b-g) OP-ICESCR.

⁸² These states include Angola, Egypt, Ethiopia, Nigeria and the United Kingdom, which had initially indicated that victims should be free to decide which procedure to use (see Report of the Third Session of the OEWG, para 52; and Report of the Fourth Session of the OEWG, para 62).

⁸³ Report of the Third Session of the OEWG, para 52.

⁸⁴ These states include Argentina, Azerbaijan, Belgium, Norway, Peru and Portugal (see Report of the Third Session of the OEWG, para 54; and Report of the Fourth Session, para 62).

⁸⁵ Report of the Third Session of the OEWG, para 54.

measures does not only ensure respect for human rights but they are, as Viljoen states, aimed at upholding the integrity of the body that will take the final decision.⁸⁶

During the discussions of the OEWG, a number of states and the NGO Coalition highlighted the need for the ESCR Committee to have the power to request interim measures.⁸⁷ Accordingly, the Optional Protocol in article 5 enables the ESCR Committee to respond to exceptional or life-threatening situations in order to avoid possible irreparable harm to the victim(s) of the alleged violation. The risk of such harm would have to be sufficiently substantiated. The request to take interim measures can be made at any time after the receipt of a communication and before a determination on the merits has been reached. A state is required to act on such request with urgency.⁸⁸

Furthermore, a proposal that a linkage should be established between the use of interim measures and the capacity or resources available to the state concerned was not incorporated,⁸⁹ the reasons being that such a provision is not contained in any of the existing communications procedures and, based on its practice in considering state reports, the ESCR Committee would be expected to take into account the issue of resource constraints in the consideration of interim measures and communications in general.⁹⁰ Some states opposed referring to resource availability, as states are obliged to avoid possible irreparable damage at all times.⁹¹

Among the states that had reservations as to the inclusion of interim measures in general were Japan, which, surprisingly, found it difficult to imagine an urgent situation requiring interim measures given the nature of economic, social and cultural rights and questioned the need for such measures.⁹² Others wanted states to be given an opportunity

⁸⁶ Viljoen (n 67 above) 326.

⁸⁷ These states include Angola, Argentina, Belgium, Brazil, Canada, Chile, Ecuador, Finland, France, Liechtenstein, Mexico, Morocco (on behalf of the African Group), Portugal, Russia, Spain, Switzerland, Uruguay and Venezuela (see Report of the Third Session of the OEWG, para 65; Report of the Fourth Session of the OEWG, para 67; and Report of the Fifth Session of the OEWG, para 60). It should be noted that Germany, the Republic of Korea and Switzerland proposed the inclusion of interim measures in the rules of procedures instead.

⁸⁸ In initial drafts, the urgency of interim measures was not emphasised. Consequently, the NGO Coalition, supported by Colombia and Uruguay, amongst others, argued that interim measures should be considered with urgency in order to protect victims of violations (see Chenwi (n 50 above) 24).

⁸⁹ Proposed by Morocco, supported by China, Ethiopia, India and Nepal (see Report of the Third Session of the OEWG, para 137; Report of the Fourth Session of the OEWG, para 72; and Report of the Fifth Session of the OEWG, para 62).

⁹⁰ Explanatory Memorandum paras 18 & 19.

⁹¹ Australia, Belgium, Egypt, France, South Africa, Switzerland, Syria and Venezuela (see Report of the Fourth Session of the OEWG, para 72; and Report of the Fifth Session of the OEWG, para 62).

⁹² Report of the Third Session of the OEWG, para 66.

to comment on the appropriateness of interim measures prior to their application, which, apparently, defeats the whole purpose of interim measures.⁹³

Another issue that came up during the discussions on interim measures was a proposal by Norway and Sweden to specify in the text the voluntary nature of requests for interim measures. Such specification would limit the purpose of interim measures. The proposal was not incorporated, with some states noting that its inclusion was not necessary since the ESCR Committee's views and requests were non-binding and voluntary in nature.⁹⁴

The practical challenge would be to get states to comply with a request to take interim measures. Based on a comprehensive study of interim measures ordered in human rights cases before international enforcement bodies, Pasqualucci concludes that, though states have generally accepted the decisions of international courts that interim measures are binding, many states have not yet accepted the view that interim measures specified by international quasi-judicial bodies are also binding on them.⁹⁵ This is a critical challenge if one looks at, for instance, the African human rights system, where 'states almost uniformly disregarded' such requests made by the African Commission, though not in the context of economic, social and cultural rights.⁹⁶

3.5 Friendly settlement

Friendly settlement is a general principle of international law. It is included explicitly in article 41(1)(e) of CCPR, article 21(1)(c) of the Convention against Torture, Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT) and article 76(d) of the International Convention on the Rights of Migrant Workers and Members of Their Families, 1990 (CRMW). It is also recognised in the Inter-American, European and African human rights systems.

Accordingly, article 7 makes provision for friendly settlement of disputes and it is applicable to all communications. A friendly settlement agreement closes consideration of a communication,⁹⁷ despite warnings by Brazil, Switzerland and the NGO Coalition that no communication should be closed before a friendly settlement has been fully implemented.⁹⁸

⁹³ Brazil, Canada, Mexico, Poland and the United Kingdom (see Report of the Third Session of the OEWG, para 66; and Report of the Fourth Session of the OEWG, paras 74 and 182).

⁹⁴ Report of the Fifth Session of the OEWG, para 66.

⁹⁵ See, generally, J Pasqualucci 'Interim measures in international human rights: Evolution and harmonisation' (2005) 38 *Vanderbilt Journal of Transnational Law* 1.

⁹⁶ See Viljoen (n 67 above) 326-329.

⁹⁷ Art 7(2) OP-ICESCR.

⁹⁸ Report of the Fourth Session of the OEWG, para 86.

A number of states and the NGO Coalition supported its inclusion,⁹⁹ while others wanted the friendly settlement procedure to apply only to inter-state communications.¹⁰⁰ The success of a friendly settlement mechanism depends on its ability to guarantee the rights of both the individual and society as a whole, and must, therefore, not prejudice the subsequent consideration of a communication should the efforts for a friendly settlement fail. Hence, those that supported its inclusion proposed that it should be subject to one or more of the following safeguards: fairness; good faith; respect for human rights; optional character; close monitoring of the implementation of the settlement; possibility to return to the adversarial procedure in the case the friendly settlement fails or is unduly delayed; possibility of the ESCR Committee to end the settlement at any time and continue with the consideration of the communication, and the terms of the settlement should be subject to review and approval by the ESCR Committee.¹⁰¹ However, there were oppositions to the Committee reviewing friendly settlements, arguing that it would undermine the nature of such a settlement.¹⁰²

Notwithstanding, the ESCR Committee might consider the review of such settlements in its Rules of Procedure. For a friendly settlement procedure to be effective, the possibility of the ESCR Committee considering the communication should be left open until the settlement agreement itself has been implemented fully.

3.6 Examination of communications and the standard of review

The relevant documentation that the ESCR Committee may consult when examining a communication are those emanating from other UN bodies, specialised agencies, funds, programmes and mechanisms, and other international organisations, including regional human rights systems, and any observations or comments by the state party concerned.¹⁰³ In addition, the standard of review in socio-economic rights cases is that of reasonableness.¹⁰⁴

The key issues that arose during the discussions of the OEWG were whether oral hearings should be allowed; whether regional mecha-

⁹⁹ These states include Argentina, Australia, Azerbaijan, Brazil, Canada, Colombia, Denmark, Ecuador, Ethiopia, Finland, France, Iran, Mexico, Morocco, the Netherlands, Russia, South Africa, Spain, Switzerland, the United Kingdom and Venezuela (see Report of the Third Session of the OEWG, para 64; Report of the Fourth Session of the OEWG, paras 80 & 183).

¹⁰⁰ These states are China, India, Sweden and the United States (see Report of the Fourth Session of the OEWG, para 81; and report of the Fifth Session of the OEWG, para 72).

¹⁰¹ Report of the Third Session of the OEWG, paras 64 & 185.

¹⁰² Australia, China, the United Kingdom, the United States and Venezuela, amongst others (see Report of the Fourth Session of the OEWG, paras 87 & 185).

¹⁰³ Art 8(3).

¹⁰⁴ Art 8(4).

nisms should be consulted; and the standard the ESCR Committee would apply in its assessment.

The possibility of oral hearings was not discussed at length. At the third session of the OEWG, Finland and Mexico stressed the usefulness of oral hearings as provided for in the Rules of Procedure of the Committee against Torture and the Committee on the Elimination of Racial Discrimination, but did not specifically suggest whether or not it should be included in the Optional Protocol.¹⁰⁵ At the fourth session, Finland and Slovenia supported the possibility of oral hearings with basic rules included in the Protocol, while Ethiopia suggested that such hearings were better dealt with in the Rules of Procedure.¹⁰⁶ The use of oral hearings has been encouraged as a way of enhancing the complaints procedure under OP1-ICCPR.¹⁰⁷ Some regional human rights mechanisms allow oral hearings. The African Commission, for example, allows oral representation.¹⁰⁸

The Optional Protocol does not make explicit reference to oral hearings or oral documentation when considering individual communications. However, unlike the OP1-ICCPR,¹⁰⁹ the Optional Protocol does not explicitly limit the information submitted to the ESCR Committee to written information either. It merely refers to 'all documentation'.¹¹⁰ It is therefore left to the Committee to decide whether or not to allow oral hearings. It is important to note that the inter-state procedure under the Optional Protocol makes explicit reference to oral and written submissions.¹¹¹

It should be noted further that the Optional Protocol does not allow for public hearings. Similar to OP1-ICCPR, the ESCR Committee is required to hold closed meetings when examining communications.¹¹²

The question of whether regional mechanisms should be consulted was based on the need for the Optional Protocol to take due account of, and benefit from, the experiences of existing regional human rights mechanisms, and the importance of ensuring co-operation and avoid

¹⁰⁵ Report of the Third Session of the OEWG, para 60.

¹⁰⁶ Report of the Fourth Session of the OEWG, para 107.

¹⁰⁷ See Steiner *et al* (n 7 above) 895.

¹⁰⁸ The legal basis for oral presentations is found in art 46 of the African Charter, which allows the African Commission to resort to any appropriate method of investigation and hear from any other person capable of enlightening it. See R Murray 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 412 427.

¹⁰⁹ Art 5(1) of OP1-ICCPR states: 'The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the state party concerned.'

¹¹⁰ Art 8(1) OP-ICESCR.

¹¹¹ Art 10(1)(g) OP-ICESCR.

¹¹² Art 8(2) of OP-ICESCR as well as art 5(3) of OP1-ICCPR read: 'The Committee shall hold closed meetings when examining communications under the present Protocol.'

duplication between regional and UN human rights mechanisms. During the discussions of the OEWG, a number of states supported the possibility of seeking additional information on a case from international and regional mechanisms, including from UN specialised agencies.¹¹³ Under the Optional Protocol, the ESCR Committee¹¹⁴

may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialised agencies, funds, programmes and mechanisms, and other international organisations, including from regional human rights systems, and any observations or comments by the state party concerned.

Hence, international NGOs with expertise in the area under consideration may be consulted as well.

It is worth noting that the International Labour Organisation (ILO) wanted a specific provision to be included requiring the ESCR Committee, when considering communications dealing with matters falling within the ILO's competence, to invite it to participate in the examination of the communication. However, this proposal did not receive much support, since article 8(3) already makes provision for information from specialised agencies. The ILO subsequently withdrew its proposal on the understanding that it would be accommodated in the practice of the Committee.¹¹⁵

Furthermore, the OEWG discussed at length what standard the ESCR Committee would use in measuring compliance by states with their obligations under CDESCR. The different criteria for the assessment of violations of rights that were considered during the discussions include 'reasonableness', 'unreasonableness' and a wide 'margin of appreciation' for states in their policy choices.

A number of states supported the application of the standard of reasonableness.¹¹⁶ This standard is consistent with both international and domestic standards of review in the field of economic, social and cultural rights. In fact, many international human rights treaties contain several references to the concept of reasonableness, UN treaty bodies have also used the concept in different contexts and with regard to various rights, and the concept has been largely used either as a

¹¹³ Argentina, Belgium, Brazil, Chile, Finland, Germany, Italy, Nigeria, Poland, Slovenia, Spain and Switzerland. Ethiopia proposed adding a reference to UN-specialised agencies (see Report of the Third Session of the OEWG, para 61; Report of the Fourth Session of the OEWG, paras 90 & 91).

¹¹⁴ Art 8(3) OP-ICESCR.

¹¹⁵ Report of the Fifth Session of the OEWG, para 175.

¹¹⁶ Belgium, Chile, Finland, Germany, Mexico, the Netherlands, Portugal, Slovenia and Spain (see Report of the Fourth Session of the OEWG, para 94). The NGO Coalition also supported the use of the standard of reasonableness but suggested, for purpose of clarification, the addition of 'effectiveness' (see Joint Submission of the NGO Coalition to the 2008 Open-Ended Working Group to consider options for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, February 2008).

criterion relating to the time frame for carrying out an action or as a criterion for legitimate restrictions on rights.¹¹⁷ In addition, the South African Constitutional Court also applies this standard in assessing the state's compliance with its obligation to take steps towards realising a right, as the state could adopt a wide range of measures to meet its obligations, but the question that remains to be answered is whether the measures are reasonable.¹¹⁸

Other states expressed concern over the term 'reasonableness'.¹¹⁹ The United States was against the use of the term, and proposed its replacement with the concept of 'unreasonableness' and the addition of a reference to 'the broad margin of appreciation of the state party to determine the optimum use of its resources'.¹²⁰ The test of 'unreasonableness' is to the effect that an administrative decision would be considered unreasonable if the court considers it to be a decision that no reasonable body could have come to.¹²¹ Reference is also made to the concept of unreasonableness in South African administrative law. Article 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000 gives a court or tribunal the power to judicially review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, 'is so unreasonable that no reasonable person could have so exercised the power or performed the function'. Some states at the discussions of the OEWG expressed support or interest in the 'unreasonableness' standard.¹²² However, others, including the NGO Coalition, objected to the standard, holding the view that it is rather restrictive and comes close to amending CESC, especially as the 'reasonableness' standard is implicit in the provisions

¹¹⁷ For the various instances in which the concept has been used, see generally 'The use of the "reasonableness" test in assessing compliance with international human rights obligations' UN Doc A/HRC/8/WG.4/CPR.1, 1 February 2008.

¹¹⁸ The South African Constitutional Court's jurisprudence is to the effect that, in order for measures to be reasonable, they must aim at the effective and expeditious progressive realisation of the right in question, within the state's available resources for implementation. The measures must be comprehensive, coherent, inclusive, balance, flexible, transparent, be properly conceived and properly implemented, and make short, medium and long-term provision for those in desperate need or in crisis situations. The measures must further clearly set out the responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation. See L Chenwi 'Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions' (2008) 8 *Human Rights Law Review* 105-119.

¹¹⁹ Azerbaijan, Denmark, Nigeria, Norway and Russia (see Report of the Fourth Session of the OEWG, para 94).

¹²⁰ Report of the Fourth Session of the OEWG, paras 95 & 95.

¹²¹ See *Associated Provincial Picture Houses Limited v Wednesbury Corporation* (1948) 1 KB 223-230.

¹²² China, India, Japan, Norway, Poland and, surprisingly, the United Kingdom, which had earlier shown support for the 'reasonableness' standard (see Report of the Fourth Session of the OEWG, paras 94 & 95).

of CESCR as seen in the use of the phrase ‘appropriate means’ in article 2(1).¹²³

The ‘broad margin of appreciation’ proposal was supported by some states.¹²⁴ However, the NGO Coalition as well as other states expressed concern about referring to the ‘broad margin of appreciation’, arguing that, while it is implicit in CESCR, it is a flexible notion the application whereof varies depending on the specific context and the right in question; it would undermine the core objective of the Protocol; increase the burden of proof on victims; and it could undermine the sovereignty of states.¹²⁵

As noted above, the standard of review in the Optional Protocol is that of ‘reasonableness’ and there is no explicit reference to the ‘margin of appreciation’ of states. The particular provision reads:¹²⁶

When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the state party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the state party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

It is hoped that, when applying this standard, the ESCR Committee would draw inspiration from the existing jurisprudence at the international and national levels that have applied this standard.

3.7 Inter-state communications

Inter-state communications procedures allow a state to bring a complaint against another, so as to ensure that the other state abides by its treaty obligations. Such procedures have been included in other UN human rights treaties.¹²⁷

Article 10 of the Optional Protocol makes provision for the ESCR Committee to receive and consider communications from a state party alleging that another state party is not fulfilling its obligations under CESCR. The procedure is optional — ‘opt-in’ — as state parties have to declare that they recognise the competence of the ESCR Committee in this regard before the provision can be applicable to them. This is

¹²³ Belgium, Ethiopia, Mexico, Portugal, Slovenia (see Report of the Fourth Session of the OEWG, para 95).

¹²⁴ Austria, Canada, Denmark, Greece, Italy, Ireland, Japan, Netherlands, New Zealand, Norway, Poland, the Sweden, Turkey, the United Kingdom and Venezuela (see Report of the Fourth Session of the OEWG, para 96; Report of the Fifth Session of the OEWG, paras 91, 145 & 230).

¹²⁵ The states that were not in support of the reference to margin of appreciation include Argentina, Bangladesh, Belgium, Chile, Costa Rica, Ecuador, Finland, France, Germany, India, Liechtenstein, Mexico, Portugal, the Russian Federation and Sri Lanka (see Report of the Fourth Session of the OEWG, para 100; Report of the Fifth Session of the OEWG, paras 91 & 171).

¹²⁶ Art 8(4) OP-ICESCR.

¹²⁷ Eg, art 41 of CCPR, art 21 of CAT, art 76 of CRMW and art 11 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD).

similar to most treaties. Acceptance of an inter-state complaints procedure is optional in CCPR, CAT and CRMW. However, it is mandatory in CERD, as well as, at the regional level, under, for instance, the African Charter on Human and Peoples' Rights (African Charter).

Inter-state communications received much attention during the discussions of the OEWG, particularly in relation to whether or not it should be included and whether it should be mandatory or optional. This was partly because similar procedures under other human rights mechanisms have hardly been used. In fact, no inter-state communication has been submitted under any of the UN human rights treaties. However, at the regional level, as at 2007, 13 have been decided under the European human rights system and one under the African human rights system.¹²⁸

Though states were sceptical or had reservations¹²⁹ about the procedure during the discussions of the OEWG, a number of states supported its inclusion in the Optional Protocol, especially as an optional procedure.¹³⁰ Under the Optional Protocol to CESC, states may withdraw from this procedure at any time by notification to the Secretary-General in terms of the declaration made under article 10. Once the notification of withdrawal has been received, the ESCR Committee can no longer receive communications against the state party concerned.¹³¹

3.8 Inquiry procedure

Inquiry procedures are generally important as they allow the supervisory bodies to respond, in a timely fashion, to grave or systematic violations that are in progress. Articles 11 and 12 make provision for an inquiry procedure. Similar to the interstate procedure, the inquiry procedure is an 'opt-in' one. The ESCR Committee is able to respond to 'grave or systematic violations' based on 'reliable information' it receives. The inquiry procedure is different from communications procedures in that, in the inquiry procedure, the ESCR Committee does not have to receive a formal complaint; it is up to it to decide to initiate the procedure and there is no victim requirement.

A similar procedure exists under CAT and the OP-CEDAW and both are 'opt-out', as states may enter a reservation that they do not recognise the competence of the respective committee in this regard.¹³²

¹²⁸ Viljoen (n 67 above) 35.

¹²⁹ Russia had reservations; and China, Ecuador, Ethiopia, Japan, Norway, New Zealand, Senegal, Syria, Russia and the United Kingdom were not in support of its inclusion (see Report of the Fourth Session of the OEWG, para 109; Report of the Fifth Session of the OEWG, paras 95 & 177).

¹³⁰ Argentina, Egypt, France, Ghana, Poland, Mexico, the Netherlands, South Africa, Spain and Venezuela as well as the NGO Coalition (see Report of the Fourth Session of the OEWG, para 109; Report of the Fifth Session of the OEWG, para 94).

¹³¹ Art 10(2) OP-ICESCR.

¹³² See art 20 of OP-CAT and arts 8, 9 & 10 of OP-CEDAW

During the discussions of the OEWG, its inclusion was justified on the grounds that it would allow a response to be made to serious violations in a timely manner and it could be used by individuals and groups facing difficulties in accessing the communication procedure or in danger of reprisal.¹³³ Accordingly, several states and the NGO Coalition supported its inclusion, with some emphasising that it must be optional.¹³⁴ Others were not in support of or expressed reservations about such a procedure,¹³⁵ while Denmark wanted it to be limited to cases of non-discrimination or other fundamental and well-defined principles.¹³⁶ Some of the concerns were based on the fear of an overlap between this procedure and the work of UN Special Rapporteurs.¹³⁷

The inquiry procedure is confidential at all stages — all meetings of the ESCR Committee dealing with an inquiry procedure are closed — but the results can be included in the Committee's report following consultation with the state concerned. The ESCR Committee is also required to seek the co-operation of the state concerned at all stages of the proceedings. Moreover, where the ESCR Committee decides to initiate a visit to the state concerned, it cannot do so without the state's consent. The practical challenge would be getting states to fully co-operate with regard to country visits, as consent itself does not necessarily guarantee full co-operation. Hence, respect for state sovereignty is a key element in the procedure.

It should be noted that a state party can, at any time, withdraw the declaration under article 11.¹³⁸ Unlike with the inter-state communication procedure, it is not clear whether the ESCR Committee can continue with an inquiry it commenced before the withdrawal notification, due to the absence of the qualification contained in article 10 of the Optional Protocol.

3.9 Follow-up mechanism

Generally, follow-up mechanisms may take various forms, including calling on the offending state to discuss the measures it has taken to give effect to the recommendations, or inviting the state party to include in its report the details of the measures taken. The advantage of the follow-up procedure is that it opens an avenue for addressing problems encountered when implementing views and recommendations and guarantees that they would be actually implemented. It also allows for guidance and support to be provided to states regarding

¹³³ Report of the Fourth Session of the OEWG, para 111.

¹³⁴ Austria, Brazil, Chile, Costa Rica, Ecuador, Finland, Liechtenstein, Portugal, Senegal, South Africa, Sweden (see Report of the Fourth Session of the OEWG, para 111).

¹³⁵ Australia, China, Egypt, India, Nigeria, Poland, Russia and the United States.

¹³⁶ Report of the Fourth Session of the OEWG, para 112.

¹³⁷ Report of the Fourth Session of the OEWG, para 113.

¹³⁸ Art 11(8) OP-ICESCR.

measures taken to comply with the decisions. In addition, it is a means of assessing the impact of the decisions of the ESCR Committee on the lives of those affected or others living in the state concerned.

Article 9 of the Optional Protocol emphasises the obligation of states to implement the views and recommendations of the ESCR Committee and enables the Committee to monitor their implementation. It requires a state party to submit to the Committee, within six months, a written response to its views and recommendations, including information on any action taken in light of the views and recommendations. The Committee may invite the state party to submit further information on any measures taken in response to its views or recommendations in its subsequent state party report under CESC.¹³⁹ This provision ensures that decisions and recommendations are effectively enforced.

The provision on follow-up to the views of the ESCR Committee was not a controversial one. In fact, the Optional Protocol to CESC goes a step further than the OP1-ICCPR, as the latter does not explicitly provide for a follow-up mechanism. Rather, it only requires the Human Rights Committee to transmit its views to the parties.¹⁴⁰ However, rule 95 of the Rules of Procedure of the Human Rights Committee allows it to 'designate a Special Rapporteur for follow-up on views adopted under article 5, paragraph 4, of the Optional Protocol, for the purpose of ascertaining the measures taken by state parties to give effect to the Committee's views'.¹⁴¹ The Optional Protocol to CESC does not make reference to a Special Rapporteur, but it is important that this issue be addressed in the Rules of Procedure as the ESCR Committee might not have the capacity to follow up on views on its own. Furthermore, though the Human Rights Committee had adopted a statement indicating that the state has to reply within a period not exceeding 180 days, in practice, it usually indicates a period of 90 days.¹⁴² It would be interesting to see if, in practice, the ESCR Committee will stick to the six month period or reduce it as the Human Rights Committee usually does. It would also be interesting to see the extent to which states will comply with the follow-up procedure, since it is contained in the treaty itself, as states have not often co-operated with the Human rights Committee in this regard.

In addition, the inquiry procedure, just like the individual communications procedure, includes a follow-up mechanism. This gives the ESCR Committee room to monitor the implementation of its recommendations and the measures taken by a state party in response to the inquiry conducted.

¹³⁹ Art 9(3) OP-ICESCR.

¹⁴⁰ Art 5(4) OP1-ICCPR.

¹⁴¹ Rules of Procedure of the Human Rights Committee, UN Doc CCPR/C/3/Rev 6 of 24 April 2001.

¹⁴² De Wet (n 59 above) 541.

3.10 International assistance and co-operation and the fund

Article 14 of the Optional Protocol requires the ESCR Committee to transmit, when appropriate, to UN specialised agencies, funds and programmes and other competent bodies, its views and recommendations concerning communications and inquiries that indicate a need for technical advice or assistance. This has to be done with the consent of the state party concerned.¹⁴³

The importance of international co-operation and assistance as a tool in ensuring enhanced implementation of economic, social and cultural rights in general, and the views and recommendations of the ESCR Committee in particular, was highlighted during the discussions of OEWG.¹⁴⁴ It is an obligation of states that is underlined in articles 2(1), 11(1) and (2), 15(4), 22 and 23 of CDESCR, and is based on free consent.¹⁴⁵ The view of the ESCR Committee is that in the absence of an active programme of international assistance and co-operation on the part of all those states that are in a position to undertake one, the full realisation of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.¹⁴⁶ In fact, one of the roles of the ESCR Committee is¹⁴⁷

to encourage greater attention to efforts to promote economic, social and cultural rights within the framework of international development co-operation activities undertaken by, or with the assistance of, the United Nations and its agencies.

At the regional level, looking at the African system, for instance, international co-operation and assistance is an objective of the African Union (AU).¹⁴⁸

Though Venezuela observed that the state reporting procedure was more appropriate to identify needs for technical assistance, a number of states supported its inclusion in the Optional Protocol.¹⁴⁹

¹⁴³ Art 14(1) OP-ICESCR.

¹⁴⁴ See, eg, Explanatory Memorandum, para 35 22.

¹⁴⁵ Art 11(2) CDESCR.

¹⁴⁶ General Comment 3 on the nature of state parties' obligations, 14/12/1990, para 14, UN Doc E/1991/23. In the same General Comment, the ESCR Committee also observed that the phrase 'to the maximum of its available resources' was intended by the drafters of CDESCR to refer to both the resources existing within a state and those available from the international community through international co-operation and assistance (para 13).

¹⁴⁷ General Comment 2 on international technical assistance measures, 02/02/1990, para 3, UN Doc E/1990/23.

¹⁴⁸ See art 3(d) of the Constitutive Act of the AU; art 2(1)(e) of the Charter of the Organisation of African Unity (OAU). In addition, African states have an obligation to promote international (economic) co-operation (see the Preamble to and art 21(3) of the African Charter).

¹⁴⁹ Argentina, Austria, Belgium, Finland, France, Germany, Italy, Japan, the Netherlands, New Zealand, Norway, Poland, Slovenia, Sweden, Switzerland and the United Kingdom (see Report of the fourth Session of the OEWG, para 122).

Furthermore, article 14(3) makes provision for the establishment of a fund to provide

expert and technical assistance to state parties, with the consent of the state party concerned, for the enhanced implementation of the rights contained in the Covenant, thus contributing to building national capacities in the area of economic, social and cultural rights in the context of the present Protocol.

States are the direct beneficiaries of the fund, though victims were also beneficiaries in earlier drafts and some states had indicated their support for providing assistance to victims.¹⁵⁰ Moreover, the kind of assistance under the fund is not financial assistance, but 'expert and technical' assistance. It is important to note that issues relating to the modalities of the fund have not been addressed in the Optional Protocol, but have been left to the General Assembly.

The establishment of a fund was proposed as a means of encouraging and facilitating international assistance and co-operation. Some human rights treaties make provision for the establishment of a fund. For instance, the Optional Protocol to CAT, 2002 (OP-CAT) establishes a fund to help finance the implementation of the recommendations made by the Sub-Committee on Prevention after a Visit to a State Party, as well as education programmes of the national preventive mechanisms.¹⁵¹ This fund is financed through voluntary contributions made by governments, inter-governmental organisations, NGOs and other private or public entities.¹⁵² Also, the Rome Statute of the International Criminal Court, 1998, establishes a fund for the benefit of victims of crimes within its jurisdiction and their families.¹⁵³ This fund is financed through money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the trust fund. The Rome Statute does not exclude the possibility that it might be financed from other sources, and it sketches the general outlines of the trust fund, leaving the Assembly of State Parties to decide on how to implement it in practice.

While the establishment of a fund received some support,¹⁵⁴ a majority of states objected to it.¹⁵⁵ The objections were based on the risk of

¹⁵⁰ Argentina, Australia, Bangladesh, Belgium, Germany, India, Sweden and Switzerland, for instance, supported the provision of assistance to victims. Russia supported assistance to both victims and states (see Report of the fifth Session of the OEWG, paras 184 & 192).

¹⁵¹ Art 26 OP-CAT.

¹⁵² The fund is not yet formally established by the General Assembly.

¹⁵³ Art 79 Rome Statute.

¹⁵⁴ Algeria, Austria, Argentina, Bangladesh, Belarus, Egypt (on behalf of the African Group), Germany, Slovenia and Ukraine (see Report of the Fourth Session of the OEWG, para 127; and Report of the Fifth Session of the OEWG, paras 107, 114, 115, 117 & 183).

¹⁵⁵ Austria, Australia, Belgium, Canada, Denmark, France, Liechtenstein, Netherlands, New Zealand, Poland, Sweden, Switzerland, United Kingdom and the United States (see Report of the Fourth Session of the OEWG, para 127; and Report of the Fifth Session of the OEWG, paras 107, 114, 115, 117 & 183).

duplicating other funds and the practical difficulties in implementing and managing the fund. It was also argued that there are dangers in linking violations to funding and that the fund would involve high administrative costs and imposes an additional burden on the Office of the High Commissioner for Human Rights (OHCHR).¹⁵⁶ It was pointed out, however, that concerns about duplication had not been an issue when OP-CAT was adopted, the fear of additional burden for the OHCHR should not prevent the creation of the fund, and that developing countries could not fully realise the rights in CESCER without international assistance.¹⁵⁷ One thing that was clear from states, even those who supported the fund, was that the fund should not be mandatory.¹⁵⁸

4 Conclusion

Individual complaints procedures are vital in that they further develop and fine-tune international human rights law, create precedents, draw attention to the specific, concrete human rights violation, making the problem and the victim more visible, and the remedy more specific and implemental.¹⁵⁹ Though some writers have questioned the establishment of this new international adjudicative mechanism,¹⁶⁰ the benefits of having the Optional Protocol to CESCER are numerous: It would encourage state parties to ensure more effective local remedies; promote the development of international jurisprudence which would in turn promote the development of domestic jurisprudence on economic, social and cultural rights; strengthen international accountability; enable the adjudicating body to study concrete cases and thus enable it to create a more concise jurisprudence; help empower vul-

¹⁵⁶ Report of the Fourth Session of the OEWG, paras 129 & 168; Report of the Fifth Session of the OEWG, para 114. The funds administered by the UN Secretary-General and the OHCHR include a Voluntary Fund for Victims of Torture, Voluntary Trust Fund on Contemporary Forms of Slavery, Voluntary Fund for Indigenous Populations, and a Voluntary Fund for Technical Co-operation in the Field of Human Rights. These funds have a specific focus, are voluntary, and most of them either provide assistance to NGOs assisting victims or assist representative organisations or communities to participate in meetings.

¹⁵⁷ Report of the Fourth Session of the OEWG, para 130.

¹⁵⁸ Report of the Fourth Session of the OEWG, para 165.

¹⁵⁹ A de Zayas 'The examination of individual complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights' in Alfredsson *et al* (n 10 above) 73.

¹⁶⁰ See, eg, M Dennis & D Stewart 'Justiciability of economic, social and cultural rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health' (2004) 98 *American Journal of International Law* 462-515.

nerable and marginal groups; and would combat arguments against the justiciability of economic, social and cultural rights.¹⁶¹

The next step is the effective implementation of the Optional Protocol, which is challenging, considering its 'optional' nature and the continuous existence of objections to the justiciability of economic, social and cultural rights as evidenced in the discussions of the OEWG. There are a number of challenges to the implementation of the Optional Protocol, including: getting states to ratify; accessibility to the mechanism since victims would need to have the financial means to travel to Geneva, Switzerland, where the ESCR Committee is based, should they have to testify during hearings; and ensuring effective implementation of the request for interim measures, and the views and recommendations of the Committee, which are non-binding and left to the political will of states.¹⁶² The effective implementation of the views and recommendations of the ESCR Committee is another challenge, as is the case with the implementation of the recommendations of other human rights bodies.

Notwithstanding these challenges, the Optional Protocol has been seen as an important mechanism to expose visible economic, social and cultural rights abuses that are usually linked to poverty, discrimination and neglect.¹⁶³ Most importantly, it has brought CESC into line with other human rights treaties by placing economic, social and cultural rights on an equal footing with civil and political rights, thereby correcting the historical asymmetry between these categories of rights and emphasising their indivisibility and interrelatedness.

¹⁶¹ Report of the First Session of the OEWG, paras 23 & 67-70. See also P Alston 'Establishing a right to petition under the Covenant on Economic, Social and Cultural Rights' in *Collected Courses of the Academy of European Law* (1995) 107, quoted in H Steiner *et al International human rights In context: Law, politics, morals* (2007) 363-364.

¹⁶² For additional reading on the challenges to the implementation of the OP-ICESCR, see C Golay 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' CETIM Critical Report No 2, November 2008 <http://www.cetim.ch/en/documents/CETIM-Report-2.pdf> (accessed 20 January 2009).

¹⁶³ UN High Commissioner for Human Rights, Louise Arbour, when congratulating HRC on its adoption of OP-ICESCR (Press release, 2008).

The right of indigenous peoples to self-determination versus secession: One coin, two faces?

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Summary

The UN Declaration on the Rights of Indigenous Peoples of 13 September 2007 revisits the notion of 'self-determination' which has been the subject of great debate in international law over several decades and which still presents a quandary to international lawyers. As the representatives of indigenous peoples mentioned in a letter to the Working Group on Indigenous Populations in 1993, 'the right of self-determination is the heart and soul of the declaration'. Was the insertion of the right to self-determination in the Declaration intended to be understood in a broader sense as granting the right to indigenous peoples who fulfil certain conditions in the Declaration, to secede? In other words, is the right to 'self-determination', as contained in the Declaration, akin to a right to secession or is it akin to the right to 'self-determination' as contained in the United Nations Charter and in common article 1 of the two international Covenants? The notion of self-determination brings with it several issues for resolution. One such issue is the precise nature of self-determination in international law: Is it determinate or does it evolve over time? Can it be used for purposes of secession where the sovereign state

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does not guarantee such rights to indigenous people; or can it be used as justification for the secession of indigenous peoples where their right of self-determination within the state has been violated? It is argued in this article that the notion of 'self-determination' as used in the Declaration must be distinguished from 'self-determination' as used in the other international instruments, as a mere declaration cannot modify a norm of international law contained in international conventions and covenants. Since the Declaration does not provide sanctions for non-compliance, the author further argues that, where states do not conform, the sanction may well be the same as that for self-determination in general, amounting to what is much feared by states: the possible dismemberment of a state entity along indigenous lines. To arrive at this, the author analyses the notion of 'self-determination', on the one hand, and the ensuing development into the notion of the right to 'secession', on the other, before concluding that indigenous peoples who do not enjoy their indigenous rights within the state under the scope of internal self-determination, may exercise their right to external self-determination, and in the course of exercising their right to external self-determination, they may make claims to their right of 'secession'.

1 Introduction

On 13 September 2007, the General Assembly of the United Nations (UN) adopted¹ the Declaration on the Rights of Indigenous Peoples (Declaration),² after over two decades of negotiations. This resolution failed to be adopted by consensus because of several reasons highlighted in the declarations of the countries that voted against as well as in the declarations of some of the countries that abstained from voting.

One issue that posed substantial problems during the negotiations and discussions was the implication of the insertion of the notion of 'self-determination' in the Declaration. The importance of the question of self-determination cannot be gainsaid. As the representatives of indigenous peoples mentioned in a letter to the Working Group on Indigenous Populations in 1993, '[t]he right of self-determination is the heart and soul of the Declaration'.³ And they were not ready to 'consent to any language which limits or curtails the right of self-determination'.⁴

¹ The adoption was by a vote of 143 for, four against and 11 abstentions. The United States of America, New Zealand, Australia and Canada voted against the Declaration.

² UN Resolution A/RES/61/295 of 13 September 2007.

³ Cited in S Pritchard 'Working group on Indigenous Populations: Mandate, standard-setting and future perspectives' in S Pritchard (ed) *Indigenous peoples, the United Nations and human rights* (1998) 46.

⁴ Pritchard (n 3 above) 3.

Was the insertion of the right to self-determination in the Declaration intended to be understood in a broader sense as granting the right to indigenous peoples who fulfil certain conditions in the Declaration, to secede? In other words, is the right to 'self-determination' as contained in the Declaration akin to the right to 'self-determination' as contained in the UN Charter⁵ and in common article 1⁶ of the two international covenants? Is it akin to a right to 'secession' or does it have a separate meaning distinct from the above?

The final text of the Declaration seems to answer this question in the negative. Article 46(1) of the Declaration provides:

Nothing in this Declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.

I use the word 'seems' because this article, which was modified⁷ at the behest of the African group, if read in isolation, may give the impression that the use of the expression 'self-determination' invariably would strive to protect territorial integrity and in no circumstance may amount to secession.

The notion of self-determination that reappears in this Declaration, like the mythical phoenix that rises from its ashes, brings with it several issues for resolution. One such issue is the precise nature of self-determination in international law: Is it determinate or does it evolve over time? Can it be used for purposes of secession where the sovereign state does not guarantee such rights to indigenous people, or can it be used as justification for the secession of indigenous peoples where their right of self-determination within the state has been violated?

I argue in this article that the notion of 'self-determination', as used in the Declaration, must be distinguished from 'self-determination' as

⁵ The 1945 Charter.

⁶ Art 1 of the International Covenant on Civil and Political Rights (General Assembly Resolution 2200A (XXI) of 16 December 1966) (CCPR) and art 1 of the International Covenant on Economic, Social and Cultural Rights (General Assembly Resolution 2200A (XXI) of 16 December 1966) (CESCR): '1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'

⁷ The initial draft reads: 'Nothing in this Declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.'

used in other international instruments, as a mere declaration cannot modify a norm of international law contained in international conventions and covenants.

Since the Declaration does not provide sanctions for non-compliance, I further argue that where states do not conform, the sanction may well be the same as that for self-determination in general, which may amount to what is much feared by states, that is, the possible dismemberment of a state entity along indigenous lines. To arrive at this, I analyse the notion of 'self-determination', on the one hand, and its ensuing development into the notion of the right to 'secession', on the other, before concluding that indigenous peoples who do not enjoy their indigenous rights within the state under the scope of internal self-determination may exercise their right to external self-determination, and in the course of exercising their right to external self-determination, they may make claims to their right to 'secession'.

2 Justifications of the right of indigenous peoples to self-determination

One may ask the question: Why is it important to grant a right of self-determination specific to indigenous peoples? In other words, are the general human rights instruments not sufficient? What sense does it make to coin a new right to self-determination specific to indigenous peoples when the existing human rights instruments already afford them such rights? Is there no duplicity in such a provision? In the ensuing paragraphs, I highlight the insufficiency of treating the rights of indigenous peoples as general human rights and examine the justifications that have been advanced for the existence of a separate rights instrument for indigenous peoples.

The argument may be advanced that the Charter of the UN and common article 1 of the two international human rights Covenants make sufficient provision for the right to self-determination. The UN Charter provides *inter alia* in article 1 that the purpose of the UN shall be to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples ...',⁸ and common article 1 of the two international Covenants⁹ determines that '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

These international instruments do not distinguish between the types of persons or peoples protected and may be deemed to be largely suf-

⁸ Art 1(2) of the Charter of the United Nations.

⁹ CCPR and CESCR.

ficient. Hence, the argument is that there is no necessity for another instrument specific to indigenous peoples.

The same question would have been asked as to the necessity of having specific instruments relating to the protection of the rights of children and minors¹⁰ and the rights of women.¹¹ If those instruments were sufficient, then there would have been no need to over-belabour the point.

However, one argument that can be advanced is as to the specificity of the rights of indigenous peoples. Theirs cannot be treated merely as rights falling within the global ambit of human rights, as indigeneity¹² and the rights that go with it are specific.

The question of the rights of indigenous peoples is one of collective rights as opposed to individual rights. While the rights contained in the international Covenants may be actionable as individual rights under the international human rights system, the rights of indigenous peoples would be actionable as a collective right. Also, the various qualifications of the notion under UN practice did not extend it to cover minorities and indigenous peoples.

As to whether a communication can be brought before the Human Rights Committee for self-determination as a collective right, this possibility was eliminated by the Committee in the *Lubicon Lake Band* case.¹³ In that case, the Committee opted for a restrictive interpretation of the Optional Protocol to the International Covenant on Civil and Political Rights (CCPR) with regard to complaints relating to the right of self-determination and held that:

While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a 'people' is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive.

In the light of the foregoing, one may safely state that the Declaration serves as an instrument that would empower indigenous peoples with the appropriate tools to fight against such escape mechanisms in the protection of their rights. In fact, Amnesty International thinks that the

¹⁰ Convention on the Rights of the Child (CRC).

¹¹ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

¹² Some authors, such as Jeremy Waldron (*Indigeneity? First peoples and last occupancy* (2003)), prefer the use of the word 'indigeneity', while others, such as Patrick Thornberry (*Indigenous peoples and human rights* (2002)) prefer the word 'indigenesness'.

¹³ *Lubicon Lake Band v Canada*, Communication No 167/1984, views adopted on 26 March 1990.

Declaration fills an important gap.¹⁴ It addresses indigenous peoples' protection against discrimination and genocide. It reaffirms their right to maintain their unique cultural traditions and recognises their right of self-determination, including secure access to lands and resources essential for their survival and welfare. Though UN treaty bodies have repeatedly affirmed state obligations to protect indigenous peoples, the grave human rights violations they have experienced have continued unabated in every region of the world. 'Indigenous peoples are among the most marginalised and the most vulnerable.'¹⁵

3 The evolutionary nature of the theory of self-determination

The UN Declaration on Indigenous Peoples' Rights revisits a concept which is in constant evolution in international law. The difficulty in coining an overarching concept of self-determination has been present for a long time. The notion of self-determination may be seen as the chameleon of international law that changes its colour depending on circumstances and according to what kind of shrub it finds itself in. It is also very evasive in that it has been used to mean different things at different times.¹⁶

Hannum in his article 'Rethinking self-determination',¹⁷ in presenting the difficulty inherent in coining a clear-cut scope and meaning for the concept of self-determination, states:

No contemporary norm of international law has been so vigorously promoted or widely accepted — at least in theory — as the right to self-determination. Yet the meaning of that right remains as vague and imprecise as when it was enunciated by President Woodrow Wilson and others at Versailles.

The evolutionary nature of the concept of self-determination is most aptly presented by Drew,¹⁸ who states:

The right of self-determination is simply one of the most normatively confused and indeterminate principles in the canon of international legal doctrine ... beyond colonialism, the right of self-determination is played by an excess of indeterminacy both in terms of scope and content.

Building on this, one can clearly distinguish three periods in the evolution of the right to self-determination, namely, the use of the concept

¹⁴ Amnesty International Index IOR 40/038/2006 (Public) News Service No 282 of 1 November 2006.

¹⁵ As above.

¹⁶ It was used during the League of Nations era to justify the creation of nation states in Europe; it was used for the purpose of decolonisation under the UN, and has been used after the decolonisation era for different purposes, including secession.

¹⁷ (1993-1994) 34:1 *Virginia Journal of International Law* 2.

¹⁸ C Drew 'The East Timor story: International law on trial' (2001) 12 *European Journal of International Law* 653.

before the decolonisation era, the use of the concept for the purpose of decolonisation and the evolution of the concept post-colonisation.

3.1 The period before decolonisation or the period before the United Nations

Brilmayer traces the origin of the concept back to the American Revolution and, in particular, to the text of the Declaration of Independence, and attributes its development to the French Revolution.¹⁹ One may even argue that the wording of the American Declaration of Independence is itself clearly a case of colonial self-determination.

However, the International Committee of Jurists, established in 1920 to examine the question of whether the people of the Aaland Islands had a right to conduct a plebiscite on the issue of the territory's potential separation from Finland and amalgamation with Sweden, was of the view that, although self-determination was important in [modern] political thought, it was not incorporated into the Covenant of the League of Nations and, therefore, was not a part of the positive rule of the Law of Nations:²⁰

Positive international law does not recognise the right of national groups, as such, to separate themselves from the state of which they form part by the simple expression of a wish, any more than it recognises the right of other states to claim such a separation.

The second body of experts, the Commission of Inquiry, described it as 'a principle of justice and of liberty, expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinions'.²¹

National self-determination became the paradigm for political organisation in the eighteenth and nineteenth centuries. The move was towards the creation of nation states with homogeneous populations based on language and culture. The nationalist argument was used to justify the wars that led to the disintegration of the Austro-Hungarian and Ottoman empires.

A more precise formulation of the concept is credited to President Woodrow Wilson, who coined the term even though he did not use it in his famous 'fourteen points' speech to the United States Congress on 8 January 1918 because of his belief that the principle was neither

¹⁹ L Brilmayer 'Secession and self-determination: A territorial interpretation' (1991) 16 *Yale Journal of International Law* 177.

²⁰ Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aalands Question, Official Journal of the League of Nations (1920) Supplement No 3 5.

²¹ The Aaland Islands Question 27, League of Nations Doc B7.21/68/106 (1921) (English version) (report submitted to the Council of the League of Nations by the Commission of Rapporteurs).

absolute nor universal. It was not until a month later that he addressed the question of self-determination directly in the following words:²²

National aspirations must be respected; peoples may now be dominated and governed only by their own consent. Self-determination is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.

The League of Nations was to address the issue of self-determination after World War I through the system of mandates. In redrawing the map of Europe after the war, the victors tried to respect ethnic boundaries — at least with regard to the empire of the defeated nations.²³

It was also to find some support in Marxism-Leninism. 'The principle of self-determination was used to encourage colonised peoples to throw off alien (and not, coincidentally, capitalist) domination.'²⁴ Thus, Russia supported self-determination for reasons of communism and quickly extended its power to the newly-freed nations.

3.2 Self-determination as a concept for decolonisation as used by the United Nations

One period when the purpose of self-determination was widely accepted was during the decolonisation era. It was used as a concept to relieve colonial peoples from the yoke of colonialism.

Though it was widely accepted, its content and format did not seem to be clear to international lawyers either. UN General Assembly Resolution 1514 (XV) of 14 December 1960 on the Declaration on Granting of Independence to Colonial Countries and Peoples provides in article 2 that '[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. Resolution 2625(XXV) of 24 October 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, in the section on the principle of equal rights and self-determination of peoples, states that '[e]very state has the duty to promote, through joint and separate action, realisation of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter'. What is of cardinal importance here are the provisions of article 3 of General Assembly Resolution 1514 (XV) of 14 December 1960 on the Declaration on granting of independence to colonial countries and peoples, which provides unequivocally that 'inadequacy of political, economic,

²² Woodrow Wilson 'War aims of Germany and Austria', Address of the President of the United States of America, delivered at a joint session of the two houses of Congress on 11 February 1918, para 5 <http://www12.dataformat.com/Document.aspx?doc=30724> (accessed 15 January 2009).

²³ Brilmayer (n 19 above).

²⁴ Brilmayer (n 19 above) 16.

social or educational preparedness should never serve as a pretext for delaying independence’.

These Resolutions did not delineate the format that self-determination was to take and who should qualify for self-determination in their application. There was therefore a debate as to whether it applied to ethnic groups, nation states or to any organised community. The criteria were fixed by two important UN documents by Hector Gros Espiell²⁵ and Aurelia Cristecu²⁶ to include a history of independence or self-rule in an identifiable territory, a distinct culture, and a will and capability to regain self-governance. However, this did not solve the problem. A people could have a common culture, language, boundary and will and capability to regain self-government and yet be spawn across two or more states. Furthermore, there could be a nation state where the people speak more than one language.

To ease things, a couple of tests were used that have all proved to be problematic today. The first was the principle *uti possidetis juris*²⁷ that was used to limit the boundaries to colonial boundaries. In as much as this had an advantage in that it limited the issue of determining the boundaries of the colonies in time, it had a major drawback in that those boundaries themselves, at the time they were drawn, did not take into consideration the geography of the area and the cultural constitution of the various peoples. In fact, the story is told of how a senior British official boasted about drawing a line with his blue pen to delimit the boundary between Nigeria and Cameroon (an area he had never been to) while sitting in his office in London:²⁸

In those days we just took a blue pencil and a ruler, and we put it at Old Calabar, and drew that line to Yola ... I recollect thinking when I was sitting having an audience with the Emir [of Yola], surrounded by his tribe, that it was a very good thing that he did not know that I, with a blue pencil, had drawn a line through his territory.

²⁵ ‘The right to self-determination: Implementation of United Nations Resolutions. A study prepared by Hector Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities’ (E/CN4/Sub2/405/Rev1) 1980.

²⁶ Aurelia Cristescu (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities) 1981 ‘The right to self-determination: Historical and current developments on the basis of United Nations instruments’ UN Document E/CN.4/Sub2/404/Rev1.

²⁷ A principle of international law that states that newly-formed states should have the same borders that they had before their independence.

²⁸ JC Anene *The international boundaries of Nigeria 1885-1960* (1970), cited by M Mutua in ‘Why redraw the map of Africa: A moral and legal inquiry’ (1994-1995) 16 *Michigan Journal of International Law* 1113. Little wonder, therefore, that several boundary disputes have occurred between Cameroon and Nigeria concerning the boundary in question, which culminated in the International Court of Justice ruling on the issue in October 2002 (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*).

Most of the borders of African states were drawn as a result of colonial conquests and states or entities with a long history of antagonism were crammed together into one state with more powerful tribes put under the control of weaker tribes with imperial support and supervision,²⁹ and 'it mattered little even when pre-colonial societies met the criteria for statehood, as many did'.³⁰ This could only serve as a recipe for future problems and disputes. Little wonder, therefore, that today there is a large cry for self-determination *cum* secession coming from most of these states.³¹

Another solution that was devised for self-determination during the colonial period was the 'salt water test'. By this test, the colony to qualify for self-determination had to be separated by the ocean from the colonial state. Put laconically, 'the 'salt water' test prescribed that the colony be 'external' to the 'mother country'.³² This test could well have worked during the American Declaration of Independence (1776), as the 13 American colonies were separated by salt water from the colonial masters. However, such a test was based on the premise that colonialism only existed where the colonial power is on another continent and did not take into consideration colonialism on the same continent. The international understanding was that³³

[a]part from colonies and other similar non-self-governing territories, the right to self-determination is extended only to territories under occupation ... and to majorities subjugated to institutionalised racism (segregation, apartheid) but not to minorities that are victims of similar policies.

The other test was the 'pigmentation test'.³⁴ This limited self-determination to black freedom from white rule. As Mazrui³⁵ puts it:

For many nationalists in Africa and Asia the right to sovereignty was not merely for the nation states recognisable as such in a Western sense but for 'peoples' recognisable as such in a racial sense, particularly where differences of colour were manifest.

This was the most ridiculous of all the tests, as it only looked at colonialism on the African continent and saw it as a racial issue. It did not

²⁹ CW Hobley in his book *Ethnology of the A-Kamba and other East Africa tribes* (1910) 43-48 tells how the 'Akamba, Kikuyu and the mAsai, three groups which fought each other from time to time, were all bunched into the new state of Kenya', cited in Mutua (n 28 above).

³⁰ Mutua (n 28 above) 1125-1126.

³¹ Eritrea, Biafra, Katanga, Southern Cameroons, and such.

³² JS Ward 'The Mi'kmaq and the right to self-determination' (2004) 1 *Célanen: A journal of indigenous governance* 1 http://web.uvic.ca/igov/research/journal/articles_ward_p.htm (accessed 10 April 2009).

³³ Ward (n 32 above) para 32.

³⁴ W Ofuathey-Kodjoe *The principle of self-determination in international law* (1997) 129-147.

³⁵ AA Mazrui *Towards a pax Africana: A study of ideology and ambition* (1967), cited in OS Kamanu 'Secession and self-determination: An OAU dilemma' (1974) 12 *Journal of Modern African Studies* 356.

take into consideration colonialism practised by persons of the same colour on peoples of the same colour. I doubt if such a test was applied to the American colonies it would have had the same effect.

One issue that was not very clear was whether these three tests had to be applied together or whether one could be applied to the exclusion of the others, or whether a combination of any two would have been satisfactory. My guess is that the first test was indispensable, that is, the justification of a boundary in conformity with the principle of *uti possidetis juris*, coupled with a culture and language of the peoples. The other two could be applied in any form and in fact could even have been dispensed with in certain cases. However, it is worth mentioning that *uti possidetis juris* is the only test that mattered in the decolonisation era, save for exceptional cases such as Namibia and Western Sahara.

It has also not been very straightforward for international lawyers to agree on the notion of 'people' or 'peoples' for the purpose of self-determination. What enables a group or people to claim the right to self-determination? According to Hannum,³⁶ the definition would normally include subjective and objective components:

At a minimum it is necessary for members of the group concerned to think of themselves as a distinct group. It is also necessary for the group to have certain objectively determinable common characteristics, eg ethnicity, language, history, or religion.

Friedlander provides a more straightforward set of criteria: 'A people consists of a community of individuals bound together by mutual loyalties, an identifiable tradition, and a common cultural awareness, with historic ties to a given territory.'³⁷

3.3 Self-determination in the post-decolonisation era

The argument of self-determination has been used even after the colonial period and out of the colonial context. It would be illogical to limit the question of self-determination to dealing with colonial issues. It is not right for any people to be subjected to alien subjugation.

The cases of self-determination cited above constitute what I refer to as 'positive' self-determination. That is, where people exercise the right by choosing to associate in an entity organised to rule itself. But there may also be cases of 'negative' or 'reverse' self-determination. This would be the case where a people decide to break away from an existing entity and form their own state. Buchheit³⁸ refers to this situation as 'remedial secession':³⁹

³⁶ H Hannum 'Rethinking self-determination' (1993-1994) 34:1 *Virginia Journal of International Law* 35.

³⁷ RA Friedlander 'Proposed criteria for testing the validity of self-determination as it applies to dissatisfied minorities' (1997) 25 *Chitty's Law Journal* 335 336.

³⁸ L Buchheit *Secession: The legitimacy of self-determination* (1978).

³⁹ Buchheit (n 38 above) 222 para 2.

Remedial secession envisions a scheme by which corresponding to the various degrees of oppression inflicted upon a particular group by its governing state, international law recognises a continuum of remedies ranging from protection of individual rights, to minority rights, and ending with secession as the ultimate remedy.

However, this has been accepted only after long and devastating wars or where the sovereign state consents to self-determination of part of its territory. The cases of the secession by Eritrea from Ethiopia and Bangladesh from Pakistan are examples of cases where the right may be exercised after long and bloody wars. The self-determination of the countries of the former Soviet Union was only achieved with the consent of Russia. Kohen states:⁴⁰

When a new state is formed from part of the territory of another state with its consent, it is a situation of 'devolution' This presupposes an agreement between the two states and, as such, is not a source of conflict, at least with regard to the existence of the new state itself.

There is a lot of inconsistency in the practice outside the colonial context as the UN has been seen to admit certain countries that acquired self-determination in violation of the principle of states sovereignty (Eritrea from Ethiopia and Bangladesh from Pakistan), while they opposed the self-determination of Biafra from Nigeria and in fact sent UN forces to quell the Katangese rebellion for self-determination from the Congo. In as much as this has no immediate bearing on the admission policy of the UN, it seems rather that the issue of fanning state sovereignty in deciding issues of self-determination is governed by the recognition policies of great powers.

The only international instrument that apparently extends the right of self-determination beyond the colonial context is the Helsinki Final Act of the Conference on Security and Co-operation in Europe (CSCE) of 1975. It provides in Principle VIII:⁴¹

The participating states will respect the equal rights of peoples and their right to self-determination. By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

⁴⁰ MG Kohen 'Creation d'Etats en droit international contemporain' (2002) 6 *Bancaja Euromediterranean Courses of International Law* 573.

⁴¹ This article of the Helsinki Final Act also carries the popular *caveat* on the limitation of the right to secession. It states that the right has to be exercised 'in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of states'.

3.4 Self-determination under the African Charter on Human and Peoples' Rights

Other than the two international covenants already mentioned, prominent among human rights treaties are the provisions of the African Charter on Human and Peoples' Rights (African Charter)⁴² on self-determination. The African Charter insists on the equality of peoples in article 19 and hammers on the fact that there can be no justification for the domination of a people by another: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'

Article 20 sets forth the right of self-determination:

- 1 All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
- 2 Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.
- 3 All peoples shall have the right to the assistance of the state parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

In great contrast to the beautiful phraseology contained in the African Charter, most African states have adopted a very limited interpretation of the concept outside the post-colonial context of independence.⁴³

Because of the extreme ethnic heterogeneity of most African states and the resulting difficulty in developing a sense of statehood in the post-independence period, the principles of territorial integrity and national unity have been widely felt to be more fundamental than that of self-determination.

4 The right of indigenous peoples to self-determination

4.1 The right under the United Nations Declaration

The right of indigenous peoples to self-determination under the UN Declaration⁴⁴ was not achieved without much debate. In fact, it was an issue of controversy and underwent numerous modifications before the final Declaration. In this section, I will examine the right under the

⁴² Adopted on 27 June 1981 http://www.achpr.org/english/_info/charter_en.html (accessed 21 January 2009).

⁴³ H Hannum *Autonomy, sovereignty and self-determination: The accommodation of conflicting rights* (1990) 46-47

⁴⁴ UN Resolution A/RES/61/295 of 13 September 2007.

Declaration alongside the different formulations that were presented before its final adoption.

Preambular paragraph 16 of the UN Declaration states the principle of self-determination in blanket terms:

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

Article 3 goes a little further and states that '[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

It has not been easy to justify the insertion of this article, which is culled *verbatim* from the Charter of the UN and common article 1⁴⁵ to the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, in the Declaration.

Article 4 goes further to state:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

What is the purport of this addition if the intention is not to grant a separate right of self-determination to indigenous peoples distinct from that in the international Covenants?

In order to arrive at the formulation in articles 3 and 4, the Declaration saw several proposals on the issue of self-determination which the indigenous caucus⁴⁶ held was primordial for the protection of the rights of indigenous peoples. The draft proposals of the representatives of indigenous peoples to the Working Group on Indigenous Populations (WGIP) followed the following formulations: The representatives of indigenous peoples submitted a draft to the 4th session in 1985 with the following formulation:

All indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious and cultural development, and determine their own membership and/or citizenship, without external interference.

⁴⁵ 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

⁴⁶ A Working Group on Indigenous Populations was formed at the level of the UN that monitored the negotiations and in fact drafted the article on self-determination without which they thought the whole exercise would have been futile.

At the 8th session in 1990, the formulation was as follows:

Indigenous peoples have the right of self-determination, by virtue of which they may freely determine their political status and institutions and pursue their own economic, social, religious and cultural development.

During the 1991 session of the WGIP, what appears to be the Preamble and articles 3 and 4 of the Declaration today were presented as one article, namely:

Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the states in which they live, in a spirit of coexistence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.

The UN Meeting of Experts to Review the Experiences of Countries in the Operation of Schemes of Internal Self-Government for Indigenous Populations in 1991, presented the following formulation:

Indigenous peoples have the right of self-determination as provided for in the international covenants on human rights and public international law and as a consequence of their continued existence as distinct peoples. This right will be implemented with due consideration to other basic principles of international law. An integral part of this is the inherent and fundamental right of autonomy and self-government.

The evolution of these drafts clearly shows an inherent fear in the WGIP not to venture onto controversial issues that may hamper the adoption of the Declaration when it is finally tabled, such as the fear that the interpretation of self-determination may grant a right of secession. Their fears were founded.

The four countries that voted against the Declaration had various reasons for doing so. The issue of self-determination was central to the hesitation of three of the four countries (the United States, Australia and New Zealand), as they felt that this could lead to some misconception and misinterpretation in the course of the application of the Declaration. Such fears are not wholly unfounded.

The representative of the United States⁴⁷ questioned the insertion of the concept on the grounds that it 'risked endless conflicting interpretations and debate about its application'. To him, 'under existing common article 1 legal obligations, indigenous peoples generally are not entitled to independence nor any right of self-government within the nation state'. That it was not the mandate '... to qualify, limit, or expand the scope of the existing legal obligations set forth in common article 1', but that the mandate was 'to articulate a new concept' of 'self government within a nation state'. Furthermore, he finds 'such an

⁴⁷ USUN Press Release of 13 September 2007: Explanation of vote by Robert Hagen, US Advisor on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly.

approach on a topic that involves the foundation of international law ... likely to result in confusion and disputes⁷.

Australia, for its part, contended that:⁴⁸

Self-determination applies to situations of decolonisation and the break-up of states into smaller states with clearly defined population groups. It also applies where a particular group with a defined territory is disenfranchised and is denied political or civil rights. It is not a right which attaches to an undefined subgroup of a population seeking to obtain political independence.

New Zealand⁴⁹ challenged the Declaration on grounds that it conflicted with the Treaty of Waitangi⁵⁰ and various dispositions of its Constitution.

Canada⁵¹ thought that the issue ought to have been seen in terms of self-government and the question of self-determination under Canadian jurisprudence should be subject to negotiations.

Though the United Kingdom voted for the Declaration, it mentioned that it understood that the Declaration did not apply to UK overseas territories. One may wonder, therefore, if the broad concept of self-determination, as used for the decolonisation of colonial peoples, should not apply to the so-called UK overseas territories.

During the negotiations, the African group⁵² made observations on the insertion of the notion of self-determination in the Declaration in a rather contradictory manner. On the one hand, the group observed:

The principle of self-determination only applies to peoples under colonial and/or foreign occupation, that is people residing in territories or areas which fall within the jurisdiction of the UN trusteeship system, as enumerated in article 77 of the United Nations Charter as well as those non-self-governing peoples within the purview of article 3 of the UN Charter. Implicitly recognising the rights of indigenous peoples to self-determination in ... the Declaration can be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity and the territorial integrity of any country.

It must be precised that the recognition of the right to self-determination was not implicit (as the African group claimed), but express. The preoccupation of the African working group here echoes the fear of

⁴⁸ Explanation of vote by Hon Robert Hill, Ambassador and Permanent Representative of Australia to the UN, 13 September 2007.

⁴⁹ Explanation of vote by New Zealand Permanent Representative to the UN, HE Ms Rosemary Banks, 13 September 2007.

⁵⁰ 1840.

⁵¹ Statement by Ambassador John McNee, Permanent Representative of Canada to the UN, regarding the UN Declaration on Indigenous Peoples' Rights of 13 September 2007.

⁵² *Aide Memoire* of 9 November 2006.

the so-called dismemberment of a state as a result of the exercise of the right to self-determination. That is, the question of secession.⁵³

On the other hand, the African group, overwhelmed by the fear of secession, loses sight of the objective of the issue of self-determination in the Declaration. They argue that the Declaration may be misunderstood as embracing and promoting self-determination within nation states. For all intents and purposes, the Declaration is actually intended to promote self-determination, at the least within nation states. That is, internal self-determination.

These misapprehensions were rectified by the African Commission on Human and Peoples' Rights (African Commission) in its Advisory Opinion of May 2007, in which it argued that

the right to self-determination in its application to indigenous populations and communities, both at the UN and regional levels, should be understood as encompassing a series of rights relative to the full participation in national affairs.

The African Commission also echoes its preference for internal self-determination as opposed to external self-determination in the following words: 'It is ... a collection of variations in the exercise of the right of self-determination, which are entirely compatible with the unity, and territorial integrity of state parties.'

It is therefore clear that the African Commission, even though it differs with the views of the African group, merely quelled the fears of the group on issues of external self-determination and draws from its jurisprudence to state that self-determination of indigenous peoples is compatible with the African Charter, provided it is 'exercised within the national inviolable borders of a state, by taking due account of the sovereignty of the nation state'.⁵⁴

The argument of the African Commission is a double-edged sword. If the argument was used to create nation states in Europe, why can it not be used to create nation states in Africa? Furthermore, it is my humble opinion that Eritrea would beg to differ with such a view as that would be incompatible with the process that was used to arrive at the creation of an independent Eritrea.

4.2 Can one found a theory of secession from a breach of the right of indigenous peoples to self-determination?

Secession may be seen as the extreme side of self-determination since it leads to the complete dismantling of the state. According to Buchanan,⁵⁵ the notion of secession is premised on two types of normative theories: Remedial Right Only theories and Primary Right theories. According to the Remedial Right Only theories, the right to

⁵³ This is the subject of discussion of the next section.

⁵⁴ n 46 above.

⁵⁵ A Buchanan 'Theories of secession' (1997) 26 *Philosophy and Public Affairs* 35.

secede is analogous to the right to revolution, understanding it as a right that a group comes to have only as a result of violations of other rights. On this view, secession is justified only as a remedy of last resort for persistent and serious injustices. Examples of Remedial Right Only cases of secession would include secession on grounds of (a) large-scale and persistent violations of basic human rights; (b) unjust taking of the territory of a legitimate state; and (c) in certain cases, the state's persisting violation of agreements to accord a minority group limited self-government within the state.⁵⁶ It goes without saying, therefore, that, based on the Remedial Right Only theory, where indigenous peoples have been deprived of the minimum right of self-determination within the state, they may seek to exercise their right to secede.

The other right is what Buchanan refers to as 'Primary Right theories' to secede. By this right, a group can have a right to secede not only on remedial grounds, but the right to secede can exist even when the group has not been subject to any injustice. This second type of theory thus holds that there is a right to unilateral secession over and above whatever remedial and hence derivative right there may be. Primary Right theories are of two types: Ascriptivist theories and Associative Group theories. The former hold that certain groups whose memberships are defined by what are sometimes called ascriptive characteristics, simply by virtue of being those sorts of groups, have a unilateral right to secede. 'Ascriptive characteristics are those that are ascribed to individuals independently of their choice and include being of the same nation or being a "distinct people".'⁵⁷ The most common form of Ascriptivist theory holds that nations as such have a right to self-determination that includes the right to secede in order to have their own state.

The Associative Group theories or Plebiscitary theories⁵⁸ in contrast hold that a unilateral moral claim-right to secede exists if a majority residing in a portion of the state chooses to have their own state there, regardless of whether or not they have any common characteristics, ascriptive or otherwise, other than the desire for independence. They need not be co-nationals or members of a distinct society.⁵⁹

What the two types of Primary Right theories have in common is that they do not require injustice as a necessary condition for the existence of a right to secede. They are *Primary* Right theories because they do not make the right to secede derivative upon the violation of other, more basic rights, as the Remedial Right Only theories do.

On the strength of the foregoing, one may argue that indigenous peoples, either in the exercise of their Remedial Right, where that may

⁵⁶ *Stanford encyclopedia of philosophy*.

⁵⁷ Buchanan (n 55 above) 38.

⁵⁸ A Buchanan 'Self-determination, secession and the rule of international law' in D Copp (ed) *International law and morality in the theory of secession* (1998).

⁵⁹ n 56 above.

be the case where their right to self-determination within the state is violated, or in a broader sense, in the simple exercise of their right under the Associative Group theories, may choose to secede from the existing state in application of their right to self-determination under the Declaration on Indigenous Peoples' Rights.

One of the fears clearly established in all the arguments advanced against the insertion of self-determination in the UN Declaration is that it may lead to an open interpretation that may in turn lead to claims of secession. Be these arguments as they may, they all implicitly betray support for the provision to be used to justify secessionist tendencies if they are carried out by indigenous peoples, especially so where their rights to internal self-determination have been violated.

The revisiting of the notion of self-determination is living proof that the question of self-determination is very much alive and still presents a quandary in international law. It is dynamic and denies being limited to decolonisation. It presents itself as an amorphous object that changes its structure over time and in different conditions. It has been used to justify rebellion of the governed against their rulers during the American War of Independence and the French Revolution; it was used by President Woodrow Wilson to justify the creation of nation states in Europe after World War I, based on the respect of ethnic boundaries; and it was used during the League of Nations mandate system to justify the creation of trust territories.⁶⁰ It has been used by the UN for the purpose of decolonisation and it has even been used after the decolonisation era. The cases are akin to cases of secession and secessionist groups are using the notion for the same purpose.

International law neither forbids nor encourages secession. If one were to apply the popular legal adage that what is not forbidden by the law is permissible, then one may argue that secession is permitted under international law. International law has often treated secession as a matter of fact. 'If the secessionist forces were able to impose the existence of a new state, then the international legal system was to record the fact of the existence of this new entity.'⁶¹

Article 46 of the Declaration⁶² smacks of *déjà vu*. It was used more or less *expressis verbis* in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation⁶³ on the principle of equal rights and self-determination of peoples:

⁶⁰ Art 22 of the Covenant of the League of Nations.

⁶¹ MG Kohen (ed) *Secession: International law perspectives* (2006) 5.

⁶² 'Nothing in this Declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.'

⁶³ General Assembly Resolution 2625 (XXV) of 24 October 1970.

Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Also, the UN Declaration, on the granting of independence to colonial peoples,⁶⁴ provides in its article 6:

Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

This seems a rather curious statement in a resolution on decolonisation. One may wonder if the purport of the provision was to limit the application of the principle of self-determination to colonial peoples. If that was the case, then the purpose would have been defeated.

The question of self-determination has and shall always remain the Janus⁶⁵ of international law. Whenever it is mentioned, there is no doubt it shall always have two faces: one looking in front, at what is intended to be understood, and the other looking backwards, at what may be implied, that is, secession. That is why, whenever it is used, an extra effort is made to qualify and contain the interpretations that may be given to it by the insertion of the so-called 'safeguard clauses'.

The insertion of the 'safeguard clause' on the notion of self-determination in the Declaration comes with little surprise to the international lawyer, as it has been the practice of existing states to frown at the dismemberment of the territory of one of its members. The use of the word 'secession' even sounds like a taboo in international law discourse. Various forms of euphemisms have been used to describe cases that otherwise would have qualified as clear cases of secession, such as 'separation [of parts of a state], devolution and dissolution'.⁶⁶ Of course, the Vienna Convention on Succession of States in respect of Treaties of 12 August 1978 also carries the most celebrated *caveat* in limiting the right to secede.⁶⁷

The present Convention applies only to the effects of a succession of states occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

What then is the significance of the incorporation of the beautiful phraseology of self-determination in the Declaration? I am of the opinion that the provision should be given effect to and where indigenous

⁶⁴ General Assembly Resolution 1514 (XV) of 14 December 1960.

⁶⁵ In Roman mythology, Janus (or Ianus) was the two-faced god of gates, doors, doorways, beginnings and endings.

⁶⁶ Vienna Convention on Succession of States in respect of Treaties, 23 August 1978.

⁶⁷ Art 6.

peoples are not given the possibility to exercise their right of self-determination within the nation state, they should be allowed to exercise their right of external self-determination or secession. As a matter of fact, as Tomuschat argues, '[t]here are not two different rights to self-determination, one internal and the other external, but two aspects of a single right'.⁶⁸ This solution is not without its own difficulties and one would have to resolve the problem that, as a question of positive law, when is the self-determination of an indigenous group sufficiently frustrated that they must turn outwards and secede? Is this a purely negative concept of self-determination, or can the right to external self-determination kick in when states fail to provide indigenous peoples with affirmative rights protection?

Buchanan⁶⁹ finds two compelling justifications for secession, namely, 'rectificatory justice' and 'discriminatory redistribution'. The argument as to rectificatory justice is premised on the 'assumption that secession is simply the re-appropriation, by the legitimate owners, of stolen property'. The discriminatory redistribution argument is for the 'secessionists to show that they are victims of "discriminatory redistribution" at the hands of the state'. This argument seems to be the one advanced by most secessionist groups⁷⁰ and may be well-founded if indigenous peoples in the exercise of their right to self-determination could prove discriminatory redistribution.

5 The implications of non-respect of the right to internal self-determination or violation of human rights of indigenous peoples

5.1 Implications on justiciability

How is the UN Declaration on Indigenous Peoples' Rights, not being a binding instrument, intended to be justiciable? Is the right justiciable as an economic, social or cultural right or a civil and political right? The Declaration carries no mechanism for its enforcement. Is it meant to be a tool for indigenous peoples to pile declarations on their right to self-determination?

The issues of justiciability that arose in the *Mikmaq* case⁷¹ can still be raised in the case of the justiciability of the rights of indigenous peoples to self-determination. In that case, a communication was brought by a representative of the Mikmaq tribal society who claimed that the Mikmaq peoples' right of self-determination had been violated by Canada.

⁶⁸ C Tomuschat 'Secession and self-determination' in Kohen (n 61 above) 23-45.

⁶⁹ A Buchanan *Self determination and the right to secede* (2001).

⁷⁰ The Basque secessionists in Spain, Biafra in Nigeria, Katanga in Congo.

⁷¹ *The Mikmaq Tribal Society v Canada*, Communication No 78/1980 (30 September 1980), UN Doc Supp No 40 (A/39/40) 200 (1984).

The Committee failed to pronounce itself on the substance of the communication, but instead decided that the complaint was inadmissible on the basis of lack of *locus standi* of the tribe's representative — in light of the failure of the Grand Council, as its legal entity, to authorise the author.

There ought to have been a clear mechanism where, if the rights of indigenous peoples were violated, they can make them actionable before the courts. In the absence of this, the fear is that the Declaration may as well remain a toothless bulldog.

Even though the Declaration is not a binding instrument, inspiration can be drawn from some common law jurisdictions that have made aboriginal rights justiciable. McHugh⁷² sees it in the light of public interest litigation. In his article, he examines a certain number of cases decided by courts in common law countries⁷³ and states that those cases projected the specter of aboriginal rights. The aboriginals became active members rather than passive objects of the mainstream legal system. He advocates for the use of 'breakthrough rights' to accomplish this purpose. That is, the use of 'soft law' adaptation (litigation, negotiation and administration) to achieve rights recognition and hence an erosion of the concepts of non-justiciable 'political trusts' (New Zealand) and '*terra nullius*' (Australia). He distinguishes between three types of aboriginal rights, namely, jurisdictional, procedural and proprietary, of which the jurisdictional and procedural rights will contribute directly to the achievement of the goal of justiciability. Jurisdictional-type rights is the acceptance by the legal system of the inherent authority of the tribe over its own people and territory, and procedural-type rights is the right to participate in decision making with the support of the courts.

5.2 Legal secession as an alternative?

Recognising the right of indigenous peoples to self-determination is one thing and implementing such rights is another. Where all attempts at internal self-determination have failed, can indigenous peoples exercise their right to external self-determination by the use of legal means notably the courts? In order for this to be possible, the indigenous peoples must be capable of constituting themselves into a state. According to Hannum,⁷⁴ a state must possess the following characteristics: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states. Where there is a total failure to allow indigenous peoples to

⁷² P McHugh 'New dawn to cold light: Courts and common law Aboriginal rights' in R Bigwood (ed) *Public interest litigation: New Zealand experience in international perspective* (2006) 25-68.

⁷³ The *Coulder* case in Canada; the *Martinez* case by the US Supreme Court; the *Mauri Council* case in New Zealand; and the *Mabo* case in Australia.

⁷⁴ Hannum (n 36 above).

exercise their right of internal self-determination as provided by the Declaration and in the absence of any clear mechanism for their justiciability domestically, can the indigenous community exercise their right of external self-determination?

That possibility does not seem to have been rejected by the Canadian Supreme Court in *Reference re Secession of Quebec*⁷⁵ and the African Commission in *Katanga v Zaire*.⁷⁶ In the former case, the Canadian Supreme Court held:⁷⁷

Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

In the latter case, the African Commission was of the opinion that the people of Katanga could secede if they could show the violation of their human rights.⁷⁸

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

The Helsinki Final Act, which recognises the notion of self-determination outside the colonial context, is also a powerful instrument in this context:

The participating states will respect the equal rights of peoples and their right to self-determination ... By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

⁷⁵ *Reference re Secession of Quebec* [1998] 2 SCR 217, in the matter of sec 53 of the Supreme Court Act, RSC, 1985, c S-26.

⁷⁶ *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995).

⁷⁷ n 75 above, 85 para 155.

⁷⁸ Para 6.

6 Conclusion

The insertion of the notion of self-determination in the UN Declaration on the Rights of Indigenous Peoples of 13 September 2007, like the mythical phoenix that rises from the ashes of the old, has rekindled the debate on an issue which is not quite settled in international law.

Its constant mutation can well play into the court of secessionists. Despite all the *caveats*, such as article 46 excluding the possible dismemberment of states, it is difficult to exclude the possibility of secession in the absence of proper self-determination of indigenous peoples. After all, can one not argue that, as the law of divorce has evolved from justifying 'irretrievable breakdown of marriage' by proving one of five facts (ranging from adultery to five years' separation), to no-fault divorce, so too, where the marriage of peoples within a nation state is no longer a going concern, can they not be allowed to separate regardless of the name given to such separation, be it self-determination or secession? Or should the international community prefer the present 'buckets of blood'⁷⁹ solution, as witnessed in the cases of Eritrea, Biafra, Bangladesh and Katanga?

Secession ultimately appears to be one side, albeit the hidden side, of the self-determination coin.

⁷⁹ AA Mazrui 'The African state as a political refugee: Institutional collapse and human displacement' (1995) 7 *International Journal of Refugee Law* 23.

Inclusion by exclusion? An assessment of the justiciability of socio-economic rights under the 2005 Interim National Constitution of Sudan

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Summary

Section 22 of the Interim Constitution of Sudan states that socio-economic rights provided for under the Guiding Principles and Directives section are not justiciable. However, section 27(3) of the same Constitution states that every right and freedom provided for in international human rights instruments to which Sudan is a party forms an integral part of the Sudan Bill of Rights. Sudan is a party to, inter alia, the International Covenant on Economic, Social and Cultural Rights, the United Nations Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child. Each of these international human rights instruments provides for socio-economic rights. This article is an attempt to establish that, even though socio-economic rights are provided for under the Guiding Principles

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and Directives section of the Interim Constitution of Sudan, they are nonetheless justiciable. This is because socio-economic rights, excluded from the jurisdiction of the courts via section 22, have in fact been included by virtue of section 27(3). This paper argues that section 22 has been rendered redundant by section 27(3).

1 Introduction

It cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by the bill of rights ...¹

To characterise the last three decades as marking a socio-economic rights renaissance for the African continent would not be an exaggeration. Almost all constitutions in Africa provide for socio-economic rights in one form or another.² There are at least two discernible methods of constitutionalising socio-economic rights in Africa. The majority of countries that have constitutionalised socio-economic rights in Africa have provided for them under the Directive Principles of State Policy (DPSP).³ Others have selectively constitutionalised them and render those selected few justiciable.⁴

The values and virtues of constitutionalising socio-economic rights as DPSP lie in the fact that, in addition to providing interpretative guidance to the legislature, the executive and the judiciary in law and policy making, socio-economic rights could directly or indirectly, through the implied doctrine, benefit social litigants, without necessarily overburdening the country economically or destabilising its democratic institutions and principles. One of the limitations of this mode of constitutionalising socio-economic rights is that their effectiveness as human rights instruments is determined and dependant on the ingenuity and whims and caprices of a given bar and bench at a given time.

Consequently, for countries whose stability is dependent on the certainty of radical social transformation, the preferred route is that of rendering socio-economic rights directly justiciable. In this case, carefully-crafted constitutional and other legal frameworks are provided for the adjudication of socio-economic rights. Countries have to be careful because socio-economic rights adjudication could have serious budgetary, policy and other polycentric effects with harmful counter-majoritarian implications for smooth democratic governance.⁵

¹ *Ex parte Chairperson of Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC), 1996 10 BCLR 77.

² See generally F Viljoen *International human rights law in Africa* (2007).

³ The Nigerian and Lesotho Constitutions provide examples for this method.

⁴ The South African Constitution is a good example.

⁵ E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

Politics is about power and resource distribution. Politicians are voted in or out of power depending on how they promise to deal with the distribution of power or resources or how they have failed to deal with them. Consequently, only elected representatives have the legitimacy to decide on resource allocation and need prioritisation.⁶ Those against the justiciability of socio-economic rights argue that, allowing unelected judges to adjudicate on socio-economic rights cases, in addition to the danger that these judges could replace their values for that of the elected representatives, adjudicating socio-economic rights will amount to courts legislating and deciding on policy issues and unavoidably raise counter-majoritarian tensions between the representative elected by the majority of the population and judges nominated by the executive and confirmed by parliament.⁷

Sudan has constitutionalised socio-economic rights in a manner that combines the features of a DPSP approach and the directly-justiciable method. This approach of combining the attributes of the two methods of constitutionalising socio-economic rights benefits from their positive features but is burdened by negative aspects. Therefore, as a hybrid method, the Sudanese approach, in addition to providing new benefits for the struggle for the realisation of socio-economic rights, equally brings with it new challenges. This paper investigates the prospects and challenges that attend this innovative approach to constitutionalising and enforcing socio-economic rights.

On 9 July 2005, Sudan ushered in an Interim National Constitution (Constitution). The Constitution was a part of a Comprehensive Peace Agreement (CPA) which was concluded between the government of Sudan and the Sudanese People's Liberation Movement (SPLM) in Naivasha, Kenya, on 5 January 2005. The agreement brought to an end one of Africa's longest and most brutal civil wars. The Constitution is in force in the interim period, which began on 9 July 2005 and ends in January 2011.

Part I of the Constitution deals with the nature of the state and the Constitution. This part has two chapters. Chapter one is entitled 'The state and the Constitution'. Chapter two is entitled the 'Guiding Principles and Directives' (GPD) section. This section deals with a range of issues, including socio-economic rights, such as the right to a clean environment;⁸ employment;⁹ the right of physically disabled persons to participate in social, vocational, creative or recreational

⁶ P Brest 'The fundamental rights controversy: The essential contradiction of normative constitutional scholarship' (1981) 90 *Yale Law Journal* 1063.

⁷ M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383.

⁸ Sec 11.

⁹ Sec 12(1).

activities;¹⁰ the right to establish educational institutions;¹¹ the rights of children to welfare and protection from abuse and abandonment;¹² the right to culture;¹³ the right to language;¹⁴ the right to marry and found a family;¹⁵ gender equality;¹⁶ and access to primary health care.¹⁷

Section 22, the last section of chapter two, contains a ‘saving’ clause which provides:¹⁸

Unless this *Constitution otherwise provides*, or a duly enacted law guarantees the rights and liberties described in this chapter, the provisions contained in this chapter are not *by themselves* enforceable in a court of law; however, the principles expressed therein are basic to governance and the state is duty-bound to be guided by them, especially in making policies and laws.

Part II of the Constitution contains a Bill of Rights. The Bill of Rights has 22 sections. It provides for civil and political rights and some socio-economic rights. Section 27, which is the first and founding section of the Bill of Rights, provides:

- 1 The Bill of Rights is a covenant among the Sudanese people and between them and their governments at every level and a commitment to respect and promote human rights and fundamental freedoms enshrined in this Constitution; it is the cornerstone of social justice, equality and democracy in the Sudan.
- 2 The State shall protect, promote, guarantee and implement this Bill.
- 3 All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill.
- 4 Legislation shall regulate the rights and freedoms enshrined in this Bill and shall not detract from or derogate any of these rights.

Section 48 is the last provision in the part dealing with the Bill of Rights, and provides for the ‘Sanctity of the Rights and Freedoms’ as follows:

No derogation from the rights and freedoms enshrined in this Bill shall be made except in accordance with the provisions of this Constitution and only with the approval of the National Legislature. The Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts; the Human Rights Commission shall monitor its application in the state.

¹⁰ Sec 12(2).

¹¹ Sec 13(1)(a).

¹² Sec 14.

¹³ Sec 13.

¹⁴ Sec 8.

¹⁵ Sec 15(1).

¹⁶ Sec 15(2).

¹⁷ Sec 19.

¹⁸ My emphasis. The intention is to show later on that sec 27(3) is already anticipated here.

Section 27(3) has been the subject of an ongoing scholarly exchange with scholars lining up on both sides of the debate.¹⁹ There are at least two issues that can be distilled from this academic discourse: The first relates to what the Constitution means when it directs that '[a]ll rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill'.

Does it mean that 'all the rights and freedoms' provided for in all human rights instruments ratified by Sudan form substantive provisions of the Constitution which are thereby actionable before courts in the Sudan? Or should this sub-section be construed to mean that those human rights instruments referred to do not form substantive provisions, but interpretative tools for construing the meaning of the 20 rights and freedoms expressly provided for in the Bill of Rights?

The second debate relates to the meaning of the word 'ratified' as used in this sub-section. Does it refer to human rights instruments that were ratified before the Constitution came into force or only those ratified after the Constitution entered into force?

Arising from the first issue are other conceptual concerns. If all the international human rights instruments are a substantive part of the Constitution, what are the legal implications? What in essence is constitutionalised? The instruments themselves? Would this include the standards as well as decisions and General Comments of their monitoring bodies? Or do only the substantive provisions of these instruments form an integral part of the Constitution?

Even though Sudan has ratified many international human rights instruments, the International Covenant on Economic, Social and Cultural Rights (CESCR)²⁰ will be the focus of this work. This is primarily because it is relevant to the subject matter of the investigation:²¹ that is the justiciability and enforceability of socio-economic rights in the Sudan. Central to this enquiry is the relationship between sections 27(3) and 22 of the Constitution. This is because there exists a tension between these two provisions in the opinion of the author.

This tension arises from the fact that, whereas CESCR forms an *integral part* of a justiciable and enforceable bill of rights, the provisions of the GPD are merely 'codes of conduct' for the state, and are not enforceable.²² Consequently, even though the socio-economic rights

¹⁹ See generally the Max Plank Institute of Public and International Law report of series of seminars they organised for scholars and jurists on the Sudanese Interim Constitution to discuss these provisions; <http://www.mpil.de/shared/data/pdf/manualpapersand-proceedingsoftheheidelbergseminarson> (accessed 31 March 2009).

²⁰ Sudan has *inter alia* ratified the African Charter on Human and Peoples' Rights and the United Nations Convention on the Rights of the Child, all of which provide for socio-economic rights.

²¹ Any conclusion reached as it is likely to be valid for all other instruments.

²² B de Villiers 'Directive principles of state policy and fundamental rights: The Indian experience' (1992) 8 *South African Journal on Human Rights* 29.

provided for under GPD are equally contained in CESC, section 22 provides that they cannot be subjects of adjudication by the courts. Can section 22 limit the extent of Sudan's obligations under CESC or its operation as part of the Constitution? On the other hand, can CESC 'trump' section 22 with respect to mutually-shared socio-economic rights?

2 The concept of justiciability

Justiciability relates to the power of courts to review and determine compliance or non-compliance with the terms of an agreed legal regime.²³ Accompanying this power is the right of courts to identify entitlements and duties created by such a legal regime and to ensure that they are executed and maintained. Rendering socio-economic rights justiciable, therefore, is tantamount to creating individual as well as collective entitlements to socio-economic benefits. This possibility has enraged many scholars who cannot reconcile their understanding of the institution of rights with socio-economic entitlements.²⁴

To these scholars, economic, social and cultural rights are 'choice-sensitive',²⁵ 'ideologically loaded',²⁶ 'vague',²⁷ 'indeterminate',²⁸ expensive to realise and merely 'programmatically',²⁹ in the sense that they need to be 'realised progressively'³⁰ depending upon 'availability'

²³ As above.

²⁴ M Cranston 'Human rights real or supposed' in D Raphael (ed) *Political theory and the rights of man* (1967) 43. See also C Sunstein 'Against positive rights: Why social and economic rights don't belong in the new constitutions of post-communist Europe' (1993) 1 *East European Constitutional Review* 35; D Beatty 'The last generation: When rights lose their meaning' in D Beatty (ed) *Human rights and judicial review: A comparative perspective* (1994) 321; D Davis 'The case against inclusion of socio-economic rights in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 476.

²⁵ N Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South African Journal on Human Rights* 451.

²⁶ C Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1.

²⁷ As above.

²⁸ W Nickel 'How human rights generate duties to protect and provide' (1993) 15 *Human Rights Quarterly* 76.

²⁹ D Bilchitz 'Towards a reasonable approach to the minimum core obligation: Laying the foundations for the future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1.

³⁰ H Ram 'Negative rights vs positive entitlements: A comparative study of judicial interpretation of rights in emerging neo-liberal economic order' (2000) 22 *Human Rights Quarterly* 1060.

of resources.³¹ Unlike civil and political rights, socio-economic rights impose positive obligations on the state.

In addition, it is believed that socio-economic rights are conceptually ill-suited for judicial review and that courts are politically poorly-positioned and institutionally ill-equipped to decide matters of social and economic justice.³² The polycentric³³ nature of socio-economic rights inevitably renders them to be not amenable to the tri-partite process of judicial decision making, and drags the judiciary into the muddy waters of politics.³⁴ Socio-economic rights, it is maintained, thus 'politicise justice and judicialise politics'.³⁵ They allow the courts, by enforcing socio-economic rights, to stray onto the political terrain,³⁶ at the expense of the democratic process — and 'political life is inevitably impoverished'.³⁷ By constitutionalising socio-economic rights, it is argued, one forces the judiciary into an uncomfortable choice between usurpation and abdication from which there is no escape without embarrassment or discredit.

These arguments have been widely discredited. The division of human rights into watertight categories cannot serve the purpose of conceptual clarity, nor enhance the justiciability of either group of rights.³⁸ It has been argued, and rightly so, that 'the rights in both purported categories are indivisible and interdependent, collectively as well as individually, simply because they are all essential for the wellbeing and dignity of every person as a whole being'.³⁹ In addition, the two categories of rights impose positive as well as negative obligations

³¹ S Fredman 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *South African Journal on Human Rights* 163.

³² M Wesson 'Grootboom and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 284.

³³ This word was used by Lon Fuller to describe decisions that have potential implications for many interested parties and that have many complex and unpredictable social and economic repercussions, which inevitably vary for every subtle difference in the decision. See Pieterse (n 7 above) 383.

³⁴ N Udombana 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5 *South African Journal on Human Rights* 47.

³⁵ J Ferejohn 'Judicialising politics, politicising law' (2002) 65 *Law and Contemporary Problems* 41.

³⁶ As above.

³⁷ E de Wet *Constitutional enforceability of economic and social rights: The meaning of the German constitutional model for South Africa* (1996).

³⁸ C Mbazira 'Translating socio-economic rights from abstract paper rights to fully-fledged individual rights: Lessons from South Africa' (2006) 12 *East African Journal of Peace and Human Rights* 183.

³⁹ M Scheinin 'Economic and social rights as legal rights' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2005) 41.

on the state;⁴⁰ they are both progressive in a sense;⁴¹ and both have an immediate component for realisation.⁴² Adjudicating socio-economic rights does not place on the judiciary any greater responsibility than they already have adjudicating civil and political rights, it is argued.

Even though it is conceded that socio-economic rights are different in content and in the nature of some of the duties they impose, the difference is not that of kind, but of degree. Socio-economic rights are human rights. They are vested with all the qualities of rights and suffer from the same challenges as other rights. Human rights are universal, interdependent and interrelated. Therefore, divorcing one side of the human rights equation from justiciability will inevitably impact negatively on the realisation of other rights.

Ultimately, the concern with the judicial enforcement of socio-economic rights is that of legitimacy, meaning the ability of people to 'accept judicial decisions, even those they bitterly oppose, because they view courts as appropriate institutions for making such decisions'.⁴³ The belief is that, by ruling on non-justiciable socio-economic rights, courts risk losing this legitimacy. However, it is equally true that courts risk losing their legitimacy when socio-economic rights appear side by side with civil and political rights in a constitution and they fail to protect both.⁴⁴

Having said that, one cannot but concede that socio-economic rights adjudication involve hard and complex choices with far-reaching social and economic ramifications. As a result, it is submitted that socio-economic rights should be constitutionalised and rendered justiciable in such a way that maximises their potential and guards against their violation. The next section investigates whether or not Sudan's model of constitutionalising socio-economic rights has benefited from such a careful balancing.

3 The justiciability of socio-economic rights under the Interim National Constitution

The inclusion of a comprehensive Bill of Rights in the Constitution represents a 'remarkable divergence in Sudanese constitutional making'.⁴⁵

⁴⁰ M Pieterse 'Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 882.

⁴¹ J Nickel 'How human rights generate duties to protect and provide' (1993) 14 *Human Rights Quarterly* 76.

⁴² R Gittleman, as quoted in CA Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2000* (2002) 137.

⁴³ J Gibson & G Caldiera 'Defenders of democracy? Legitimacy, popular acceptance, and the South African Constitutional Court' (2003) 2 *The Journal of Politics* 65.

⁴⁴ As above.

⁴⁵ N Ibrahim 'The Sudanese Bill of Rights' (2008) 4 *International Journal of Human Rights* 613.

This is so in more than one way. Since independence, Sudan has had three transitional Constitutions, two permanent Constitutions and a series of constitutional decrees regarding constitutional issues. Even though these Constitutions made provision for human rights, none of these documents contained a comprehensive bill of rights so ambitious as to incorporate all rights and freedoms enshrined in international human rights treaties.⁴⁶

Second, the Constitution introduced an overhaul of the governance structure of Sudan reflecting the rights-based approach of the Constitution. First, it created a 'decentralised' or an asymmetrical federation with four levels of government: the national government, the government of Southern Sudan, state governments and local governments.⁴⁷ In addition, the Constitution creates a Kelsenian model of judicial review. This model concentrates the powers of constitutional review within a single judicial system called the Constitutional Court and situates that court outside the traditional structure of the judicial branch.⁴⁸ Defining with exactitude, however, what constitutes this Bill of Rights in Sudan will likely engage scholars and human rights activists for a long time to come.

The Sudanese Bill of Rights explicitly provides for 20 civil and political rights as well as some socio-economic rights. In addition to this, the Constitution states that any right or freedom contained in any international human rights instrument Sudan is a party to automatically forms 'an integral part of this Bill'. The question of what constitutes the Bill of Rights in Sudan, therefore, depends on what is meant by the phrase 'integral part'. Scholars are not agreed on the purport of these words. There are two groups of scholars: those who consider these international human rights instruments as forming a substantive part of the Bill of Rights and those who consider them as interpretative tools to it.⁴⁹

Both positions have implications for the justiciability of socio-economic rights in the Sudan. If these international human rights instruments are interpretative tools, then the socio-economic rights explicitly mentioned in the Bill of Rights should be interpreted along the lines of the jurisprudence of the ESCR Committee. However, the problem with this position is that the definition of socio-economic rights in the Bill of Rights is different from those in CESCR. For example, article 12 of CESCR provides for the 'right of everyone to the enjoyment

⁴⁶ As above. C Murray & C Maywald 'Subnational constitution making in Southern Sudan (2006) 37 *Rutgers Law Journal* 1203.

⁴⁷ Murray & Maywald (n 46 above).

⁴⁸ L Garlicki 'Constitutional courts versus supreme courts' (2007) 5 *International Journal of Constitutional Law* 44.

⁴⁹ See, generally, Max Planck Institute (n 19 above). See also J Sloth-Nielson 'Measures to strengthen children's rights in the Constitution of Sudan' (2005), report for Save the Children Sweden Kenya and South Sudan Office. A copy of the report can be obtained from Anna Lindenfors at office@swedsave-ke.org.

of the highest attainable standard of physical and mental health', while section 46 of the Constitution states that 'the state shall promote public health ... provide free primary health care and emergency services for all citizens'. Which substance of the right prevails? This is important because, while the former provision is comprehensive, the latter is not. It is the proposition of this paper that the former should prevail because a country cannot escape its international obligations by virtue of its constitutional provisions.

Second, since section 27(3) of the Constitution incorporates all the provisions of CESCER, it can reasonably be presumed that it was the intention of the drafters to implement CESCER using the same language. Consequently, it could be inferred that the drafters intended to import into the Constitution provisions that have the same effect as the corresponding provisions of CESCER. In this, it is submitted that the socio-economic rights provisions in the Constitution should be construed in the same manner by courts in the Sudan, in accordance with the meaning attributed to CESCER in international law. This is because attributing a different meaning would be to defeat the intention of the drafters and to invalidate in part or in whole CESCER.⁵⁰

If they form a substantive part of the Constitution, this has even wider implications for Bill of Rights adjudication in general and socio-economic rights justiciability in particular. What forms part of the Bill: the rights and freedoms, the decisions and interpretations of the monitoring bodies? In the event of a conflict, which one has the final say? The Constitution is silent on the question of the legal status of these international human rights instruments as well as on their relationship to it or with it. The nature, scope, application and limitation of the Bill of Rights can only be ascertained by constructive interpretation of the Constitution. It is the thesis of this article that Sudan has not only provided for justiciable and enforceable socio-economic rights in the Constitution, but that the scope of justiciable socio-economic rights has been widened to incorporate all socio-economic rights in all international human rights instruments that Sudan is a party to.

4 The nature, scope and limitation of the Sudanese Bill of Rights

Section 27, the first and founding provision of the Bill of Rights, is the starting point in answering the question of what constitutes the Bill of Rights in the Sudan. In addition to the 20 rights and freedoms provided for in the Bill of Rights,⁵¹ section (27)(3) provides that 'all rights and freedoms enshrined in international human rights treaties, covenants

⁵⁰ N Jayawickrama *The judicial application of human rights law: National, regional and international jurisprudence* (2002) 159.

⁵¹ Secs 28-47 of Interim National Constitution (INC).

and instruments ratified by the Republic of Sudan shall be an integral part of this Bill'. The words 'ratified' and 'integral part' are decisive to answering this question.

The word 'ratified' as used in section 27(3) has generated controversy among jurists.⁵² The concern has been with what 'ratified' means. Does it mean exactly what it means in public international law? Does it refer to treaties ratified before the Constitution or those that will be ratified after it came into effect? Will it mean the same thing as accession, adherence, adhesion or acceptance of an international treaty? When does a ratified instrument become an integral part of the Bill of Rights, when Sudan ratifies it or when it comes into force after the requisite number of ratifications at the international level?⁵³

There are no final answers to these concerns until the Constitutional Court pronounces on them. However, the sanctity of the Bill of Rights and the sanity of the right-holders, to a large extent, depend on the kind of answers that are provided to these questions. Section 27(3) will be analysed in two parts: the meaning and effect of ratification and the meaning and effect of 'integral part'.

4.1 'Ratified by' Sudan: Meaning and effects

The word 'ratification' appears four times in the Constitution. Its use tends to suggest different meanings. The Constitution uses the verb form of the word 'to ratify' three times, first in section 58(1)(k), assigning to the President of the Republic the power to 'ratify treaties and international agreements with the approval of the National Legislature'. However, section 91(3)(d) empowers the National Assembly 'to ratify international treaties, conventions and agreements'. Section 109(4) goes on to say that the National Assembly may delegate to the President the 'power to ratify international conventions and agreements' while it is not in session. The attempt by sections 58(1)(k) and 91(3)(d) to assign one competency to two organs of the government is confusing and needs further interpretation. The possibility that the word 'ratification' could have more than one meaning within the Constitution suggests that its use in section 27(3) could mean that more than one method of becoming a party to an international treaty is contemplated.

The Vienna Convention on the Law of Treaties 1969 is the main international instrument regulating the law of treaties. It provides for different ways of becoming a party to an international treaty. A state could express its intention to be bound through a 'signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession or by any other means if it so agrees'.⁵⁴

⁵² As above.

⁵³ For a detailed discussion of these various positions, see Max Planck Institute (n 19 above).

⁵⁴ Art 11 of the Vienna Convention on the Law of Treaties 1969.

In a bilateral treaty, ratification is effected when the instruments of ratification are exchanged between the state parties, while in a multilateral treaty this is effected when the instrument of ratification is deposited with the depository. States which were not parties to the negotiation of a treaty can express their consent by accession, which has the combined effect of signing and ratification. Sometimes the words 'acceptance' and 'approval' could be used instead of accession.⁵⁵

It is submitted, therefore, that the word 'ratified' in article 27(3) should be interpreted to encompass all the methods of assuming legal obligations in a treaty. This interpretation is consistent with paragraph 1.6.1 of the Protocol on Power Sharing between the government of Sudan and the SPLM, which is an integral part of CPA and is incorporated into the Constitution by virtue of section 225. According to this paragraph:

The Republic of the Sudan, including all levels of government throughout the country, shall comply fully with all its obligations under the international human rights treaties to which it is or becomes a party.

The word 'ratification' is not mentioned here. The emphasis is, therefore, not on how Sudan becomes a state party to the treaty, but on its membership and compliance with its obligations under a treaty. Even though the word 'ratified' is used in its past tense in section 27(3) of the Constitution, it does not refer only to the treaties that Sudan ratified before the Constitution entered into force, as some scholars have suggested. Neither does it refer only to those it will ratify after the Constitution has entered into force.⁵⁶ Instead, it refers to both types of treaties that are ratified by Sudan.

4.2 '[A]n integral part of this Bill': Meaning and effects

The *Oxford English dictionary* defines the word 'integral' to mean 'of or pertaining to a whole'; 'a constituent, component necessary to the completeness or integrity of the whole'; 'forming portion or element, as distinguished from an adjunct or appendage'.⁵⁷ Saying that all international human rights instruments ratified by Sudan form an integral part of the Constitution is therefore the same thing as stating that these instruments form substantive provisions of the Constitution. If the drafters of the Constitution intended these international human rights instruments to be mere interpretative tools, it is submitted that this intention is not communicated in section 27(3).

⁵⁵ Max Planck Report (n 19 above).

⁵⁶ Judge Abdallah Ya'qoub of the Constitutional Court of Sudan is of the opinion that only post-INC treaties are referred to in art 27(3). See his submission at page 49 of the report (n 19 above).

⁵⁷ *Oxford English dictionary* (2008) <http://www.dictionary.oed.com> (accessed 1 November 2008).

What is conveyed in section 27(3) is what the Committee on the International Covenant on Civil and Political Rights (CCPR) rightly observed in its concluding observation on Sudan. According to the Committee; 'pursuant to section 27 of the Interim National Constitution of 2005, the Covenant is binding and may be invoked as a constitutional text'.⁵⁸ This is even more so, when the government of Sudan, in its state report of 2006 to the African Commission on Human and Peoples' Rights (African Commission), stated that:⁵⁹

The Sudan has ratified numerous covenants and chapters [instruments] relating to human rights and considered to be part and parcel [integral] of the National Legislation [Constitution] under the provision of section 27(3) of the Constitution. These include the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights and the Convention on the Rights of the Child.

In its state report to the African Commission in 2008, Sudan repeated that the rights and freedoms which are not expressly stated in the Constitution 'form part and parcel of the Constitution'.⁶⁰ The government went on to state that 'the Constitution commits the state to protect, promote, guarantee and implement all the freedoms provided for in this chapter (article 27)'.⁶¹

It is difficult to avoid the conclusion that all rights and freedoms provided for in the international human rights instruments to which Sudan is a party are 'fully-fledged constitutional provisions'⁶¹ and, therefore, actionable before the courts in Sudan in their own right.

It would appear that everyone living in the Sudan is not only entitled to the protection provided by the Bill of Rights and those in all the international human rights instruments Sudan has ratified, but also has the choice (depending on which instrument offers higher protection) of which instrument to invoke before the Constitutional Court.

This submission raises another question: What, in essence, are the substantive parts of the Constitution? Are they just the rights and freedoms or also the decisions and procedures given or provided for under these instruments? The author submits that the provision of article 27(3) is explicit on the issue. The section refers to 'rights and freedoms' and not CCPR or CESCPR, for example. What is, therefore, binding on Sudan, within this context, is the content of these instruments, that is, the rights and freedoms and not the procedures provided for under them. The decisions of the monitoring bodies of these instruments, it

⁵⁸ The CPPR Committee Concluding Observations for 2007 <http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.SDN.CO.3.CRP.1.pdf> (accessed 4 September 2008) para 8.

⁵⁹ The report is available at http://www.achpr.org/english/state_reports/sudan/sudan%2550_3_Rrport.pdf (accessed 1 November 2008) para 70.

⁶⁰ See the full report at http://www.achpr.org/english/state_reports/Sudan/Sudan%20_3_Report.pdf (accessed 1 November 2008) para 13.

⁶¹ Ibrahim (n 45 above).

is submitted, are not binding on Sudan or its courts, but, nonetheless, are persuasive authorities before the Sudanese courts.

What is the legal implication of this on the socio-economic rights which are provided for both in CESCER and the GPD? The relationship between sections 27(3) and 22 needs to be clarified.

5 The relationship between sections 22 and 27(3) and the justiciability of socio-economic rights

Different constitutions adopt varying methods of constitutionalising socio-economic rights. Some constitutions restrictively select thematic items of socio-economic rights and render only those specifically mentioned socio-economic rights justiciable and enforceable. Socio-economic rights so constitutionalised are further subjected to internal modifiers or 'claw-back clauses'. A good example of this approach is the 1996 Constitution of South Africa.⁶² Sections 26, 27 and 28 of the South African Constitution provide for three clusters of socio-economic rights and the terms and conditions of their justiciability. These clusters are:

- 1 qualified socio-economic rights: the right of 'everyone' to 'have access to';⁶³ with respect to these rights the state is expected 'to take reasonable legislative and other measures, within its available resources to achieve progressive realisation of each of these rights'.⁶⁴
- 2 unqualified socio-economic rights: These are basic socio-economic rights of children,⁶⁵ basic education, adult education, socio-economic rights of detained persons and sentenced prisoners.⁶⁶
- 3 socio-economic rights that prohibit certain state action: These are rights prohibiting arbitrary evictions⁶⁷ and the right to emergency medical treatment'.

In some other constitutions, socio-economic rights are provided for as Directive Principles of State Policy (DPSP). Traditionally, Guiding and Directive Principles are merely 'code of conducts' for the state, which are justiciable, but not enforceable. The only sanctions attached to GDP are therefore moral, political and judicial to the extent only that they provide the framework in which fundamental rights are to be inter-

⁶² Secs 26, 27 & 28 of the 1996 Constitution of South Africa provides an example.

⁶³ Secs 26(1) & 27(1).

⁶⁴ Secs 26(2) & 27(2).

⁶⁵ Sec 28.

⁶⁶ Secs 28(1)(c); 29(1)(a) & 35(2)(e). It is difficult to sustain this categorisation after the decision in *Grootboom* which is discussed below.

⁶⁷ Secs 26(3) & 27(3).

preted and understood.⁶⁸ An example is the Nigerian Constitution of 1999. After providing for an extensive list of socio-economic rights and sternly admonishing organs of government to 'conform to, observe and apply'⁶⁹ these socio-economic rights, the Constitution summons by stipulating that the courts have no jurisdiction to inquire if conduct or legislation conforms with the provisions of the DPSP.⁷⁰

The approach of the Interim National Constitution of Sudan appears to be an attempt to incorporate both approaches of constitutionalising socio-economic rights. It will be recalled that, after listing some socio-economic rights, section 22 contains a 'saving' clause.⁷¹

The Bill of Rights proceeds to selectively and restrictively provide for socio-economic rights. Without section 27(3), the Sudanese constitutional format with respect to socio-economic rights would have followed, for instance, the Nigerian Constitution; in which case section 22 would have been consistent with the rest of the constitutional provision. However, having incorporated CESCRR via section 27(3) and making it an integral part of the Bill of Rights, to which section 22 does not apply; it is difficult to see how the DPSP approach argument can be maintained without the danger of inconsistency. Such inconsistency arises from the fact that almost all the socio-economic rights in Part I of the Constitution are provided for in CESCRR which, through section 27(3), is part and parcel of the Bill of Rights.

In most constitutions that provide for a bill of rights, those constitutions usually provide in explicit terms whether the provisions of the bill of rights are enforceable in a court of law or not. The drafters of the Sudanese Bill of Rights did not provide in explicit terms whether or not the Bill of Rights is justiciable and enforceable in a court of law.⁷² It is therefore important to establish first if the provisions of the Bill of Rights are justiciable and only after such a finding to determine which provisions are justiciable and which are not justiciable.

This paper is predicated on the assumption that the Constitution provides for a bill of rights that is justiciable and enforceable notwithstanding the fact that it does not explicitly provide so. This presumption is based on the fact that section 22 of the Constitution is the only provision in the Constitution ousting the jurisdiction of the courts with respect to human rights. An *argumentum e contrario* will suggest that, for the rest of the Constitution, the binding effect of the Constitution is accompanied by justiciability and enforceability by courts. Therefore,

⁶⁸ De Villiers (n 22 above) 29.

⁶⁹ Art 13 of the 1999 Constitution.

⁷⁰ Art 6(6)(c).

⁷¹ n 18 above.

⁷² Except that sec 48 provides that 'the Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts; the Human Rights Commission shall monitor its application in the state.' This provision could be interpreted to mean justiciability and enforceability of the provisions of the Bill of Rights.

since the Bill of Rights is not accompanied by such a saving clause, it is enforceable by the courts of law. It follows that, CESCER having been incorporated into the Bill of Rights, which is justiciable, the rights and freedoms contained in it are equally justiciable and enforceable before the Constitutional Court.

The picture, however, is not that simple. Section 22 of the Constitution must be there for a purpose. As a constitutional provision, it places a limitation or provides an exception, limiting or directing the application and binding effects of the Constitution. What section 22 of the Constitution attempts to do is to break the connection between the rights and freedoms before it and those that follow it. The legal consequence could be that, while the provisions under the GDP bind the legislature and the executive, judicial oversight is ousted.⁷³ It would mean, then, that the courts in the Sudan cannot hold the executive or the legislature accountable for a violation of the socio-economic rights provided for in the GDP.

It is the contention of this article that, first, section 22 of the Constitution applies only to that chapter and consequently has no effect on the provisions of the Bill of Rights. Second, by incorporating CESCER, the socio-economic rights provided for under part I of the Constitution, which at the same time are equally provided for in CESCER, are justiciable and enforceable as part of the Bill of Rights. As a result, section 27(3) of the Constitution provides the bridge connecting socio-economic rights under the GDP with those under the Bill of Rights. This submission is predicated on the following premises:

First, there is no intention in section 27(3) to limit the extent to which these instruments will take effect in the domestic legal system. The section rather provides for the incorporation of 'all the rights' in these instruments. Having provided for international human rights instruments as self-executing norms, the only acceptable legal process under international law available to Sudan to limit the effect of these instruments is a reservation or declaration to that effect. It is submitted that section 22 cannot replace this.

It is important to note that a similar intention is conveyed in section 32(5), which provides that 'the state shall protect the rights of the child as provided for in the international and regional conventions ratified by the Sudan'. What can be seen from these provisions is that the intention of the drafters of the Constitution was to extend the protection offered by the Bill of Rights to the international level and not to limit international protection to the domestic provision.

Secondly, the wording of section 22 supports this submission. The Constitution, where it intends to limit or prejudice the provision of another section, has used phrases such as 'notwithstanding section ...

⁷³ Viljoen (n 2 above) 573.

below’;⁷⁴ or ‘without prejudice to’.⁷⁵ Unlike these provisions, section 22 rather provides ‘unless this Constitution otherwise provides’, making section 22 a self-limiting provision. This, it is submitted, implies that section 22 anticipates section 27(3), rather than limiting it. Consequently, by incorporating ‘all the rights’ in CESC, section 27(3) has already provided otherwise.

This article has successfully demonstrated that the scope of the Bill of Rights has been extended by section 27(3) to include all the rights and freedoms in all international human rights instruments ratified by Sudan. In addition, by incorporating CESC, the African Charter on Human and Peoples’ Rights (African Charter), the African Charter on the Rights and Welfare of the Child (African Children’s Charter) and the Convention on the Rights of the Child (CRC), for example, all socio-economic rights which are provided for both in these instruments and the GDP are justiciable and enforceable in the Sudan. Since all the socio-economic rights provided for in the GDP are also provided for in these international human rights instruments, section 22 is redundant to the extent that it purports to exclude socio-economic rights from judicial enforcement.

6 Application and obligations under the Bill of Rights

Section 27(1) provides that ‘the Bill of Rights is a covenant among the Sudanese people and between them and their government at every level ...’ The words ‘among’ and ‘between’ would suggest a vertical and horizontal application of the Bill of Rights in the Sudan. In other words, as much as the provisions of the Bill of Rights are binding on all organs of government, it is equally binding on private individuals as well.

Traditionally, a bill of rights regulates the relationship between the individual and the state. It confers rights on individuals and imposes duties on the state. This was premised on the realisation that the state is far more powerful than individuals.⁷⁶ This is what scholars refer to as the vertical application of the bill of rights.

However, over time, it was recognised that private entities or individuals may abuse the human rights of others, especially the weak and the marginalised sectors of society. The scope of bills of rights was gradually extended to cover their activities as well. This is what is often called the horizontal application of the bill of rights which, essentially, means that individuals are conferred rights by the bill of rights, but

⁷⁴ See eg arts 58(2), 60(2), 66(e) & 79 where this expression is used.

⁷⁵ Arts 91(2), 93(2) & 132.

⁷⁶ *Jimson v Botswana Building Society* (2005) AHRLR 86 (BwIC 2003).

also, in certain circumstances, have duties imposed on them by the bill of rights to respect the rights and freedoms of other individuals.⁷⁷ Whether or not a bill of rights should apply to private parties is hotly contested.⁷⁸

At the centre of the debate is the obligation of non-state actors for human rights violations. Some scholars maintain that applying human rights duties to non-state actors may undermine efforts to build indigenuous social capacity and to make governments more responsible to their own citizenry.⁷⁹ Clapham has summarised the motivations for this position in the following words:⁸⁰

All of the arguments outlined above [against imposing human rights obligations on non-state actors] boil down to two claims: first, that an application of human rights obligations to non-state actors trivialises, dilutes and distracts from the great concept of human rights. Second, that such an application bestows inappropriate power and legitimacy on such actors. The counter-argument is that we can legitimately reverse the presumption that human rights are inevitably a contract between individuals and the state; we can presume that human rights are entitlements enjoyed by everyone to be respected by everyone.

These contestations have not been limited to scholars. The courts also have their share. For instance, in *Retail, Wholesale and Department Store Union Local 580 v Dolphin Delivery Ltd*,⁸¹ the Supreme Court of Canada held that the Bill of Rights provisions did not apply, as the case was between individuals without any government involvement. This decision has been severely criticised as offering a screen behind which private power could flourish on human rights abuses.⁸²

To minimise these debates, some countries have opted to clearly stipulate the scope of the application of their bill of rights and under what circumstances a non-state actor can incur human rights obligations. A good example will be section 8 of the 1996 Constitution of South Africa which stipulates as follows:

⁷⁷ As discussed in the above case.

⁷⁸ See, generally, A Clapham *Human rights in the private sphere* (1996); A Clapham *Human rights obligations of non-state actors* (2006); D Betz 'Holding multinational corporations responsible for human rights abuses committed by security forces in conflict-ridden nations: An argument against exporting federal jurisdiction for the purpose of regulating corporate behaviour abroad' (2001) 14 *DePaul Business Law Journal* 176; A Ramasastry 'Corporate complicity: From Nuremberg to Rangoon — An examination of forced labour cases and their impact on the liability of multinational corporations' (2002) 20 *Berkeley Journal of International Law* 109; A Clapham 'The question of jurisdiction under criminal law over legal persons: Lessons from the Rome Conference on an International Criminal Court' in MT Kamminga & S Zia-Zarifi *Liability of multinational corporations under international law* (2000) 178.

⁷⁹ J-M Henckaerts & L Doswald-Beck *Customary international humanitarian law* (2005).

⁸⁰ Clapham (2006) (n 78 above) 58.

⁸¹ (1987) 33 DLR (4th) 174.

⁸² D Beatty 'Constitutional conceits: The coercive authority of courts' (1987) 37 *The University of Toronto Law Journal* 186.

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state.
- (2) A provision of the Bill of Rights binds a natural or jurisdiction person, if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

In the world of today, in which private entities exercise so much power relative to the individual, excluding them from the ambit of a bill of rights, cannot make a human rights protection sense. As a Botswana High Court held:⁸³

In today's world there are private organisations that wield so much power relative to the individuals under them that to exclude those entities from the scope of the bill of rights would in effect amount to a blanket licence for them to abuse human rights.

The position under the Interim Constitution of Sudan is not as clear as it seems under the South African Constitution. It is the opinion of this writer that, in light of the current trend towards holding non-state actors liable for human rights violations, the words 'among' and 'between' Sudanese and their governments should be purposively interpreted to extend the scope of the Sudanese Bill of Rights to non-state actors in the meantime. Ultimately, however, this provision should, when debating a permanent Constitution for Sudan, clearly stipulate this position. This extension cannot, however, incorporate all the typologies of obligations enumerated under the Constitution of Sudan. Unlike most human rights instruments, the Constitution seems to provide for additional obligations which non-state actors cannot reasonably be made to discharge.

CESCR provides for three typologies of obligations, which are the obligation to respect, protect and promote.⁸⁴ The South African Constitution adds the obligation to fulfil. The African Commission seems to have incorporated the obligation to fulfil in its list of duties. According to the African Commission:⁸⁵

[A]ll rights — both civil and political rights and social and economic — generate at least four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties.

Unlike the foregoing instruments, the Sudanese Constitution provides for five typologies of obligations. Section 27(1) of the Constitution binds all duty bearers to a commitment to 'respect and promote human rights and fundamental freedoms enshrined in this Constitution'. Sub-section (2) provides further for the duty to 'guarantee,

⁸³ n 76 above.

⁸⁴ *Social and Economic Rights Action Centre & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (SERAC case).

⁸⁵ SERAC case (n 84 above) para 44.

protect and implement this Bill'. Therefore, the Constitution imposes a novel obligation to 'guarantee' to the list under CESC and the African Charter, it is submitted. In order to appreciate the importance of these obligations, it is expedient to determine what they entail.

The duty to respect requires the state to refrain from interfering with the enjoyment of socio-economic rights.⁸⁶ Interference could be explicit or implicit. Therefore, the duty to respect imposes a negative obligation upon the state, but it could, nevertheless, require the state to take proactive measures, for example, to prevent state agents from acting in certain ways, or to provide reparation if a duty has been breached.⁸⁷

With respect to the duty to protect, the state is required to prevent third parties from unduly interfering with the right-holder's enjoyment of a particular freedom or entitlement. The state is expected to act in such a way that is necessary to prevent, stop, or obtain redress or punishment for third party interference.⁸⁸ In *Commission Nationale des Droits de l'Homme et des Libertés v Chad*,⁸⁹ the African Commission held that the failure by Chad to protect its citizens against rebel attacks was a breach of its obligation to protect under the African Charter.

The duty to 'fulfil' and 'promote' imposes obligations on a state to 'facilitate, provide and promote access to rights. This is particularly the case when such access is limited or non-existent.'⁹⁰ It is positive in nature and requires great resources. It requires the state to adopt legislative, judicial or administrative and budgetary measures towards the fulfilment or full realisation of these rights.⁹¹ In *People's Union for Civil Liberties v Union of India and Others*,⁹² the Supreme Court of India found the government of India in violation of its obligation to fulfil when it failed to provide emergency grains from its reserves for the inhabitants of Rajasthan where many people were dying of starvation.

The word 'guarantee' means a formal assurance that certain conditions will be fulfilled; it is a promise with certainty.⁹³ Therefore, Sudan, as a guarantor of the Bill of Rights by virtue of this obligation, undertakes formally to ensure that every person living within its jurisdiction will benefit from the provisions of the Bill of Rights. But is this not what the justiciability of a bill of rights is all about? What new value is added? It is suggested that some value is added: As a surety of the Bill of Rights, Sudan must ensure its implementation and can offer no excuse

⁸⁶ Maastricht Guidelines (1998) 20 *Human Rights Quarterly* 693 para 6.

⁸⁷ SERAC case (n 84 above).

⁸⁸ SERAC case (n 84 above) para 15.

⁸⁹ (2000) AHRLR 66 (ACHPR 1995).

⁹⁰ International Commission of Jurists Report on Socio-Economic Rights 2008, http://www.icj.org/publi_multi.php3?lang=en (accessed 31 March 2009).

⁹¹ Committee on ESC General Comment 14E/C 12/2000/4, CESC para 33.

⁹² 2004 3 SCC 363.

⁹³ *Compact Oxford English dictionary* http://www.askoxford.com/concise_oed/guarantee?view=uk (accessed 1 September 2008).

in defence of why it could not. It is also making a formal and legal undertaking that it will certainly ensure that no third party violates the provisions of the Bill of Rights. Its value, therefore, is not in its content, but the certainty it brings to bear on the realisation of its obligations.

Implementation refers to the 'putting in effect'⁹⁴ of the provisions of the Bill of Rights. It is submitted that this obligation mandates the government to design programmes and policies to give effect to the provisions of the Bill of Rights. This obligation ensures that the government plays a purposive and proactive role in giving effect to provisions of the Bill of Rights.

Therefore, the government of Sudan not only has obligations under the Bill of Rights to respect, promote, protect, guarantee, fulfil and implement the provisions of the rights, but the government has a positive obligation to prevent, investigate and punish violations against individuals, whether that violence is committed by non-state actors or government officials.

Judicial review is a *sine quo non* to the realisation of the rights and liberties provided for in the Bill of Rights. In this regard, the Constitution establishes a concentrated court system. There are two systems of courts under the Constitution: the national judiciary, made up of the Supreme Court, the Court of Appeal, and any other court that may be established;⁹⁵ and the Constitutional Court.⁹⁶ Thus, Sudan has adopted the Kelsenian model of judicial review. This model concentrates the power of constitutional review within a single judicial system called the Constitutional Court and situates that Court outside the traditional structure of the judicial branch.⁹⁷ The national judicial system is then left to deal with non-constitutional issues.

There are problems with this model. The delineation of jurisdiction in which the resolution of all cases with a constitutional dimension is monopolised by the Constitutional Court and those arising from ordinary laws by the national judiciary is simple, but problematic in a transitional society with an infant judiciary.⁹⁸ In modern constitutional states, each and every judge must first establish the content of the relevant norm, which in some cases requires the simultaneous application of statutory, constitutional and sometimes supra-national norms.⁹⁹ A complete separation of constitutional jurisdiction and ordinary jurisdiction is not possible in practice.¹⁰⁰ Thus, in many jurisdictions today, even though they give the Constitutional Court the last word

⁹⁴ As above.

⁹⁵ Arts 123, 124, 125, 126 & 127.

⁹⁶ Art 119.

⁹⁷ Garlicki (n 48 above) 44.

⁹⁸ As above.

⁹⁹ As above.

¹⁰⁰ As above.

in constitutional disputes, the Constitutional Courts no longer claim a monopoly of the system, but act as co-ordinators of that process.¹⁰¹

Having provided for justiciable socio-economic rights that are very extensive and complicated, the Constitution does not provide adequate guidance to the judiciary on how to adjudicate these rights. The only reference the Constitution makes in this regard is in section 122(d)(4) where it provides that the Constitutional Court shall protect the rights and liberties provided for under the Bill of Rights. The Constitutional Court Act of 2005 and the Rules of Procedures of the Court neither provide for an ascertainable framework for adjudicating socio-economic rights, nor capture in its entirety the complexities and challenges presented by justiciable socio-economic rights. It is, therefore, necessary to examine in detail the court system established by the Constitution.

7 The national judiciary

According to the Constitution, it does seem that the national judiciary has no competency to adjudicate on constitutional and human rights issues. Section 125 of the Constitution, which spells out the function of the national Supreme Court, determines that it shall be a court of cassation and review in criminal and civil matters arising under national laws and personal matters. The national judiciary has ‘competency to adjudicate on disputes and render judgement in accordance with law’, meaning that it cannot declare a law null or void.¹⁰² The national Supreme Court is the court of last instance for all non-constitutional matters arising in respect of national laws.

The Constitution — while taking away from the national Supreme Court jurisdiction over constitutional issues — fails to provide for whether or not, if a constitutional matter arises in the course of a trial, the Supreme Court should defer to the Constitutional Court. This failure has serious implications for constitutionalism as well as for individual litigants. Thus:¹⁰³

Referring constitutional questions to the Constitutional Court is clearly problematic. This will prevent constitutionalism from filtering down to lower courts, to take root and to operate effectively — which is essential. Also, there is the danger that people are forced to go through years of expensive litigation, and only thereafter can they show that the point could be disposed of on a simple constitutional issue. A more worrying aspect of such a procedure is its implication for the right to a fair trial. One would wonder how the lower courts are supposed to apply the criminal law, if they cannot test its constitutionality.

¹⁰¹ As above.

¹⁰² Sec 123(3).

¹⁰³ Ibrahim (n 45 above) 630.

This has particular implications for the Bill of Rights. Excluding the jurisdiction of the national judiciary on human rights issues presupposes that there are cases that are purely civil or criminal and others human rights cases. As stated earlier, there is no such watertight division in practice.

It is submitted that, since section 48 of Constitution provides that ‘the Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts’, an interpretation that excludes the national judiciary is unconstitutional. The national judiciary is bound and constitutionally competent to adjudicate on and apply the Bill of Rights. Given its widespread presence and its lax accessibility provisions, excluding the Bill of Rights from its jurisdiction is tantamount to excluding the majority of people from the protection of the Bill of Rights.

8 The Constitutional Court

The Constitutional Court was first established under the 1998 Constitution. It has nine justices of ‘proven competency, integrity, credibility and impartiality’ who are appointed by the President of the Republic upon recommendation of the newly-founded National Judicial Services Commission and the approval of the Council of States by a two-thirds majority.¹⁰⁴ The Constitutional Court is the custodian of the Constitution.¹⁰⁵ It controls the actions of the government with respect to individuals.¹⁰⁶ It is the only court with the power to repeal and quash unconstitutional laws, to declare null and void and its decisions are binding *erga omnes*.¹⁰⁷ It is ‘independent and separate from the national judiciary’.¹⁰⁸ The Constitutional Court is not a court of appeal, except from the Southern Sudan Supreme Court.¹⁰⁹ Consequently, it lacks supervisory jurisdiction over the decisions of the highest state courts. With no appellate jurisdiction from the national judiciary and insulated from adjudicating on the ordinary law of the land, it would seem that for alleged violations of national or state laws, the Constitutional Court has no jurisdiction.¹¹⁰

8.1 The Constitutional Court and human rights

Section 122(1)(d) of the Constitution provides that the Constitutional Court shall ‘protect human rights and fundamental freedoms’. Furthermore, section 78 states:

¹⁰⁴ Secs 120 & 121.

¹⁰⁵ Sec 122.

¹⁰⁶ Sec 122(1)(b)(d).

¹⁰⁷ Sec 122 & para 2.11.32 of the Power Sharing Agreement (Component of CPA).

¹⁰⁸ Sec 119.

¹⁰⁹ Sec 122 (c).

¹¹⁰ Sec 122.

Any person aggrieved by an act of the National Council of Ministers or a national minister may contest such act ... before the Constitutional Court, if the alleged act involves a violation of ... the Bills of Rights.

The combined effect of sections 78(a) and 122(1) (b), (c), (d) and (e) of the Constitution is that an individual can apply to the Constitutional Court if his or her right in the Bill of Rights is infringed.

These rights and freedoms include those provided for in the Bill of Rights and all rights and freedoms enshrined in international human rights instruments to which Sudan is a party.¹¹¹ How an individual or group of individuals could access the Court and how the Court conducts its procedures are scantily provided for in the Constitution. The Constitutional Court Act of 2005 (CCA) was passed to regulate these issues. The analysis of the Constitutional Court Act below is limited to questions of the constitutional review of laws and individual complaints procedures which fall within the scope of this work.

8.2 Constitutional review of laws

There are usually two types of constitutional review of laws:¹¹² the abstract constitutional review process in which the applicant approaches a court directly for it to scrutinise a piece of legislation, and the concrete constitutional review of laws in which the constitutionality of a law is scrutinised in a legal suit in which the constitutionality of the law is decisive. There is no clear provision in the Constitution to identify from which type is anticipated. Section 122(1)(e) only empowers the Constitutional Court to 'adjudicate on the constitutionality of laws', which could mean both the abstract and the concrete review of laws. However, while the CCA provides for the abstract review,¹¹³ it omits completely the concrete review.

The Constitution is equally silent as to whether an individual can initiate an application for the constitutional review of laws. It has been suggested that the word 'disputes' in sections 122(1)(b) and (c) and 174(b) of the Constitution is a broad term which includes individuals.¹¹⁴ The CCA provides for individual procedures in section 18 of the CCA. The combined effect of sections 18(b) and (d) of the CCA is that if an individual's interest is affected by any law, he or she has the requisite standing to approach the Constitutional Court for a review. Since the executive or the legislature does not need an interest to approach the

¹¹¹ Sec 27(3).

¹¹² For a comprehensive review of the different methods of judicial review, see M Mohammed 'The emergence of constitutional courts and the protection of individual and human rights: A comparative study' in E Cotran & A Sharif (eds) *The role of the judiciary in the protection of human rights* (1997) 283.

¹¹³ Secs 18-20 CCA.

¹¹⁴ http://www.mpil.de/shared/data/pdf/manual_papers_and_proceedings_of_the_heidelberg_seminars_on_potential_disputes_before_the_sudanese_constitutional_court.pdf (accessed 31 March 2009).

Constitutional Court, it is submitted that the condition that an individual must claim the violation of a constitutional right and a prejudice of an interest is extremely strict.

8.3 Admissibility

The question of admissibility of an application is also not clear under the Constitution. Since it provides that the Constitutional Court shall 'adjudicate on the constitutionality of laws or provisions in accordance with the Constitution', it could mean that there is no standing requirement. Section 18 of the CCA only stipulates the requirement of interest in respect to individual or group suits.¹¹⁵ An *argumentum e contrario* would yield that other applicants not mentioned are admitted in this procedure.

The subject matters of a possible application before the Constitutional Court are 'laws and provisions'. Law generally here might mean acts of the legislature. But what 'provisions' are referred to that might need interpretation? It is presumed that it could not mean provisions of law, because that could just be a tautology, and therefore, it could refer to other legal norms other than those enacted by the legislature.

What is not certain is whether the individual applicant must complain of a violation of his own constitutional rights and must be affected negatively by the contested act. Does it mean that any provision of the Constitution can be challenged as long as one is affected by the act in contention? Or even that one could challenge any provision of the Constitution even if one is not negatively affected? It does seem that only an individual or group of individuals who have their constitutional rights violated and have suffered actual injury as a result are allowed to approach the Constitutional Court.¹¹⁶ It is submitted that this interpretation is too restrictive and a teleological interpretation should be adopted to make room for public interest litigation.

Access to the Constitutional Court is further limited because a constitutional suit may not be conducted except by a counsel who has practised the legal profession for 20 years.¹¹⁷ In addition, it is not clear whether or not an applicant must exhaust judicial remedies before approaching the Constitutional Court. Section 19(4) of the CCA provides:¹¹⁸

Saving the rights and freedoms contained in the Bill of Rights, set out in the [Constitution], where the decision, or work, which is constitutionality contested is from such, as the law may empower a higher authority to review it, the plaintiff shall produce such, as may prove his exhaustion of the ways of

¹¹⁵ Secs 18(1)(a) & (d) CCA.

¹¹⁶ Sec 18 CCA.

¹¹⁷ Sec 29 CCA.

¹¹⁸ Constitutional Court Act 2005.

grievances or the expiry of thirty days, of the date of receipt by the higher authority, of the grievance.

With respect to the decisions and acts of the executive and that of the judiciary, approaching the appropriate body for review is probably what is anticipated here. It is practically difficult to imagine how an individual complaining of an infringement of rights on the basis that the law is unconstitutional can exhaust all remedies, given that only the Constitutional Court can hear constitutional issues. It is therefore submitted that there is no constitutional need for the exhaustion of remedies with respect to constitutional law review cases.

8.4 Remedial powers of the Constitutional Court and human rights cases

It is trite law that where there is a wrong, there must be a remedy. However, section 122, dealing with the competency of the Constitutional Court, does not provide for a remedy other than in section 122(d), where it provides for the protection of human rights and fundamental freedoms. What this means in concrete terms will be a matter of interpretation by the Constitutional Court itself. It is submitted, however, that the Constitution places on the Court an obligation to protect.

As a standing paragraph, the drafters of this Constitution wanted to emphasise this obligation. It is submitted that this obligation confers upon the Constitutional Court, in addition to ensuring that the government does not interfere with the rights of its people, a proactive jurisdiction to ensure in all its decisions and pronouncements that all human rights are respected. It is submitted that the duty to protect should enable the Constitutional Court to dispense with any rule of standing that prejudices a right, when a human right has been violated. As stated earlier, this obligation has negative as well as positive components.

9 Conclusion

The Interim Constitution of Sudan is a complex legal document. A complex feature is the way in which it attempts to constitutionalise economic and social rights. A brief reading of the Constitution may reveal that socio-economic rights are not justiciable and enforceable since section 22 of the Constitution has ousted the jurisdiction of the courts. This work has demonstrated that such an interpretation is unconstitutional and has convincingly established that socio-economic rights, not only those mentioned in the GPD, but those provided for in all international human rights instruments, are indeed justiciable and enforceable by the Constitutional Court.

It has also been proven that section 22 is not only redundant, but that section 27(3) has rendered international human rights instruments self-executing and therefore takes precedent over domestic norms. In order to effectively adjudicate on these international human rights instruments, it has been recommended that the Kelsenian model of judicial review is deficient. A model that allows courts at all levels to adjudicate on the Bill of Rights that falls within their jurisdiction has been suggested.

Unaccompanied minor refugees and the protection of their socio-economic rights under human rights law

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Summary

This paper reflects the results of a study, the main objective of which was to investigate the practical treatment of unaccompanied minor refugees in Ghana and South Africa, and to explore whether such treatment is in accordance with existing international norms and standards for the protection of refugee children. The study focused on the realisation of children's socio-economic rights in order to measure treatment. The paper seeks to address the obstacles which prevent the proper treatment of unaccompanied minor refugees, and to make recommendations as to how the international community can better regulate the treatment of unaccompanied minor refugees. In essence, this paper aims to investigate whether there is a discrepancy between the rights of child refugees acknowledged in international law, and the situation of unaccompanied minor refugees in practice and, if so, how this can be remedied. The paper seeks to show, through the case studies of Ghana and South Africa, that unaccompanied minor refugees are, to a certain extent, lost in the system.

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1 Introduction

According to the office of the United Nations High Commissioner for Refugees (UNHCR), the world's refugee¹ problem is one of the most complicated issues before the international community today.² According to several estimates, there are millions of refugees in Africa who are vulnerable to abuse and who, therefore, need to be protected in order to ensure that their human rights are not violated. Certain groups of refugees, most particularly children, require special protection as a consequence of their exceptional vulnerability.³ More than half the world's refugees are children, and some of these children are unaccompanied minors.⁴ Unaccompanied minor refugees (UMR) require special protection because of their personal situation and their immediate need for nurturing and care. Unaccompanied minors are defined as children, as defined in article 1 of the Convention on the Rights of the Child (CRC),⁵ who have been separated from both parents, as well as from other adults who have a legal or customary duty to care for the child.⁶ According to Ressler *et al*, 'unless special assistance is provided, unaccompanied children are dependent on the chance charity of others, which can fall short of even minimal care and protection'.⁷

Refugees are entitled to all the rights and freedoms contained in international human rights instruments, as well as to the protection provided for in guidelines, conventions and policies which specifically address the problem of child refugees.⁸ There is, however, concern that child refugees, particularly UMR, are abused and exploited as a result of insufficient protection, and that existing protections are not properly implemented and enforced. There is also a concern that the international law of the child, at the point where principles move into practice, is incomplete and narrowly defined.⁹ Although legal instruments which

¹ For the purposes of this study, the term 'refugees' also refers to asylum seekers and, to the extent applicable, illegal immigrants.

² <http://www.unhcr.ch/html/menu6/2/fs20.htm> (accessed 20 August 2008).

³ C Nicholson 'A first call on available resources for child refugees in South Africa' (2005) 38 *De Jure* 71.

⁴ Nicholson (n 3 above) 72.

⁵ 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.'

⁶ General Comment No 6 (2005) Committee on the Rights of the Child 'Treatment of unaccompanied and separated children outside their country of origin' (para 7); <http://www.ccrweb.ca/uam.htm> (accessed 28 August 2008).

⁷ EM Ressler *et al Unaccompanied children: Care and protection in wars, natural disasters, and refugee movements* (1988) 4.

⁸ Arts 3(1), 20 & 22 CRC and arts 4 & 23 African Charter on the Rights and Welfare of the Child.

⁹ GS Goodwin-Gill 'Protecting the human rights of refugee children: Some legal and institutional possibilities' in J Doek *et al* (eds) *Children on the move: How to implement their right to family life* (1996) 97.

offer protection to children do exist, these instruments may not be broad enough and may not be implemented sufficiently at the national level. According to Ressler *et al.*:¹⁰

Unaccompanied children have existed in virtually every past war, famine, refugee situation and natural disaster ... on the basis of past and present experience, it is certain that the future will produce its share of unaccompanied children as well.

2 International and regional law

UMR are entitled to protection under international law, more specifically, under international human rights law, international refugee law and various regional instruments.¹¹ These laws provide the framework¹² within which decisions and actions taken on behalf of UMR should take place.¹³

2.1 Rights of the child

CRC is an international human rights instrument which entered into force in September 1990, and which contains the largest number of international standards concerning the treatment of children. Although it is not specifically a refugee treaty, its provisions directly affect and apply to refugee children, as article 1 of CRC provides that the provisions of the Convention are granted to all persons under the age of 18.¹⁴ The standards set by CRC are comprehensive as they cover most aspects of a child's life. Although the realisation of some social welfare rights, such as health, education and an adequate standard of living, is subject to a state's financial capability, the non-discrimination clause in CRC ensures that whatever benefits are given to children who are citizens of a state must also be given to children who are refugees in the territory of the state.¹⁵ The 'near-universal ratification'¹⁶ of CRC has ensured that CRC standards have been agreed to and accepted by most countries of the world. It is also important to consider regional

¹⁰ Ressler *et al.* (n 7 above) 3.

¹¹ <http://www.unhcr.org/excom/EXCOM/43bce4782.pdf> (accessed 22 September 2008).

¹² Ressler *et al.* (n 7 above) 3.

¹³ [http://216.239.59.104/search?q=cache:MdSYBD9a1qIj:www.savethechildren.net/arc/files/c_sepchil.pdf+Key+concept:+Action+for+the+Rights+of+Children+\(ARC\)+S+eparated+children+%E2%80%93+December+2004+Foundations.&hl=en&ct=clnk&cd=1&gl=gh](http://216.239.59.104/search?q=cache:MdSYBD9a1qIj:www.savethechildren.net/arc/files/c_sepchil.pdf+Key+concept:+Action+for+the+Rights+of+Children+(ARC)+S+eparated+children+%E2%80%93+December+2004+Foundations.&hl=en&ct=clnk&cd=1&gl=gh) (accessed 22 August 2008).

¹⁴ <http://216.239.59.104/search?q=cache:SzafmD-qv6AJ:www.unhcr.org/cgi-in/texis/vtx/protect/ opendoc.pdf%3Ftbl%3DPROTECTION%26id%3D3b84c6c67+Refugee+Children:+Guidelines+on+Protection+and+Care&hl=en&ct=clnk&cd=1&gl=gh> (accessed 22 August 2008).

¹⁵ As above.

¹⁶ As above.

African law. The African Charter on the Rights and Welfare of the Child (African Children's Charter) entered into force in 1999.¹⁷ The African Children's Charter has many similar provisions to CRC, and has specific provisions referring to the socio-economic rights of refugee children on the continent.

2.2 Refugee law

International and regional refugee law do not specifically refer to the rights of refugee children. The 1951 UN Refugee Convention and 1967 Protocol, which have been acceded to by both Ghana and South Africa,¹⁸ make no distinction between adults and children with regard to their socio-economic rights. Article 22 of the UN Convention does, however, set standards that are of special importance to children. It states that refugees must receive the 'same treatment' as nationals in primary education, and treatment at least as favourable as that given to non-refugee aliens in secondary education. The Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa has no article that specifically refers to refugee children.

2.3 The United Nations High Commissioner for Refugees

The UNHCR has issued numerous policies and guidelines concerning refugees, some of which focus on the treatment of child refugees, and UMR in particular.¹⁹ According to Ressler *et al*, these policies 'constitute a broad body of substantive rules for decisions on the issue of care and placement of the unaccompanied children falling within the agencies' jurisdiction'.²⁰ They are important as they constitute part of the 'legal framework which has come to influence the treatment of unaccompanied children'.²¹ The UNHCR Guidelines on Refugee Children were first published in 1988. They were initiated by the 1987 Note on Refugee Children, which finally drew a distinction between refugee adults and refugee children.²² The Guidelines were then updated in 1994 in light of the 1993 UNHCR Policy on Refugee Children. Central to these Guidelines is the acknowledgment of the need that refugee children have for special care and assistance and, as such, the Guidelines recognise that

¹⁷ <http://www.africa-union.org/child/6th%20meeting/WORKSHOP-CONCEPT%20NOTE.pdf> (accessed 23 April 2009).

¹⁸ <http://treaties.un.org/Pages/Treaties.aspx?id=5&subid=A&lang=en> (accessed 23 April 2009).

¹⁹ Such as the Revised (1995) Guidelines for Educational Assistance to Refugees, or the UNHCR policy on Refugees in Urban Areas (December 1997).

²⁰ Ressler *et al* (n 7 above) 275.

²¹ Ressler *et al* (n 7 above) 272.

²² CP Cohen 'The rights of the child: Implications for change in the care and protection of refugee children' (1991) 3 *International Journal of Refugee Law* 683.

children are vulnerable, dependent and developing. These Guidelines are intended to guide the staff of the UNHCR and other organisations, as well as governments. According to the UNHCR, they are not merely suggestions but rather tools for reaching policy objectives, and so they cannot be dismissed without good reason.²³ In addition, most of the Guidelines are intended to be universal.²⁴ They are based on human rights law, as they were created in light of CRC and the notion of human rights. There is thus an obligation under human rights law to follow these Guidelines.²⁵

The UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum are also important to consider.²⁶ Section 7(1) of the Guidelines states that all children seeking asylum, *particularly* if they are unaccompanied, are entitled to special care and protection. In addition, the Guidelines state that every child should have access to education in their asylum country.²⁷

2.4 Other

The Inter-Agency Guiding Principles on Unaccompanied and Separated Children²⁸ are intended to guide future action for 'national, international and non-governmental organisations, as well as for governments in their efforts to meet their obligations, and for donors in making decisions on funding'.²⁹ The Principles seek to ensure that all actions and decisions taken in respect of separated and unaccompanied children are anchored in a protection framework, and that the best interests of the child are respected at all times.³⁰ General Comment 6 of 2005 on the treatment of unaccompanied and separated children outside their country of origin was adopted by the Committee on the Rights of the Child on 3 June 2005.³¹ It identifies the vulnerable situation of unaccompanied and separated children and provides guidance on the protection, care and proper treatment of these children based on the legal framework of CRC, with particular reference to the principles of non-discrimination and the best interests of the child.³² Finally, General Assembly Resolution 51/77 on the rights of the child, passed in 1996, makes specific reference to the plight of UMR and urged that

²³ n 14 above.

²⁴ As above.

²⁵ As above.

²⁶ <http://www.unhcr.org/refworld/docid/3ae6b3360.html> (accessed 23 April 2009).

²⁷ Sec 7(12).

²⁸ <http://www.unhcr.org/refworld/docid/4113abc14.html> (accessed 23 April 2009).

²⁹ <http://www.icrc.org/web/eng/siteeng0.nsf/html/p1101> (accessed 16 August 2008).

³⁰ n 29 above.

³¹ <http://www.unhcr.org/cgi-bin/tehis/vtx/refworld/rwmain?page=search&docid=42dd174b4> (accessed 23 April 2009).

³² n 11 above.

co-ordinated efforts be made by all agencies to address their specific needs as ‘the [CRC] itself calls for co-operation in protection, care and tracing of unaccompanied minors, and the Committee on the Rights of the Child attaches great importance to [their] situation’.³³

3 The problem of access to socio-economic rights of unaccompanied minor refugees: The cases of South Africa and Ghana

Despite the existence of legal instruments which provide for special care and assistance in the case of UMR, the plight of UMR has largely been ignored by the international community. Various international instruments touch on the issue, and can be used in advocating for the rights of these children, but there is no specific instrument or body which regulates the treatment of UMR. The UNHCR — the primary actor responsible for the assistance and protection of refugees — has used international law as the basis for specific guidelines to protect refugee children, yet these guidelines are not always followed. They do not constitute ‘hard international law’ and so there are no sanctions, and few consequences attached to the lack of implementation. According to Ressler *et al*:³⁴

[I]n a number of emergencies, unaccompanied children have been left without food, medical care, shelter ... in these and other instances, relevant national and international law has been ignored and violated by those who have acted or should have acted upon the children.

Although it is clear that the law requiring special care and protection of UMR exists, it is also clear that the law is not always implemented and that many UMR suffer as a result. In addition, the Guidelines and Principles set by agencies such as the UNHCR and CRC are also not always followed: Ressler *et al*³⁵ have stated that

[i]n many past emergencies ... policy and programme staff have not been prepared to make these decisions and have been uncertain as to what actions should be taken, and, therefore, some unaccompanied children have received no help at all ... where there has been assistance, it has sometimes been inadequate or misdirected.

This section seeks to demonstrate that maltreatment of UMR does occur. It explains the treatment of UMR in South Africa, a relatively wealthy African state, in a recent refugee emergency. It also explains the treatment of UMR in Ghana, a poorer African state, where refugees have resided in a camp situation for approximately 20 years and the situation is no longer considered an emergency. These two countries

³³ n 11 above.

³⁴ Ressler *et al* (n 7 above) 300.

³⁵ Ressler *et al* (n 7 above) 4.

were chosen in order to demonstrate that in either type of national economy, and in either type of refugee crisis, UMR are still lost in the system, despite the efforts of the parties involved. This section will study the access that UMR have to education, healthcare, food and water, and sanitation and shelter in order to address the realisation of the socio-economic rights of UMR.

3.1 South Africa

3.1.1 General

According to Landau and Jacobsen, 'since its transition to majority rule in 1994, South Africa has become the destination for tens of thousands of migrants and refugees from across the African continent'.³⁶ In fact, according to the International Office for Migration, there are more than 125 000 registered refugees in South Africa.³⁷ Yet many refugees are faced with maltreatment at the hands of the police and South African citizens. Many refugee advocates 'frequently criticise the police and the Department of Home Affairs for their treatment of refugees ... the data indicate that such complaints are justified'.³⁸ In 2008, the number of refugees entering South Africa drastically increased due to the political crisis in neighbouring Zimbabwe. This influx of Zimbabwean refugees into South Africa was described by government as a 'serious problem' requiring action.³⁹ In addition, refugees living in South Africa faced increased challenges in 2008 due to the outbreak of xenophobia and xenophobia-related attacks. The UNHCR stated that in May 2008, during a period of only two weeks, more than 17 000 people, including refugees and asylum seekers, were estimated to have fled xenophobic attacks. According to the UNCHR, this group was in urgent need of assistance and protection.

Amongst this group of refugees in South Africa, there are a number of UMR. Lawyers for Human Rights, together with partner non-governmental organisations (NGOs), stated that there are 'a few hundred'⁴⁰ living in Musina alone, a town bordering Zimbabwe. In August 2008, a Child Protection Rapid Assessment was carried out in the Musina municipality. The assessment concluded that more than 600 unaccompanied children were living in the town of Musina, more than 200 of whom had arrived in the previous month from neighbouring Zimbabwe. Save the Children's Resource Centre in Musina alone registered

³⁶ L Landau & K Jacobsen 'Refugees in the new Johannesburg' (2004) 19 *Forced Migration Review* 44.

³⁷ http://www.polity.org.za/article.php?a_id=134092 (accessed 14 September 2008).

³⁸ Landau & Jacobsen (n 36 above) 45.

³⁹ http://www.news24.com/News24/Africa/Zimbabwe/0,,2-11-1662_2158024,00.html (accessed 15 September 2008).

⁴⁰ E-mail from an employee at Lawyers for Human Rights, South Africa, 1 October 2008.

60 new unaccompanied children from Zimbabwe in two months,⁴¹ and the Centre for Positive Care, a local NGO, has registered over 1 000 unaccompanied children from Zimbabwe since it opened its doors in 2004.⁴² Ninety-two percent of these unaccompanied children were found to be living on the streets or in other dangerous places, such as the bushes, and yet services for these children were found to be *ad hoc* and reactive as opposed to proactive.⁴³ There is therefore no doubt that UMR do exist in the current refugee emergency in South Africa.

3.1.2 Education

Legally, child refugees living in South Africa are entitled to an education; however, many do not gain access to state schools. Thirty-five percent of children who enter South Africa as refugees do not attend school due to the problems of school fees, schools being under-resourced, and the language in which the school operates.⁴⁴ At eight refugee sites established in Cape Town, children have had no access to education.⁴⁵ In Johannesburg, there are 110 children who have been denied access to state schools. They are currently enrolled at a school which runs classes in the afternoons for refugee children who otherwise would have no education at all.⁴⁶ The school is run by a group of civil society organisations.

In the Child Protection Rapid Assessment for UMR conducted in 2008, it was established that the lack of access to education was a recurrent issue. Apparently refugee children were asked to provide documents, such as birth certificates, as a pre-condition to their enrolment, documents which UMR seldom had. Even when UMR do enrol, school drop-out rates are high, partly because of language barriers but mainly because, in the absence of adequate care structures, unaccompanied children need to earn an income to survive.⁴⁷ In urban and rural areas alike, schools do not have the capacity or space to accommodate the large number of new arrivals from Zimbabwe and need support and

⁴¹ Child Protection Rapid Assessment Musina Municipality Limpopo Province, South Africa, August 2008.

⁴² As above.

⁴³ As above.

⁴⁴ http://www.sagoodnews.co.za/education/school_offers_hope_to_child_refugees.html (accessed 15 September 2008).

⁴⁵ <http://64.233.183.104/search?q=cache:QXnKvsPVZ4J:www.tac.org.za/community/files/file/xenophobia/MEMORANDUM%2520TO%2520THE%2520MINISTER%2520OF%2520EDUCATION%2520FROM%2520THE%2520JOINT%2520REFUGEE%2520LEADERSHIP%2520COMMITTEE%2520OF%2520THE%2520WESTERN%2520CAPE.pdf+Memorandum+to+the+Minister+of+Education+from+the+Joint+Refugee+Leadership+Committee+of+the+Western+Cape+24+July+2008.&hl=en&ct=clnk&cd=1&gl=gh> (accessed 15 September 2008).

⁴⁶ n 44 above.

⁴⁷ n 41 above.

training if they are to fulfil their constitutional obligation to provide basic education to all children.⁴⁸

3.1.3 Healthcare

For UMR arriving from Zimbabwe, there is one public hospital and one clinic in Musina, as well as a presence of *Médecins Sans Frontières* (MSF) in townships and farming areas.⁴⁹ Access to healthcare facilities for unaccompanied children was not a major issue in theory, although many had never tried to access these in practice. Children who had used the facilities reported having been treated adequately and receiving the drugs they needed. Many children said that language barriers posed a problem and that they were too scared of deportation to access any government service.⁵⁰ MSF has reported that only accompanied South African children report for consultations as there is a problem with reaching unaccompanied children.⁵¹

3.1.4 Food and water

UMR who were displaced in South Africa were sheltered in sites set up around the country. Yet some of these sites were not provided with food, and other sites which were provided with food did not necessarily provide appropriate food.⁵² According to a human rights advocate working in South Africa, 'it took a few days for management to realise that different religions could not eat certain foods'.⁵³ For the UMR entering South Africa from Zimbabwe, access to food was also a problem. In Musina there were numerous feeding schemes making feeding available to unaccompanied children. Nevertheless, securing access to food was mentioned as a problem by some children, especially girls working on neighbouring farms, who do not benefit from feeding schemes and are only provided with food when there is work available.⁵⁴ Although there are certainly projects in place to feed UMR, it must be noted that they are all run by civil society and faith-based organisations and not by the South African government nor the UNHCR; and that they are not sufficient to address the nutrition needs of all the UMR living in northern South Africa.⁵⁵

48 As above.

49 As above.

50 As above.

51 As above.

52 n 40 above.

53 As above.

54 n 41 above.

55 As above.

3.1.5 Sanitation and shelter

There is a chronic shortage of shelter for refugees in South Africa, both for UMR entering the country and UMR displaced due to xenophobia. Hundreds of children are left with no access to shelter at all and have to sleep in the streets or in the bush. Not only are these shelters insufficient in the number of UMR that they cater for, but also due to the fact that they only provide shelter for boys.⁵⁶ Regarding UMR who have been displaced within South Africa, sites have been set up around the country to accommodate the refugees but still there are refugees, specifically UMR, who are left without shelter. In Cape Town, 150 refugees were at one point living on the street, even though 15 community halls in the province were already housing refugees.⁵⁷ Displaced refugees in Cape Town, Salt River and Muizenberg are currently living in mosques, NGO offices and accommodation paid for by NGOs, yet there is an increasing likelihood that, due to the lack of funds, these groups will 'end up sleeping outside in the cold and rain'.⁵⁸ Another problem is that refugees already in sites are at risk of being evicted from the sites, or having the sites closed down by the government. In August 2008, the Department of Home Affairs requested refugees in Johannesburg shelters to sign a document which stated that refugees who registered at camps would lose their rights to social assistance. Those who questioned the documents, or refused to sign them, were immediately sent to the Lindela deportation centre. It is, however, illegal to deport refugees, and so the group were released on the side of the highway with no money.⁵⁹ In addition, hundreds of refugees and asylum-seekers at the Klerksoord temporary shelter sought answers from the United Nations (UN) and government after the tents in which they had been living were removed with no warning and no government or UN officials were visible on site.⁶⁰ These cases illustrate the disregard with which the right to shelter of refugees is considered in South Africa.

3.2 Ghana

3.2.1 General

Buduburam is a refugee camp that was established in 1990. It is located just west of the town Kosoa, 30 miles from the capital city of Accra. It was founded on 140 acres of land, which initially was

⁵⁶ As above.

⁵⁷ <http://www.mg.co.za/article/2008-06-12-cape-officials-to-meet-on-refugee-crisis> (accessed 14 September 2008).

⁵⁸ <http://www.tac.org.za/community/node/2343> (accessed 4 October 2008).

⁵⁹ <http://www.lhr.org.za/news/2008/refugees-make-mistake-knowing-their-rights-business-day> (accessed 14 September 2008).

⁶⁰ http://www.iol.co.za/index.php?art_id=nw20081006172807464C184214 (accessed 4 October 2008).

intended to serve 3 000 refugees only.⁶¹ Despite its size, the camp soon became home to approximately 42 000 refugees, although this number is now significantly reduced due to UNHCR efforts to encourage resettlement and repatriation.⁶² As a result, the refugees live in an environment of poor sanitation, overcrowded and under-resourced schools, expensive and limited access to healthcare, and a lack of vocational opportunities.⁶³ Most of the refugees in Buduburam are Liberians who fled to Ghana during the 18 year-long civil war in their country. The camp is characterised by dirt roads, cinder-block houses, sporadic electricity and very little running water.⁶⁴ As a result of this poor environment, many of the hundreds of unaccompanied children living in the camp are uneducated and often work as child labourers.⁶⁵ It is clear that there are many 'orphans and children without guardians'⁶⁶ living in Buduburam, but it is unclear what the exact figures are as the children are being resettled, repatriated, reunited with family, or they are simply lost within the system. Reverend Osei-Agyemang stated in 2004 that there were 214 children in the camp who had been separated from their parents as a result of the conflict in Liberia, as well as a group of 569 children who 'accompanied their parents to Ghana, but were abandoned, and had to fend for themselves as a result'.⁶⁷ An employee of an orphanage at the camp has stated that 'there are so many of them [UMR], but it is difficult to trace them all'.⁶⁸ There is an official UNHCR list of unaccompanied and separated children which, as of 2003, showed that there were at least 700 separated and unaccompanied children between the ages of one and 20 at the camp.⁶⁹ The Liberian Welfare Council believes, however, that this list is not complete as many more UMR exist and are simply not documented.⁷⁰

⁶¹ <http://www.brcinternational.org/> (accessed 15 September 2008).

⁶² Personal observations, August–October 2008.

⁶³ n 61 above.

⁶⁴ <http://www.childrenbetterway.org/> (accessed 15 August 2008).

⁶⁵ In Buduburam, there are children who earn a living by pushing rented wheelbarrows full of goods for shopowners. These children are often orphans with nowhere to sleep, and no money or time to attend school. ('Children push wheelbarrows to survive in Buduburam' *The Vision* 21 May 2007; 'Survival of the fittest: Pushing wheelbarrows to live in Buduburam' *The Vision* 4 August 2007).

⁶⁶ LS Nyan 'Teacher volunteers for Buduburam' (2004) 1 *ExileNews* 6.

⁶⁷ AA Dulleh 'Child rights abuses at Buduburam' (2004) 1 *ExileNews* 7.

⁶⁸ Interview with employee at ARCH, 3 October 2008, ARCH premises, Buduburam camp.

⁶⁹ Interview with social welfare officer, 26 September 2008, Social Welfare Office, Buduburam camp.

⁷⁰ 'Survival of the fittest' (n 65 above).

3.2.2 Education

There are numerous schools in Buduburam, both at primary and secondary level (although there are notably fewer secondary schools),⁷¹ which provide the children in the camp with education. Education is not free, however, and most families cannot afford to pay the tuition fees.⁷² The UNHCR built the Buduburam Senior Secondary and the Buduburam Junior Secondary School in the camp, but they handed over management of the school to the Liberian Welfare Council, and the fees are now too expensive for most refugees. CBW has built a school, which is the cheapest in the camp, but it only caters for up to the end of grade 9 level.⁷³ Even where children are able to attend school, the quality of their education is questionable. Existing classrooms are overcrowded, with the student/classroom ratio sometimes being as high as 130:1, although usually it is 50:1. There are inadequate instructional materials, a lack of school administration, a student/teacher ratio of approximately 90:1, and more than 70% of the teachers are untrained.⁷⁴

In 2004 it was reported that 4 000 school-going children in the camp were not attending a school due to a lack of funds,⁷⁵ and this figure must clearly incorporate UMR. Statistics for the 2003/2004 year showed that almost half of the children who had enrolled in schools dropped out 'due to the inability ... to pay school fees'.⁷⁶ Following the survey, the UNHCR committed itself to absorb 2 000 registered children into schools located in the camp, and to give similar assistance to the remaining 2 000 children after their registration.⁷⁷ The challenge to attend school is the greatest for UMR: They can rarely afford to go to school and, as a result, spend their time trying to earn money, or become involved in adult activities.⁷⁸

Many kids living on their own ... are vulnerable to exploitation and varying types of abuses, including child labour, prostitution and crimes ... wayward children as young as 10 are seen pushing wheelbarrows while others, especially girls, go around [washing] clothes for a living.

Even UMR living in foster families may battle to attend school, as their foster parents receive no financial assistance in respect of the UMR.⁷⁹

⁷¹ 'How Liberians live on the camp at Buduburam in Ghana' *The Perspective* 14 June 2004.

⁷² <http://www.pointhope.org/site/c.fdKIIONoEmG/b.4323915/k.E6B9/Education.htm> (accessed 27 September 2008).

⁷³ Interview with employee at CBW, 29 August 2008, CBW Offices, Buduburam camp.

⁷⁴ n 71 above.

⁷⁵ AA Dulleh '4000 children out of school at Buduburam' (2004) 1 *ExileNews* 6.

⁷⁶ n 71 above.

⁷⁷ Dulleh (n 75 above) 6.

⁷⁸ n 71 above.

⁷⁹ n 69 above.

Despite the high cost of education in the camp, NGOs and the UNHCR are attempting to send as many refugee children as possible, including UMR, to school. Claims are that there is one tuition-free school in the camp, namely the Carolyn A Miller Elementary School.⁸⁰ This study, however, is unable to confirm that this school does indeed provide free education, and some residents in the camp dispute this claim.⁸¹

3.2.3 Healthcare

'The healthcare system in the camp is grossly inadequate at best and terrible at worst.'⁸² There is no free healthcare in the camp, and the healthcare which is provided at a fee is generally inadequate. Adequate healthcare is of great importance to the refugees in Buduburam. Statistics show that one in four children dies before the age of five, as 'the camp is plagued by waterborne diseases, malnutrition, malaria, and untreated sexually transmitted diseases'.⁸³ The UNHCR has reported that by 2004, 1 438 children were identified as suffering from micronutrient deficiencies, with 225 children seriously malnourished.⁸⁴ Despite this fact, the lack of funds means that people who need medical attention often go without it.⁸⁵ Regarding the UNHCR clinic in the camp, 'residents see the clinic and its modern facilities as mere cosmetics intended to paint a good picture of the camp and UNHCR authorities'.⁸⁶ Despite this, it is reported that 95% of the children under five in the settlement have been vaccinated against measles.⁸⁷ Breast-feeding is generally promoted and the use of bottles discouraged, and children have been trained in basic personal hygiene.⁸⁸

In a system where healthcare is not readily accessible, UMR often suffer. An officer at the Department of Social Welfare has stated that the UNHCR clinic in the camp has offered free treatment for UMR since 2004,⁸⁹ and an official at the National Catholic Secretariat stated that if a child is recommended to the clinic by Social Welfare as a UMR in need

⁸⁰ Interview with employee at UNHCR, 7 October 2008, UNHCR offices, Accra.

⁸¹ Interview with employee at ARCH, 3 October 2008, ARCH premises, Buduburam camp and Interview with employee at CBW, 29 August 2008, CBW offices, Buduburam camp.

⁸² n 71 above.

⁸³ <http://www.pointhope.org/site/c.fdKIIONoEmG/b.4323909/k.C2D4/Medical.htm> (accessed 27 September 2008).

⁸⁴ n 71 above. The actual number is expected to be considerably higher.

⁸⁵ n 71 above.

⁸⁶ As above.

⁸⁷ As above.

⁸⁸ Results of a questionnaire posed to a volunteer who lived in Buduburam for three months working with refugee children, and to an employee of an NGO operating in Buduburam for the welfare of refugee children.

⁸⁹ n 71 above.

of free treatment, the child receives free treatment.⁹⁰ Yet a resident in the camp, who is aware of issues affecting UMR, stated that 'everyone pays for everything, including the first consultation. UMR pay too, unless they are in an orphanage, then the orphanage pays.'⁹¹ In addition, a newspaper article reported an unaccompanied minor in the camp as stating that 'mosquitoes are eating me up and I get sick sometimes ... I go to the clinic, but they ask for US \$10 ... so I have to push wheelbarrows to get money to get better.'⁹² It is therefore unclear whether the principle of free treatment for UMR has been implemented.

3.2.4 Food and water

Food is the most pressing need facing refugees.⁹³ 'In Buduburam, very few children ever get the luxury of a full and satisfying meal ... tiny portions of rice are just about the only thing that any of them ever get to eat.'⁹⁴ Most refugees can only afford one meal a day, often consisting of small onions and peppers, and perhaps one small piece of dried fish.⁹⁵ Even children who do get fed are not always given food of sufficient nutritional value to help build a healthy immune system. 'In Buduburam, the combination of starvation and disease kills one in four children under the age of five.'⁹⁶

The availability and adequacy of water in Buduburam pose a serious problem. The UNHCR does not provide residents in the camp with water,⁹⁷ and running water has only been introduced into the camp very recently (May 2008)⁹⁸ by the UNHCR and Point Hope, but it is not free as refugees have to pay for it per bucket.⁹⁹ Apparently the refugees are being charged the 'lowest possible price', but even this is sometimes too much.¹⁰⁰ Even where there are working taps, drainage around water points is inadequate.¹⁰¹ Because of its cost, many refugees cannot afford to pay for water from commercially-operated

⁹⁰ Interview with employee at NCS, 6 October 2008, National Catholic Secretariat, Accra.

⁹¹ Interview with camp resident B, 26 September 2008, CBW guest house, Buduburam camp.

⁹² n 70 above.

⁹³ n 73 above.

⁹⁴ http://www.pointhope.org/site/c.fdkIIONoEmG/b.4323913/k.844F/Feed_A_Child.htm (accessed 27 September 2008).

⁹⁵ Personal observations, 26 September 2008.

⁹⁶ n 94 above.

⁹⁷ n 71 above.

⁹⁸ http://www.pointhope.org/site/c.fdkIIONoEmG/b.4323927/k.8D2A/Living_Waters.htm (accessed 27 September 2008).

⁹⁹ n 73 above.

¹⁰⁰ n 98 above.

¹⁰¹ n 88 above.

mobile tankers or for potable water in plastic sachets, and so ‘this leaves a considerable number of refugees without safe water’.¹⁰²

3.2.5 Sanitation and shelter

There are not enough rubbish bins in Buduburam to handle the volume of garbage generated by the thousands of refugees who reside in the camp. In response to the obvious need for a refuse system, CBW has provided the camp with numerous rubbish bins.¹⁰³ Yet there is still litter all over the camp, with children playing in mounds of garbage. When it rains, litter is often swept into the water supply of the camp.¹⁰⁴ ‘The inescapable filth in the camp contributes to the spread of disease and despair.’¹⁰⁵ According to an article written by Saah Charles N’Tow in *The Perspective* in 2004,¹⁰⁶ the two main sanitation problems facing the residents of the camp are limited or no latrine facilities and poor refuse collection and the lack of a functional waste management system. There are inadequate and unaffordable toilet facilities for refugees.

The UNHCR has identified various gaps in its services to refugees, including the need for additional toilets, fumigation, additional refuse collection points and the establishment of a waste disposal system and the distribution of soap to needy refugees. By 2004 the UNHCR had yet to address these gaps, and it is clear that by 2008 soap was still not being distributed to needy refugees.¹⁰⁷ The general cleanliness of the camp is unsatisfactory, with certain areas of the camp prone to flooding. Children in the camp have not been sensitised to, or involved in, the cleaning and maintaining of sanitary facilities.¹⁰⁸ Residents in Buduburam pay for the use of public toilets, but in principle children under the age of 12 should not pay. Despite this, there are rumours that these children are still being made to pay.

4 Obstacles to implementation

Numerous obstacles to the full realisation of the socio-economic rights of UMR exist. The first obstacle concerns the law. In Ghana there are insufficient protections embodied in legislation, which results in an inferior system of protection for UMR. In South Africa the protections exist to some extent in law, yet the law is not always properly implemented. In addition, international law fails to expressly provide for the

¹⁰² n 71 above.

¹⁰³ n 73 above.

¹⁰⁴ <http://www.pointhope.org/site/c.fdkIIONoEmG/b.4323919/k.22A2/Sanitation.htm> (accessed 27 September 2008).

¹⁰⁵ As above.

¹⁰⁶ n 71 above.

¹⁰⁷ n 73 above.

¹⁰⁸ n 88 above.

protection of the rights of UMR. The second obstacle is the lack of financial resources. The parties involved in the protection of UMR often lack the necessary funds to adequately address their socio-economic needs. The third obstacle is presented by the limited capacity of the parties involved. Addressing the needs of UMR requires co-operation between various parties, but these parties sometimes lack the resources, regulation or direction to participate effectively, or to co-operate sufficiently. These three obstacles to the implementation of the socio-economic rights of UMR are addressed in detail below.

4.1 Legal obstacles

There are legal obstacles within both South African and Ghanaian domestic law. Firstly, the protections of the rights of UMR in South African law are extensive. These rights are expressly protected in the Constitution, in legislation, as well as in case law. The Refugees Act¹⁰⁹ came into effect in 2000, and includes special provisions for unaccompanied children.¹¹⁰ Section 27 of the Act outlines the rights and obligations of refugees and asylum seekers. Both the Constitution and the Refugees Act guarantee and recognise the right of 'everyone' to access healthcare; refugees, asylum seekers and undocumented persons are therefore equally protected.¹¹¹ There is currently a Refugees Amendment Bill¹¹² which will incorporate the above-mentioned provisions of the Children's Act into the Refugees Act.¹¹³ In the case of *Centre for Child Law v Minister of Home Affairs*,¹¹⁴ the Court declared that all unaccompanied foreign children found in need of care should be dealt with in accordance with the provisions of the Child Care Act,¹¹⁵ and the South African government is directly responsible for the socio-economic and education needs of unaccompanied foreign children in South Africa, including the needs of refugee children. In the case of *Bishogo v The Minister of Social Development*,¹¹⁶ it was held that there

¹⁰⁹ Act 130 of 1998.

¹¹⁰ <http://hrw.org/reports/2005/southafrica1105/4.htm> (accessed 3 October 2008); see sec 32(1).

¹¹¹ Sec 27(g) Refugees Act & sec 28(1)(c) Constitution.

¹¹² The Refugees Amendment Act 33 of 2008 was assented to by the President of the Republic of South Africa on 26 November 2008. Sec 21A, as inserted into the Refugees Act by the Amendment Act, deals with the provision of care to unaccompanied children.

¹¹³ Sec 21A.

¹¹⁴ 2005 (6) SA 50 (T).

¹¹⁵ This has been replaced by the Children's Act 38 of 2005. The Children's Act is a far-reaching and progressive piece of legislation which requires in sec 151(1) that children regarded as in need of protection and care should be brought to the attention of the relevant authorities.

¹¹⁶ Unreported Transvaal Provincial Division Case 9841/2005.

should not be a bar on refugees accessing social services, whether the bar be direct or indirect.¹¹⁷

From the foregoing it is evident that the legal framework in South Africa adequately addresses the plight of UMR. Yet the law is not always adequately implemented. In a 2000 report commissioned by the UNHCR on the development of health and welfare policies for refugees in South Africa,¹¹⁸ there was concern that there is a lack of uniformity amongst government departments in dealing with UMR.¹¹⁹ For example, the Children's Court in Johannesburg was not aware that it had jurisdiction over refugee children.¹²⁰ In addition, Home Affairs personnel at the Johannesburg Refugee Reception Office have been accused of not assisting minors.¹²¹ In the workshop summary of a recent strategy workshop,¹²² it was recorded that refugee children were not receiving support; there was no uniformity in the manner in which the Children's Court managed foster applications; and officials had poor management in government offices. The legal framework in South Africa for addressing UMR is extensive, yet the poor implementation of these laws is an obstacle to the realisation of the rights of UMR.

In Ghanaian law, there is a notable lack of references to the situation of UMR, or to refugee children in general. There is no specific reference to the rights of refugees in the 1992 Constitution. The Refugee Law of 1992 does not specifically mention UMR. The Children's Act 560 of 1998¹²³ makes no reference to the situation of refugee children. The only reference to refugees is in section 3, which states that no child shall be discriminated against because he or she is a refugee. In summary, there is no law in Ghana which sets out the rights of UMR or establishes what policy or guidelines will guide involved parties in the protection and treatment of UMR. This gap in the legal framework governing refugee children in Ghana certainly obstructs and inhibits the proper realisation of the rights of UMR living in the country.

Concerning the legal protection of UMR under international law, Goodwin-Gill states that 'neither the 1951 Convention nor CRC, so

¹¹⁷ Children's Amendment Bill — public hearings in Gauteng, Braamfontein Recreation Centre, October 2006, submission by Lawyers for Human Rights.

¹¹⁸ In January 2000, the Community Agency for Social Enquiry was commissioned by the UNHCR to undertake research to understand the existing situation, including an assessment of capacity and obstacles to the implementation of government health and welfare policy at national and provincial level, to examine government policies and practices regarding social service provision, and to develop guidelines to facilitate the implementation of government policy.

¹¹⁹ Workshop Summary: ACCESS KwaZulu-Natal Provincial Review and Strategy Workshop 20-21 April 2006.

¹²⁰ <http://www.queensu.ca/samp/sampresources/migrationdocuments/documents/2001/dha.pdf> (accessed 20 October 2008).

¹²¹ As above.

¹²² n 119 above.

¹²³ http://www.mowacghana.net/files/childrens_act.pdf (accessed 29 April 2009).

far as they address the situation of children as refugees, provides an entirely satisfactory legal basis'.¹²⁴ Yet, international law must address the protection of refugees, as it is the role of international law to substitute its own protection for that which the country of origin or the host country is unable to provide.¹²⁵

4.2 Financial obstacles

A lack of financial resources constitutes another obstacle to the implementation of the socio-economic rights of UMR. That much was evidenced by interviews conducted with an official at the UNHCR, Accra, and an officer at the Liberian Welfare Council in the Buduburam camp.¹²⁶ The UNHCR officer noted that the gaps which still exist in the treatment and protection of UMR in Ghana exist largely because of limitations of funding.¹²⁷ The officer at the Liberian Welfare Council in Buduburam camp, who works directly with issues affecting children, has stated that there are insufficient funds to help the children.¹²⁸ It is interesting to note that in discussions with various stakeholders, many concluded that the UNHCR is not spending enough of their money. They have the necessary funds but do not spend them wisely.

4.3 Capacity of parties involved

4.3.1 Government

Sovereign states have primary jurisdiction over UMR in their territory.¹²⁹ Governments in host countries are therefore under an obligation to ensure that UMR in their jurisdiction are protected and treated according to international standards.¹³⁰ In many countries, host governments fulfil this obligation by mandating the Department of Social Welfare, or its equivalent, to care for UMR.¹³¹ For example, in Ghana there is a branch of the Department of Social Welfare in the Buduburam camp catering for the needs of UMR.¹³² This branch has assisted UMR by formalising informal fostering arrangements which existed prior to

¹²⁴ GS Goodwin-Gill *The refugee in international law* (1996) 257.

¹²⁵ Goodwin-Gill (n 124 above) 207.

¹²⁶ Interview with officer at Liberian Welfare Council, 6 October 2008, Liberian Welfare Council Office, Buduburam camp and interview with employee at UNHCR, 7 October 2008, UNHCR offices, Accra.

¹²⁷ n 80 above.

¹²⁸ n 70 above.

¹²⁹ Ressler *et al* (n 7 above) 207.

¹³⁰ Ressler *et al* (n 7 above) 300: 'The obligations for the care and protection of unaccompanied children fall in the first instance to the authorities of the state where the children are located.'

¹³¹ Interview with Camp Manager, 26 September 2008, Camp Manager's Offices, Buduburam camp.

¹³² Interview with officer at Liberian Welfare Council, 6 October 2008, Liberian Welfare Council Office, Buduburam camp.

Social Welfare's involvement, and they have, in conjunction with the UNHCR, set up a Fostering Committee to arrange formal fostering for the remaining UMR.¹³³ Yet, the work of the Department of Social Welfare alone is not sufficient. Prompt responses to refugee situations from governments are vital. Yet, in Ghana, a branch of the Department of Social Welfare was only established in Buduburam in 2003, many years after the camp itself was established.

In 2007, Jacob van Garderen, a human rights lawyer in South Africa, stated that 'despite the small number of refugee children in the country, the South African authorities are struggling to provide them with the necessary protection and assistance'.¹³⁴ A problem encountered is that not all parties are aware of the rights of refugees and of the responsibilities of the South African government. It is the role of the government to ensure that departments mandated to protect the rights of child refugees are equipped to do so. Winterstein¹³⁵ claims that refugee children's welfare in South Africa is not being seen to properly due to bureaucracy and social obstacles, such as too few social workers.¹³⁶ In her Master's dissertation, Livesey states that in a 2004 International Refugee Day speech, the Deputy-Director of Refugee Affairs of the South African government noted that South Africa needed to look for ways to provide material support to vulnerable groups, including children,¹³⁷ and Livesey deduces from this that the South African government acknowledges that not enough is being done to assist vulnerable refugee children.¹³⁸ Governments are responsible for providing social workers, for reducing unnecessary bureaucracy and for finding ways to fulfil their legal obligations to UMR.

It is also the duty of governments to ensure that the rights of refugees and the responsibilities of government departments are fulfilled. Regarding access to healthcare in South Africa, the 'general inability amongst health officials at all government levels to differentiate between different groups of foreigners and their respective rights to healthcare services' remains an obstacle.¹³⁹ As of 2000, there was no uniform policy of the National Health Department indicating whether identification documents are required for primary healthcare access, and there was also evidence that administrative assistants in hospitals were not aware of a national agreement that a series of documents

¹³³ n 69 above.

¹³⁴ <http://www.mg.co.za/article/2007-07-09-out-of-harms-way> (accessed 27 October 2008).

¹³⁵ 'South African legal system fails refugee children' *Sunday Independent* 26 June 2005.

¹³⁶ TK Livesey 'A survey on the extent of xenophobia towards refugee children' unpublished LLM dissertation, University of South Africa, 2006 27.

¹³⁷ M Mashele 'Home in exile: Rebuilding refugee lives in South Africa' International Refugee Day speech (2004).

¹³⁸ Livesey (n 136 above) 24.

¹³⁹ n 120 above.

could be accepted from refugees instead of an identification document. In addition, there is evidence that asylum seekers and refugees are expected to put down a deposit, similar to that required of tourists, before receiving hospital care.¹⁴⁰ Although provincial departments have the ability to provide short-term social relief to refugees through the national Social Relief Fund, it is not clear whether this is a known practice amongst Social Services officials.¹⁴¹ Governments need to disseminate information about the rights of refugees to all government departments and officials to ensure that the rights which are provided for UMR are indeed being implemented.

A host government cannot adequately address the needs of UMR alone. According to Ressler *et al*, 'national authorities may fulfil their duty by inviting an international or voluntary organisation to assume full or partial responsibility for the care, protection and placement of the children'.¹⁴² Governments should request assistance, for example, by inviting the UNHCR to participate and creating an environment in which NGOs can act. Where governments do not do so, the rights of UMR may be undermined. In South Africa there was confusion recently regarding the role of the UNHCR in the country, and there were allegations that the South African government had not invited the UNHCR to act.¹⁴³ This confusion ultimately hampered the realisation of the rights of refugees in the country.

Finally, another obstacle to the implementation of the rights of UMR is corruption and bribery within government offices. This corruption is remarked upon in Livesey's Master's dissertation: Harris¹⁴⁴ is reported to state that corruption and fraud are common within the asylum-seeking process in South Africa, and that foreigners who are entitled to be in South Africa often have to pay extra for the processing of their documents and to secure their status. This corruption undoubtedly affects UMR in Africa who rely on assistance from government officials for their very livelihood.

4.3.2 The United Nations High Commissioner for Refugees

According to Goodwin-Gill, 'today, most states clearly want the UN to assume responsibility for a broad category of persons obliged to flee their countries'.¹⁴⁵ The UNHCR is indeed a body that can assume such responsibility: It is 'not only a forum in which the views of states may be represented; it is also, as a subject of international law, an actor in the

¹⁴⁰ As above.

¹⁴¹ As above.

¹⁴² Ressler *et al* (n 7 above) 301.

¹⁴³ <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=90903&sn=Detail> (accessed 22 October 2008).

¹⁴⁴ B Harris 'A foreign experience: Violence, crime and xenophobia during South Africa's transition' (2001) 5 *Violence and Transition Series* in Livesey (n 136 above).

¹⁴⁵ Goodwin-Gill (n 124 above) 213.

relevant field whose actions count in the process of law formulation'.¹⁴⁶ The UNHCR has legal personality, and as such can be held accountable for the exercise of its responsibility. According to a Liberian journalist, the UNHCR is 'the lead organisation providing material assistance and protection to the refugee community'.¹⁴⁷ Material assistance entails food, shelter, medical aid, education and other social services.¹⁴⁸ The mandate of the UNHCR involves the material assistance and legal protection of refugees. The protection of UMR falls within this general mandate.¹⁴⁹ Yet the UNHCR's assistance to and protection of UMR are also required more specifically by the UN General Assembly in Resolution 35/187, which highlights the competence of the UNHCR to 'take necessary measures of care' for refugee children.

In Ghana, the UNHCR focuses on the welfare of UMR in the Buduburam camp. They have held workshops on issues relevant to the physical protection of UMR, and have hosted a Child Protection Officer from Geneva who worked specifically with UMR.¹⁵⁰ The UNHCR has a Child Panel Committee which works with the Department of Social Welfare.¹⁵¹ There is also a Best Interests Determination Committee which was revised in 2007.¹⁵² This Committee deals with issues concerning children, and involves interviewing UMR and making recommendations. It is possible, however, for this Committee to lose sight of UMR once they are placed with foster families. In addition, there are no child protection officers who work from the Accra branch of the UNHCR. The UNHCR has not established an orphanage in the camp, and has no direct project with unaccompanied children.¹⁵³

The UNHCR is best placed to respond to the needs of UMR and, in fact, the UN has recognised its role in responding.¹⁵⁴ Despite its mandate and vital role in the support of UMR, the UNHCR faces 'substantial political, financial, and logistical challenges'.¹⁵⁵ It cannot achieve the full care and protection of UMR on its own. In both South Africa and Ghana, the UNHCR does not sufficiently address the needs of UMR and, as such, it cannot be expected to achieve protection of UMR without assistance.

¹⁴⁶ Goodwin-Gill (n 124 above) 216.

¹⁴⁷ n 71 above.

¹⁴⁸ <http://www.dfa.gov.za/foreign/Multilateral/inter/unhcr.htm> (accessed 1 October 2008).

¹⁴⁹ Ressler *et al* (n 7 above) 269.

¹⁵⁰ n 131 above.

¹⁵¹ n 69 above.

¹⁵² n 73 above.

¹⁵³ As above.

¹⁵⁴ The UNHCR has a *de facto* responsibility for the care and protection of the children; it must follow its guidelines and implement its principles, as well as principles of international law.

¹⁵⁵ <http://www.hrw.org/campaigns/crp/promises/> (accessed 20 August 2008).

4.3.3 Non-governmental organisations

Co-operation between parties in response to the refugee crises is crucial. NGOs play a large and important role in such responses. Indeed, 'protection concerns reveal a commonality of interest, effective protection demands a purposeful degree of co-operation, by no means limited to states'.¹⁵⁶ Although there is little regulation or oversight of their participation in these responses, the research for this article revealed that NGOs provide UMR with tangible assistance and support. In fact, the UNHCR recognises the importance of an NGO presence in refugee crises, and recognises the need for it to solicit support from these organisations. In Ghana, NGOs that wish to work in refugee camps inform the UNHCR of their goal, and they are sometimes informally monitored by the UNHCR.¹⁵⁷ An NGO presence is not only vital in emergency refugee situations, but also in the long-term protection of and assistance to refugee settlements,¹⁵⁸ and a limited NGO presence reduces the assistance and protection offered to UMR. Thus it can be deduced that, although not the case in South Africa or Ghana, where there is no active NGO presence in a refugee situation, UMR may suffer.

NGOs operate with little external oversight or regulation. Apart from informal monitoring from the UNHCR, the work of NGOs seems to be largely independent, particularly in Ghana, where personal observations demonstrated that NGOs operate with little oversight. This can create problems where the operations of such organisations do not act in the best interests of UMR. A potential obstacle thus highlighted in this is the lack of oversight of programmes of NGOs which work with UMR, and the negative effect this may have on UMR when the programmes are disadvantageous to the children.

5 Recommendations and conclusion

5.1 Summary of findings

This article set out to investigate the treatment of UMR in Ghana and South Africa by examining their access to socio-economic rights such as education, shelter, food and water, as well as healthcare. The results of this investigation show that UMR are among the most vulnerable in any refugee situation, and that their socio-economic rights are not being fully realised in either country, for various reasons. This study also analysed the obstacles to the full implementation of the rights of UMR. Firstly, it was found that existing international conventions do not adequately address the plight of UMR and there is, therefore,

¹⁵⁶ Goodwin-Gill (n 124 above) 229.

¹⁵⁷ n 80 above.

¹⁵⁸ n 120 above.

a critical need to fill this gap in the protection of the socio-economic rights of UMR. This can be achieved by creating an international convention which focuses on the situation of child refugees, including UMR, and with which state parties must comply in their treatment of UMR within their territories. It was also found that domestic law and policies in Ghana and South Africa do not sufficiently provide for national mechanisms for the regulation of the treatment of UMR. In South Africa, this is due to the poor implementation of the existing laws and a lack of policy on the matter. In Ghana, it is due to a lack of legislation or a policy framework regarding child refugees in general, and UMR in particular. This can be remedied by the adoption of policies, and the amendment of legislation to allow for the proper protection of the rights of UMR. In addition, the study found that the interested parties operating in refugee situations, including the UNHCR, governments and NGOs, cannot achieve the full protection of UMR when acting alone, as individually they lack the capacity or resources to do so. This can be remedied by co-operation between states and between the interested parties. Such co-operation is vital for full and far-reaching protection of UMR. It can also be achieved by initiating changes within the UNHCR in order to resolve the capacity-related inadequacies of the organisation.

5.2 Conclusion

The article focuses on the treatment which UMR receive in Ghana and South Africa, and whether this is in accordance with international and regional legal standards set out in human rights instruments, refugee instruments and UNHCR Guidelines and Principles. As a study of the relevant international and domestic law revealed, there is certainly a gap between the rights provided for UMR in South Africa and Ghana, and the realisation of these socio-economic rights guaranteed in the law. This article has proposed reasons for the lack of implementation of the rights, including financial reasons, and inadequacies in both the law and the implementation of the law. Recommendations are now made on how these obstacles to implementation can be remedied. These recommendations will explore the creation of a new international instrument. Whether or not these particular recommendations are implemented, it is clear that some action *must* be taken in order to protect the rights of UMR. States and other actors, such as the UNHCR, are required to respect the human rights of all people, including UMR, and they are under a duty to ensure that the human rights of UMR are not violated. This article concludes that the international community, and indeed the African community, must place a greater focus in the future on the situation of UMR, and on the achievement of the human rights of UMR in order to ensure that they are no longer 'lost in the system'.

5.3 Recommendations

5.3.1 An international instrument

A new international instrument needs to be created with a focus on the treatment of, protection of and assistance to child refugees, including UMR. The principles for such protection and treatment already exist in the international arena, as outlined above, but they need to be translated into 'hard' law — law which has consequences for non-compliance. It is recommended that this convention should make provision for a regulatory body with the power to conduct on-site visits and investigations into state parties' treatment of its child refugees. Although ratification of this instrument would create an additional responsibility for states, this is not a justification for failure to create the instrument, as every international instrument which a state ratifies creates obligations on the state, and yet this has not prevented states from ratifying numerous important treaties and conventions. The proposed international convention should require governments to work with civil society in their protection of child refugees in order to encourage greater inter-party co-operation.

Although creating such an instrument may not be without challenges, it is submitted that in this case the existing conventions are clearly insufficient. Thus, even if attention were to be given to properly implementing existing instruments, as opposed to creating a new one, the result would still leave gaps in the protection of child refugees. The existing 'soft' law, in the form of inter-agency guiding principles and UNHCR Guidelines, offers a better prospect of protection than the existing conventions, but should be transformed into legal obligations rather than simply guiding principles.

5.3.2 Domestic laws and policies

This article examines the gaps in domestic policies and laws in South Africa and Ghana, and recommends that comprehensive policies and laws be created or amended to be brought in line with international guidelines and principles of protection for refugee children. It is recommended that all states need to create policies and domestic laws, possibly drawing on the UNHCR Guidelines and Inter-Agency Guiding Principles, which provide for the treatment of UMR within their territories. The European Council on Refugees and Exiles has called on states to develop policies which 'take account of the special needs of unaccompanied children ... in the provision of suitable care'.¹⁵⁹ This position is endorsed and it is recommended that states domesticate international standards of protection, either contained in a new international instrument or in the UNHCR Guidelines and Inter-Agency

¹⁵⁹ European Council on Refugees and Exiles 'Position on refugee children' (1997) 9 *International Journal of Refugee Law* 76.

Guiding Principles, through domestic legislation or policy. In addition, it is recommended that priority be given in budget allocations to the realisation of the socio-economic rights of refugee children, particularly UMR.¹⁶⁰

In the case of South Africa, it is recommended that the country should formulate clear and detailed policy guidelines, the implementation of which could be monitored by the national Human Rights Commission. A human rights advocate in South Africa has recommended that the country develop a comprehensive policy framework to protect and assist UMR.¹⁶¹ This recommendation was made in response to the recent case of the Donkakim family,¹⁶² in which the court found that 'the procedures to determine the asylum applications of unaccompanied children in South Africa were inadequate and fell short of international guidelines'.¹⁶³ This study endorses this recommendation. Policies which are implemented should recommend an interdepartmental policy initiative which deals specifically with the access of child refugees to health and welfare services. It is imperative that such policies require the dissemination of information on the legal status of UMR in a country, for example to the police services, medical officers and educators in the country.¹⁶⁴ In addition, the study proposes that such policies address the activities of NGOs and regulate their assistance of UMR.

It is further recommended that all states adopt suitable policy frameworks. Any policy formulated by states should be in the form of an interdepartmental policy initiative which specifically deals with the access of child refugees to socio-economic services. This is because the provision of social services to UMR generally requires an integrated approach, based on the co-operation of different government departments, and so any policy adopted in this area should be interdepartmental in character.¹⁶⁵

In the case of Ghana, it is recommended that legislation needs to be drafted and passed which directly addresses the needs of child refugees, including UMR. Refugee legislation should be amended to explicitly provide for the protection of UMR.¹⁶⁶ Even in South Africa, where legislation addresses the situation of UMR, it has been suggested that the government should review existing legislation which adversely affects services for children.¹⁶⁷

¹⁶⁰ Concluding observations made by the Committee on the Rights of the Child regarding Ghana's initial report 1997 (para 31).

¹⁶¹ n 134 above.

¹⁶² Unreported case Pretoria High Court (2006).

¹⁶³ n 134 above.

¹⁶⁴ n 120 above.

¹⁶⁵ As above.

¹⁶⁶ http://www.hrw.org/reports98/sareport/#_1_7 (accessed 23 October 2008).

¹⁶⁷ n 119 above.

5.3.3 International and regional responsibility

It is vital for the international community, comprising of states and UN bodies, to co-operate in their response to refugee situations, regardless of the country in which the crisis exists. Indeed, Goodwin-Gill notes that 'every state is bound by the principle of international co-operation',¹⁶⁸ so not only is it recommended, but it is an international principle which binds states. Such co-operation may help address the financial limitations of individual parties in response to the refugee crises. In Africa, particularly, it is recommended that all African states act as partners in responding to refugee situations and, as such, co-operate in the care and assistance of child refugees, particularly UMR. This co-operation would be in line with the principles of the African Union, to which all but one African state belong, which promote African unity, brotherhood and co-operation,¹⁶⁹ as well as article 23 of the African Children's Charter, which requires states to co-operate with existing international organisations in their efforts to protect and assist children.

¹⁶⁸ Goodwin-Gill (n 124 above) vii.

¹⁶⁹ Arts 3(a) & (e) Constitutive Act.

The Model Law on HIV in Southern Africa: Third World Approaches to International Law insights into a human rights-based approach

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Summary

Legislating in response to the HIV epidemic is a core element of the global HIV strategy. A human rights-based approach is essential in order to comply with international law as well as to ensure effectiveness. This stands in contrast to punitive measures and criminalisation provisions within HIV legislation. Third World states are entitled to be cautious about a purportedly human rights-based approach and an explicit conformity with international law that have their institutional origins in advancing Western hegemonic interests. The insights of Third World Approaches to International Law (TWAIL) are important in harnessing international human rights law as a necessarily transformative framework that is effective in meeting its globally equitable and social justice character. This is especially so for the Southern African model law on HIV. TWAIL provide critical guidance relating to context and strategy for Southern African states in this regard and the model law, in turn, offers important opportunities in advancing TWAIL objectives in its counter-hegemonic struggle for global equity and justice. The Southern African model law on HIV is strongly compliant with international human rights principles and obligations and relevant to effectively address the nature of the HIV epidemic in the region. The domestic adoption of the model law across Southern

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African states has the potential to fulfil a strategically crucial transformative role in advancing Third World resistance.

1 Introduction

The statistics of the human immunodeficiency virus (HIV) and of the acquired immune deficiency syndrome (AIDS) are so staggering as to verge on the incomprehensible. During 2007, an estimated two million people died globally of AIDS; an estimated 33 million people were living with HIV; and an estimated 15 million children (aged under 18 years) were living as orphans due to AIDS.¹ These figures, in fact, signify an improvement, due to concerted efforts in public health responses. According to the Joint UN Programme on HIV/AIDS (UNAIDS):²

No disease in history has prompted a comparable mobilisation of political, financial and human resources, and no development challenge has led to such a strong level of leadership and ownership by the communities and countries most heavily affected. In large part due to the impact of HIV, people throughout the world have become less willing to tolerate inequities in global health and economic status that have long gone unaddressed.

This is unlikely to resonate with many of those living in the Southern African Development Community (SADC) states.³ Despite comprising 3,9% of the global population,⁴ their share of the above three statistical indicators for 2007 were 43,8% of global AIDS deaths, 41,4% of the global population living with HIV, and 37,6% of the global population of children living as orphans due to AIDS.⁵ SADC states account for fully 47,5% of the global population of children aged under 15 years living with HIV resulting from paediatric infections.⁶

Largely due to a recognition of the need to take control at the domestic level of the management of responses to HIV and AIDS, SADC parliaments have developed a model law on HIV as one element of a more concerted approach. This article examines the nature of that model law and, especially, its human rights-based approach to HIV-related legislation. It also considers the extent to which the emerging global scholarship on Third World Approaches to International Law

¹ UNAIDS *Report on the global AIDS epidemic 2008* (2008) 214 217 218 http://data.unaids.org/pub/GlobalReport/2008/JC1510_2008GlobalReport_en.zip (accessed 10 April 2009).

² UNAIDS (n 1 above) 13.

³ The SADC states are Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. Madagascar was suspended by the Extraordinary Summit of the SADC Heads of State and Government (30 March 2009) until its return to 'constitutional normalcy'.

⁴ UNDP *Human Development Report 2007/2008* (2007) Table 5 (2005 data).

⁵ UNAIDS (n 1 above).

⁶ UNICEF *The state of the world's children 2008* (2007) Table 4 (2005 data).

(TWAAIL) assists in an improved understanding of legislative responses to HIV within the Southern African context.

Section 2 presents an overview of TWAAIL scholarship, especially in informing the critique of this article. Section 3 describes the Southern Africa model law, its conceptual framework and legislative scope, and briefly compares the West and Central African model law. Section 4 outlines some characteristics from the TWAAIL overview which may better inform appropriate actions, and discusses some aspects of HIV in the region which distinguish it from the epidemic elsewhere. The article concludes that the Southern African model law is a regionally-appropriate response to the HIV and AIDS epidemic, and that it presents opportunities to benefit from TWAAIL insights. Just as importantly, it also may contribute meaningfully to TWAAIL demands for international law to be more relevant to Third World rights to a more just and equitable international order.

2 TWAAIL insights: An overview

TWAAIL's foundations lie in the extent of contemporary international law's origins in a European legal tradition that has insufficiently acknowledged and thus been unable to fully come to terms with the characteristics of its own imperialism and colonialism. A consequential examination of international law needs to understand that it is both culturally constitutive and historically contingent.⁷ This is certainly important with respect to African states, which can be seen to suffer from a 'structural illegitimacy' in view of their origins in the 'brutal state building' of the colonial era.⁸

TWAAIL's origins date from the growth of the decolonisation movement in the aftermath of World War II,⁹ with particular scholarship occurring as the decolonisation process strengthened in the 1960s and 1970s.¹⁰ Explicit TWAAIL critiques have emerged in the past decade or two as a means of eradicating the conditions of underdevelopment in the Third World.¹¹ This requires both a deconstruction of the use of international law to the extent that it creates and perpetuates Western hegemony, and a construction of the bases for a post-hegemonic

⁷ JT Gathii 'Alternative and critical: The contribution of research and scholarship on developing countries to international legal theory' (2000) 41 *Harvard International Law Journal* 265.

⁸ Gathii (n 8 above) 266.

⁹ M Mutua 'What is TWAAIL?' (2000) *ASIL Proceedings 2000* 31. Okafor locates TWAAIL's origins in the pre-1940s decolonisation movements of Latin America. OC Okafor 'Newness, imperialism, and international legal reform in our time: A TWAAIL perspective' (2005) 43 *Osgoode Hall Law Journal* 177.

¹⁰ BS Chimni 'The past, present and future of international law: A critical Third World approach' (2007) 8 *Melbourne Journal of International Law* 500.

¹¹ Mutua (n 9 above).

global order in which Third World states and peoples escape marginalisation.¹² For some scholars, all of this is being sidelined by the hegemonic priorities of a 'post-9/11' global order.¹³ This is a threat insofar as it signifies 'the subtle displacement of Third-World suffering from international consciousness'.¹⁴

2.1 Toward a universal and equitable global order

It is the unjustness of inequality and the strive for substantive responses within a global framework that are unifying features of a diverse and dynamic body of scholarship.¹⁵ A TWAIL analysis demands an intellectual consistency across its various approaches to international law; constituting a 'dialectic of opposition' to an international legal 'regime and discourse of domination and subordination'.¹⁶ This requires that TWAIL exhibit a 'shared ethical commitment' to a just international order, characterised by a global human rights-based approach that is politically transformative.¹⁷

One reason this is essential is the need to move away from the sense in which human rights serve as a means of Third World 'surveillance' by Western interests, as elaborated in Baxi's 'TREM thesis'.¹⁸ For Baxi, the logic of the human rights paradigm in the Universal Declaration of Human Rights (Universal Declaration) — and its consequential human rights covenants — is steadily being supplanted by a trade-related market-friendly (TREM) human rights paradigm which better serves dominant global (Western) interests. That paradigm entrenches the protection of the property interests of global capital as central to its conception of the global social order. It conceives the 'progressive' Third World state as one that is a good host to global capital, protecting it against political instability even at a cost to its most vulnerable citizens. Further, such a state is conceived as market efficient when suppressing its people's human rights-based resistance to the state's 'excessive softness' toward global capital. Unlike the character of the Universal Declaration, the TREMF paradigm acts to deny a redistributive

¹² DP Fidler 'Revolt against or from within the West? TWAIL, the developing world, and the future direction of international law' (2003) 2 *Chinese Journal of International Law* 31.

¹³ Fidler (n 12 above) 74. For ways in which '9/11' was used — especially by the USA — to intensify pro-hegemonic international law and its institutions, see B Rajagopal 'Counter-hegemonic international law: Rethinking human rights and development as a Third World strategy' (2006) 27 *Third World Quarterly* 774.

¹⁴ Okafor (n 9 above) 173.

¹⁵ Mutua (n 9 above) 36. 'Just like the Third World on which it focuses, TWAIL is not a monolithic school of thought' (Okafor (n 9 above) 176).

¹⁶ Mutua (n 9 above) 31.

¹⁷ OC Okafor 'Marxian embraces (and de-couplings) in Upendra Baxi's human rights scholarship: A case study' in S Marks (ed) *International law on the left: Re-examining Marxist legacies* (2008) 256-7.

¹⁸ Okafor (n 17 above) 265-270.

role to the state, which effectively subordinates — even negates — the Universal Declaration’s embrace of the state’s pursuit of a just social order that at least ensures the basic needs of its citizens.¹⁹

Baxi nevertheless offers qualified optimism in the face of such threats to human rights through its subordination to global capital interests. Noting the ‘soft’ character of much international law — especially in the human rights area — he emphasises that the normative expectations of such aspirational laws ‘survive, and even grow stronger, in the face of disappointment. Put another way, the more they stand violated, the greater become their moral strength.’²⁰

Anghie reminds us of the sixteenth century European origins of international law whereby — in furtherance of exploitative trade and territorial conquest — ‘foreigners enjoyed more extensive economic rights than locals who could not assert their claims at the international level or invoke international standards’.²¹ In this setting, the establishment of ‘equal’ rights has emerged in a manner in which they cannot be equally accessed. This has, at least, made their acceptance by dominant and privileged interests that much easier, whilst leaving little for optimism about the immanent elevation of entitlements to globally equitable justice to the level of a ‘hard’ law of rights. Notably, in this regard, Chimni points out that²²

official international human rights discourse eschews any discussion of the accountability of international institutions such as the IMF/World Bank combine or the WTO which promote policies with grave implications for both the civil and political rights as well as the social and economic rights of the poor.

A relevant current example cited by Anghie is the international protection of intellectual property rights via the World Trade Organisation (WTO) Trade Related Intellectual Property Rights (TRIPS) agreements. These oblige — *inter alia* — Third World states to ensure the protection of intellectual property within their domestic jurisdictions, and to protect and benefit ‘foreigners’ (essentially, Western private capital interests) far more than ‘locals’.²³ In this context, it is thus necessary to consider the character of international law and the means by which it may more explicitly ensure its genuinely equitable and universal character.

¹⁹ Okafor (n 17 above) 266-267. For a coherent elaboration of the means by which international law is being used to advantage global capital and property interests over Third World states and peoples and, by association, human rights standards, see BS Chimni ‘Third World approaches to international law: A manifesto’ in A Anghie *et al* (eds) *The Third World and international order: Law, politics and globalization* (2003) 52-60.

²⁰ U Baxi ‘What may the “Third World” expect from international law?’ (2006) 27 *Third World Quarterly* 721.

²¹ A Anghie *Imperialism, sovereignty and the making of international law* (2004) 271.

²² Chimni (n 19 above) 62-63.

²³ n 21 above.

2.2 TWAIL: A signpost at the fork in the human rights road

The challenge commences with outlining a distinction between hegemonic and counter-hegemonic international law such that a co-existence between the two 'requires a serious reconsideration of past tactics and even goals', especially in such areas as human rights and development.²⁴ Chimni phrases this distinction as 'between those demands that are not so good for Third World countries and those that are'.²⁵ Echoing other commentators, Rajagopal points out that human rights discourse has also become a convenient tool of hegemonic international law, and has thus contributed to thwarting the attainment of global justice.²⁶ For Mutua, whilst human rights has its origins in European efforts to curb European atrocities, the development of human rights in international law was largely driven by the legacy of European atrocities against colonised Third World peoples. However, its legitimised practice has been one of European 'defence' of the human rights of Third World peoples, enabled by a 'grand narrative' of Third World 'savages' and 'victims' and Western 'saviours', which thus also affords the latter with 'self-redemption'.²⁷

Responses thus need to be rooted and originate in the Third World as well as find 'common universality' through respect for cultural pluralism, 'to create a new multicultural human rights corpus'.²⁸ Human rights can play a role in changing the unjust international order and particularly the imbalances between the West and the Third World.²⁹ TWAIL analysis in this regard differs from so-called 'Asian-values' discourse. Whilst the latter sees human rights as tantamount to being irredeemably Western in origin and purpose, the former largely views human rights — whatever its sins as a hegemonic tool — as a necessary part of the struggle for Third World justice and counter-hegemonic international law.³⁰

Rajagopal describes four primary prospects in promoting a counter-hegemonic international law: first, the growth of regional international law, albeit still vulnerable to the flaws in the dominant global system; second, the replacement of the current multilateral

²⁴ Rajagopal (n 13 above) 768.

²⁵ Chimni (n 19 above) 67.

²⁶ Rajagopal (n 13 above). For the reader surprised by the notion that human rights discourse has served hegemonic purposes, see Rajagopal (n 13 above) 769-775 and, more vociferously, Mutua (n 27 below), including concerning the hegemonic role of Western/international human rights NGOs.

²⁷ M Mutua 'Savages, victims, and saviours: The metaphor of human rights' (2001) 42 *Harvard International Law Journal* 201 208 210.

²⁸ Mutua (n 27 above) 245.

²⁹ As above.

³⁰ n 21 above, 255-256. There is not uniform optimism about the capacity to reform from 'within'; see, eg, OC Okafor 'Poverty, agency and resistance in the future of international law: An African perspective' (2006) 27 *Third World Quarterly* 808.

system with a co-operative alliance of hegemonic powers, likely not feasible given inevitable clashes between state interests; third, the emergence of a new Third World alliance to succeed the increasingly limited functions of the G-77 (as the primary Third World block), although recent experiences in World Trade Organisation (WTO) negotiations reveal the danger of selective co-option of key states by Western political alliances; or fourth, the emergence of coalitions of smaller states and social movements, for which experience suggests a poor likelihood in creating the necessary global politics.³¹ Elsewhere, Rajagopal has described social movements as ‘extra-institutional forms of mobilisation [that] constitute important arenas of resistance’ and human rights as ‘international law’s sole, approved discourse of resistance’.³²

Given such potential threats and limitations, and the importance of popular engagement in realising the transformative agenda, key issues which need to be mainstreamed within domestic and regional actions in order to re-define international law’s relevance to and within the Third World are those of poverty, agency and resistance.³³ ‘Agency’ concerns local capabilities and autonomy in managing local responsibilities, and relates to the extent to which international law permits or promotes ‘the capability of African peoples to chart their own futures and to self-constitute’ in the face of external and international agencies and actors.³⁴ ‘Resistance’ relates to the essence of TWAIL’s hegemonic versus counter-hegemonic analysis, demonstrating its substantive value to Third World peoples through such actions as ‘the epic (African-led) campaign to reform the relevant world trade rules so as to allow Third World peoples far more access to much cheaper essential (especially HIV/AIDS) medications ...’³⁵

Okafor’s analysis is consistent with Rajagopal’s preferencing of a combination of state-based and social movement strategies. Rajagopal retains some optimism that the existence of such strategic pathways provides a potentially useful framework for TWAIL-informed actions and resistance despite the constraints of that current (TREM-Focused) hegemonic framework.³⁶

For the purposes of later discussion, it is at least noted that the first of his aforementioned options — the development of regional international law — remains a viable pathway despite threats, and provided that it is adequately conscious of the hegemonic potential of human

³¹ Rajagopal (n 13 above) 780-781.

³² B Rajagopal ‘International law and Third World resistance: A theoretical inquiry’ in Anghie *et al* (n 21 above) 151.

³³ Okafor (n 30 above) 799. In the context of HIV and AIDS in Southern Africa, the issue of poverty is highly contested: it is briefly referred to in sec 4.2.

³⁴ Okafor (n 30 above) 804.

³⁵ Okafor (n 30 above) 809.

³⁶ Rajagopal (n 13 above) 781.

rights discourse. This option will further benefit from careful attention to the third and fourth of his alternative prospects: respectively, improved Third World alliances and coalitions of smaller states and social movements. This is especially so in informing strategy and in strengthening the essential place of agency and resistance in ensuring the transformative role of international law in achieving its necessarily counter-hegemonic character.

Following the next section's description of the current nature of the development of a model law on HIV within Southern African states, this article proceeds to examine the relevance of the preceding TWAIL overview and associated insights for that project.

3 Development of the SADC regional model law on HIV

3.1 SADC Parliamentary Forum and its HIV and AIDS focus

SADC was established as an inter-governmental organisation in 1992, with its antecedents mainly in the struggles of the Southern African 'front line' states to end colonial administrations and white minority rule in the region. SADC is governed by its Treaty³⁷ which provides for socio-economic, political and security co-operation although, in practice, its mandate is focused on the former. The Treaty was amended in 2001 in an effort to strengthen its organisational roles and sustainability.³⁸ Generally, SADC aims³⁹

to build a region in which there will be a high degree of harmonisation and rationalisation to enable the pooling of resources to achieve collective self-reliance in order to improve the living standards of the people of the region.

It also serves as a 'regional economic community' of the African Union (AU).⁴⁰

The SADC structure includes a Secretariat located in Gaborone, Botswana, and the SADC Tribunal based in Windhoek, Namibia. The Tribunal was established in 2005 and was ready to receive cases in 2007, and serves as a regional African court. Its jurisdiction concerns determining matters of interpretation or application of the Treaty, SADC Protocols and other aspects of SADC actions, as well as matters

³⁷ SADC *Treaty of the Southern African Development Community (SADC)* (2001) <http://www.sadc.int/index/browse/page/120> (accessed 10 April 2009).

³⁸ See, eg, the African Union <http://www.africa-union.org/root/au/RECs/sadc.htm> (accessed 10 April 2009).

³⁹ As above.

⁴⁰ African Union (n 38 above) http://www.africa-union.org/About_AU/Abrecs.htm (accessed 10 April 2009).

where member states have specified its jurisdiction.⁴¹ The Tribunal, further⁴²

is exhorted to develop its own community jurisprudence, applying also general international law principles and principles from individual states' laws ... Whether that law will include general principles of human rights as found in international law and the constitutions of the member states will be determined by Tribunal jurisprudence.

Whilst SADC represents states via their governments, the SADC Parliamentary Forum (PF or Forum) comprises those states' parliaments, with the single exception of Madagascar, which only joined SADC in 2005 and has not yet joined the Forum. SADC PF was established in 1997 and its objectives include the promotion of multiparty democracy, good governance, gender equality and political stability in the region, and respect for the rule of law, human rights and fundamental freedoms.⁴³

It is a regional inter-parliamentary body, although lacking the statutory basis under the SADC Treaty to enable it to affiliate as an associate member of the Inter-Parliamentary Union (IPU).⁴⁴ This is due to the Forum having been established under article 9(2) of the SADC Treaty as an 'other institution' rather than an article 9(1) institution of SADC — and thus lacking the associated formal status of a SADC body — and the unresolved issue of transforming the Forum into a regional legislature, which would require an amendment to the SADC Treaty. Two principal impediments are a view by some that it is preferable to instead — rather than also — support the Pan-African Parliament, which was inaugurated in March 2004,⁴⁵ and the issue of recurrent financing of a parallel regional body. SADC states thus lack the critical roles of other regional legislative bodies — which are affiliated with the IPU — such as the East African Legislative Assembly and the Parliament of the Economic Community of West African States (ECOWAS).

SADC and Forum responses to HIV and AIDS have taken two different but complementary pathways, linked to and informed by global and continental initiatives, such as UN General Assembly declarations on HIV and AIDS and the 2001 Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases of African Summit of the

⁴¹ SADC Tribunal Protocol of Tribunal and the Rules of Procedure thereof arts 14 & 15 <http://www.sadc.int/tribunal/protocol.php> (accessed 10 April 2009).

⁴² See African International Courts and Tribunals http://www.aict-ctia.org/courts_sub-reg/sadc/sadc_home.html (accessed 10 April 2009).

⁴³ SADC Parliamentary Forum <http://www.sadcpf.org/index.php?disp=about> (accessed 10 April 2009).

⁴⁴ Inter-Parliamentary Union <http://www.ipu.org/english/membshp.htm> (accessed 10 April 2009).

⁴⁵ African Union http://www.africa-union.org/root/au/organs/Pan-African_Parliament_en.htm (accessed 10 April 2009). Only two SADC member states (DRC and Seychelles) are not current members.

Organisation of African States, predecessor of the AU.⁴⁶ In 2003, SADC states adopted the Maseru Declaration on the Fight against HIV/AIDS in the SADC Region.⁴⁷ The Maseru Declaration committed SADC member states, individually and collectively, to concerted efforts in responding to HIV and AIDS through scaling-up services, community education, training and programme efforts, and this remains the focus of SADC's HIV work plan.⁴⁸

At the same time, SADC PF has focused on building parliamentary awareness and support for parliamentary actions on HIV and AIDS, and on legislative reform. A PF regional forum in 2002 resolved to consider the development of model HIV legislation, and this was duly agreed upon by the Forum's Plenary Assembly, in the context of the United Nations (UN)'s 2001 General Assembly Special Session which committed states to adopt a human rights approach in addressing HIV and AIDS.⁴⁹ A survey of legislative efforts to address HIV was carried out in 2004,⁵⁰ and led to the Forum recommending a concerted action on legislative review and reform.

The Forum adopted a wide-reaching plan of action on HIV and AIDS by its Secretariat staff and, in 2005, formalised the establishment of a dedicated small staff unit, which grew during 2008.⁵¹ From 2005, a particular focus was placed on parliamentary training on HIV/AIDS and orphans and vulnerable children (OVC), shaped by collaboration with a technical and funding partner, European Parliamentarians for Africa, and the sheer magnitude of this dimension of the issue and

⁴⁶ For the Abuja Declaration (2001), see http://www.un.org/ga/aids/pdf/abuja_declaration.pdf (accessed 10 April 2009).

⁴⁷ SADC Declaration on HIV and AIDS (2003) [http://www.sadc.int/sadcaidsinfo/docs/Technical Documents/The Maseru Declaration on HIV and AIDS.pdf](http://www.sadc.int/sadcaidsinfo/docs/Technical%20Documents/The%20Maseru%20Declaration%20on%20HIV%20and%20AIDS.pdf) (accessed 10 April 2009).

⁴⁸ See, eg, SADC *SADC HIV and AIDS business plans: Strategic 5-Year business plan 2005-2009* (2004) [http://www.sadc.int/sadcaidsinfo/docs/Technical Documents/Southern African Development Community \(SADC\) HIV and AIDS Business Plan 2005-2009.pdf](http://www.sadc.int/sadcaidsinfo/docs/Technical%20Documents/Southern%20African%20Development%20Community%20(SADC)%20HIV%20and%20AIDS%20Business%20Plan%202005-2009.pdf) (accessed 10 April 2009).

⁴⁹ UN *Declaration of Commitment on HIV/AIDS* (2001); for human rights, see paras 58-61 http://data.unaids.org/publications/irc-pub03/aidsdeclaration_en.pdf (accessed 10 April 2009). A subsequent UNDP-commissioned study in 2006 recommended that regional institutions be tasked 'with taking the lead in developing model legislation' on HIV and AIDS. UNDP *A review of regional and national human rights-based HIV and AIDS policies and frameworks in Eastern and Southern Africa* (2006) 75.

⁵⁰ National Development Institute for International Affairs and SADC Parliamentary Forum *Survey of legislative efforts to combat HIV/AIDS in the Southern Africa Development Community (SADC) region* (2004) http://www.sarpn.org.za/documents/d0001339/NDI_Nov2004_HIV.pdf (accessed 10 April 2009).

⁵¹ By late 2008, the Forum's HIV/AIDS unit comprised five officers — co-ordinator, web-master, information officer, training ('capacity development') officer and accountant — and the present author on a part-time voluntary basis. It has also recruited national HIV/AIDS researchers in seven of the 14 member parliaments: Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe; see <http://www.sadccpf.org/hiv/aids/page.php?pn=research%20assistants> (accessed 10 April 2009).

associated political interest in responding to it.⁵² For example, whilst the number of orphaned children in sub-Saharan Africa increased from 30,9 million in 1990 to 48,3 million in 2005, the share of that cohort due to AIDS was, respectively, 330 000 and 12 million, representing a rapidly growing proportion of that growth (roughly, increasing from 1% to 25% of the total OVC population).⁵³

By 2007, the Forum was in a position to escalate its work on legislative reform. It contracted technical expertise in this regard from the University of Pretoria's AIDS and Human Rights Research Unit,⁵⁴ which prepared a 'position paper' to inform, in particular, parliamentarians in the process of drafting a model law.⁵⁵ The draft model law was successively amended following various review processes, culminating in several formal discussions in mid-2008.⁵⁶ This process enabled a final draft to be produced in preparation for SADC PF's conduct — in collaboration with the AIDS and Human Rights Research Unit — of a 'satellite session' on the model law at the XVII International AIDS Conference held in Mexico City in August 2008.

The model law was formally adopted at the November 2008 Plenary Assembly of the Forum. Following that, the Forum Secretariat has been pursuing opportunities with member parliaments, and especially the relevant parliamentary committees responsible for HIV matters, as well as key social movements, to determine preferred mechanisms for achieving the domestic adoption of the model law. This needs, for each state, to take account of three primary concerns. First is the issue of whether the model law should be used as a basis for modifying or supplanting existing domestic law; second, whether adoption of the law

⁵² These workshops led to the 2004 Cape Town Declaration on an Enhanced Parliamentary Response to the Crisis of Orphans and other Children made Vulnerable by HIV/AIDS in Africa http://www.awepa.org/resources/cape-town-declaration-on-an-enhanced-parliamentarian-response-to-the-crisis-of-orphans-and-other-ch_en.html (accessed 10 April 2009).

⁵³ UNICEF *Africa's orphaned and vulnerable generations: Children affected by AIDS* (2006) 35 http://www.unicef.org/publications/files/Africas_Orphaned_and_Vulnerable_Generations_Children_Affected_by_AIDS.pdf (accessed 10 April 2009).

⁵⁴ Established in 2005 as a collaboration between the University's Centre for Human Rights and Centre for the Study of AIDS; see http://www.chr.up.ac.za/centre_projects/ahrru/ (accessed 10 April 2009). Financial support to the PF for these purposes has come from the Swedish International Development Co-operation Agency.

⁵⁵ SADC Parliamentary Forum *Model law on HIV in Southern Africa: Position paper* (2007) http://www.sadcpf.org/SADC_PF_model_law_on_HIV_position_paper.pdf (accessed 10 April 2009).

⁵⁶ Primarily, but not only, the following PF workshops: 'HIV/AIDS Standing Committee and Policy Organs: Workshop on Consideration of Model Legislation on HIV & AIDS', Pretoria, South Africa (25-27 June 2008); 'Regional Consultation and Action Planning Meeting on Rights-Based Law in the Context of National Responses to HIV' (with UNAIDS and AIDS and Rights Alliance for Southern Africa), Johannesburg, South Africa (7 July 2008), and 'Regional Consultative Meeting of Experts on the Draft SADC PF Model Law on HIV' (with University of Pretoria AIDS and Human Rights Research Unit), Pretoria, South Africa (15-16 July 2008). For a final version of the Model Law on HIV in Southern Africa, see http://www.chr.up.ac.za/centre_projects/ahrru.

would best or more likely occur by formal government sponsorship or as a private member's bill; and third, whether the domestic laws should seek to ensure uniform provisions across the member state jurisdictions or to strategically accommodate policy differences.

All three aspects are likely to impede the model law's passage into domestic legislation. However, it is first necessary to summarise the key features of the framework 'position paper' and of the model law before considering its rationale and content in terms of parliamentary strategy and policy adequacy. This needs to occur in terms of both the nature of HIV in the region and the previous survey of TWAIL scholarship and insights.

3.2 Overview of the Model Law on HIV in Southern Africa

The position paper sets the framework for the model law and provides a general discussion of the role and nature of HIV-responsive laws. In doing so, it emphasises a human rights focus as more effective than proscriptive or punitive (criminalisation) approaches in responding to the epidemic. This accords with UN experience: 'Countries that have recorded the greatest success in addressing their national epidemic have implemented a strong human rights-based approach.'⁵⁷

The paper describes the model law as serving as a 'template' which is relevant to the various jurisdictions, and possessing persuasive value 'materially, on the quality of [its] provisions; formally, on the process of [its] adoption; and organically, on the nature of stakeholders involved in that process'.⁵⁸ It emphasises the importance in any state-based adaptation of its provisions to ensure that the 'minimum core' of human rights protections and primary focus on being HIV-responsive are not compromised, especially given that SADC states are parties to the range of UN and African Union (AU) human rights instruments.⁵⁹

The importance of this in the SADC region is that, whilst various countries have adopted appropriate policy in the area, this is ultimately unenforceable, and – within those states that have adopted HIV-related legislation – it has tended to be concerned with employment law and the criminalisation of transmission.⁶⁰ Prior efforts to promote

⁵⁷ UN General Assembly *Summary of the 2008 high-level meeting on the comprehensive review of the progress achieved in realising the Declaration of Commitment on HIV/AIDS and the Political Declaration on HIV/AIDS (United Nations Headquarters, 10-12 June 2008): Note by the President of the General Assembly, 62nd session UN Doc A/62/895 (3 July 2008) para 27.*

⁵⁸ n 55 above, 5-6.

⁵⁹ n 55 above, 7-8. All SADC PF member states are parties to all of the relevant human rights treaties.

⁶⁰ n 55 above, 12-14; UNDP (n 49 above) 73. For various legislation, policies and case law in the region, see UNDP *Compendium of key documents relating to human rights and HIV in Eastern and Southern Africa (2008) Parts D2, D3 & D4, respectively* http://content.undp.org/go/cms-service/download/asset/?asset_id=1704942 (accessed 10 April 2009).

model HIV laws within the region have been external initiatives lacking domestic ownership and appropriate engagement of the responsible legislative bodies.⁶¹

Foreshadowing the political impediments to a rights-based approach, the position paper observes that⁶²

of the 14 SADC member states, at least eight criminalise commercial sex work or activities related to it, 11 criminalise male-to-male sex, and in most of them, the situation of women and girls is one of inequality and serves to fuel the epidemic.

In its discussion of the scope of legislation, the paper notes that a human rights-based approach remains the most proven successful strategy in response to the epidemic, including compared to a response based on 'public health principles'.⁶³ It asserts that criminalisation approaches are — at best — futile and more likely to be counter-productive, and that sufficient provisions are already contained within domestic criminal statutes to complement rights-based HIV legislation with respect to such concerns as sexual assault and the protection of minors.⁶⁴ The paper concludes with a discussion of a range of contentious issues such as cultural practices, mother-to-child transmission, HIV testing and disclosure of status, and the situation of prisoners, and annexes a summary of the current legislative situation concerning HIV and AIDS across SADC states (minus the Democratic Republic of the Congo, plus the Seychelles, which withdrew from SADC in 2004) and Uganda.

This, understandably, ensured robust dialogue at the principal consultative forum on the model law, the Deliberative Session for Members of Parliament and Legal Drafters on Model Legislation for HIV and AIDS in the SADC Region, held in Dar es Salaam, Tanzania, in November 2007, as a session of the Forum's Regional Standing Committee on HIV/AIDS. Recurring issues raised throughout the five-day forum concerned such aspects as the legal status of sodomy, condom provision to prisoners, criminalisation of 'intentional transmission', the right of HIV-positive people to have a family, and the status of commercial sex workers. In a useful intervention as a sessional speaker, a High Court judge from Botswana reminded the gathered legislators that, in the absence of proper legislation, courts increasingly resort to international law to safeguard the human rights of those living with

⁶¹ n 55 above, 15.

⁶² n 55 above, 8.

⁶³ n 55 above, 17. For a valuable discussion of the need for a rights-based approach to health services and care, in the specific context of HIV/AIDS, see P Farmer 'Global AIDS: New challenges for health and human rights' (2005) 48 *Perspectives in Biology and Medicine* 10.

⁶⁴ n 55 above, 27–29. For the inappropriateness, if not counter-productivity, of criminalisation approaches, see PM Eba 'Pandora's box: The criminalisation of HIV transmission or exposure in SADC countries' in F Viljoen & S Precious (eds) *Human rights under threat: Four perspectives on HIV, AIDS and the law in Southern Africa* (2007) 13.

or affected by HIV. He noted the range and limitations of relevant laws across the region (an 'uneven' legislative landscape) and the need for more uniform remedies and protections for affected populations consistent with human rights provisions.⁶⁵

Whilst the draft model law was well-informed by the proceedings of that 'deliberative session', its provisions were bound to be contentious to many legislators across the region. Debate within subsequent consultative workshops on the model law has tended to focus on the legal status of the issues referred to in the preceding paragraph, except that the right of HIV-positive persons to have a family seems to have been broadly accepted. This is at least so in principle, even though it remains problematic in practice in terms of references to 'wilful transmission' when the HIV status is known. As for the scope and provisions of the model law, it has — first and foremost — placed a human rights-based approach as the primary benchmark, which has challenged many parliamentarians favouring some forms of criminal responses to various vulnerable or marginalised populations.

The model law describes its aims as being to provide a legal framework for national law reform on HIV in conformity with international human rights law standards; to promote effective prevention, treatment, care and research strategies and programmes on HIV and AIDS; to ensure the respect, protection and realisation of human rights for people living with or affected by HIV; and to promote the adoption of specific national measures to address the needs of vulnerable and marginalised groups in the context of AIDS.⁶⁶ It seeks to be particularly informed by compatible provisions within existing HIV laws within countries of and beyond the region.⁶⁷

There are various notable provisions. The following is, thus, only a selective summary of the model law's treatment of particular issues. Part II concerns prevention. It includes provisions for the eradication of 'harmful cultural practices that contribute to HIV transmission' and sensitisation of the community to the associated dangers of those practices, defined as including 'early marriages, female genital mutilation, forced marriages and widow inheritance'. It requires the state — *inter alia* — to ensure access to quality female and male condoms and needle exchange programmes, and to 'consider' the decriminalisation of commercial sex work and consensual adult same-sex relationships. It provides, for those states where male circumcision is legal and culturally and religiously acceptable, that it only be performed in accordance with proper standards

⁶⁵ SADC Parliamentary Forum Deliberative Session for Members and Legal Drafters on the Model Law for HIV and AIDS in the SADC Region (including the final Communiqué) 10-14 November 2007, draft version.

⁶⁶ SADC Parliamentary Forum Model Law on HIV in Southern Africa (Draft) (2008) sec 1. All references within this paper to the SADC PF model law are to the version presented to the Plenary Assembly in November 2008.

⁶⁷ The model law has adapted provisions drawn from laws in place across eight different countries, of which seven are African states, as well as UN and AU instruments.

and with the prior voluntary and informed consent of the person or his guardian, and that campaigns emphasise that male circumcision ‘may reduce but does not eliminate the risk of HIV transmission’.

Part III deals with HIV testing and counselling. It requires the state to ensure free and accessible HIV testing facilities, with testing being voluntary and anonymous and both preceded and followed by counselling. Whilst it defines compulsory testing, its only reference to it is to prohibit it for prisoners. It authorises a ‘person providing treatment, care or counselling services to a person living with HIV [to] notify a third party of the HIV status of that person’ when that provider determines that the third party is at risk of HIV transmission, the person living with HIV has failed to inform the third party of that risk, and the provider has ‘ensured that the person living with HIV is not at risk of physical violence resulting from the notification’.⁶⁸

Part IV provides for the protection of the rights of people living with or affected by HIV, especially children, women and girls, and prisoners. It prohibits any discrimination against any person on the basis of their HIV status, including safeguarding all sexual and reproductive rights, the rights to marry and to bear children, and the right to access anti-retroviral treatment. It requires measures to safeguard the HIV-affected child’s inheritance and property rights and that the court designate an adult guardian for children remaining in child-headed households, who shall also be guaranteed state support and assistance. It further provides that the state shall protect women and girls from ‘traditional practices that may negatively affect their health’, prohibit marital status as a defence to a rape charge or non-consensual sexual act, and ensure equal legal rights to women regardless of HIV status. Prisoners are to be afforded access to information on and the means of HIV prevention, including clean injecting drug equipment and access to condoms, the provision of which may not be regarded as an offence. General provisions for testing, counselling and free health services apply equally to prisoners, who may not be isolated due to HIV status, and should receive compassionate early release in the final stage of AIDS.

Part V obliges the state to ensure access to high-quality treatment, care and support, including ‘the use of all flexibilities under the [TRIPS Agreement] and the Doha Declaration as well as measures to encourage the local production of medicines’, prompt and free treatment and support for all rape survivors, and ‘protection of the population against fake and counterfeit medicines and treatments’.

⁶⁸ The person in a relationship to first ascertain their HIV status is often the female, with frequent reported instances of violence against her by her male partner when informed of her status (whether or not he transmitted the virus or knows his status). This thus seems to expose the woman to such additional risk and to place a substantial legal onus on the service provider in such circumstances. Nevertheless, this provision is consistent with UNAIDS’s recommended language; see UNAIDS *UNAIDS recommendations for alternative language to some problematic articles in the N’Djamena legislation on HIV (2004)* (2008) 11-12 http://www.icw.org/files/Alternative_language_280308.doc (accessed 1 November 2008).

Part VI concerns research and clinical trials, and requires the establishment of an ethical research body to review HIV-related human biomedical research in accordance with the model law and human rights principles, and mandates the written voluntary informed consent of persons in associated trials and research.

Part VII concerns support to people living with HIV, including the regulation of community home-based care. It provides that non-governmental organisations (NGOs) may institute legal proceedings on behalf of HIV-affected persons and assures such persons of their right to 'meaningful participation in the design and implementation of HIV and AIDS activities at national and community level'.

Part VIII deals with offences and penalties, and sets down penalties associated with breaches of confidentiality and unlawful disclosure, violations concerning testing and counselling, and contraventions of the requirements for informed consent to research and clinical trials. Part IX provides for two state-based enforcement options: the establishment of an HIV tribunal or assignment of jurisdiction to a superior court.

In brief, the PF model law is strongly compatible and consistent with international standards and obligations, including those concerning human rights instruments, and is comprehensive in its human rights provisions. It is also controversial for the same reasons, especially when legislators are faced with seemingly inevitable temptations to sacrifice an effective legal basis for combating the HIV and AIDS epidemic to 'moral' concerns and punitive desires. These are not problems that have plagued the model law that is considered in the next sub-section.

3.3 Comparative comments on the West and Central African Model Law

In 1998, the IPU adopted its resolution on HIV and AIDS.⁶⁹ This called on governments to 'adopt legislation ensuring that the human rights of persons infected or affected by HIV/AIDS are respected', and to 'review and reform penal legislation and prison systems so as to ensure that they comply with international obligations for the protection of human rights, especially as regards HIV/AIDS'.⁷⁰ In this context, the IPU called upon legislators to comply with the International Guidelines on HIV/AIDS and Human Rights in implementing this resolution.⁷¹

The process to develop a model law on HIV in West and Central Africa was led by the Action for West Africa Region (AWARE) HIV/AIDS Proj-

⁶⁹ UNAIDS and Inter-Parliamentary Union *Handbook for legislators on HIV/AIDS, law and human rights: Action to combat HIV/AIDS in view of its devastating human, economic and social impact* (1998) Annex B.

⁷⁰ n 69 above, para 7.

⁷¹ UNAIDS *International guidelines on HIV/AIDS and human rights* (2006 Consolidated Version) http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf (accessed 1 November 2008).

ect, a 'USAID-funded instrument'.⁷² In September 2004, it conducted a regional workshop in N'djamena, Chad, to adopt the model law — commonly referred to as the N'djamena model law — in collaboration with regional bodies, including the Forum of African and Arab Parliamentarians for Population and Development and ECOWAS.⁷³

The UN General Assembly's 2001 Declaration of Commitment on HIV/AIDS included an unqualified commitment that states legislate 'to ensure the full enjoyment of all human rights and fundamental freedoms by people with HIV/AIDS and members of vulnerable groups'.⁷⁴ However, AWARE's statement of 'justification' forming a part of that workshop report qualified that commitment, 'to find solutions that reconcile individual rights and demands of public health based on a prescriptive framework model'.⁷⁵ This was an early sign of intent to qualify human rights guarantees.

The N'djamena model law comprises seven chapters dealing with, respectively, access to education and information; secure health practices and procedures, mainly concerning the handling of and exposure to blood; the regulation of traditional medicine practitioners; voluntary counselling and testing, including provisions for mandatory testing; health and counselling services; confidentiality, including provisions for involuntary disclosure; and prohibitions on discrimination on the basis of real or suspected HIV status.⁷⁶

The N'djamena model law contains — at best — very weak and qualified human rights provisions, elements of mandatory testing and disclosure, and criminalisation of non-intentional HIV transmission. It makes no explicit reference to human rights. It is silent on the rights of prisoners and their access to condoms, silent on male-to-male sex, silent on commercial sex work, silent on injecting drug use, and silent on the rights of women and girls. It is gender-blind on provisions for partner notification of HIV status. For an epidemic with well-established gender dimensions, it makes just two references to women, neither of which exhibit sensitivity to or awareness of such considerations. Firstly

⁷² AWARE-HIV/AIDS Project Regional Workshop to Adopt a Model Law for STI/HIV/AIDS for West and Central Africa (2004) 3 <http://www.awarehiv.org/images%5Cinserts%5CModel%20law%20on%20HIV-AIDS%20.PDF.pdf> (accessed 28 August 2008), but site <http://www.awarehiv.org/> and this report unavailable by 1 November 2008 (copy of document with author).

⁷³ ECOWAS is the regional counterpart to SADC, comprising 15 countries of West Africa, and similarly to SADC is a regional economic community of the AU.

⁷⁴ UN (n 49 above) para 58.

⁷⁵ n 72 above, 7. It is not clear whether this report was agreed to by the workshop partners to represent an official record of proceedings, or whether the absence of commentary on human rights aspects or dissenting views on the scope of the model law is an accurate representation of the workshop discussions.

⁷⁶ *West and Central Africa: Law # of 2004 on HIV/AIDS Prevention and Control* in UNDP (n 60 above) 279-283. The version in this UNDP report is slightly amended from that annexed to AWARE (n 72 above) 9-19; but not with respect to human rights provisions.

is the inclusion of mother-to-child transmission within the definition of 'HIV transmission' (article 1), which thus includes breast-feeding within the scope of 'wilful transmission' should infection of the child occur and, secondly, is the provision for mandating HIV testing of a pregnant woman who undergoes a medical check-up (article 18(c)).

UNAIDS has responded with recommendations on extensive amendments to the model law in order to harmonise it with international human rights obligations and UN HIV and AIDS resolutions and declarations.⁷⁷ This includes advising against the model law's adoption of various criminalisation provisions. 'There is no evidence that criminalising HIV is an effective means of preventing HIV transmission. Furthermore UNAIDS is concerned that criminalising HIV transmission is likely to undermine proven HIV prevention efforts ...'⁷⁸

In meeting the need for effective responses to HIV and AIDS, Kirby has spoken of 'the danger of a virus of a different kind, namely the virus of highly inefficient laws', by which he means 'intuitive' legislative responses to the epidemic which are contrary to the most effective means of its prevention, based on the protection of the human rights of vulnerable populations.⁷⁹ Such legislative inefficiencies include mandatory testing, restrictions placed on people living with HIV, criminalisation and punishment, involuntary disclosure associated with social stigmatisation, and weak or absent protections of the human rights of persons living with or affected by HIV, especially those vulnerable to labelling as 'unclean, immoral and dangerous to the community — people who need to be controlled, checked and sanctioned'.⁸⁰

Since the 2004 adoption of the N'djamena model law, seven states have adopted or adapted its provisions, and another six states are preparing to do so.⁸¹ A number of the national laws closely follow many of the punitive and counter-productive provisions of the model law,

⁷⁷ n 68 above.

⁷⁸ n 68 above, 15.

⁷⁹ M Kirby 'The never-ending paradoxes of HIV/AIDS and human rights' (2004) 4 *African Human Rights Law Journal* 167.

⁸⁰ As above.

⁸¹ The seven legislating states are Benin (2005), Guinea (2005), Guinea-Bissau (2006), Mali (2007), Niger (2007), Sierra Leone (2007) and Togo (2005). The prospective legislating states are Cameroon, Cape Verde, Chad, Côte d'Ivoire, Mauritius and Senegal (R Pearshouse 'Legislation contagion: The spread of problematic new HIV laws in Western Africa' (2007) 12 *HIV/AIDS Policy and Law Review* 2/3, 5 and n 1 <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1275> (accessed 10 April 2009). The inclusion of Mauritius — a SADC state — may mean to refer to Mauritania or simply be a geographic error. With the exception of Cameroon and Chad, all these states are ECOWAS members, except Mauritania, which left ECOWAS in 2000. The UNDP's 2008 *Compendium* only includes Benin's law. A subsequent report cites the AWARE model law as 'best practice' shaped by Benin's domestic adoption, followed by Burkina Faso, Cape Verde and Niger (suggesting nine legislating states), each with support from various UN agencies: Family Health International *Disseminating and replicating best practices in West Africa: Strengthening West Africa's response to the HIV/AIDS epidemic* (2008) 9-13.

and all of those domestic laws provide that ‘wilful transmission’ is an offence whilst not defining it.⁸² The N’djamena model law includes a definition of wilful transmission that is based on knowledge of status but does not include intent.

This is not inconsistent with the IPU’s 2005 HIV/AIDS resolution that ‘calls upon parliaments to enact legislation to punish those who knowingly take the risk of transmitting HIV/AIDS, or who wilfully do so’.⁸³ However, the IPU may be having a re-think, given the ‘final conclusions’ to its First Global Parliamentary Meeting on HIV/AIDS in 2007. These state that ‘there is no evidence that criminal laws specific to HIV transmission will make any significant impact on the spread of HIV or on halting the epidemic’.⁸⁴

UNAIDS urges the criminalisation of HIV transmission only where it is wilful and actually occurs, and encourages states to use general criminal law provisions rather than HIV-specific laws in this regard.⁸⁵ ‘In the overwhelming majority of cases, HIV is not spread by criminals but by consensual participants in a sexual act, neither of whom know their HIV status.’⁸⁶

Equating knowledge of status with intent when engaging in risky activities is particularly problematic in jurisdictions in which ‘wilful transmission’ is defined to include mother-to-child transmission. This is the case with the West and Central African model law. It has been, at the least, incorporated into the corresponding legislation for Sierra Leone, explicitly criminalising a pregnant woman who knows her HIV-positive status but fails to ‘take all reasonable measures and precautions to prevent the transmission of HIV [to] the foetus’.⁸⁷ Given the impact upon such risk due to the availability in many parts of Africa of single-dose medication rather than full triple therapy during pregnancy, as occurs throughout Western countries,⁸⁸ it is spurious to thus attribute criminal culpability to the mother.

⁸² Pearshouse (n 81 above) 9-10. Only Togo’s law includes intent as a factor in wilful transmission.

⁸³ Inter-Parliamentary Union *The role of parliamentarians in advocating and enforcing observance of human rights in the strategies for the prevention, management and treatment of the HIV/AIDS pandemic* (2005) para 14(c).

⁸⁴ Inter-Parliamentary Union *Final conclusions* (2007) para 18.

⁸⁵ UNAIDS *Policy brief: Criminalisation of HIV transmission* (2008) 1 http://data.unaids.org/pub/BaseDocument/2008/20080731_jc1513_policy_criminalization_en.pdf (accessed 10 April 2009).

⁸⁶ S Burris & E Cameron ‘The case against criminalisation of HIV transmission’ (2008) 300 *Journal of the American Medical Association* 5, <http://jama.ama-assn.org/cgi/reprint/300/5/578> (accessed 10 April 2009).

⁸⁷ n 3 above; Prevention and Control of HIV and AIDS Act 2007 (Sierra Leone) sec 21 <http://www.sierra-leone.org/Laws/2007-8p.pdf> (accessed 10 April 2009); conviction carries a sentence of up to seven years’ imprisonment and a fine.

⁸⁸ S Lewis ‘Keynote address at the closing session of the XVI International AIDS Conference’ Toronto, Canada (2006) <http://www.aids-freeworld.org/content/view/74/153/> (accessed 10 April 2009).

The Sierra Leone law appears to similarly criminalise breast-feeding by a woman knowing she is HIV positive. For HIV-positive mothers, exclusive breast-feeding is advocated; risk to the infant arises when a combination of feeding practices are used, as it reduces the infant's viral resistance. For women unable to consistently afford substitute milk formula — especially when informed that breast-feeding risks transmission — or concerned about available water quality to mix infant formula, criminalisation of breast-feeding is manifestly absurd, and exacerbated by situations in which pregnant women are unable to access or afford anti-retroviral treatment for themselves or their newborn child. '[I]n 2007 only an estimated 34% of pregnant HIV-positive women in need were receiving such treatment.'⁸⁹ Criminal culpability might more reasonably rest with the political decision makers and the international community which fails to fulfil resource commitments on treatment.

UNAIDS — as with other UN agencies in the West African region — appears not to have been engaged in the process of developing the N'djamena model law. The drafting process was clearly driven by AWARE, which comprised four of the 2004 workshop's five opening presentations, and there is no reference to UNAIDS in the workshop report. The workshop report notes the attendance of 'representatives for the United Nations Agencies in Chad'. However, in its annexed list of participants, no UN presence is listed amongst the 50 attendees. From the combined text of the report and the list of participants, AWARE's HIV/AIDS officers and the US Embassy's *chargé d'affaires* — and, at the closing session, the US Ambassador — appear to be the only attendees outside regional member states or formal regional bodies.⁹⁰

Even if UNAIDS had been excluded from that process, this does not account for its apparent invisibility in the subsequent processes of developing and adopting domestic HIV laws and its associated engagement with the relevant governments. Its production of a strong and coherent response to the deficiencies and shortcomings of the N'djamena model law did not occur until 2008, by which time many laws had already been adopted.

The framework of West African law on HIV and AIDS appears to illustrate Kirby's warning of 'intuitive' responses to resort to punitive measures. This is the consequence of political representatives being tempted to sacrifice effective responses in order to exhibit 'strong' and 'moral' leadership. In the case of the N'djamena model law, this proved to be unnecessary, as the USAID-funded external process provided that 'leadership'.

⁸⁹ n 85 above, 6. The figure for African states would be even lower.

⁹⁰ n 72 above, 1 5, Annex 4.

4 TWAIL responses to the Model Law

The Southern African Model Law has the capacity to provide leadership of a different kind. Resonant with Rajagopal, it is explicitly human rights-focused, indigenous to the region in origin, mandate and process, and unfolding as a collaborative exercise between regional legislators and key social movements.⁹¹ There appears to have been a degree of symbiosis in this regard: the uniting of major non-governmental agencies in supporting the development of a model law that is rights-based, participatory in its process and that repudiates coercive or punitive provisions also served to strengthen the Forum's own efforts at leveraging the commitment of legislators otherwise attracted by criminalisation provisions.⁹²

This contrasts with the apparent lack of civil society resistance in West Africa, which granted at least tacit approval to the punitive provisions in that region's Model Law. This does not mean that the SADC PF Model Law is fully rights-based: It merely asks states to 'consider' the decriminalisation of commercial sex work and consensual sexual relations (article 11(4)); it provides that pre-test counselling includes notification of the 'fact' of confidentiality of the results and 'encouragement of disclosure' to a partner even though contrary provision is made for a doctor to divulge the person's status to a third party deemed to be at risk of infection where the HIV-positive person fails to do so (articles 13(3) and 15(4)); and it enables 'actual or perceived HIV status' to be grounds for denying a person health or life insurance, retirement benefits or social security on the condition that there are other grounds for such denial (article 21(1)). However, as previously discussed, the Southern African Model Law is nevertheless strongly compliant with human rights provisions, and by global standards.

The Model Law is also capable of contributing to the building of regional international law, but is clearly hampered in this regard by SADC's resistance to date to establish a regional parliamentary body. This places Southern African states at some considerable disadvantage compared to other parts of Africa, notably those states covered by the ECOWAS Parliament and the East African Legislative Assembly,⁹³ and the parallel judicial structures of the ECOWAS Community Court of Justice and the East African Court of Justice. On the other hand, this enabled SADC PF — with its informal status within the SADC frame-

⁹¹ Rajagopal (n 13 above) 780-781.

⁹² See, eg, 'Civil Society Statement on HIV-related Legislation in Southern Africa', signed by 15 civil society agencies across 10 countries of the region (14 July 2008) <http://www.chr.up.ac.za/press%20releases/PRETORIA%20CIVIL%20SOCIETY%20STATEMENT%20ON%20HIV%20RELATED%20LEGISLATION.doc> (accessed 10 April 2009).

⁹³ The East African Community comprises the original member states of Kenya, Tanzania and Uganda, plus — since 2007 — Burundi and Rwanda. Tanzania is a member of both EAC and SADC.

work — to develop a model law in an incremental and collaborative manner that has afforded it the opportunity to canvass support and build consensus across a range of core but controversial elements.

But, as it stands, the PF Plenary Assembly's adoption of the Model Law carries no formal authority, but rather enables concerted parliamentary-level processes toward that end as well as adding symbolic weight to parliamentary support due to PF endorsement by its parliamentary representatives. There is a strategic shortcoming in the Forum's actions in this regard, which concerns the role of the SADC Tribunal.⁹⁴ To the extent that regional justiciability is an important objective of a regional model law, a preferred course of action — rather than a protracted state-by-state adoption of some version of it — would appear to have been for the Forum to advocate SADC's formal adoption of it, whether as a declaration or as a protocol.

The SADC Tribunal demonstrated in its earliest stages — its second case — that its development of regional jurisprudence will rely upon international law, including human rights law, as well as being guided by human rights jurisprudence in other regional jurisdictions.⁹⁵ SADC protocols are fundamental sources of law for the Tribunal, and SADC declarations are influential and may also be referenced by parties in formal proceedings. The model law would only come within the Tribunal's jurisdiction once it is adopted domestically, and then only for matters concerning that state, although any domestic judgments on it may be influential in subsequent Tribunal decisions concerning matters arising from other member states. This suggests that, insofar as the development of regional jurisprudence is concerned, the model law remains outside of the Tribunal's jurisdiction as it is not a 'subsidiary instrument' and the Forum's Plenary Assembly adoption of the model law is also unlikely to constitute a states' agreement that confers such jurisdiction, in accordance with the Tribunal's Protocol (article 14).⁹⁶

Such an important issue of strategy was absent from options canvassed in the position paper prepared to inform the development of the model law. Whilst that paper correctly stated that 'the main weakness of [national] policies is that they are not legally enforceable', it did not point out that such policies at least have a persuasive value that the model law appears to lack within the regional jurisdiction. The Tribunal's early demonstration of the core relevance of international

⁹⁴ 'The Tribunal shall have jurisdiction over disputes between states, and between natural or legal persons and states' (art 15(1)), provided that the applicant 'has exhausted all available remedies or is unable to proceed under the domestic jurisdiction' (art 15(2)), and regardless of the consent of the other (state) party (art 15(3)); n 41 above.

⁹⁵ *Mike Campbell (PVT) Limited & Another v Republic of Zimbabwe (2/07)* [2007] SADCT 1 (13 December 2007) <http://www.sadc-tribunal.org/docs/CASENo207.pdf> (accessed 10 April 2009).

⁹⁶ Comments by the Tribunal's Registrar, Justice C Mkandawire (interview with author 8 April 2009).

law in its decision making also suggests that any such non-compliance of various national laws on HIV may be currently vulnerable to successful regional judicial challenge without any influential role of the Model Law in this regard. However, as per Rajagopal's reference to strategic pathways being faced with both opportunities and limitations in pursuing TWAIL-informed actions,⁹⁷ SADC states may also have an advantage in this adopted pathway. The Forum's strong leadership in the model law's development through a participatory process with a focus on rights-based provisions may, in turn, help to leverage the political commitment necessary for advancing the transformation of SADC PF into a regional parliamentary structure. The Forum's collaboration with several state parliaments in adopting the model law as domestic legislation without sacrificing human rights provisions may, in turn, help to expedite its domestic adoption across other member states and, as a consequence, strengthen its regional uniform character as appropriately rights-based law. There is no less guarantee that member states will adopt laws in conformity with the model law whether it enjoys the support of member parliamentarians via the Plenary Assembly or it assumes the status of a SADC protocol with member states. The former course has probably enabled stronger engagement of civil society in the process whilst the latter course strengthens its justiciability at the regional level in the absence of domestic adoption.

The effective engagement of key members of the judiciary across several states needs to be strengthened in this regard. This, in turn, may assist in better advancing a domestic legal framework strongly based on international legal standards and obligations and with better state attention to Tribunal powers. Nevertheless, the continued absence of a regional legislature remains a potentially inherent limitation.

4.1 TWAIL insights to SADC collective action

The Forum's focus on networking with key civil society organisations, academia and social movements within the region may serve to build state-based coalitions necessary to promote the centrality of 'agency' as advocated by Okafor,⁹⁸ whose reminder of the need to ensure local autonomy and capabilities is pertinent. Although the region is not submitting to the external agenda-setting and shaping of the legislative framework as has occurred in West and Central Africa, it remains an issue for the Forum that non-local actors may normatively disregard its direct engagement in various capacity-building activities with the parliaments of member states with respect to HIV and AIDS-related issues.⁹⁹

⁹⁷ Rajagopal (n 13 above) 781.

⁹⁸ Okafor (n 30 above) 804.

⁹⁹ This is an ongoing issue for the Forum with some of its key external partners which, eg, engage in training and policy development activities directly with Southern African parliaments in the absence of timely notification of SADC PF, let alone engagement.

This needs to be confronted forcefully, given the importance to effective counter-hegemonic agency of engagement with appropriate transnational social movements. This is especially so concerning global issues demanding global responses duly informed and shaped by the situation, experiences and priorities of the most adversely impacted within marginalised and disadvantaged populations. Such agency is also crucial to aspects of Third World resistance that are necessary for Southern African states. This concerns, for HIV and AIDS in SADC states, at least three areas of attention.

First, human rights duties, obligations and protections must be rigorously and persistently asserted — even restated and reinterpreted — in a non-hegemonic context. This requires due regard to marginalised populations as well as alliances which more effectively engage western states in actually meeting their unequivocal commitments and obligations under international agreements, especially with respect to the financing of and support for measures to deal with the epidemic. To paraphrase Baxi, such commitments have been so consistently violated that they become morally stronger in the face of such repeated disappointment.¹⁰⁰ This is evident, for example, in the repeated defaulting by key donor (notably Western and, in particular, G8) states concerning official development assistance levels and the resourcing of efforts towards achieving the Millennium Development Goals within Third World states. For Lewis, '[e]verything in the battle against AIDS is put at risk by the behaviour of the G8'.¹⁰¹

Second, it is necessary to strengthen Third World solidarity on trade-related issues that adversely impact capacity to respond to HIV and AIDS. This includes access to affordable medications, and provides the strategy for resistance to the TREMF paradigm of which Baxi has warned. The model law provides that the state must take 'all necessary measures' to ensure access to treatment by those needing it, including 'the use of all flexibilities' under the TRIPS Agreement and the Doha Declaration — which asserts and elaborates those 'flexibilities' — and encouragement for 'the local production of medicines'.¹⁰²

Okafor emphasises the inevitable conflict between such WTO trade obligations and UN treaty provisions that shape international human rights law, including with respect to poverty eradication and the right to development, to the extent that trade rules inhibit the achievement of human rights obligations.¹⁰³ As a consequence,¹⁰⁴

it is now a widely established principle that the relevant global patent protection rules can and ought to be broken in order to provide ready access to

¹⁰⁰ n 21 above.

¹⁰¹ n 88 above.

¹⁰² n 65 above, para 36(1). All SADC member states are WTO members and are therefore bound by those instruments.

¹⁰³ Okafor (n 30 above) 802-4.

¹⁰⁴ n 55 above, 8.

cheap life-saving essential drugs to the poorer peoples of the world; a large percentage of whom live on the African continent.¹⁰⁵

Likely so, but it may not be necessary to explicitly go outside the WTO framework. The Doha Declaration presents the SADC region with opportunities in confronting TRIPS rigidities. It would obviously be useful for a case before the SADC Tribunal to elaborate the HIV and AIDS situation within member states as a 'national emergency' in accordance with the Declaration (para 5(c)) and to shape regional jurisprudence on the application of TRIPS, although a collective declaration to that effect by member states via SADC may suffice. It is also important for strategic elaboration of a regional agreement to apply TRIPS 'flexibilities' to their fullest practical extent, and to build alliances with supportive non-regional states that may be capable of assisting with the associated technology transfers in accordance with the Declaration.¹⁰⁶ This likely extends such flexibilities beyond the most affected states to the extent that those supportive states are instrumental to Doha-sanctioned measures taken or called for by seriously-affected states, and may characterise the recent co-operation agreement between Mozambique and Brazil on the production of antiretrovirals.¹⁰⁷

Co-operative elaboration of regional political alliances as well as counter-hegemonic international law — as advocated by Rajagopal — may thus represent viable arenas of resistance that the HIV crisis not only enables but demands. Gathii seems to hold out some cautious optimism in interpreting the Doha Declaration in this way, concluding that it 'might build a more stable and perhaps fair legal framework'.¹⁰⁸ To do so, however, may require Third World states — and notably the most HIV-impacted states of Southern Africa — to test the limits of the Declaration, in view of USA opposition at the time to the need to elaborate 'flexibilities' due to what it claimed was a failure by developing states to prove TRIPS rigidities.¹⁰⁹ This might, importantly, extend to exploring the legal limits of the consequences of the 'national emergency' provisions, especially given the apparent interpretation which could invite Third World states to engage in expropriation of foreign capital and suspension of foreign patent rights.¹¹⁰ It may also be timely in the

¹⁰⁵ Okafor (n 30 above) 809.

¹⁰⁶ Declaration on the TRIPS and Public Health, Ministerial Conference, WTO Doc WT/MIN(01)/DEC/2 (2001) para 7.

¹⁰⁷ Agencia de Informacao de Mocambique 'Mozambique: Anti-retroviral factory by 2010, pledges Lula' (17 October 2008) <http://allafrica.com/stories/200810171101.html> (accessed 10 April 2009).

¹⁰⁸ JT Gathii 'The Doha Declaration on TRIPS and public health under the Vienna Convention on the Law of Treaties' (2002) 15 *Harvard Journal of Law and Technology* 317.

¹⁰⁹ Gathii (n 108 above) 297.

¹¹⁰ AO Sykes *TRIPs, pharmaceuticals, developing countries, and the Doha 'solution'* (2002) 10-12 http://www.law.uchicago.edu/Lawecon/WkngPprs_126-150/140.Sykes.TRIPs.pdf (accessed 10 April 2009).

new post-Bush/Cheney environment of apparent mutual dialogue and global rapprochement rather than neo-imperialist paternalism.

A third area for SADC states' attention is the need to emphasise the more relevant characteristics of the epidemic within the region in order to better inform appropriate responses. The HIV epidemic within Southern Africa exhibits different characteristics than elsewhere, which invites a portrayal of HIV as constituting parallel epidemics, one in Southern Africa, and one or others elsewhere. This is not an entirely satisfactory distinction from referring to HIV as a unified global pandemic, as the region does not have a monopoly on a discrete form of epidemic in terms of viral subtype or means of transmission. However, the dominant features of the epidemic in Southern Africa distinguish it from HIV epidemics elsewhere.

4.2 The particular character of HIV in Southern Africa

Higher rates of long-term concurrent heterosexual partnerships by both males and females — including various cultures practising polygamy — are especially vulnerable to HIV transmission given the higher 'viremic window' for closely-spaced sexual encounters between different partners, with the viral load decreasing over time.¹¹¹ This characterises the epidemic in Southern Africa, as well as that HIV transmission appears to be linked to a different virus subtype more readily transmitted via heterosexual vaginal sex than is the subtype more prevalent elsewhere. The lower HIV transmission rates within other regions of Africa and the Middle East, where polygamy is more common, are likely attributable to higher levels of male circumcision — which lowers the likelihood of transmission from an HIV-positive female by about 60% — and much lower rates of female concurrent relationships.¹¹²

Evidence of the different character of HIV transmission in Southern Africa must not be mistaken for a continuation of 'past racist discourse about black sexuality'.¹¹³ So-called 'promiscuity' is lower in Africa — and Asia — than in Western states, and is more evidently linked to¹¹⁴

¹¹¹ H Epstein *The invisible cure: Why we are losing the fight against AIDS in Africa* (2008) 57-58 61. Epstein has strongly criticised the 2008 UNAIDS global report (n 1 above) for its failure to adequately treat evidence of the role of concurrent relationships in HIV transmission in Southern Africa, and a consequential inability to engage in appropriately informed policy dialogue on such a significant core of the issue. See H Epstein 'Open letter to the Lancet regarding UNAIDS 2008 Report on the Global AIDS Epidemic' (30 July 2008) (copy with author).

¹¹² Epstein (n 111 above) 62; n 1 above, 122. Male circumcision protects the male against infection. Women benefit from the reduced number of HIV-positive males (assuming continued safe practice) including the female's primary partner, especially where she is monogamous.

¹¹³ n 111 above, 255.

¹¹⁴ N Scheper-Hughes 'AIDS in South Africa: The invisible cure' (letter in response to book review: H Epstein) *The New York Review of Books* Vol 50, No 18 (20 November 2003) <https://www.nybooks.com/articles/16809> (accessed 10 April 2009).

the legacy of apartheid's barely concealed genocidal project ... of apartheid [which] forced male workers to live in worker hotels that destroyed the social fabric of proudly patriarchal peoples. Contained to concentration camp-type barracks near mines and factories, workers took temporary 'wives' and formed 'bedholds' in place of households. When women were unavailable to service the army of displaced workers recruited from all over southern Africa, migrant workers engaged in same-sex relations, violating strong cultural taboos. [Thus] was born an environment ripe for a sexually transmitted epidemic.

This is a reminder of TWAIL's emphasis on the importance of cultural and historical context. Farmer's commentary on international reactions to President Mbeki's contribution to the AIDS dialogue at the XIV International AIDS Conference in Durban, South Africa, in 2001, is of interest in this regard. For Farmer, Mbeki's 'sin' was primarily embodied in his 'heretical' canvassing of new options in the pricing and supply of patented drugs, of citing poverty and social inequality as instrumental factors in HIV prevalence, of pointing out the invisible dynamics of racial inequality in accessing treatments viewed as differentially 'cost-effective', and his repudiation of President Clinton's assistance for financing the purchase of drugs on loan terms less favourable even than the World Bank.¹¹⁵

It is only within a political discourse informed by culture and history that the debate may occur on the relationship between poverty and HIV, and thus on inequality and racial characteristics. To date, much of the discussion in the region has simply viewed poverty as a driver of human behaviour within an economic framework. This is not especially useful in informing policy and legislative responses to the epidemic, nor in developing effective strategies to address the need for and nature of behaviour change within the region with reference to the devastating consequences of unsafe sexual practices within concurrent partnerships. This needs to at least emphasise condom use in multiple heterosexual relationships, complemented by the promotion of male circumcision, and comprehensive anti-retroviral treatment programmes which ensure counselling and ongoing clinical care.¹¹⁶

Epstein argues that Uganda's early success in lowering HIV prevalence and transmission was largely due to the Ugandan government devising domestic responses and 'not simply adopt[ing] whatever programmes foreign advisers prescribed', such that those responses — focusing on changing behaviours within or toward multiple sexual

¹¹⁵ P Farmer 'AIDS heretic: Paul Farmer reveals how the President of South Africa broke the AIDS establishment's inequality taboo' (2001) *New Internationalist* http://find-articles.com/p/articles/mi_m0JQP/is_331/ai_30065280 (accessed 10 April 2009). Farmer emphasises that, contrary to popular opinion, Mbeki 'has never denied that HIV is the etiologic agent of AIDS' and, at that conference, 'consistently referred to the disease as "HIV/AIDS"'.
¹¹⁶ Refer to, eg, n 115 above, 263-269.

activity — were initially ‘largely dismissed’ by WHO and USAID.¹¹⁷ A dilemma for the SADC PF Model Law is that effective responses thus require a primary focus on concurrent heterosexual partnerships, but that the legislative and political focus is on other elements, concerning prisoners, commercial sex workers, injecting drug users and men who have sex with men.¹¹⁸

These, however, all remain necessary elements of the model law, including from a human rights-based approach. Injecting drug use may be unfamiliar to legislators in most SADC member states, but is the most common cause of HIV transmission in one member country, Mauritius, and not unknown elsewhere. Commercial sex work remains a significant factor in transmission, especially given the size of migrant labour workforces in such industries as the mining sector within and between most countries in the region. The incidence of migrant labour is itself an important factor in both male and female concurrent relationships. Transactional sex is a common phenomenon, in large part undergoing some change in character to the extent that it is ‘heightened by the penetration of the global market in consumer goods’,¹¹⁹ but also an exploitative sexual practice by — most commonly — older males toward adolescent and young females. It is reported that, in such instances, the relationship may last for a reasonable period of time and that safe sex, especially condom use, is rare.¹²⁰ Male-to-male sex is practised across all member states, even though it remains commonly denied or ignored by politicians and legislators, who seem content to leave a mutually-consensual private adult sexual act within the criminal law, thus thwarting efforts to reach an already difficult to reach vulnerable population. This also poses a problem in ensuring the provision of condoms to prisoners, with a common response from legislators being that to do so makes them complicit in facilitating a criminal act (sodomy).

The Model Law makes strong provision against discrimination due to HIV status, and explicitly includes ‘vulnerable or marginalised groups’ — which are defined to include ‘sex workers, injecting drug users ... members of sexual minorities, [and] prisoners’ — across the scope of its

¹¹⁷ Epstein (n 111 above) 65 167.

¹¹⁸ Conversely, western responses have often targeted messages to people in heterosexual relationships, when the need has been to primarily focus on those other elements. ‘Aiming propaganda at heterosexual teenagers is (outside the special case of Africa) a waste of money. It is, however, often an easier course than tackling drugs, whores and buggery, which many politicians would prefer to pretend have no place in their countries’ (‘Getting the message: Good news on treatment. Bad news on propaganda’ *The Economist* 5 June 2008 http://www.economist.com/science/displaystory.cfm?story_id=11487365 (accessed 10 April 2009)).

¹¹⁹ n 115 above, 77.

¹²⁰ n 115 above, 127; G Bertozzi ‘Sugar daddies and garden boys: Relationships that increase infection risk for young adolescents’ eforum posting (11 August 2008) <http://www.healthdev.org/viewmsg.aspx?msgid=edee3cb4-a186-4bac-bd74-80102e3d8d8d> (accessed 1 November 2008).

provisions. Given the care taken in the drafting process to avoid criminalisation provisions, the harmonisation of the model law with existing domestic criminal laws remains a difficult issue to be addressed on a state-by-state basis, with the need to ensure the retention of a 'minimum core' of human rights and continued advocacy to legislators of each state's obligations under international human rights law.¹²¹

These are important elements of Third World resistance. They include the counter-hegemonic assertion of human rights focused on the conditions and priorities of the Third World, the building of Third World solidarity to subordinate trade-related issues to human rights priorities, activism across Southern African states to elaborate jurisprudence in response to the HIV epidemic, and the determination of rights-based responses to that epidemic which are domestically determined, relevant and managed. These imperatives must inform the progress of the Forum's model law into regional application. Such TWAIL insights to essential collective action represent a transformative project in ensuring that the international human rights regime is capable of working towards its character of global justice.

5 Concluding comments: HIV model law as post-hegemonic process

Kirby notes that, faced with such enormous challenges as that posed by HIV and AIDS, 'the natural human reaction is flight or fight'.¹²² But flight — denial and neglect — is not an option with respect to HIV, including for the West. As Gro Harlem Brundtland points out, 'bacteria and viruses travel as fast as money'.¹²³

Aginam describes the development of Western responses to and management of epidemics over the centuries of expanding global trade and commerce, mainly resulting in the practice of quarantining of persons and products.¹²⁴ Inevitably, Western states collectively adopted standards of practice in this regard, as international trade became so crucial to their accumulation of wealth. Colonial public health objectives concerned the protection of western interests, including containing communicable diseases and viruses whilst minimising their adverse impact on commercial interests, including labour exploitation, within colonial territories.¹²⁵

¹²¹ n 55 above, 7; n 64 above, 32-7.

¹²² n 79 above, 164.

¹²³ Cited in O Aginam 'The nineteenth century colonial fingerprints on public health diplomacy: A post-colonial view' (2003) 1 *Law, Social Justice and Global Development Journal* http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/aginam (accessed 1 November 2008).

¹²⁴ As above.

¹²⁵ As above.

The practice and structure of public health diplomacy, entrenched power relations between states, the politics of exclusion, and the process of continuous discovery all conspire[d] to impede emerging global health governance mechanisms, and widen the gulf of inequalities in a postcolonial global health context.

The Third World history scholar should need no further reminder of the shortcomings of an externally driven public health response to HIV, especially one not explicitly framed within a human rights-based approach.¹²⁶ With such rapid and regular global human movement, this inherited health governance mechanism does not adequately serve its original purposes.

Curiously, in this context, whilst the West and Central African Model Law makes only limited provision for the right to information on HIV — including making information available at points of entry — it mandates it to the extent possible for nationals ‘going abroad’.¹²⁷ The scope of mandated training covers all government personnel appointed abroad, sailors on fishing and passenger boats, and all airline flight personnel. Echoing Anghie’s reminder of Third World states’ obligations under TRIPS to safeguard Western capital interests, those states may be required to protect Western states from the risk of viral transmission. This provision would seem to enable (western) ports to prohibit entry where proof of HIV ‘training’ is lacking, and readily permits expanded population coverage. One can but imagine the reverse situation being applied.

TWAIL emphasises that, for HIV legislation to be focused on ensuring the full extension of international human rights law to all people in a just and equitable manner, it must be historically and culturally informed. A failure to do so threatens the pursuit of an international legal regime that is post-hegemonic. The disastrous impact of the HIV epidemic upon the peoples of Southern Africa cannot be a pretext to modify, curtail or postpone the human rights of those affected populations.

This article particularly points to the leadership that TWAIL scholarship also provides in highlighting the potential value of regional coalitions, of the seizing of regional control of appropriate responses, of the importance of regional institutions such as the proposed SADC parliament and of the effective and strategic shaping of regional jurisprudence through the SADC Tribunal in this regard. Important space remains for co-operative alliances with external agencies alongside the strengthening of local coalitions with regional social movements, but local leadership must be assured despite encountering resistance from external actors.

Southern African states also have the opportunity — even obligation to Third World agency — to confront global trade-related injustices with

¹²⁶ See also Farmer (n 63 above).

¹²⁷ n 76 above, art 6.

respect to HIV and AIDS, even within existing international structures due, in large part, to the global flexibilities to TRIPS secured by successful African-led interventions. This points to the likely emergence of challenges, especially from threatened global interests. Legislators need to be supported in comprehending the political importance to Third World resistance and counter-hegemonic struggle constituted by the process, content and consequences of the Forum's legal framework.

Taken together, the character of the Southern African Model Law and its broader process indicate its potential reciprocal contribution to tackling TWAIL-informed concerns about the limited prospects for embracing a transformative post-hegemonic global order. The difficulty of pursuing such an agenda cannot diminish the need to do so.

Such concerns include understandable doubts about capacity to maintain sufficient solidarity in pursuing an ultimately just system of international law, within which human rights are truly universal. For those engaged in the Southern African Model Law on HIV, the pathway remains paved with many challenges. It values '*the local* as an agent of change' and may serve to lift the 'national/domestic' above the ambivalent in TWAIL-based discourse.¹²⁸ The potential benefits for the Third World — and thus for all peoples — are enormous.

¹²⁸ n 7 above, 266 275 (emphasis in original). Gathii notes Rajagopal's reference to international law not taking 'the local' seriously, and that TWAIL is more 'ambivalent' about the value of the national/domestic context than 'traditional Western approaches' which see it as a barrier to the 'emancipatory potential of universalist projects'.

The African Commission on Human and Peoples' Rights and the promotion and protection of refugees' rights

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Summary

African countries have been host to and have produced refugees for decades. These refugees have fled their countries for various reasons, including political and religious reasons. Many African countries are party to the 1951 United Nations Convention Relating to the Status of Refugees and its additional Protocol of 1967. In 1969, the Organisation of African Unity¹ Convention Governing the Specific Aspects of Refugee Problems in Africa, the major instrument that deals with the rights and duties of refugees in Africa, was adopted to address, as the name suggests, the specific aspects of refugee problems in Africa which were not addressed by the 1951 UN Refugee Convention. The African Commission on Human and Peoples' Rights has put in place various measures to promote and protect the rights of refugees in Africa. These measures include the organisation of seminars, seminar paper presentations by commissioners, the appointment of a Special Rapporteur on Refugees, Asylum Seekers,

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¹ The Organisation of African Unity was replaced by the African Union. For a comprehensive discussion of the history and functioning of the Organisation of African Unity and African Union, see F Viljoen *International human rights law in Africa* (2007) 157-234.

Migrants and Internally Displaced Persons in Africa, and adopting resolutions on the rights of refugees. The African Commission has also allied itself with various international human rights and humanitarian law organisations to protect the rights of refugees in Africa. It has protected the rights of refugees through its visits to different countries and through its decisions on individual communications. This article observes, inter alia, that, although the African Commission has entertained various communications dealing with the rights of refugees in Africa, the arguments of the parties to those communications as well as the decisions of the Commission have largely focused on the African Charter on Human and Peoples' Rights and not on the 1969 OAU Convention on Refugees. The author recommends that, in matters relating to refugee rights, the African Commission should always invoke the provisions of the 1969 OAU Refugee Convention in addition to the African Charter and, where need be, reference should be made to other refugee-related instruments.

1 Introduction

African countries have been host to and the producers of refugees for a long period of time.² Although in Africa '[r]efugees were initially considered generously as one of the consequences of the fight against colonialism',³ there are now various factors contributing to people fleeing their countries. These factors include political, social and economic problems; religious and ethnic tensions and internal conflicts; liberation struggles, civil wars and *coups d'état*.⁴ In December 2008, the United Nations High Commissioner for Refugees (UNHCR) reported that by the end of 2007, Africa, the poorest continent in the world, was hosting the largest number of refugees (22%) after Asia (55%).⁵ Both natural disasters (such as floods, drought and other calamities) and man-made ones (such as civil wars) have been responsible for displacing thousands of people in various African countries. Africa has been host to many dictatorial regimes that have caused many people to find it impossible to live in their countries of nationality and hence seek asylum in other countries because of persecution.

² IC Jackson *The refugee concept in group situations* (1999) 143-176.

³ R Murray 'Refugees and internally displaced persons and human rights: The African system' (2005) 24 *Refugee Survey Quarterly* 56.

⁴ See OS Oyelade 'A critique of the rights of refugees under the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' (2006) 12 *East African Journal of Peace and Human Rights* 164-168.

⁵ UNHCR *Statistical yearbook 2007: Trends in displacement, protection and solutions* (December 2008) 7 <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?id=4981c4812&tbl=STATISTICS> (accessed 2 February 2009).

This article looks at the measures the African Commission on Human and Peoples' Rights (African Commission) has adopted to promote and protect the rights of refugees in Africa in the light of the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), the 1951 UN Convention Relating to the Status of Refugees (1951 UN Refugee Convention) and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol), as well as under the African Charter on Human and Peoples' Rights (African Charter). The author concludes that the African Commission has relied more on the African Charter than on the OAU Refugee Convention and calls upon the African Commission to always invoke the provisions of the latter instrument in addition to other relevant instruments in protecting and promoting the rights of refugees in Africa.

2 Putting the legal regime in place

As early as 1964, African countries realised that some countries, such as Uganda, Burundi and Tanzania, were facing problems related to hosting refugees and that the international community was not paying sufficient attention to the problems these countries and the refugees they were hosting faced. The OAU Council of Ministers appointed the Commission on the Problems of Refugees in Africa,⁶ which wrote a report on the problems of refugees in the above countries that it had visited.

After looking at the findings of the 1964 Commission on refugee problems in the above countries, the OAU Council passed a resolution that, among other things, called upon 'the African Group at the United Nations with the help of the Asian and other interested groups' to submit a resolution to the UN General Assembly calling upon the UNHCR to increase the assistance it was giving to refugees in Africa and also 'invite[d] the Commission to draw up a Draft Convention covering all aspects of the problems of refugees in Africa' and requested the Administrative Secretary-General 'to circulate the draft Convention to member states of the OAU for their comments and observations'.⁷

It was hoped that the OAU Refugee Convention would complement the 1951 UN Refugee Convention and that the former would be

⁶ Resolution CM/Res 19(II).

⁷ Resolution CM/Res 36(III) 1964, paras 4-8.

dedicated to governing 'the specifically African aspects of the refugee problem'.⁸ Murray states that:⁹

Feeling that the circumstances of Africans were insufficiently considered in the existing international instruments, in particular the 1951 UN Convention on Refugees, the OAU moved towards the creation of its treaty.

The adoption of the OAU Refugee Convention could therefore be interpreted to mean that African countries were of the view that the 1951 UN Refugee Convention did not sufficiently address some of the unique problems that refugees in Africa and African refugee-hosting countries were facing. Hence, the OAU deemed it necessary to come up with a convention that would deal with those problems. Put differently, African countries were convinced that the 1951 Refugee Convention was not designed with an African-specific approach in mind and thus was of less relevance to African refugee problems. One of these problems was that of mass influx of refugees.

The 1951 UN Refugee Convention was not designed to address the problem of people fleeing in big numbers as is often the case with African refugees, but rather to deal with individuals who are being persecuted or had a well-founded fear that they would be persecuted by their countries. This explains why, when the UNHCR started dealing with African refugees in the 1960s, it had to rely on its 'good offices' under General Assembly Resolution 1673 (XVI) of 18 December 1961 rather than on the definition of a refugee under article 1 of the 1951 UN Refugee Convention. While speaking of the 'good offices' and the implications of General Assembly Resolution 1673(XVI) of 18 December 1961 and how it was meant to deal with African refugees whose characteristics were never contemplated by the drafters of the 1951 UN Refugee Convention, the High Commission for Refugees said:¹⁰

Having regard to the refugee definition [in the 1951 UN Refugee Convention], eligibility can only be *finally* determined after an examination of each individual case. Here, however, we were confronted with refugees dispersed in the African bush and the absence of the necessary administrative structures made it impossible to screen each individual case in order to determine whether they met the criteria of the Statute.

⁸ Resolution CM/Res 88(VII), 1966. It has been observed that '[t]he growing refugee problem in Africa led to the emergence of a regional refugee instrument, the ... (OAU) Refugee Convention. This contained a broader refugee definition that took into account the possibility of mass influx and generalised fears of violence. However, Deputy High Commissioner Sadruddin Aga Khan spoke with relief when the OAU decided that African states, though members of the OAU Refugee Convention, still needed to accede to the 1951 Convention. He declared that this demonstrated that the Convention had become "more universally recognised" — implying, of course, that it was not before.' See SE Davies 'Redundant or essential? How politics shaped the outcome of the 1967 Protocol' (2007) 19 *International Journal of Refugee Law* 703 718.

⁹ Murray (n 3 above) 57.

¹⁰ Jackson (n 2 above) 107.

This meant that the 1951 UN Refugee Convention definition ignored the unique nature of the refugee problem including factors that force people to flee their countries on the African continent. When people flee in big numbers, they are more likely to be associated with many problems as opposed to those who flee individually, and hence the need for different approaches to deal with the different problems that crop up. Some of the problems associated with a mass influx of people are that they become a burden to the financial resources of the host country and they can easily organise themselves and form a rebel group to destabilise their country of origin. This was clearly expressed by the Tanzanian government while defending itself before the African Commission in *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaire and Zambia*.¹¹ It could also explain why article 23(2) of the African Charter specifically prohibits asylum seekers and refugees from using their countries of asylum to engage in subversive activities against their countries of origin. Refugees can also be a source of insecurity to the nationals who live near them.¹² The OAU was determined to ensure that the measures adopted to regulate refugees in Africa were designed 'to improve the living conditions of the refugees and to help them lead a normal life'.¹³

2.1 The OAU Refugee Convention and the definition of a refugee: An unnecessary step?

The OAU Refugee Convention was adopted after extensive consultations with African countries.¹⁴ At the time of writing, the OAU Refugee Convention had been ratified or acceded to by most of the African countries, apart from the following nine countries: Djibouti, Eritrea, Madagascar, Mauritius, Namibia, Sahrawi Arab Democratic Republic, Somalia and São Tomé and Príncipe.¹⁵

¹¹ (2003) AHRLR 111 (ACHPR 2003) para 26, where it is observed that '[i]n reaction to the allegation of violation of article 23(2) of the Charter, Tanzania states [that] "it has never granted shelter to terrorists fighting against Burundi. However, Tanzania admits that it has always welcomed in its territory streams of refugees from Rwanda and Burundi each time trouble f[]ares up in those two countries. Tanzania has always refused to serve as a rear base or staging post for any armed movement against its neighbours. Leaders of political parties and factions are welcomed in Tanzania just like other refugees are. But they are not allowed to carry out military activity against Burundi from Tanzanian territory".'

¹² Resolution CM/Res 104 (IX) 1967.

¹³ Resolution CM/Res 149 (XI) 1968.

¹⁴ As above.

¹⁵ See <http://www.africa-union.org/root/au/Documents/Treaties/List/Convention%20on%20Refugees.pdf> (accessed 4 February 2009). It should be noted that, although the following countries had not yet ratified the OAU Refugee Convention, they had signed it: Somalia (1969); Madagascar (1969); Mauritius (1969); and Djibouti (2005).

African states that are parties to the OAU Refugee Convention are requested to 'implement it in a spirit as liberal as possible'.¹⁶ The Convention establishes various principles that govern refugees in Africa. Some of them will be discussed when an analysis of the jurisprudence of the African Commission that relates to refugees is done below, whilst others have been discussed by some scholars.¹⁷ The OAU Refugee Convention, in defining a refugee, adopts *verbatim* the definition of a refugee under the 1951 UN Refugee Convention read together with the 1967 Protocol (there is already a plethora of literature on the 1951 UN Refugee Convention's definition of a refugee¹⁸ and, therefore, its discussion falls outside the purview of this article), but adds in article 1(1) that a person will also qualify to be a refugee if:

owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, [he] is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

This definition has been described by Moore as 'the expanded 1969 OAU Convention refugee definition'.¹⁹ Jackson has called it 'the extended refugee definition', but he has cautioned that 'there must ... necessarily be a considerable amount of overlapping, and as regards their practical application, the difference between the two definitions is probably not as great as at first sight appears'.²⁰ It has been rightly observed that the OAU Refugee Convention's definition's 'inclusion ... of those fleeing the country due to "events seriously disturbing public order" enabled individuals caught up in the fight against colonial domination to be afforded protection'.²¹ Jackson argues that the practical application of the 1951 UN Refugee Convention in group situations 'no doubt covered very many of the persons falling within the scope of the "extended" definition in paragraph 2 of article I of the OAU Convention'.²²

It is submitted that, by adopting the OAU Refugee Convention's definition, African countries wanted to ensure that the recognition of the unique characteristics of African refugees got binding legal status under

¹⁶ n 13 above, para 6.

¹⁷ Oyelade (n 4 above) 152-182; Viljoen (n 1 above) 253-260.

¹⁸ Eg, see M Smith 'The relevancy of the work of the International Criminal Court to refugee status determination' (2008) 20 *International Journal of Refugee Law* 167-169; HE Cameron 'Risk theory and "subjective fear": The role of risk perception, assessment, and management in refugee status determinations' (2008) 20 *International Journal of Refugee Law* 567 573; A Atkinson 'Assumption of risk in United States refugee law' (2008) 49 *Virginia Journal of International Law* 273 277 284.

¹⁹ J Moore 'The alchemy of exile: Strengthening a culture of human rights in the Burundian refugee camps in Tanzania' (2008) 27 *Washington University Journal of Law and Policy* 139 141.

²⁰ Jackson (n 2 above) 178.

²¹ Murray (n 3 above) 57.

²² Jackson (n 2 above) 178.

the OAU treaty and not under General Assembly Resolutions whose legal effect has for many years been a source of considerable disagreement among international law scholars.²³ They wanted to ensure that these problems are recognised through the 'main door' rather than the 'back door' in the law of treaties. The OAU Refugee Convention's definition of a refugee has been incorporated in refugee legislation in various African countries, such as Angola, Benin, Burkina Faso, Burundi, Central African Republic, Gabon, Congo Brazzaville, Ghana, Lesotho, Liberia, Malawi, Mozambique, Nigeria, Rwanda, Senegal, Somalia, South Africa,²⁴ Sudan, Tanzania,²⁵ Uganda²⁶ and Zimbabwe.²⁷ The fact that many African countries have incorporated the OAU Refugee Convention's definition of a refugee could be indicative of the commitment of these countries to give effect to that treaty and also to ensure that they extend as much protection to people fleeing their countries as possible. The article now examines the role the African Commission has played in promoting and protecting refugees' rights in Africa and, in the process, an analysis of the relevant refugee principles as laid down in the OAU Refugee Convention and the 1951 UN Refugee Convention, read together with the 1967 Protocol, will be undertaken.

²³ It has been observed that '... the legal effect of UN General Assembly Resolutions has been the subject of constant debate among scholars. Most legal writers are of the view that such resolutions may be evidentiary weight of customary international law ... The traditional view is that the Resolutions of the General Assembly are not binding, as they are only recommendations.' See LB Malagar & MA Madgoza-Malagar 'International law of outer space and the protection of intellectual property rights' (1999) 17 *Boston University International Law Journal* 311-340. The International Court of Justice 'note[d] that General Assembly Resolutions, even if they are not binding, may sometimes have normative value'. See ICJ Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ 32-33 para 70, as cited in PM Rao 'Multiple international judicial forums: A reflection on the growing strength of international law or its fragmentation?' (2004) 25 *Michigan Journal of International Law* 929-942. It has been argued that the 'General Assembly Resolutions ... while technically only recommendations, have been viewed by several member countries, with regard to certain matters and within certain limits, as legally binding'. See GR Lande 'The effect of the Resolutions of the United Nations General Assembly' (1966) 19 *World Politics* 85. While referring to the United States courts and how they have treated UN General Assembly Resolutions, it was observed that 'traditionally, United States courts have not considered United Nations General Assembly Resolutions to be authoritative sources of international law, unless the Resolution merely restated legal principles that could be verified by reference to recognized sources such as customary international law, treaties, and judicial decisions. Recently, however, some courts have gone further and have given General Assembly Resolutions the same weight as fully-fledged sources of international law. Other courts have refused to take this step and have preferred to treat Resolutions as mere evidence of international law.' See GJ Kerwin 'The role of the United Nations General Assembly Resolutions in determining principles of international law in United States Courts' (1983) 4 *Duke Law Journal* 876.

²⁴ Sec 3 South Africa Refugee Act (1998).

²⁵ Sec 4 Tanzania Refugee Act (1998).

²⁶ Sec 4 Uganda Refugee Act (2006).

²⁷ Jackson (n 2 above) 194-209.

3 The African Commission on Human and Peoples' Rights and refugee rights in Africa

The African Commission was established under article 30 of the African Charter. Article 45 of the Charter gives the African Commission the mandate to promote and protect the rights and freedoms of the people on the African continent enshrined in the African Charter. The African Commission is empowered to interpret human rights treaties in the African human rights system that have been ratified by African countries and it is upon that basis that it interprets the OAU Refugee Convention. This is so notwithstanding the fact that the OAU Refugee Convention was adopted several years before the African Charter was adopted.

3.1 Some measures taken by the African Commission to protect and promote refugee rights

3.1.1 The Special Rapporteur on Prisons

Although the African Charter does not contain a provision which explicitly empowers the African Commission to establish special mechanisms, the African Commission 'had to adopt a progressive interpretation to find room for these mechanisms within its Charter mandate'.²⁸ Since 1994, the African Commission has 'established a number of Special Rapporteurs to provide focal points for the Commission on issues arising from the Charter'.²⁹ It is against that background that, in enforcing the rights of refugees in Africa, the African Commission, while appointing the Special Rapporteur on Prisons and Conditions of Detention in Africa, gave him a wide mandate for his first two years, which included making available an evaluation of the conditions of detention in Africa, highlighting the main problems. This evaluation had to include areas such as conditions of detention of particularly vulnerable groups such as refugees.³⁰ However, it is not clear from the reports of the African Commission whether the Special Rapporteur on Prisons in Africa ever visited any place of detention in which the refugees were detained during his first two years. It is also not mentioned in the most recent and only extensive analysis of the work of the office of the Special Rapporteur on Prisons in Africa whether he ever visited any place of detention where refugees were being detained.³¹ This could be attributed to the

²⁸ Viljoen (n 1 above) 392.

²⁹ As above.

³⁰ 10th Annual Activity Report of the African Commission, Annex VII.

³¹ See F Viljoen 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and possibilities' (2005) 27 *Human Rights Quarterly* 125-171.

fact that his mandate is very wide and he has limited financial and human resources to carry out visits, even in prisons where there are no refugees.³²

3.1.2 The Special Rapporteur on Refugees

The fact that the Special Rapporteur on Prisons and Conditions of Detention in Africa did not pay serious attention to the plight of refugees in Africa could explain why the African Commission, after concluding that the Special Rapporteur mechanism 'was not very successful' and therefore needed an overhaul, at its 34th ordinary session appointed Commissioner Bahame Tom Mukirya Nyanduga to act as the Focal Person on Refugees and Displaced Persons in Africa.³³ This office was later upgraded to the status of Special Rapporteur on Refugees, Asylum Seekers and Displaced Persons in Africa. The Special Rapporteur on Refugees has carried out various activities to promote and protect the rights of refugees and displaced persons. In his inter-session report at the 44th ordinary session of the African Commission in November 2008, the Special Rapporteur reported that he had issued a statement condemning the xenophobic attacks in South Africa and suggesting various measures that should be adopted by the government of South Africa to protect migrant workers.³⁴ He gave a radio interview in which he 'condemned the [xenophobic] attacks, called for their cessation, and urged the authorities at all levels to ensure that timely action is taken to deal with the problem'³⁵ and participated in a meeting of African Union (AU) Member States' Legal Experts to 'finalise the draft AU Convention on the Protection and Assistance to IDPs'.³⁶

The Special Rapporteur is reported to have published various papers in peer-reviewed journals about refugees in Africa and also to have discussed plans for these displaced persons in Geneva, together with

³² JD Mujuzi 'An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 435-437.

³³ 17th Annual Activity Report of the African Commission 2003-2004, para 32.

³⁴ *Report of Activities by the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants in Africa for the Intersession Period May to November 2008* (November 2008, paras 1 & 2 <http://www.achpr.org/english/Commissioner%27s%20Activity/44th%20OS/Special%20Rapporteurs/IDPs.pdf> (accessed 3 February 2009)). The African Commission also issued a resolution condemning the xenophobic attacks in South Africa; see Resolution on the Situation on Migrants in South Africa, ACHPR/Res 131 (XXXIII)08 of May 2008 http://www.achpr.org/english/resolutions/resolution131_en.htm (accessed 9 February 2009).

³⁵ *Report of Activities* (n 34 above) para 3.

³⁶ *Report of Activities* (n 34 above) para 4.

the Bureau of the UN Secretary-General's Special Representative for the Rights of Displaced Persons and with the Brookings Institution, University of Berne.³⁷ He delivered a lecture on 'the role of the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants in Africa' to the LLM students at the Centre for Human Rights, University of Pretoria.³⁸ The Special Rapporteur, at the invitation of the AU, participated in the Humanitarian and Security Assessment Mission to Darfur, Sudan (from 2 to 4 June 2005) to make an assessment of the humanitarian and security situation in Darfur following the deployment of the AU Military Observer Force.³⁹

He has attended conferences or expert meetings on refugees' rights in countries such as Burkina Faso (June 2006),⁴⁰ Austria (September 2006),⁴¹ Switzerland (September 2007),⁴² Rwanda (October 2007),⁴³ Uganda (March 2008),⁴⁴ South Africa (March 2008)⁴⁵ and Tanzania (April 2008).⁴⁶ He has delivered papers at seminars or conferences on the rights of refugees and IDPs in countries such as Uganda (July 2008),⁴⁷ Norway (July 2008),⁴⁸ Ethiopia (October 2006)⁴⁹ and Tanzania (April 2008).⁵⁰ The African Commission has also put seminars and conferences on refugees and IDPs on the list of the seminars it would like to host from time to time.⁵¹ The Special Rapporteur has closely monitored the situation of refugees' rights in politically unstable countries and has condemned refugee rights violations in

³⁷ 18th Annual Report of the African Commission 2004-2005 paras 28-32. The Special Rapporteur is reported to have given 'an interview on the situation of refugees and displaced people in Africa, and other related human rights issues, which appears in a book titled *Africa's long road to rights – Reflections on the 20th anniversary of the African Commission on Human and Peoples' Rights*'. See 23rd Activity Report of the African Commission on Human and Peoples' Rights, May 2007–November 2007, EX CL/446(XIII) Annex I, para 75 (footnotes omitted).

³⁸ 24th Activity Report of the African Commission on Human and Peoples' Rights, November 2007–May 2008, EX CL/446(XIII) Annex II, para 154.

³⁹ 19th Activity Report of the African Commission, July-December 2005 para 37.

⁴⁰ 21st Activity Report of the African Commission, May-November 2006, EX CL/322(X), para 44.

⁴¹ As above.

⁴² 23rd Activity Report of the African Commission para 80.

⁴³ 23rd Activity Report of the African Commission para 83.

⁴⁴ 24th Activity Report of the African Commission para 151.

⁴⁵ n 44 above, para 152.

⁴⁶ n 44 above, para 153.

⁴⁷ *Report of Activities* (n 34 above) para 5.

⁴⁸ *Report of Activities* (n 34 above) para 7.

⁴⁹ n 40 above.

⁵⁰ n 44 above, paras 155 & 156.

⁵¹ n 40 above, para 73; 22nd Activity Report of the African Commission para 97.

those countries.⁵² For example, on the situation of human rights in Eastern Democratic Republic of Congo, he categorically condemned 'the disregard and wanton violation of the human rights of the civilian population' by all the warring parties and 'condemn[ed] the deliberate attack and emptying of a camp hosting 50 000 refugees and IDPs in eastern DRC'.⁵³ Regarding the situation in Somalia, he was concerned at the 'serious deterioration in the human rights and international humanitarian law situation with massive violations' such as '[t]he internal displacement of an estimated 1 million people from Mogadishu ... and the flight of about 50 000 people into Kenya'.⁵⁴ On the situation in Mauritania, the Special Rapporteur recalled that 'in November 2007, the democratically elected government of ... Mauritania committed itself to the return of Mauritania[n] refugees from Senegal and Mali', but that 'unfortunately' the *coup* in Mauritania had 'set back the process'. It is because of that background that he 'call[ed] for a quick return to constitutionality so that the refugees, who had been suffering for long and who are now returning to Mauritania, recover their rights in accordance with the decision of the Commission'.⁵⁵ On the situation in Sudan, he sent a letter to the government appealing to it 'to co-operate with the African Union and the UN, in finding an amicable solution to the deployment of the UN peacekeeping force in the Darfur'.⁵⁶ It can be observed from the above that the Special Rapporteur on Refugees has been carrying out his mandate. As indicated earlier, the African Commission extended the mandate of the Special Rapporteur on Refugees to also include migration issues.⁵⁷ Using his extended mandate, the Special Rapporteur has carried out various activities, including presenting papers and working hand in hand with international organisations, such as

⁵² Eg, it is reported that 'Commissioner Bahame Nyanduga reported on the situation of refugees, asylum seekers and IDPs and Migrants in Africa, in particular in countries affected by conflicts, namely: the DRC, Darfur-Sudan, Central African Republic, Chad, Somalia, Northern Uganda and Côte d'Ivoire. He observed that the conflict in these countries impacts negatively on the human rights of these people, in particular women and children.' See 23rd Activity Report of the African Commission para 76. See also 24th Activity Report of the African Commission paras 167–171. He has also monitored the human rights situation in Burundi and the plight of Liberian refugees in Ghana and that of Saharawi refugees in Algeria. See 24th Activity Report of the African Commission paras 164–166.

⁵³ *Report of Activities* (n 34 above) para 9.

⁵⁴ *Report of Activities* (n 34 above) paras 4–5.

⁵⁵ *Report of Activities* (n 34 above) 5. The Special Rapporteur had earlier '... commended the Islamic Republic of Mauritania for starting to implement the repatriation programme of Mauritanian refugees from Senegal, whose rights have been denied for the past 20 years. He called on the government to also implement the recommendations made by the ACHPR following the fact-finding mission undertaken in September 2007.' See 24th Activity Report of the African Commission para 163.

⁵⁶ n 40 above, para 45.

⁵⁷ 20th Activity Report of the African Commission para 6.

the International Committee of the Red Cross, to promote humanitarian law on the African continent.⁵⁸

3.1.3 Reports about country visits, fact-finding missions and country periodic reports

The African Commission has carried out several fact-finding missions and promotional missions in which the rights of refugees have been brought to the attention of government officials in the countries visited. The African Commission is empowered under article 62 of the African Charter to receive and examine reports on the measures taken by African countries to implement their obligations under the African Charter. What follows is a discussion of how refugees' rights have been promoted and protected under the aforementioned three mechanisms.

In its Report on the Mission of Good Offices to Senegal, during which it reported on its visit to Senegal, after being notified by a Senegalese non-governmental organisation (NGO) about the grave human rights violations that were taking place in that country which resulted in massive displacement of people, the African Commission, after studying the root cause of the violations and suggesting a number of strategies that could be put in place by the government of Senegal, recommended to the government that it should ensure that the refugees who had fled are encouraged to return to their homes by guaranteeing them security.⁵⁹ In its report on the mission to Mauritania, where it investigated 'disturbing violations of human rights', the African Commission investigated and documented various problems that were facing Mauritanian refugees in Senegal and recommended numerous measures that should be put in place to solve their problems.⁶⁰ The African Commission has also carried out promotional missions to several African countries and during those missions it has raised the issue of refugees' rights with government officials or members of civil society in countries such as Burkina Faso,⁶¹ Swaziland,⁶² Burundi,⁶³ Rwanda,⁶⁴ Botswana,⁶⁵ Lesotho⁶⁶ and Seychelles.⁶⁷

⁵⁸ n 57 above, paras 44-45.

⁵⁹ 10th Annual Activity Report of the African Commission 1996-1997 Annex VIII para VI(1).

⁶⁰ n 59 above, Annex IV.

⁶¹ *Report of a Promotion Mission of Commissioner Rezag Bara to Burkina Faso* (26–30 March 2007) para 28.

⁶² *Report of the Promotional Mission to the Kingdom of Swaziland* (21–25 August 2006) paras 42 & 43.

⁶³ *Report of the Mission of Promotion to Burundi by Commissioner Mohamed Abdellahi Ould Babana* (4–11 February 2004) paras 30, 51, 52 & 59-63.

⁶⁴ *Report of Promotional Mission Undertaken by Commissioner Mohamed Abdellahi Ould Babana in Rwanda* (26 January–2 February 2004) paras 51, 81, 90, 91, 93, 94 & 135.

⁶⁵ *Mission Report to the Republic of Botswana* (14–18 February 2005) 13, 15, 20, 21 & 45.

⁶⁶ *Report of the Promotional Mission to the Kingdom of Lesotho* (3–7 April 2006) para 37.

⁶⁷ *Report of the Promotional Mission to the Republic of Seychelles* (26–30 July 2004) 7, 8 & 14.

In its report on a fact-finding mission to the Sudan, the African Commission highlighted the plight of refugees and internally-displaced persons in the Sudan and neighbouring Chad,⁶⁸ although for logistical reasons the delegation was unable to visit 'Sudanese refugee camps situated in Chad'⁶⁹ and called upon the government of Sudan to, amongst other things, ensure that the 'repatriation policy [...] conform to the voluntary wishes of the displaced persons and refugees, upon the establishment of security and other favourable conditions' and that '[c]onsultations with humanitarian agencies on the ground will facilitate the restoration and promotion of the IDPs' confidence, which is ... lacking in government'.⁷⁰ From 29 August to 3 September 2005, the Special Rapporteur on Refugees undertook a fact-finding mission to Senegal to investigate the situation of Mauritanian refugees in Senegal. The purpose of the visit was to facilitate 'a durable solution to the Mauritanian refugee problem'.⁷¹ The Special Rapporteur has also carried out a fact-finding mission to Botswana 'on the protection regime for asylum seekers, refugees and migrants in Botswana'.⁷² He also undertook a fact-finding mission to Mali and Mauritania 'regarding the question of Mauritanian refugees in Mali' and commended the government of Mauritania for, amongst other things, introducing a democratic process in the country 'which had enabled the government to adopt a new policy of bringing all Mauritanian refugees back to Mauritania'.⁷³ The Special Rapporteur 'affirmed' to the African Commission that 'he continue[d] to follow the situation affecting an alleged 3 million Zimbabwean asylum seekers in the sub-region, hoping that a fact-finding mission to a number of states in the sub-region will be authorised as requested by the Commission'.⁷⁴

As mentioned earlier, article 62 of the African Charter requires state parties to submit initial and periodic reports on the measures they have taken to promote and protect the rights guaranteed under the

⁶⁸ *The African Commission's Report of the Fact-Finding Mission to the Republic of Sudan* undertaken from 8–18 July 2004, 22nd Activity Report of the African Commission paras 5, 27, 35 & 114.

⁶⁹ n 57 above, para 14.

⁷⁰ n 57 above, para 133. At para 150, the Commission recommends that '[t]he implementation of the government policy of repatriation should be strictly voluntary, on condition that the security and social infrastructure is repaired and the burnt out villages are rebuilt. To the end ... government [should] fully co-operate with international humanitarian agencies and other relevant partners with a view to ensuring that ... displaced persons and the refugees return voluntarily to their villages of origin.'

⁷¹ n 39 above, para 42.

⁷² *Report of Activities* (n 34 above) para 6.

⁷³ n 42 above, para 77.

⁷⁴ n 44 above, para 174.

African Charter. States such as Senegal,⁷⁵ Algeria,⁷⁶ Democratic Republic of Congo,⁷⁷ Ethiopia,⁷⁸ Tunisia,⁷⁹ Sudan,⁸⁰ Tanzania,⁸¹ Uganda,⁸² Madagascar⁸³ and Nigeria⁸⁴ have reported on the measures they have taken. However, because of the fact that the African Commission is yet to publish concluding observations and recommendations on state parties' initial and periodic reports,⁸⁵ it is difficult to assess whether the African Commission, after examining a state party's report, has ever recommended to any state party to put in place measures to protect refugees' rights.

3.1.4 Resolutions and memorandum

The African Commission has also passed various resolutions calling upon various parties to the conflicts in Africa and also various countries to respect the rights of refugees. These include resolutions on the former Zaire, calling upon parties to the then conflict to respect the human rights of refugees in the country,⁸⁶ and on Sudan.⁸⁷ As mentioned earlier, the African Commission issued a resolution in which it strongly condemned the xenophobic attacks which took place in South Africa in mid-2008.⁸⁸ The African Commission also signed a Memorandum of Understanding with the UNHCR with the

⁷⁵ 3rd, 4th, 5th, 6th and 7th *Periodic Reports of Senegal in Application of Article 62 of the African Charter on Human and Peoples' Rights* (reported not dated) 22.

⁷⁶ 3rd and 4th *Periodic Reports of the Peoples' Democratic Republic of Algeria to the African Commission on Human and Peoples' Rights* (2006) 18.

⁷⁷ 8th, 9th and 10th *Periodic Reports of the Democratic Republic of Congo to the African Commission on Human and Peoples' Rights* (2007) paras 141 & 144.

⁷⁸ *Combined Report (Initial and Four Periodic Reports) of the Federal Democratic Republic of Ethiopia to the African Commission on Human and Peoples' Rights* (2008) paras 99–301, 425 & 427.

⁷⁹ *Consolidated 4th, 5th, 6th, 7th, 8th & 9th Periodic Reports of Tunisia under the Terms of Article 62 of the African Charter on Human and Peoples' Rights* (1995–2006) paras 56, 225 & 229.

⁸⁰ *3rd Periodical Report of the Republic of the Sudan under Article 62 of the African Charter on Human and Peoples' Rights* (2006) paras 222, 224–226, 229–237, 296, 302, 408 & 416.

⁸¹ *The 2nd to 10th Consolidated Periodic Report Submitted by the United Republic of Tanzania under the African Charter on Human and Peoples' Rights* (2006) 21–22.

⁸² *Report by the Government of Uganda to the African Commission on Human and Peoples' Rights* (2008) 45.

⁸³ *Periodic Report of Madagascar in Accordance with the African Charter on Human and Peoples' Rights* (2008) 376–380 & 592.

⁸⁴ *Nigeria's 3rd Periodic Country Report (2005–2008) on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria* (2008) 16, 19, 73, 74 & 76–78.

⁸⁵ At the time of writing, there were no concluding observations or recommendations posted on the African Commission's website. See http://www.achpr.org/english/_info/concluding%20observation_sessions.html (accessed 9 February 2009).

⁸⁶ n 30 above, Annex XI.

⁸⁷ n 33 above, Annex IV.

⁸⁸ See Resolution on the Situation on Migrants in South Africa (n 34 above).

objective of protecting the rights of refugees in Africa⁸⁹ and adopted the Modalities for the Operationalisation of the Memorandum of Understanding between the African Commission and the UN Commissioner on Refugees,⁹⁰ which is the implementing document of the Memorandum which requires, among other things, that both institutions appoint a focal person.

The above are some of the general activities that the African Commission has carried out to protect and promote the rights of refugees in Africa. We now go to the jurisprudence of the African Commission to establish the extent to which the rights of refugees have been dealt with.

3.1.5 The jurisprudence of the African Commission and refugees' rights in Africa

Articles 55 and 56 of the African Charter empower the African Commission to receive individual communications alleging violations of any of the rights under the African Charter. The African Commission has over time, especially through individual communications,⁹¹ developed a rich jurisprudence in relation to several rights under the African Charter.⁹² What follows is a discussion of the communications in which the African Commission has dealt with the rights of refugees.

In *Organisation Mondiale Contre La Torture and Others v Rwanda*, it was alleged that Rwanda had expelled Burundian refugees who had been in Rwanda for many years without giving them a chance to be heard. The African Commission observed that:⁹³

Article 12 of the African Charter reads:

- (3) Every individual shall have the right, when persecuted to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. (4) A non-national legally admitted in a territory of a state party to the present Charter, may

⁸⁹ 16th Annual Activity Report of the African Commission Annex IV art I. For the history and details of this memorandum, see Murray (n 3 above) 61–62.

⁹⁰ n 89 above.

⁹¹ Under arts 47–54, the African Commission has the mandate to entertain inter-state communications. However, at the time of writing, the African Commission had only dealt with one inter-state communication, *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004). For a detailed discussion of this communication, see JD Mujuzi 'Inter-state communications under the African Charter on Human and Peoples' Rights: Confirming the dwindling divide between international humanitarian law and human rights law? An appraisal of *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (Communication 227/99) (2007) 2 *African Yearbook on International Humanitarian Law* 139–158.

⁹² For a detailed discussion of the jurisprudence developed by the African Commission, see Viljoen (n 1 above) 310–417. See also F Viljoen 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights law in Africa* (2004) 385–505.

⁹³ (2000) AHRLR 282 (ACHPR 1996) paras 29–34.

only be expelled from it by virtue of a decision taken in accordance with the law.

This provision should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another state. Article 12(4) prohibits the arbitrary expulsion of such persons from the country of asylum. The Burundian refugees in this situation were expelled in violation of articles 2 and 12 of the African Charter.

Article 12(5) of the African Charter reads: 'The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.'

There is ample evidence in this communication that groups of Burundian refugees have been expelled on the basis of their nationality. This constitutes a clear violation of article 12(5).

Article 7(1) of the Charter reads:

Every individual shall have the right to have his case heard. This comprises (a) the right to an appeal to competent national organs against acts violating his fundamental rights ...

By expelling these refugees from Rwanda, without giving them the opportunity to be heard by the national judicial authorities, the government of Rwanda has violated article 7(1) of the Charter.

It is not clear in the communication why the African Commission had to rely exclusively on the African Charter to find that Rwanda had violated the rights of the Burundian refugees, yet the 1969 OAU Refugee Convention was already in force (it entered into force on 20 June 1974) and Rwanda had ratified it as early as 19 November 1979 and this communication was filed 10 years later (1989). This could be attributed to the fact that the NGOs that filed the communication did not allege violations under the 1969 OAU Refugee Convention but rather of the African Charter. But even then, the African Commission is empowered under article 60⁹⁴ of the African Charter to draw inspiration from other African and international human rights treaties where necessary. In the same vein, the African Commission should have referred to the 1951 UN Refugee Convention and the Protocol because Rwanda had ratified both instruments in January 1980.

However, the African Commission should be given credit for having interpreted the African Charter in a manner that was protective of the rights and freedoms of refugees and hence for coming to the conclusion that it would have more or less come to had it referred to the relevant refugee conventions. The above ruling indicates that the

⁹⁴ Art 60 of the African Charter provides that '[t]he Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members'.

fundamental principle of refugee law, that is *non-refoulement*,⁹⁵ which ‘... the international community has generally accepted ... as a binding rule’⁹⁶ and which is ‘[a]rguably, the most practical protection granted to refugees’⁹⁷ in refugee law, can be implied in article 12 of the African Charter. This interpretation has far-reaching consequences for African countries such as Djibouti, Eritrea, Madagascar, Mauritius, Namibia, Saharawi Republic, Somalia and São Tomé and Príncipe that have not yet ratified the 1969 OAU Refugee Convention, but have ratified the African Charter. It means that such countries cannot just expel refugees without putting into consideration their rights, such as the right not to be sent back to a country where they will be persecuted and also the right to be heard before they can be returned back to such countries. The right to be heard in refugee matters before a refugee is expelled is one of the ways to ensure that the refugees are not returned to their countries of origin where they will be in danger. It gives them an opportunity to present their case and bring important facts before the judicial or quasi-judicial body that is empowered to make the decision whether they should be returned to their countries of origin or not.

In another communication that dealt specifically with the rights of refugees, *Mouvement des Réfugiés Mauritaniens au Sénégal v Sénégal*,⁹⁸

⁹⁵ For a detailed discussion of the principle of *non-refoulement*, see E Lauterpacht & D Bethlehem ‘The scope and content of the principle of *non-refoulement*: Opinion’ in E Feller *et al* (eds) *Refugee protection in international law: UNHCR’s global consultations on international protection* (2003) 87–181; A Duffy ‘Expulsion to face torture? *Non-Refoulement* in international law’ (2008) 20 *International Journal of Refugee Law* 373–390. It has been observed that ‘[t]he fundamental principle of legal protection is expressed in article 33 of the 1951 Convention — *non-refoulement*; the prohibition of a state from sending persons back to states where they may face persecution’. See KW Yundt ‘The Organisation of American States and legal protection of political refugees in Central America’ (1989) 23 *International Migration Review* 202. It has also been observed that ‘UNHCR Executive Committee conclusions underline the fundamental importance of observing the principle of *non-refoulement* “of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognised as refugees”...’ See F Nicholson ‘Implementation of the Immigration (Carrier’s Liability) Act 1987: Privatising immigration functions at the expense of international obligations?’ (1997) 46 *International and Comparative Law Quarterly* 612.

⁹⁶ See RK Goldman & MM Scott ‘International legal standards relating to the rights of aliens and refugees in the United States immigration law’ (1983) 5 *Human Rights Quarterly* 312. It has been argued that ‘... customary international law ... recognises the principle of *non-refoulement* and binds all countries, regardless of ratification status [of the 1951 UN Refugee Convention], to this principle’. See LC Currie ‘The vanishing Hmong: Forced repatriation to an uncertain future’ (2008) 34 *North Carolina Journal of International Law and Commercial Regulation* 340.

⁹⁷ CJ Benson ‘Crossing borders: A focus on treatment of transgender individuals in US asylum law and society’ (2008) 30 *Whittier Law Review* 44. It has been argued that ‘... the principle of *non-refoulement* is a universally accepted and binding international law norm’. See J Ramji-Nogales ‘A global approach to secret evidence: How human rights law can reform our migration system’ (2008) 39 *Columbia Human Rights Law Review* 332.

⁹⁸ (2000) AHR/LR 287 (ACHPR 1997).

it was alleged before the African Commission, among other things, that⁹⁹

a group of individuals described as Mauritanian refugees were arrested by the Senegalese *gendarmerie* in Mboumba and on the Island of Morphil in October 1996 [and] ... that these Mauritanian refugees are still being held at the Central Prison in Saint Louis, whilst Senegalese nationals arrested together with them have been set free.

The complainant also alleged that many Mauritanian refugees had been expelled from Senegal to Mauritania where they were at risk of being persecuted. The African Commission held that the communication was inadmissible because of two reasons: first, that the complainant had not exhausted domestic remedies and, secondly, that the complainant did not mention the provision of the African Charter that the Senegalese government had violated. It is submitted that under article 56 of the African Charter, it is not a requirement that, for a communication to be admitted, it must mention the provision of the African Charter that is alleged to have been violated. The African Commission should have inferred from the facts of the communication which provisions of the African Charter had been violated. This is because very few people understand the procedural technicalities that have to be complied with before a communication is brought to the African Commission and the African Commission should always give them the benefit of the doubt by adopting a generous and purposive interpretation. The African Commission should have investigated whether Senegal's conduct did not violate article 12 or any other relevant provision of the African Charter.

As in *Organisation Mondiale Contre La Torture and Others v Rwanda*,¹⁰⁰ where the complainant did not mention that Rwanda had violated the 1969 OAU Refugee Convention, also in this communication the complainant did not mention that Senegal had violated the 1969 OAU Refugee Convention although Senegal had ratified this treaty as early as April 1971. The African Commission should have relied on article 60 of the African Charter to investigate whether Senegal had not violated the 1969 OAU Refugee Convention. It is argued that the African Commission should be more pro-active when it comes to protecting the rights and freedoms of very vulnerable people such as refugees. This is because some, if not most, of these people can hardly mobilise resources and engage lawyers to exhaust domestic remedies in a host country that is alleged to violate their rights. The standard that the African Commission uses to protect people who are victims of massive human rights violations, that is that they are not required to exhaust domestic remedies, could also be extended to refugees when they allege that a host country is violating their rights. In cases of individual

⁹⁹ n 98 above, paras 2 & 3.

¹⁰⁰ (2000) AHRLR 282 (ACHPR 1996).

refugees who allege that their countries violated their rights but cannot go back to their countries to exhaust domestic remedies, the African Commission has declared such communications admissible 'based on the principle of constructive exhaustion of local remedies'.¹⁰¹

Another communication in which the African Commission dealt with the question of the rights of refugees is *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea*.¹⁰² This communication raised several interesting issues and warrants a detailed discussion. The complainant alleged that on 9 September 2000, Guinean President Lansana Conté proclaimed over the national radio that Sierra Leonean refugees in Guinea should be arrested, searched and confined to refugee camps and that his speech incited soldiers and civilians alike to engage in mass discrimination against Sierra Leonean refugees in violation of article 2 of the African Charter. The complainant alleged further that, as a result of the speech, widespread looting and extortion occurred; that the Guinean soldiers evicted Sierra Leoneans from their homes and refugee camps; that the soldiers further looted the homes of refugees, confiscated food, personal property and money from refugees at checkpoints; that they also extorted large sums of money from detained refugees and that these items were never returned to them. The complainant alleged further that the speech incited soldiers and civilians to rise up against Sierra Leonean refugees inside and outside of the refugee camps. The resulting physical violence ranged from beatings and rapes to shooting and killing. 'Countless refugees died in these attacks, and many have scars as permanent reminders of their time in Guinea.'¹⁰³

Paradoxically, in this communication the complainant did not allege that the government of Guinea had violated its obligations under the 1969 OAU Refugee Convention or the 1951 UN Refugee Convention. However, the African Commission used its mandate under article 60, read together with article 12(5), of the African Charter to find violations under the above refugee treaties. The African Commission observed in respect of the mass expulsion of people because of their nationality that this conduct is not only prohibited by the African Charter, but also¹⁰⁴

[a]mong the articles and other legal instruments to which the respondent state is a party and by which it is bound to protect all persons against discrimination can be noted: article 4 of the OAU Convention on the Specific Aspects of Refugees, article 26 of the International Covenant on Civil and Political Rights and article 3 of the 1951 United Nations Convention on the Status of Refugees.

¹⁰¹ *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000) para 19.

¹⁰² (2004) AHRLR 57 (ACHPR 2004).

¹⁰³ 20th Activity Report of the African Commission on Human and Peoples Rights, Annex IV, 132, para.4.

¹⁰⁴ n 102 above, para 45.

The complainant also alleged that Guinea 'violated the principle of *non-refoulement* under which no person should be returned by force to his home country where his liberty and life would be under threat'.¹⁰⁵ They contended further, in the light of the principle of *non-refoulement*, that the President's speech¹⁰⁶

not only made thousands of Sierra-Leonean refugees flee Guinea and return to the dangers posed by the civil war, but it also clearly authorised the return by force of Sierra-Leonean refugees. Thus, the voluntary return of refugees to Sierra Leone under these circumstances cannot be considered as voluntary but rather as a dangerous option available for the refugees.

The government of Guinea responded by arguing that the Sierra Leonean refugees had been involved in rebel activities against Guinea¹⁰⁷ and that it had to put in place measures to ensure that the lives of the people in Guinea and the territorial integrity of Guinea were protected. It was urged that it was in light of this that the President 'recommended that all refugees be quartered and that Guineans scatter in all districts in order to unmask the attackers who had infiltrated the population'.¹⁰⁸ The Guinean government further argued that¹⁰⁹

[s]uch measures are in conformity with the provisions of article 9 of the 1951 UN Convention on the Status of Refugees ... and article 41 of the Laws of Guinea which provides that 'the President ... is the guarantor/custodian of the independence of the nation and of the territorial integrity. He is responsible for national defence.'

In responding to the defence of Guinea, the African Commission observed that it is aware¹¹⁰

that African countries generally and the Republic of Guinea in particular, face a lot of challenges when it comes to hosting refugees from neighbouring war-torn countries. In such circumstances some of these countries often resort to extreme measures to protect their citizens. However, such measures should not be taken to the detriment of the enjoyment of human rights.

The African Commission should be credited for having realised that African states face daunting challenges when it comes to hosting refugees, but that in trying to deal with those challenges, they should not compromise their regional and international human rights obligations. However, it is regrettable that the African Commission did not give its opinion on whether Guinea's acts were consistent with article 9 of the 1951 UN Refugee Convention as Guinea had pleaded. Article 9 states that:

¹⁰⁵ n 102 above, para 58.

¹⁰⁶ n 102 above, para 48.

¹⁰⁷ n 102 above, paras 49 & 50.

¹⁰⁸ n 102 above, para 51.

¹⁰⁹ n 102 above, para 52.

¹¹⁰ n 102 above, para 57.

Nothing in this Convention shall prevent a contracting state, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the contracting state that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

The African Commission should have held that article 9 of the 1951 UN Refugee Convention was not applicable as a defence for the government of Guinea because that article deals with measures that are taken before a person has been granted refugee status in the host country. An examination of the submissions of both the government of Guinea and of the complainant shows that the issue was not whether the measures taken were violating the rights of the people who had not yet been granted refugee status, but rather whether the measures taken violated the rights of people who had already been granted refugee status. The 1969 OAU Refugee Convention does not have a provision similar to article 9 of the 1951 UN Refugee Convention. The African Commission added:¹¹¹

When countries ratify or sign international instruments, they do so willingly and in total cognisance of their obligation to apply the provisions of these instruments. Consequently, the Republic of Guinea has assumed the obligation of protecting human rights, notably the rights of all those refugees who seek protection in Guinea.

The African Commission noted that 'those who drafted the [African] Charter considered large-scale expulsion as a special threat to human rights'¹¹² and that it 'appreciates the legitimate concern of the Guinean government in view of the threats to its national security posed by the attacks from Sierra Leone and Liberia with a flow of rebels and arms across the borders';¹¹³ and that 'as such the government of Guinea is entitled to prosecute persons that they believe pose a security threat to the state'. The African Commission noted that 'however, the massive violations of human rights of refugees as ... outlined in [the] communication constitute a flagrant violation of the provisions of the African Charter'. The African Commission thus found that Guinea had violated articles 2, 4, 5, 12 (5) and 14 of the African Charter and article 4 of the 1969 OAU Refugee Convention.

Much as the complainant repeatedly raised the issue that the expulsion of the Sierra Leonean refugees was a violation of the principle of *non-refoulement*, the African Commission regrettably did not say much about that principle which is provided for under article 2(3) of the 1969 OAU Refugee Convention and article 33 of the 1951 UN Refugee Convention. This would have been an opportunity for the African Commission to clarify whether such expulsions could be justified under

¹¹¹ n 102 above, para 69.

¹¹² As above.

¹¹³ n 102 above, para 71.

article 32 of the 1951 UN Refugee Convention, which allows a host country to expel refugees when they are a threat to national security. But even then, such a state must ensure that the refugees are given a chance to be heard and must be allowed reasonable time within which to leave the country. One of the reasons why the African Commission could have failed to express its opinion strongly on the principle of *non-refoulement* but instead put emphasis on article 4 of the 1969 OAU Refugee Convention, which prohibits discrimination, is that the communication indicated that refugees from countries such as Liberia were not mistreated by the government of Guinea, but only Sierra Leonean refugees were targeted. This was considered to be discrimination on the ground of nationality, which is prohibited under article 4 of the 1969 OAU Refugee Convention and article 3 of the 1951 UN Refugee Convention.

The complainant also alleged that the government of Guinea had violated several refugees' rights, such as the right to human dignity, the right not to be subjected to sexual abuse (rape), privacy, freedom of movement, the right to property, the right to housing, the right of access to courts and the right to travel documents, most of which are protected under the 1951 UN Refugee Convention, but the African Commission regrettably did not refer to the 1951 UN Refugee Convention to establish such violations. Though, as discussed above, the African Commission referred to the African Charter to find violations of the rights to human dignity, property, life, non-discrimination and against mass expulsion, refugees would have been offered better protection if the African Commission had also referred to article 5, which recognises the fact that refugees have more rights than those under the Convention; article 7(2), which obliges state parties to accord refugees the same treatment as all aliens; articles 13 and 14, which guarantee the rights to property of the refugees; article 16, which obliges states to respect the right of refugees to access to courts; article 21, which guarantees the right to housing; article 26, which protects the right to freedom of movement; and articles 27 and 28, which protect the right to travel documents of the 1951 UN Refugee Convention. Guinea violated all these rights which it has a duty to protect. It has to be recalled that, whereas article 42 of the 1951 UN Refugee Convention allows a country at ratification to enter reservations on all the provisions of the treaty except on articles 1, 3, 4, 16(1), 33 and 36 to 46, Guinea did not enter any reservation on the provisions of the treaty that it violated¹¹⁴ and therefore it acted in breach of its obligations under the 1951 UN Refugee Convention.

¹¹⁴ See <http://www.unhcr.ch/html/menu3/b/treaty2ref.htm> (accessed 9 February 2009).

4 Conclusion

The above discussion illustrates the role the African Commission in the promotion and protection of refugee rights. It provides a brief historical background to the adoption of the 1969 OAU Refugee Convention. It is illustrated that the African Commission has put in place various measures to promote and protect refugee rights, ranging from the appointment of Special Rapporteurs to entertaining individual communications. Moreover, the discussion shows that, whereas the African Commission has entertained various communications alleging violations of refugee rights, it has leaned more towards the African Charter than the 1969 OAU Refugee Convention.

It is recommended that giving priority to the 1969 OAU Refugee Convention over the African Charter in refugee-related communications is to be preferred, as it would give refugees greater protection. The role of the African Charter as an additional measure for the protection and promotion of the rights of refugees should not be underestimated in countries that have ratified both the African Charter and the 1969 OAU Refugee Convention. However, the African Commission should be commended for having interpreted the African Charter broadly to promote and protect the rights of refugees.

African countries that have not yet ratified the 1969 OAU Refugee Convention also have obligations under the African Charter to protect and promote the rights of refugees. The African Commission is called upon to look at international law in the form of treaties when faced with communications that allege a violation of the rights of refugees. NGOs that are involved in litigation before the African Commission need to be well-acquainted with the procedure of the African Commission so that their communications are not declared inadmissible, as declaring a communication inadmissible not only frustrates such organisations, but also the refugees on whose behalf it would have been filed. These organisations should also always cite violations of the 1969 OAU Refugee Convention in their communications before the African Commission so that the Commission is given an opportunity to better develop its jurisprudence in the area of refugee law.

The right to participate in the government of one's country: An analysis of article 13 of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 political crisis

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Summary

The article analyses the right to participate in the government of one's country under article 13 of the African Charter on Human and Peoples' Rights within the context of the post-election crisis experienced in Kenya in December 2007. It is argued that the crisis was a culmination of poor governance and undemocratic practices successively handed down from one political regime to another, from when the country attained its independence. The article maintains that since 1963, many Kenyans have been denied the enjoyment of the right to participate in government through political manipulation, corruption, intimidation, vote rigging, ethnicity and other related vices. Hence, the undermining of democracy and diverse citizenship rights have contributed extensively to the country's governance crisis, the labyrinth of which was exposed by the 2007 post-election events.

1 Introduction

Kenya opened a new chapter in her history when two contesting political parties — the Party of National Unity (PNU) and the Orange Democratic Movement (ODM) — signed a power-sharing agree-

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ment in February 2008.¹ The agreement brought to an end months of civil unrest and political bickering, following the declaration of Mr Mwai Kibaki (PNU's presidential candidate) as the winner of the 2007 presidential elections.²

The wave of atrocities that resulted from the declaration of Kibaki's disputed victory caught the eye of the international community, which stepped in to restore order and peace in the country. The African Union (AU) appointed a team of international experts to mediate over the crisis. At the onset the mediators constituted the Kenya National Dialogue and Reconciliation (KNDR) team, comprising of representatives of both the ODM and PNU.³

It was evident to the team that the post-election crisis was a culmination of both long-term and immediate causes. Behind the façade of alleged election fraud were decades-old tensions that instigated the national pandemonium. The long-term causes of the crisis therefore encompassed many unresolved issues, some dating way back to the time the country attained its independence. Endemic failures in governance were at the pinnacle of such unresolved issues.⁴

Indeed, the widespread violence experienced in Kenya in every election year could best be understood within the context of long-standing grievances and failures of governance that run deeper than electoral politics.⁵ Some citizens therefore have regarded elections as an opportunity to vent their anger and frustration over poor governance. On the other hand, some political elites in successive governments have regarded elections as an opportunity to settle scores with their opponents. Thus, although elections are conducted periodically, there has been no guarantee that they would be, and in most cases they have not been, free and fair. In the process, citizens have been denied the enjoyment of many of their rights, including the right to participate

¹ The deal was contained in two documents, namely, the Agreement on the Principles of Coalition Government and the National Accord and Reconciliation Act 2008. See The Standard Team 'New dawn as MPs convene' <http://www.eastandard.net> (accessed 6 March 2008).

² According to estimates, at least 1 000 people were killed and 350 000 internally displaced. See The Standard Team (n 1 above).

³ See B Namunane 'Annan pleads for grand coalition government' <http://www.nationmedia.com> (accessed 13 February 2008).

⁴ Human Rights Watch 'Ballot to bullet: Organised political violence and Kenya's crisis of governance' (2008) 20/1 (A) 3.

⁵ Africa Watch 'Divide and rule: State sponsored ethnic violence in Kenya' (1993) <http://hrw.org/reports/1993/kenya1193.pdf> (accessed 29 March 2008); Human Rights Watch 'Playing with fire: Weapons proliferation, political violence and human rights in Kenya' (2002) <http://www.hrw.org/reports/2002/kenya/> (accessed 29 March 2008). See also the *Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya* (1999) http://marskenya.org/pages/stories/Akiwumi_Report/ (accessed 29 March 2008).

in government, as guaranteed in the African Charter on Human and Peoples' Rights (African Charter).⁶

Against this background, the article analyses the right to participate in the government of one's country under article 13 of the African Charter in the light of the political crisis experienced in Kenya in December 2007. In the main, the article argues that the crisis resulted from the undemocratic practices and poor governance successively handed down from one political regime to another, from when the country attained its independence.

The article begins with a review of article 13 of the African Charter. It proceeds to explore the jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) relating to this right. After conducting an exposition of the nature and causes of Kenya's long-term governance crisis, the article concludes with some recommendations on the way forward.

2 Article 13 of the African Charter revisited

The African Charter is the main normative instrument of the African human rights system. It consists of 68 articles clustered into four chapters. The Charter entails all the three generations of rights, namely, civil and political rights, economic, social, and cultural rights, and peoples' rights. Article 13, which guarantees the right to participate in the government of one's country, stipulates as follows:

- 1 Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
- 2 Every citizen shall have the right of equal access to the public service of his country.
- 3 Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

From the wording of the above provision, it may be argued that the right to participate in the government of one's country, at least within the context of the African Charter, entails three distinct but related guarantees. These are: (i) the right to political participation; (ii) equality of access to the public service of one's country; and (iii) equality of access to public property and services. It is worth noting that, whereas the African Charter confines the enjoyment of the rights to 'political participation' and 'equality of access to the public service' only to citizens, the right to 'equality of access to public property and services' could be enjoyed by every individual residing within a particular state.

⁶ See African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, 21 (1982) 58 *International Legal Materials*, entered into force 21 October 1986.

A distinction could be drawn between articles 13(2) and (3) in that, while the former intends to guarantee citizens the right to participate in the public service of their country, the latter guarantees every individual access to public services without discrimination. In other words, article 13(2) appears to preclude state parties to the African Charter from adopting measures that would hinder some of their citizens from participating in the public service of their countries. Such measures could be in the nature of unfair legislation, policies or practices that are discriminatory in their form, substance or effect. A cursory glance at articles 13(2) and (3) would, however, not reveal the distinction between these two provisions.

The African Charter is by no means the only international human rights instrument that seeks to protect the right to participate in government. This right is also expressly guaranteed under article 21 of the Universal Declaration of Human Rights (Universal Declaration),⁷ article 25 of the International Covenant on Civil and Political Rights (CCPR), article 23 of the American Convention on Human Rights (American Convention)⁸ and article 3 of Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms (European Convention).⁹ Some of these provisions suggest that the holding of periodic and genuine elections is the main way the right to participate in government may be enjoyed. The European Convention Protocol, for example, requires states to hold 'free elections at reasonable intervals by secret ballot'. Article 21(3) of the Universal Declaration is equally emphatic that:

The will of the people ... shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

As shall be shown elsewhere below, it would be detrimental to confine the meaning and scope of the right to participate in government within the narrow parameters of political participation or, worse still, the holding of periodic and genuine elections. This right is quite broad and envisages various facets which link up to form the requisite framework for the realisation of the rights of all who reside within a country. Simply put, the right serves as an important bridge between three key elements that define the benchmark of good governance in any civilised society — the rule of law, democracy and human rights.

⁷ Universal Declaration on Human Rights, GA Res 217 (III), adopted on 10 December 1948.

⁸ See art 44 American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123, entered into force 18 July 1978.

⁹ Arts 25-34, Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entered into force on 3 September 1953, as amended by Protocols 3, 5, 8 & 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990 and 1 November 1998, respectively.

It is imperative to note that governance relates to the manner in which responsibility is discharged.¹⁰ In the public domain, such responsibility may be acquired through, *inter alia*, election, appointment or delegation. Therefore, good governance should be understood to mean the process where such responsibility is discharged in an effective, transparent and accountable manner.¹¹ By extension, it entails the establishment of efficient and accountable institutions — whether political, judicial, administrative or economic — that would promote, among other things, human rights, the rule of law and democracy. Ultimately, it should ensure that people are free to participate in, and be heard on, decisions that affect their lives.¹²

Arguably, the inclusion of the right to participate in government in the African Charter is partly in recognition of the fact that most egregious violations of human rights on the continent occur in conditions of political dictatorship and poor governance. The gross violations of human rights registered during the despotic reigns of dictators Idi Amin of Uganda, Macias Nguema of Equatorial Guinea, Jean-Bedel Bokassa of the Central African Republic and Kamuzu Banda of Malawi, just to mention a few, could be cited to vindicate this argument. Hence, in framing article 13, the drafters of the African Charter might have been compelled by the desire to wrest political power and governmental authority from the hands of the emerging post-colonial despots and vest it in citizens.

The drafters, however, failed to define the full scope of the right to participate in government, or at least to bring article 13 on par with equivalent provisions of other international human rights instruments, such as the Universal Declaration and the European Convention. In the main, the African Charter recognises the right to political participation in a very superficial way. For instance, it does not expressly guarantee the holding of periodic and genuine elections. The inadequacy attached to this right defeats logic, given that Africans have been perpetual victims of poor governance where democracy, the rule of law and human rights are deliberately undermined.¹³

Military rule and unconstitutional changes of government have also taken its toll on the continent. Moreover, politicians almost literally 'purchase' the right to vote from their citizens and once voted, they personalise governmental power and authority for their own benefits. Political power is abused to reward cronies and sycophants, on the one hand, and on the other, to punish 'dissidents' and opponents. Under

¹⁰ K Hope 'The UNECA and good governance in Africa' paper presented at the Harvard International Development Conference 4-5 April 2003, Boston, Massachusetts, 2.

¹¹ As above.

¹² As above.

¹³ For a detailed discussion on this, see generally A Mangu 'The road to constitutionalism and democracy in Africa: The case of the Democratic Republic of Congo' unpublished LLD thesis, University of South Africa, 2002 ch 3.

such circumstances, it cannot be understood how the drafters of the African Charter could have failed to concretise this right.

In all fairness, though, it is encouraging to note that the drafters intended that the right to participate in government should be construed beyond the limited scope of 'political participation', to incorporate other relevant rights, such as equal access to public property and services. This is quite innovative because, as shall be shown below, there is a close nexus between this right and some other rights in the African Charter, to the extent that the violation of the one would most certainly lead to the violation of the others.

Indeed, even the jurisprudence of the African Commission confirms the foregoing observation. For instance, the Commission has emphasised the connectivity between this right and, among others, the rights to nationality, freedom of assembly and expression and self-determination.¹⁴ It has also hinted that unconstitutional changes of government could adversely affect the enjoyment of the right to participate in government.¹⁵

3 The African Commission's jurisprudence on article 13

Although the African Charter does not expressly guarantee the right to nationality, the African Commission appears to treat this right as essential to the realisation of the right to participate in government. It has therefore condemned political tactics such as unlawful deportation of citizens and the invention of 'exclusionary bars' to prevent political opponents from participating fully in the affairs of their governments.

In the *Amnesty International v Zambia* case cited above, the African Commission was persuaded that the deportation of two senior members of a Zambian opposition party was not only unlawful, but was also politically motivated to deprive them of the opportunity to participate in the affairs of their government.¹⁶ However, although the communication alleged the violation of article 13(1), it is not encouraging at all that the African Commission neither gave requisite attention to this claim, nor expressly found a violation of this provision. An opportunity was therefore lost where the content of this right could be demystified, at least within the context of the African human rights system.

In *Modise v Botswana*, also cited above, the complainant alleged that, although he was a national of Botswana by descent, the government

¹⁴ See generally *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000); *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999); *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001); *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000).

¹⁵ See generally *Jawara v The Gambia* (n 14 above).

¹⁶ See para 46 of the communication.

declared him an 'undesirable immigrant' and subsequently deported him because of his political involvement.¹⁷ After many years of contesting the recognition of his right to citizenship by descent, the government of Botswana granted him citizenship by registration.¹⁸ He contended that this latter form of citizenship was in several ways inferior to the former. One of its shortfalls, he argued, was that it precluded him from vying for the highest elected political office in the land, that is, the presidency of the Republic of Botswana.¹⁹ Based on the evidence adduced before it, the Commission concluded that:²⁰

[g]ranting the complainant citizenship by registration has ... gravely deprived him of one of his most cherished fundamental rights, to freely participate in the government of his country, either directly or through elected representatives. It also constitutes a denial of his right of equal access to the public service of his country guaranteed under article 13(2) of the Charter.

The African Commission has also emphasised that any measure which seeks to exclude a section of the citizenry from participating in the democratic processes of their country is discriminatory and therefore a violation of article 13 of the African Charter.²¹ In *Legal Resources Foundation v Zambia*, it was argued that the Zambian government had amended its Constitution deliberately to 'take away' 'the accrued rights of other citizens, including the first President, Dr Kenneth Kaunda'.²² The said amendment — Constitution of Zambia Amendment Act of 1996 — effectively excluded persons, other than those of whom both parents were Zambians by birth or descent, from contesting the presidency of the country.²³ In finding a violation of article 13 of the African Charter, the Commission reasoned as follows:²⁴

The Charter makes it clear that citizens should have the right to participate in the government of their country 'directly or through freely chosen representatives ...'. The pain in such an instance is caused not just to the citizen who suffers discrimination by reason of place of origin but that the rights of the citizens of Zambia to 'freely choose' political representatives of their choice, is violated. The purpose of the expression 'in accordance with the provisions of the law' is surely intended to regulate how the right is to be exercised rather than that the law should be used to take away the right.

The above reasoning is very important for two reasons. First, the African Commission establishes an important principle to the effect that the imposition of exclusionary bars with the intention to check political opposition affects both the discriminated individual and the people

¹⁷ See *Modise v Botswana* (n 14 above) para 2.

¹⁸ *Modise v Botswana* (n 14 above) para 95.

¹⁹ As above.

²⁰ *Modise v Botswana* (n 14 above) para 96.

²¹ *Legal Resources Foundation v Zambia* (n 14 above) para 64.

²² *Legal Resources Foundation v Zambia* (n 14 above) para 2.

²³ *Legal Resources Foundation v Zambia* (n 14 above) para 3.

²⁴ *Legal Resources Foundation v Zambia* (n 14 above) para 72.

he or she intends to represent in accordance with article 13(1). Secondly, the Commission's pronouncements serve as a warning to those governments that are fond of using their legal systems and other state machinery to frustrate a section of their citizenry. Thus, it is clear that laws ought to be promulgated to regulate and not to violate the rights of individuals.

The African Commission's viewpoint might have been informed by the fact that many post-colonial African governments have in the past resorted to 'exclusionary bars' to lock out their perceived erstwhile opponents from clinching the highest political office in the land. A notable example is Côte d'Ivoire, where a former Prime Minister, Alassane Ouattara, was barred from participating in the country's presidential elections held in 2000, on grounds that he was not a 'real Ivorian'.²⁵ Odinkalu correctly contended that the use of exclusionary bars by a post-colonial elite does not only restrict access to political office and processes, but also reinforces a widespread sense of illegitimacy of some African states.²⁶ At the same time, exclusionary bars undermine citizenship and instigate undue political contestations and instability.

Besides linking the enjoyment of the right to participate in government with the guarantee of the right to nationality, the African Commission has also sought to interplay this right with freedom of expression, self-determination and the prohibition of unconstitutional changes of government. It has, for example, observed that 'freedom of expression is a fundamental human right, essential to an individual's personal development, political consciousness and participation in the public affairs of his country'.²⁷ The Commission has also held that to participate freely in government entails, among other things, the right to have the results of free expression of the will of voters respected.²⁸ It also emerges from the African Commission's jurisprudence that massive human rights violations coupled with the denial of the right to political participation could justify secession.²⁹

With regard to unconstitutional changes of government, the African Commission found the imposition of a ban on leaders of a former government after a *coup* to be a violation of their right to participate in the government of their country.³⁰ Although the Commission's jurisprudence on this issue is remarkably shallow, it is encouraging

²⁵ See C Odinkalu 'Back to the future: The imperative of prioritising for the protection of human rights in Africa' (2003) 47 *Journal of African Law* 18.

²⁶ As above.

²⁷ *Amnesty International v Zambia* (n 14 above) para 46.

²⁸ *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) para 50.

²⁹ *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995).

³⁰ *Jawara v The Gambia* (n 14 above) para 67.

to note that even the Constitutive Act of the African Union (AU)³¹ unequivocally condemns unconstitutional changes of government.³² The Constitutive Act is categorical that a government that seizes power through unconstitutional means shall not be allowed to participate in the activities of the AU.³³ Additionally, the AU has a variety of options on how to deal with such governments.³⁴

It is clear that both the African Charter and the Constitutive Act lack a precise definition of what might constitute an unconstitutional change of government. The Declaration of the Framework for an OAU Response to Unconstitutional Changes of Government is instructive in this regard in that it intimates situations such as:³⁵

- (i) military *coup d'état* against a democratically elected government; (ii) intervention by mercenaries to replace a democratically elected government; (iii) replacement of democratically elected governments by armed dissident groups and rebel movements; and (iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.

The above list of situations, however, is not conclusive because it overlooks certain paramount circumstances that could as well infer an unconstitutional change of government.³⁶ For instance, it fails to appreciate the unconstitutionality of a government which refuses to call for elections at the end of its tenure, or the one which manipulates the Constitution to prevent a democratic change of government. It also ignores the effects and implications of vote-rigging and other electoral malpractices that could possibly lead to the violation of the values and principles of good governance.

The foregoing discussion therefore explains why it is not prudent, yet uncommon, to confine the scope of the right to participate in government within the narrow prism of 'citizen participation in periodic elections, either as candidates or voters'. Actually, this right demands governmental or state authority to be based on the sovereignty and the will of the people. It places obligations on states not only to ensure a level political field, but also to guarantee other rights that would

³¹ The Constitutive Act of the African Union, adopted by the 36th ordinary session of the Assembly of Heads of State and Government, 11 July 2000, Lomé, Togo, CAB/LEG/23 15, entered into force 26 May 2001.

³² n 31 above, art 4(p).

³³ n 31 above, art 30.

³⁴ Art 23 partly provides as follows: '2 ...any member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly.'

³⁵ See Declaration of the Framework for an OAU Response to Unconstitutional Changes of Government AHG/Decl 5 (XXXVI) adopted by the 36th ordinary session of the Assembly of Heads of State and Government of the OAU.

³⁶ For a more detailed definition of this phrase, see OAU *Report of the Sub-Committee of the Central Organ on Unconstitutional Changes in Africa* (2000) 25 (v)-(vi).

safeguard the interests of all in society. In other words, although the enjoyment of this right starts with the guarantee of political participation, it by no means ends there. This is because other factors that are important in safeguarding fair political participation must also necessarily be ensured.

It is rather unfortunate that the realisation of the right to participate in government has remained controversial and complicated in Africa for reasons ranging from legal complexities, vested political interests, corruption and extreme poverty. This situation is exacerbated by the fact that some countries largely still rely on laws and policies promulgated during the colonial era, which in many respects prevent the most disadvantaged groups in society from fully enjoying this right. Due to such archaic policies and laws, important issues such as equitable access to public resources and services are no longer a major concern. At the same time, political contests are intense because of what is at stake; those who wield political power benefit from widespread abuses and misappropriation of public resources and services.

Consequently, many Africans have become victims of governments of exclusion such as dictatorships, military rule, or single-party autocracies. Ethnicity, corruption and vote-rigging have also had a hand in derailing the democratic process on the continent. What follows therefore is a discussion on how some of the factors listed above could have contributed to the post-election violence witnessed in Kenya in 2007.

4 An exposition of the nature and causes of Kenya's long-term governance crisis

Compared with her neighbours, who are often besieged by civil unrest, Kenya has for long been a hub of socio-economic and political stability. However, in spite of its success in containing an outbreak of civil war, the country is still largely plagued with many of the factors that undermine citizens' participation in government. These factors, which also instigated the 2007 post-election crisis, include strong ethnic divisions, polarised politics, political manipulation, socio-economic disparities, deepening levels of poverty and endemic corruption.³⁷ These factors are examined in detail below under four major themes, namely, socio-historical, ethno-political, socio-economic and legislative.

4.1 Socio-historical factors

A number of socio-historical factors have contributed to the undermining of the right to participate in government and by extension, the 2007

³⁷ See African Peer Review Mechanism 'Country Review Report of the Republic of Kenya' http://www.polity.org.za/article.php?a_id=99422 and <http://www.nepad.org/aprm-not-accessible> (accessed 4 February 2009) 14.

post-election violence in Kenya. In the main, colonialism perpetuated and subsequently left behind an undesirable legacy on inter-communal interactions in the country in that the notion of statehood was imposed on communities that historically lacked inter-communal coherence. By forcing ethnic communities that previously lived independently of each other to live together, the British colonisers did not give a thought to the possibility of the emerging state being ethnically polarised.³⁸

Further, through its policies that favoured the investment of resources in only high potential areas that had ample rainfall and fertile lands, colonialism spawned asymmetrical development in Kenya.³⁹ The colonial government focused on developing infrastructure and social services in 'productive' areas at the expense of the rest of the country, and this inequality remains largely unaddressed in the policies or practices of independent Kenya.⁴⁰

Soon after independence, the government reiterated the colonial position that public resources would only be invested in areas where they would earn the highest return.⁴¹ Consequently, regional inequalities between Nairobi, the former 'white highlands', Coastal, Northeast and Western provinces are still evident today. Similarly, the gross domestic product (GDP) *per capita* between the various regions of the country differs widely, while about 45% of the country's modern sector employment is concentrated in less than 15 towns.⁴²

The resultant disconnection between the various ethnic communities and regions of the country has provided the ethno-regionalised basis for political and economic discrimination against some citizens. It is rather unfortunate that this trend has found support from a class of post-colonial political elite who prefer it, both as a bargaining chip to bolster their political influence and as a tool to lock out of government their perceived opponents. Although successive post-colonial governments were expected to dispel the problems that had been evolved by the colonial legacy, this has gone largely unaddressed. For various reasons, the political class in successive governments opted to entertain and nurture this inequality.

It is therefore not surprising that the underlying regional imbalances and the attendant inter-ethnic inequalities easily inform the persistent struggles over the country's resources, such as land and access to public services. This socio-historical reality has had a negative effect on

³⁸ For a similar argument, see generally K Hopkins 'A new human rights era dawns on Africa' (2003) 18 *South African Public Law* 350.

³⁹ African Peer Review Mechanism (n 37 above) 46. The areas in question were in Central Province, the Rift Valley Highlands and parts of Western Province.

⁴⁰ As above.

⁴¹ See African Socialism and its Application to Planning in Kenya, Sessional Paper No 10, Government Printer, 1966.

⁴² As above.

democracy and human rights, and in particular the realisation of the right to participate in government.

4.2 Ethno-political factors

Since independence, Kenya's political system has demonstrated overt weaknesses and inherent inequities that have had significant ramifications for citizenship rights. First, ethnocentrism transpires throughout the country's political substratum. Secondly, because of vested ethnic interests, presidential power has been personalised. These two factors have posed certain challenges to the effective realisation of the right to participate in government.

It is important to note that Kenya, like many other African countries, has been guilty of deliberately defining citizenship within the narrow prism of ethnic belonging. Consequently, one of the most acute problems the country has been facing is the endless struggle to integrate its different communities into a democratic modern nation, without compromising their respective ethnic identities. Generally, ethnocentrism has had manifold implications: One, it has encouraged the politicisation and manipulation of ethnic identities to extreme measures and two, it has led to the exclusion of some communities from government affairs.⁴³ A few illustrations need to be given to unravel the magnitude of these problems.

During the reign of the country's first President, Jomo Kenyatta, a small elite group called 'Kiambu Mafia' dominated Kenya's politics, resulting in the emergence of a class of capitalists from his Kikuyu tribe.⁴⁴ This class enjoyed unlimited economic prosperity and political influence and repressed any resistance against it. As a result, other ethnic groups as well as many non-conforming members of the Kikuyu tribe were alienated from government affairs.⁴⁵ Participation in government was somehow a preserve for those who either belonged to the President's tribe or were his pledged loyalists.

The situation took a dramatic turn for the worst when Daniel Arap Moi ascended to the presidency after Kenyatta's death. This could easily be understood, given that Kenyatta's loyalists sidelined even Moi (then the country's Vice-President), because he belonged to a small tribe — the Kalenjin.⁴⁶ Ironically, in his formative years as President Moi posed as the possible 'political messiah' who would save the country from the curse and blemish of ethno-politics. In fact, that was one of

⁴³ African Peer Review Mechanism (n 37 above) 49.

⁴⁴ A Korwa & I Munyae 'Human rights abuses in Kenya under Daniel Arap Moi 1978-2001' (2001) 5 *African Studies Quarterly* <http://web.africa.ufl.edu/asq/v5/v5i1a1.htm> (accessed 3 February 2008).

⁴⁵ As above.

⁴⁶ A Sjögren & P Karlsson 'Kenyan politics 1963-2007: A background to the elections' http://www.nai.uu.se/policy_activities/articles/sjogren_and_karlsson/background-1/ (accessed 3 February 2008).

his pledges when he took over the presidency. Towards this end, he banned all the subsisting ethnic-centred welfare associations, such as the Luo Union, Gikuyu, Embu and Meru Association (GEMA) and the Abaluhya Union.⁴⁷

His pledge notwithstanding, Moi soon became engrossed in suppressing his perceived opponents. Corruption, ethnicity and human rights became distant concerns as he began to centralise and personalise power.⁴⁸ This he achieved through tactics such as populating the civil service and state-owned institutions with members of his tribe.⁴⁹ He also criminalised competitive politics and criticisms of his leadership.⁵⁰

In order to secure the interests of their respective ethnic communities, both Kenyatta and Moi therefore resorted to political gerrymandering, which at best fettered the right to participate in government. One such way was to limit the country's democratic space by allowing only one political party – the Kenya African National Union (KANU) – to operate freely. In fact, KANU was under the effective control of the sitting President, who also sanctioned the appointment of its members and officials. In effect, there was no clear demarcation between party and state authority. Thus, for one to participate in government in whatever capacity, he or she had to be a convert of political sycophancy.

Political power was personalised around the presidency, courtesy of unilateral constitutional and legislative amendments. By 1991, for example, the country's Constitution had been amended about 32 times in order to afford more comfort and power to the incumbent Presidents, their tribe-mates and cronies. Among the amendments was the insertion of section 2A, which made Kenya a *de jure* one-party state until that provision was repealed in 1991.

Generally, Kenya's ethno-politics have led to the misplaced assumption that it is essential for one's ethnic group to win the presidency in order to have unrestricted access to state resources and services.⁵¹ Hence, governmental authority, particularly the presidency, is more or less the preserve of the person in office and could be abused without any serious repercussions. This explains why every tribe covets the presidency and why losing it is so costly and therefore unacceptable. It is also understandable why, since the re-introduction of multi-party politics in 1991, the country's political parties are mainly regional, ethnic-based and poorly institutionalised. The nature and composition of the political parties founded in 1992 and thereafter attest to this

⁴⁷ As above.

⁴⁸ Korwa & Munyae (n 44 above).

⁴⁹ As above.

⁵⁰ Amnesty International 'Kenya: Torture, political detention and unfair trials' (1987) AI Index AFR 32/17/87 and Amnesty International 'Kenya: Torture compounded by the denial of medical care' (1995) AI Index AFR 32/18/95.

⁵¹ African Peer Review Mechanism (n 37 above) 49.

fact in that even the self-styled 'national parties' have tribal or regional undercurrents.

When Kenya entered the multi-party era, there was an earnest expectation that the government would create an enabling environment for its citizens to exercise freely their constitutionally-guaranteed rights. Contrary to this popular belief, most of the 1990s were a continuation of the un-democratic practices birthed at independence. In the early 1990s, for example, the KANU government went as far as instigating ethnic-based violence in order to show that a multi-party political system was not suitable for a multi-ethnic country such as Kenya.⁵²

It was during this period when 'ethnic cleansing' occurred in many parts of the country, aimed at expelling certain communities from areas believed to be the 'native reserves' of other communities. This happened in, for example, the Rift Valley Province between 1991 and 1993, when the Kalenjin community attempted to expel other communities living in the area.⁵³ The same could be said of the violence reported in parts of Coast Province prior to and after the 1997 general elections. There is ample evidence that the 1992 and 1997 ethnic violence was politically motivated by the government.⁵⁴ Specifically, a report compiled by Amnesty International implicated certain pro-government politicians with the 1997 clashes in Coast Province.⁵⁵

It may be argued that Kenya's third multi-party elections, held in December 2002, presented the best opportunity for the realisation of an ethnically-integrated country. This is mainly because, for once, ethnicity was at its barest minimum, courtesy of the formation of an inter-ethnic party called the National Rainbow Coalition (NARC). This opportunity was nonetheless lost as NARC's promise to end ethnicity was forgotten the moment Kibaki was sworn in as the country's third President. Like his predecessors, the President is roundly accused of perpetrating ethnicity.⁵⁶

It is rather unfortunate that ethnicity as a factor in Kenya's politics has been dismissed, overlooked and considered secondary, while it is one of the staunchest challenges to citizens' participation in government. Rothchild rightly warned against such an attitude by emphasising that 'as long as observers cavalierly dismiss ethnicity as an irrational relic of the past, they will be unable to recognise its force and attraction in con-

⁵² Korwa & Munyae (n 44 above).

⁵³ C Sicherman 'Kenya' (1998) 57 *Race and Class* 63.

⁵⁴ See National Council of Churches of Kenya 'CPK/ARCH: Synod Committee Report' April 1992 and A Abuom 'The role of Kenyan churches in democratisation' paper presented at a Conference on the Christian Churches and Africa's Democratisation, Leeds, 1993, cited in Korwa & Munyae (n 44 above).

⁵⁵ See generally Amnesty International 'Kenya Annual Report for 1997' (1998).

⁵⁶ See Standard Team 'A blot on the talks' <http://www.eastandard.net> (accessed 13 February 2009).

temporary times'.⁵⁷ True to Rothchild's words, the governance crisis in Kenya and the attendant undermining of democracy and human rights could not have reached the intensity it did in 2007 had the underlying ethno-political factor been timeously resolved.

4.3 Socio-economic factors

Kenya's is the largest economy in East Africa and the third largest in sub-Saharan Africa. Its economic performance has, however, been below potential.⁵⁸ The country's poverty index is escalating, as the number of poor increased from 12,5 million in 1997 to 15 million in 2005.⁵⁹ An alarming 56% of the population lives in absolute poverty. This has been attributed to a combination of factors, including natural calamities, corruption, deteriorating infrastructure, weak implementation capacity and low levels of donor inflows.⁶⁰ Poverty in the country is also quite structured, with certain regions being disproportionately affected due to political and historical reasons.⁶¹

From another perspective, though, the country's economy displays some positive attributes, namely, reduced dependence on foreign aid, good domestic resource mobilisation efforts and a vibrant agricultural export sector.⁶² The government has also sought to expand its tax base via policies that, among other things, encourage investment, improve tax administration and enhance the efficiency of financial markets and institutions.⁶³

Despite noticeable progress in key socio-economic reforms, the country still faces many challenges which have negative implications for citizens' participation in government. These challenges concern, *inter alia*, improving the efficiency of public sector service delivery, building a new infrastructure and rehabilitating existing ones, high unemployment rates, especially among the youth, poverty eradication, maintaining sound economic policies and implementing various structural reforms so as to reverse a slow economic growth rate. The country also lacks effective anti-corruption policies.

Kenya has had, and continues to have, a worrisome level of corruption. Decades of endemic corruption have fundamentally deprived

⁵⁷ D Rothchild 'Ethnic insecurity, peace agreements and state building' in R Joseph (ed) *State, conflict and democracy in Africa* (1999) 320.

⁵⁸ African Peer Review Mechanism (n 37 above) 17. This report indicates that the country's Gross Domestic Product (GDP) fell precipitously from an annual growth rate of 7,5% in 1971-80 through 4,5% in 1981-90, to a mere 1% in 1997-2002.

⁵⁹ As above.

⁶⁰ As above.

⁶¹ See generally UNDP *Fourth Human Development Report for Kenya*, 2005; and Society for International Development (2004) 'Pulling apart facts and figures on inequality in Kenya'.

⁶² African Peer Review Mechanism (n 37 above) 17.

⁶³ As above.

citizens of their right to participate in government. The vice has exacerbated the country's socio-economic crisis to such a magnitude that the rules of fair play are either simply ignored or have been replaced with influence peddling and nepotism. This has eventually affected the competence, integrity and output of government. Moreover, it has entrenched socio-economic inequality as well as inequitable access to public resources and services among citizens.

Whereas the government has established the Kenya Anti-Corruption Commission (KACC) and enacted the Anti-Corruption and Economic Crimes Act, there is the general lack of political will to end this vice in all spheres of society. In fact, grand corruption is becoming prolific in some government ministries, departments, corporations, the judiciary and even local authorities. This is not an attribute of good governance because corruption and related vices fail to ensure the most efficient utilisation of resources in the promotion of development, enhancement of citizen participation in government and accountability.⁶⁴

Another disturbing socio-economic issue currently affecting the country pertains to land allocation and distribution. Statistics indicate that more than half of the arable land in the country is in the hands of only 20% of the population.⁶⁵ This is partly because the post-colonial land redistribution policy was deliberately designed to favour the ruling class and not the landless masses. With the aid of such a policy, politicians in successive governments have used land to induce patronage and build political alliances.⁶⁶ Thus, much of the land has ended up in the hands of the political class, members of their families, friends and tribe-mates, rather than the communities from which the colonialists had taken it.⁶⁷ A recent investigation on the unfair allocation of land found that:⁶⁸

[t]he practice of illegal allocations of land increased dramatically during the late 1980s and throughout the 1990s ... and land was ... granted for political reasons or [was] ... simply subject to 'outright plunder' by a few people at the expense ... of the public.

The practice of the illegal allocation and distribution of land has led to a general feeling of marginalisation among some communities as well as the ethnicisation of the land question. While the Constitution permits individuals to own land in any part of the country without any form of discrimination, this, in reality, has not been the case. Many areas outside the major cities and towns are ethno-geographically demarcated, a phenomenon that has led to the emergence of 'ethnic

⁶⁴ See Hope (n 10 above) 6.

⁶⁵ See generally G Njuguna 'The lie of the land evictions and Kenya's crisis' (2008) 2 *African Policy Brief* 1.

⁶⁶ Kenya National Commission on Human Rights *Unjust enrichment* (2004) 1.

⁶⁷ As above.

⁶⁸ n 66 above, 146.

reserves'. Besides being a source of corruption in terms of illegal or irregular land allocation, this phenomenon has also been tapped by politicians to instigate ethnic violence, especially during electioneering periods.⁶⁹

4.4 Legislative factors

As argued elsewhere above, Kenya's legal system has been the government's handmaiden for undemocratic tendencies such as ethnic polarisation, electoral malpractices and uneven access to public resources. The country still prides itself in a Constitution drafted at independence in 1963 and a legal system aped from its former coloniser. Although the Constitution came with a flowery package of guarantees, it failed to address certain crucial issues of national importance, which now pose a threat to good governance.⁷⁰ Some of these unresolved issues include the question of streamlining the three arms of government — executive, legislature and judiciary, land acquisition and distribution, reform of the electoral system, and improving ethnic integration.

Good governance is influenced by the existence of a sound democratic constitution that enables the government to manage the affairs of the state effectively, while at the same time empowering the citizenry to participate in government.⁷¹ Unfortunately, Kenya's current Constitution was written without much input from the citizens of the country and, in spite of relentless efforts to amend it, there is consensus that the document is now outmoded.⁷² In fact, some of the amendments eventually undermined the legal sanctity of the document, rendering it rather a powerful tool in the hands of the President than an agreement between the government and its citizens. A closer look at some of its provisions would confirm this position.

The Constitution empowers the President to be the head of state and Commander-in-Chief of the armed forces of the Republic.⁷³ Additionally, the President can hire and fire the Vice-President and Cabinet Ministers,⁷⁴ enjoys immunity from criminal and civil proceedings,⁷⁵ appoints Permanent Secretaries,⁷⁶ the Attorney-General,⁷⁷ the Chief

⁶⁹ See generally Republic of Kenya *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, Nairobi: Government Printer, June 2004 (Ndungu Report).

⁷⁰ See the Constitution of the Republic of Kenya, adopted in 1963, as amended in 1999.

⁷¹ African Peer Review Mechanism (n 37 above) 16.

⁷² African Peer Review Mechanism (n 37 above) 24.

⁷³ See art 4 of the Constitution of the Republic of Kenya.

⁷⁴ Arts 15 & 16.

⁷⁵ Art 14.

⁷⁶ Art 111.

⁷⁷ Art 109.

Justice and other judges,⁷⁸ the Controller and Auditor-General,⁷⁹ Commissioner of Police⁸⁰ and Chief of General Staff of the armed forces of the Republic.⁸¹ Moreover, he or she can summon, prorogue and dissolve parliament at whim,⁸² must assent to legislation before it becomes law⁸³ and appoints officials of the Electoral Commission.⁸⁴

It is clear that, apart from vesting enormous powers in the President, the Constitution also grants him overwhelming influence over the executive, judicial and legislative functions of government. As correctly emphasised in the African Peer Review Mechanism report on Kenya:⁸⁵

The subordination of parliament to the executive in law making and parliamentary oversight functions, the failure of the executive to heed parliamentary recommendations, executive interference in appointments to the judiciary, do not conform to the accepted norms of democracy and are a source of disquiet in certain segments of Kenyan society. The traditional democratic notion of checks and balances is seen as a safety net that can best ensure that government organs work in a perfect equilibrium to deliver to the citizen an acceptable governance package.

Democracy, strictly so-called, has therefore not been tenable in Kenya, much due to an 'authoritarian Constitution' that vests enormous powers on the presidency. Constitutional reform has been a central talking point for decades, but to date every attempt to realise this goal has stalled. The first major attempt towards comprehensive constitutional reforms was in 1998, when the Constitution of Kenya Review Act was enacted to provide the framework for substantial review.

This, however, did not materialise because the KANU government was not comfortable with the scope of the potential reforms. Most contentious were the proposals on the devolution of powers through a federal system of government and the limiting of the powers of the President through the creation of the office of a Prime Minister with 'executive powers'. The wrangling between the government and opposition parties saw the country going into the 2002 elections with no substantial legislative reforms. Expectedly, the constitutional review process is still hampered by divisive politics, animated by high levels of political posturing and discord.⁸⁶ More often than not, national interests are traded off against the sectarian interests of politicians and other decision makers.⁸⁷

⁷⁸ Art 61.

⁷⁹ Art 110.

⁸⁰ Art 108.

⁸¹ As above.

⁸² Art 59.

⁸³ Art 46(2).

⁸⁴ Art 41.

⁸⁵ African Peer Review Mechanism (n 37 above) 50.

⁸⁶ African Peer Review Mechanism (n 37 above) 24.

⁸⁷ As above.

The NARC government promised a new Constitution within its first 100 days in office, but could not deliver due to persistent wrangling within the party. By 2002, the Constitution of Kenya Review Commission (CKRC) had compiled a Draft Constitution, (popularly known as the 'Bomas Draft') from the views it collected from the public. The Draft provided for, among other things, the sharing of executive power between the President and Prime Minister. Due to disquiet from certain quarters, a parliamentary committee was constituted in 2004 to amend the Draft. The new Draft compiled by the committee (known as the 'Wako Draft') was not acceptable to some members of parliament from the Liberal Democratic Party (LDP) and KANU, since it sought to retain the enormous powers of the President.

The Wako Draft was later subjected to a referendum in November 2005, but was rejected by an overwhelming majority. Other than the general dissatisfaction with the content of the document, ethno-politics once again determined the outcome of the vote. The Wako Draft gained widespread support only in those areas dominated by Kibaki's Kikuyu tribe. It was within this context of ethnic division and animosity and the lack of legislative reforms that the country's 2007 polls were conducted.

Other than allowing the constitutional reform process to be the forum for all Kenyans to collectively determine the destiny of their nation, politicians have always usurped the process to settle their scores. It is needless to emphasise that, through comprehensive constitutional and legislative reforms, that sound democratic principles can be entrenched in a multi-ethnic country like Kenya.

5 Conclusion

The 2007 post-election chaos may have changed Kenya's political landscape irreversibly. Remarkable progress has already been registered since the signing of the power-sharing agreement between PNU and ODM and the subsequent formation of the Grand Coalition Government (GCG). The four-item agenda formulated by the KNDR team at the beginning of the mediation talks has been partly fulfilled, although other more crucial concerns are still pending. The items in the agenda were (i) measures to end the violence and restore fundamental rights and freedoms; (ii) immediate measures to address the humanitarian situation and promote reconciliation, healing and restoration; (iii) how to end the political crisis; and (iv) critical long-term issues including land reform, poverty, inequity, transparency and accountability.⁸⁸

Among other milestone achievements of the talks were the establishment of the Department of Reconciliation and National Cohesion, the

⁸⁸ See Standard Team 'It's up to you, Annan tells House members' <http://www.eastandard.net> (accessed 13 February 2009).

resettlement of some internally displaced persons, the establishment of a Truth, Justice and Reconciliation Commission and the disbandment of the Electoral Commission of Kenya in line with recommendations by an Independent Review Commission on the presidential elections. Investigations have also been concluded on the causes of the post-election violence and recommendations made on the prosecution of those who were responsible.

Beyond that, nothing has yet been done to address the long-term issues that have plagued the country since independence. Comprehensive constitutional, legislative, judicial and institutional reforms, as well as other reforms necessary to address the root causes of the conflict are not being treated with urgency. As the way forward, therefore, a system of governance that is sensitive to the country's diversity is imperative.

Kenya is in desperate need of a 'watertight' system that would ensure greater citizens' participation and promote accountability and transparency in public affairs. Such a system should first provide equal opportunities for all citizens by creating conditions that would encourage their input in governance and development.⁸⁹ Secondly, it should provide for the effective transfer of power and periodic renewal of political leadership through representative and competitive elections.⁹⁰ This would mean establishing an accountable and transparent electoral mechanism.

Thirdly, the system should strengthen legislative and administrative institutions, such as parliament, the judiciary and other state institutions. Fourthly, it should empower citizens to hold public officials accountable for their conduct, actions and decisions. Fifthly, it should ensure effective public sector management, stable economic policies, effective resource mobilisation and the efficient use of public resources. Lastly, it should adhere to the rule of law in a manner that would protect human rights and democracy and ensure equal access to justice for all.⁹¹

⁸⁹ Hope (n 10 above) 8.

⁹⁰ As above.

⁹¹ As above.

The practice on the right to freedom of political participation in Tanzania

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Summary

This is a review of the impact of the drastic reforms in 1992 on Tanzania's constitutional and socio-political scene, specifically upon the right to freedom of political participation. Using a historical perspective, the article traces the origins of the present failures and successes in this regard in order to test whether the law meets the requirements of constitutionalism and international standards. It debates the issue as to whether in practice the one-party political system allowed free and unimpeded participation in the public decision making. It is argued that this legacy has not been done away with by the post-1992 reforms. It asks the question as to whether the National Electoral Commission is really independent and free of influence and dictation by the government. The amendments of the relevant constitutional provisions and other laws have added to the establishment of the Commission's de jure independence. Nothing has been done by the government to date, following a report of the Presidential Committee on the Constitution (Kisanga Committee) of 1999, to make the Commission de facto independent, even to a limited extent. Similar questions have been asked relating to other elements of political participation, such as the right to effective participation and the need to hold a constitutional conference leading to a new Constitution and allowing independent candidates in all elections in Tanzania. In this regard the government has not done enough, despite consistent pressure and campaigns from political parties and other civil society institutions. Lastly, the prospects for genuine political reforms are debated, acknowledging only limited success.

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1 Introduction

In 1992, Tanzania experienced unprecedented changes in its constitutional and political discourse, usually referred to in Kiswahili as *Mageuzi*. The country abandoned its dogma of one-party rule and replaced it with a potentially plural multi-party political practice. This paper reviews the impact of the *Mageuzi* reforms on Tanzania's constitutional and socio-political scene, specifically as regards the right to freedom of political participation. The historical perspective employed here is intended to trace the origins of both the present failures and successes in this regard, in order to test whether the law as it is practised today meets the requirements of constitutionalism and international standards.

In current post-modernist development discourse, 'participation' generally means 'the freedom to make meaningful choices between various options [as] the essence of development and [a] precondition for personal well-being ... to ensure the quality, appropriateness and durability of improvements ...'¹ The main problem is the fact that 'development processes are generally far from participatory ... Hence [there is] resistance of traditional top-down development planners towards participation of the poor, the people who are supposed to benefit primarily from foreign interventions.'² Moreover, another problem in the debate is about what form of participation is needed in the whole process of development, that is, as between instrumental participation, which is often applied, and transformative participation, which is seen to be the most desirable in enhancing real participatory development in the future.³ Due to limited space and the need for focus, this paper avoids this discussion, while restricting itself to the subject matter of the law as provided by the Constitution of the United Republic of Tanzania and other related legal instruments and how these have been applied.

2 *Mageuzi* and the right to freedom of political participation

The right to freedom of political participation is usually enjoyed or practised alongside the right to political association. Indeed, these two rights are the key to the enjoyment of all other fundamental human rights because political practice is the condition precedent for any type of mundane life. For example, in the modern human rights discourse under the United Nations (UN) leadership and co-ordination, the right

¹ E Berner & B Phillips 'Participation: Opportunity, burden or ritual?' (2005) 7 *Development Issues* 7.

² K Biekart 'Participation in development studies: Towards mainstreaming' (2005) 7 *Development Issues* 6. See also B Cooke & U Kothari *The new tyranny* (2001).

³ M Buchy 'Let's keep transformative participation on the agenda' (2005) 7 *Development Issues* 10.

to self-determination has come to be seen as the most fundamental of all rights.⁴ However, how can one achieve self-determination without effective political articulation, both at the domestic and international levels? It follows that, in any political jurisdiction, it is necessary and desirable that consensus is reached and maintained, that the unhampered enjoyment and practice of these rights are guaranteed, not only by the printed word of the constitution, but also through overt positive deeds of the governments in power. This is particularly true for governments in the developing world, such as Tanzania. These governments have invariably fallen prey to the temptation of creating extremely powerful ruling regimes, which more often than not tend to manipulate and control the political stage in their countries, for the good of a small section of society. What this paper wishes to emphasise is that this tendency has always worked towards the erosion of a much-needed civil society, respect for human rights and the expansion of democracy, ultimately resulting in less economic development in these countries.⁵

2.1 The law and the right to freedom of political participation

I have discussed in detail elsewhere⁶ the socio-economic factors that led to the fall and disruption of the one-party political system in Tanzania. This discussion is omitted here, partly for economy of space and partly because the area is over-researched.⁷ The right to political participation is provided for in article 21 of the Constitution of the United Republic of Tanzania which, before the Eleventh Constitutional Amendment Act 1994,⁸ had provided thus:

⁴ See generally O Gye-Wado 'A comparative analysis of the institutional framework for the enforcement of human rights in Africa and Western Europe' (1990) 2 *Africa Journal of International and Comparative Law* 187; R Higgins *The development of international law through the political organs of the United Nations* (1963); J Humphreys 'The international law of human rights in the middle twentieth century' in J Bos (ed) *The present state of international law* (1973); S Kabbalo 'Human rights and democratisation in Africa' (1995) 43 *Political Studies* 189-203 199-200; H Kanger *Human rights in the UN Declaration* (1984); T Maluwa 'Discourses on democracy and human rights in Africa: Contextualising the relevance of human rights to developing countries' (1997) *African Journal of International and Comparative Law* 9; AH Robertson & JG Merrills *Human rights in the world — An introduction to the study of the international protection of human rights* (1993); IG Shivji *The concept of human rights* (1989); W Tieya 'The third world and international law' in R St J MacDonald & DM Johnson (eds) *The structure and process of international law* (1986).

⁵ See Berner & Phillips (n 1 above) 9.

⁶ See M Wambali 'The historical overview of constitutional reforms towards limited leadership in Tanzania' (2008) 34 *Commonwealth Law Bulletin* 2.

⁷ See eg CM Peter & F Kopsieker (eds) *Political succession in East Africa: In search for a limited leadership* (2006).

⁸ See sec 4 of Act 34 of 1994. Sub-sec (1) thereof was amended following a judicial ruling that we will deal with in detail in this paper. For purposes of clarity of argument and understanding of the constitutional developments involved, we proceed here to discuss the replaced provision.

- (1) Every citizen of the United Republic is entitled to take part in the government of the country, either directly or through freely chosen representatives, in accordance with the procedure provided or under the law.
- (2) Every citizen is entitled and shall be free to participate in full in the making of decisions on matters which affect him, his livelihood or the nation.

The scope of this section was delineated in the High Court of Tanzania case of *Rev Christopher Mtikila v The Attorney-General*.⁹ The High Court, presided over by the late Hon Mr Justice K Lugakingira, held as follows:

A citizen's right to participate in the government of his country implies three considerations: the right to the franchise, meaning the right to elect representatives; the right to represent, meaning the right to be elected to the law-making bodies; and the right to be chosen to political office.

In addition article 21(2) provides for the right to be consulted. Every citizen has the right to demand the government's effective consultation of them, before making important decisions seriously affecting their welfare. Moreover, the provision of the right to political participation was a significant feature of the Tanzanian Bill of Rights. It distinguished it from, for example, that of neighbouring Kenya, or even that of India.¹⁰ Even then, the right to participate in political affairs may be inferred from other constitutional provisions in such constitutions. Its inclusion in the Tanzanian Bill of Rights was evidence of the influence of the international legal regime thereto.¹¹ Actually, article 20(1) of the Constitution was, before its amendment in 1994,¹² *in pari materia* with article 13(1) of the African Charter on Human and Peoples' Rights (African Charter).

Besides that, article 25(a) of the International Covenant on Civil and Political Rights (CCPR) contains a provision akin to the former version of article 21(1) of the Tanzanian Constitution. However, CCPR is more elaborate on the right to political participation in its article 25(b), which is not found in the other legal instruments mentioned above. The right includes, *inter alia*, the right 'to vote and be elected at genuine periodic elections which shall be held by secret ballot, guaranteeing the free expression of the will of the electors'. Therefore, in the absence of such express provision in the Tanzanian Bill of Rights, the above foreign and

⁹ [1995] TLR 31 (*Mtikila case*).

¹⁰ Neither the Kenyan Bill of Rights (ch 5 of the Constitution of Kenya) nor that of India (ch 3 of the Constitution of India) provides for the right to political participation.

¹¹ The influence of international human rights standards in the Constitution of the United Republic of Tanzania can also be seen in other areas, especially arts 9(a) and (f), which refer to the relevance of the provisions of the Universal Declaration of Human Rights, 1948, to the Fundamental Objectives and Principles of State Policy, which invariably guide the interpretation of the Bill of Rights and the Constitution as a whole.

¹² n 8 above.

international provisions can be invoked by the courts in the country to develop an interpretation as to the parameters of the right to political participation.

Finally, we come to article 21(2) reproduced above. It is worth noting at this juncture that one does not find a provision analogous thereto in the international legal instruments mentioned above or in other related legal documents. Indeed, it was an innovation of the Tanzanian Constitution, reflecting the Guidelines of the then ruling political party, CCM.¹³ But it must still be borne in mind that the Bill of Rights in the Constitution of Tanzania is crafted in such a way that it imitates the International Bill of Rights. Whether the one-party political system allowed free and unimpeded participation in the public decision making in practice is the subject of the discussion in the next section.

2.2 The right to political participation in practice

If anything, by its very nature, the one-party political system was itself a negation of all aspects of the enjoyment of the right to political participation. Take, for example, the right to take part in the government, either directly or through freely chosen representatives (article 21(1)). This was marred by the election law itself. The issue is whether the *Mageuzi* process from 1992 onwards has changed substantially for the better the right to political participation in expanding the right. This issue is examined in the next subsection of this paper.

2.2.1 The right to stand for public office

Prior to the coming into effect of the Eighth Constitutional Amendment Act 20 of 1992, article 39(1) of the Constitution of the United Republic of Tanzania had categorically provided that the contestant for the position of President must be 'a member of the party who fulfils all membership obligations prescribed by the party Constitution'. Moreover, article 67(1) of the same Constitution had provided for qualifications for members of the National Assembly along the same lines.

One cannot doubt the importance of the above requirement in a one-party scenario. Similarly, one has to appreciate the logic that such requirement cannot have any substance in a multi-party situation. But that was not to be the case with the ruling party, CCM, and its government, which still insist to date on the requirement of party membership for any person wishing to contest all elective offices at the local government, parliamentary and presidential levels, even after having discarded the one-party political system. Thus, by virtue of sec-

¹³ See the *CCM Guidelines* (1982).

tion 13 of the Eighth Constitutional Amendment Act 1992, article 39 of the Constitution was amended to read as follows:¹⁴

- (1) No person shall be entitled to hold the office of the President of United Republic unless he:
 - (a) is a citizen by birth of the United Republic by virtue of the citizenship law;
 - (b) has attained the age of forty years;
 - (c) is a member and is a contestant sponsored by a political party; and
 - (d) is otherwise qualified for election as a member of the National Assembly or of the House of Representatives.¹⁵

Similarly, provisions were made in the same law in respect of contestants for membership to the National Assembly (section 19). It was indeed no secret that the above provisions followed the ruling party's directives as had been confirmed by the government.¹⁶ Thus, in defending his party's position while dismissing any rationale for the introduction of independent candidates, the then Prime Minister, John Samuel Malecela, scornfully declared that 'if one holds opinions and beliefs which are acceptable to the people but are different from those shared by the present political parties, one has the option of forming one's own political party'.¹⁷

However, such eloquent justification, which seemed to have been well received by the House, did not get the same approval from the High Court of Tanzania. The constitutional validity of the same provisions was questioned in *Rev Christopher Mtikila v The Attorney-General*.¹⁸ In this case it was held that article 39 was constitutionally valid in terms of the requirements of article 98(2) of the Constitution. It was emphasised by the Court that this did not mean that these were free from difficulties.¹⁹ The Court pointed out that article 21(1) was very broad in its wording as it addressed itself to 'every citizen'. Thus, according to the judge:²⁰

It could have easily been said 'every member of a political party', but it did not, and this could not have been without cause. It will be recalled indeed, that the provision existed in its present terms ever since the one-party era. At that time all political activity had to be conducted under the auspices and

¹⁴ Now replaced by sec 5 of the 9th Constitutional Amendment Act 1992, which amended art 39 to add to the citizenship requirement, citizenship by naturalisation, subject to the concerned contestant satisfying the condition of having prior to standing for such elective office, been resident in the United Republic for 15 years or more.

¹⁵ Author's translation of the original *Kiswahili* version.

¹⁶ Hansard (1992), *Majadiliano ya Bunge — Taarifa Rasmi: Mkutano wa Saba — 28 Aprili — 8 Mei 1992*, Part I, Dar es Salaam: Bunge Press — Government Printer 130.

¹⁷ Hansard (n 16 above) 130-1.

¹⁸ n 9 above.

¹⁹ n 9 above, 21-25.

²⁰ n 9 above, 41.

control of the *Chama Cha Mapinduzi* and it could have been argued that this left no room for independent candidates.

The judge did not see any justification for extending the above restriction to the multi-party context. Indeed, he found the requirement to be contradictory of the contents of article 20(4) which, for its part, outlaws compulsory recruitment to membership of associations. According to him, 'while participation through a political party is a procedure, the exercise of the right of participation through a political party *only* is not a procedure but an issue of substance'.²¹ Therefore, the Court ultimately held it to be lawful for independent candidates, along with candidates sponsored by political parties, to contest presidential, parliamentary and civic elections.²²

The government's reaction to the above judgment expressed its disrespect for and represented a breach of the independence of the judiciary. Not long thereafter, the Attorney-General's chambers withdrew their notice of appeal against the decision to the Court of Appeal of Tanzania. They went on to table before the following session of the National Assembly constitutional amendments which effectively provided for just the opposite of the Court's decision mentioned above.

Thus, by virtue of section 4 of the Eleventh Constitutional Amendment Act 34 of 1994, article 21 was drastically amended to subject the right to freedom of political participation to the then repugnant articles 39 and 67. At the same time it inserted therein even more stringent limitation clauses. The current article 21(1) reads as follows:²³

Without prejudice to the provisions of articles 5, 39 and 67 of the Constitution and the laws of the land relating to the provisions for electing or being elected, or appointing or being appointed to take part in the government of this country, every citizen of the United Republic is entitled to take part in the government of this country either directly or through freely chosen representatives, in accordance with the procedure provided by or under the law.

Simply stated, what had been achieved was the compromising of fundamental rights as had appeared in the original version of the Bill of Rights, with the other ordinary provisions of the Constitution and laws inconsistent with the former. The desire of the government to legislatively overrule the court as regards the validity of independent candidates in elections was further expressed when, by means of section 8 of the same Amendment Act of 1994, a new sub-article was added to article 39 of the Constitution, providing thus:

- (2) Without interfering with the right and freedom of a person to hold his own opinions, to believe in the religion of his own choice, to cooperate with others in public activities in accordance with the laws

²¹ n 9 above, 42.

²² Borrowing support from Lord Diplock's *dictum* to that effect in *Attorney-General of The Gambia v Jobe* [1984] AC 689; [1984] 3 WLR 174; [1985] LRC (Const) 556.

²³ Author's English translation of the original *Kiswahili* version.

of the land, no person shall be qualified to be elected to the office of President of the United Republic if he is not a member and contestant sponsored by a political party.

The same was done in respect of article 67 relating to contestants for membership to the National Assembly.²⁴ This indeed was a mockery of the rule of law, inhibiting the government's determination not to loosen the grip they had always maintained over the conduct of political activities in the country. The issue is whether the mere observance and correct exercise of the legislative powers in the National Assembly to amend the provisions of the Constitution under article 98 thereof may legitimate the curtailment of the substance and content of the Bill of Rights; particularly where this does not only change the letter of the concerned provisions, but also erodes the ethic of fundamental rights as was done by the Eleventh Constitutional Amendment Act of 1994.

Surprisingly, even the retired President and architect of this regime, the late *Mwalimu* Julius Kambarage Nyerere, could not remain silent over this constitutional blunder by the government, then led by his immediate successor, Alhaj Alli Hassan Mwinyi. He publicly condemned the government for this move, describing the amendments as a severe circumscription of the 'irksome provision in the Bill of Rights on the basis of which the ban [on private candidates] was ruled unconstitutional by the High Court'.²⁵

This criticism of the government from the founder of the system of governance actually sought to be defended by the amendment is sufficient reason to vitiate any political legitimacy that might have existed when the government decided to misuse its legislative authority in the way demonstrated above. What can be added, though, is to call upon the courts to cherish the responsibility of guarding against such encroachments upon their constitutional mandate to interpret and apply the law in context. They should respond to the late Nyerere's concern by making sure that there is an end to such assaults. This is what is meant by judicial activism. Indeed, the High Court of Tanzania has responded to this call in a recent judgment of 5 May 2006 in the case of *Christopher Mtikila v The Attorney-General*.²⁶ In this case, the full bench of the High Court of Tanzania (Manento J (as he then was), Massati and Mihayo JJ) took the opportunity to openly launch a vicious attack on the powers of parliament to make and amend laws, while emphasising that such powers are not limitless, relying heavily

²⁴ Sec 13 of Act 34 of 1994, mentioned above, amended sub-art (2) of art 67 by adding thereto a new clause (e), providing thus: 'Without interfering with the right and freedom of a person to hold his own opinions, to believe in the religion of his own choice, to co-operate with others and to participate in the public activities in accordance with the laws of the land, if such person is not a member and contestant sponsored by a political party.'

²⁵ JK Nyerere *Our leadership and the destiny of Tanzania* (1995) 9.

²⁶ Miscellaneous Civil Cause 10 of 2005, Dar es Salaam Main Registry [2006] TZHC 5 (Saflii).

on Shivji, among others, who had this to say on the same point in a 2003 publication:²⁷

The power to amend the Constitution is also limited. While it is true that parliament in constituent capacity ... can amend any provision of the Constitution, it cannot do so in a manner that would alter the basic structure or essential features of the Constitution.

Then the Court went on to decide conclusively, in the same terms as those of the late Lugakingira J (as he then was) in the 1993 *Mtikila* case,²⁸ that it shall be lawful for private candidates to contest the posts of President and Member of Parliament along with candidates nominated by political parties. However, unlike in the former case, in this matter the judges went on to say thus:²⁹

Cognisant of the fact that the vacuum might give birth to chaos and political pandemonium, we shall proceed to order that the respondent, in the true spirit of the original article 21(1) and guided by the Fundamental Objectives and Principles of State Policy contained in Part II of the Constitution, between now and the next general elections, *to put in place a legislative mechanism that will regulate the activities of private candidates, so as to let the will of the people prevail as to whether or not such candidates are suitable.*

Certainly it is clear that the judges have gone far beyond the recommendations of the Kisanga Committee of 1999, which had advised the government to allow private candidates only during parliamentary and civic elections, and not in presidential elections,³⁰ as we shall see shortly. However, it can be stated that in the current Tanzanian constitutional discourse, there still exists a tug of war between the government's position against the desirability of independent candidates to contest in elections, on the one hand, and that of the judiciary and other progressive stake-holders, consistently urging the government to allow independent candidates in all elections, on the other hand.

Suffice it to say at this juncture that, although the government has not yet openly supported the *Mtikila* judgment, it seems unlikely that it is going to directly oppose it, particularly in view of the recent constitutional amendment of 2005, which fortified its respect and adherence to the principle of the independence of the judiciary.³¹ Nevertheless, before we deal with the recommendations of the Kisanga Committee

²⁷ IG Shivji 'Constitutional limits of parliamentary powers' (2003) *The Tanzania Lawyer* 39.

²⁸ n 9 above.

²⁹ My emphasis.

³⁰ See the 7th Proposal in the *Report of the Presidential Committee for the Collection of Views on the Constitution*, Book One on 'The views of the people and the Committee's advice thereon' Dar es Salaam: Ministry of Justice and Constitutional Affairs (1999).

³¹ See art 107A of the Constitution of the United Republic of Tanzania, 1977 (as re-enacted by sec 16 of the Fourteenth Constitutional Amendment Act 2005).

on the same issue, let us discuss the specific aspects of freedom of political participation, beginning with the right to effective representation.

2.3 The right to effective representation

The right to effective representation is discussed with reference to the issue as to whether the legal reforms made during the *Mageuzi* period have really reflected a departure in total from the former system under the one-party rule. Focus is directed to the changes effected in the electoral system.

Together with the Eighth Constitutional Amendment Act of 1992, amendments were also made to the Elections Act 1 of 1985.³² The most significant thereof was the repeal of the former section 4A of the Act, which had provided for the membership of the National Electoral Commission established by the Constitution,³³ by replacing it with a new section 4.

This was the re-enactment *in pari materia* of sub-article (1) of article 74 of the Constitution of the United Republic of Tanzania. The former law had provided for the Commission's Chairperson to be a judge of the Court of Appeal only. Moreover, the new law did not provide for the membership of a judge from the High Court of Zanzibar, but instead it created the position of Vice-Chairperson. In order to guarantee the representation of each side of the United Republic in the topmost positions of the Commission, article 74(2) of the Constitution of Tanzania, as amended, provides for the appointment of a Vice-Chairperson in the manner that if the Chairperson came from one party, the Vice-Chairperson would have to be appointed from another.

It is worth noting the number of amendments article 74 of the Constitution has endured over a period of a decade from the *Mageuzi* of 1992. By virtue of section 2 of the Tenth Constitutional Amendment Act 7 of 1993, article 74 was amended to give power to the National Electoral Commission to supervise civic elections at the district, town, municipal and city levels. Furthermore, article 74 was again amended by means of section 4 of the Thirteenth Constitutional Amendment Act 3 of 2000. The National Voters' Register was established, and section 14 of the Amending Act included in the membership of the Commission, among others, the 'Vice-Chairman who shall be a person who holds or in the past held or is qualified to hold the position of judge of the High Court or Court of Appeal'. Also, the same section was made to provide for the guarantee of the independence of the National Electoral Commission. Lastly, section 14 of the Fourteenth Amendment Act 2005 amended article 74 by again providing that the membership of the Commission must include 'the Chairman who shall be a person

³² See Elections (Amendment) Act 6 of 1992.

³³ See art 74 of the Constitution of the United Republic of Tanzania as amended by Act 4 of 1992.

holding the position of judge of the High Court or Court of Appeal or a person qualified to be appointed to the position of judge of the High Court or Court of Appeal'. Undoubtedly, these multiple amendments are a result of the ongoing and yet unresolved controversy and demands of the campaigners in the opposition camp of the Tanzanian political area. Their aim is a fully independent National Electoral Commission, which I deal with briefly in the next section, after having examined a few other constitutional changes.

Alongside these constitutional amendments in the electoral system, the amended Elections Act 1985 was made to provide for the Director of Elections as the Chief Executive Officer of the National Electoral Commission.³⁴ Thus, coming to the question whether these changes have improved effective representation, it is important that we critically analyse whether the whole process is capable, under the new constitutional set-up, of guaranteeing free and fair elections. Therefore, an evaluation of the independence of the National Electoral Commission cannot be avoided.

2.4 The independence of the National Electoral Commission

Right from the beginning of *Mageuzi* in 1992, there has invariably been voiced — mainly from academic circles and the parties in the opposition — reservations about the independence of the present National Electoral Commission. Indeed, it was part of the recommendations of the Nyalali Commission that³⁵

[c]hairmen of electoral commissions together with the ordinary members thereof should be appointed by the National Assembly/House of Representatives as applicable, but not from the members of the Houses. The Directors of Elections, who shall also be secretaries of the electoral commissions, should also be appointed by the National Assembly/House of Representatives on the recommendations of the respective civil service commissions. It is also advised that electoral commissions should be independent organs in the conduct of their business without the involvement of the offices of the National Assembly/House of Representatives.

The above recommendations have so far been implemented partly by the government in that, at least at the level of law, the independence requirement in the National Electoral Commission's conduct is fulfilled. It is provided in the new article 74(7) that:

For the purposes of the best performance of its functions set out in this article, the electoral commission shall be an independent department and

³⁴ The position was established by sec 6 of the Elections Act 1985, as amended by sec 7 of the Elections (Amendment) Act 1992. The other amendments to the Act are not relevant to the discussion here.

³⁵ Nyalali Commission Report (1991), *Tume ya rais ya mfumo wa chama kimoja au vyama vingi vya siasa Tanzania: Taarifa ya mapendekezo ya tume kuhusu mfumo wa siasa nchini Tanzania, Kitabu cha Kwanza*, (Dar es Salaam: President's Office, United Republic of Tanzania) 141 para 593. Author's English translation of the original *Kiswahili* version.

it shall reach its decisions regarding the implementation of its official duties by way of meetings, and its chief executive shall be the Director of Elections who shall be appointed to work in accordance with the provisions of the law made by Parliament.

Moreover, it is expressly stipulated in the same article (article 74(11)) that, in the due exercise of its authority under the provisions of the Constitution, the National Electoral Commission shall not be bound to follow any order, directive or instruction of any person, government department or any political party's opinion. Also, with the same strong words it is further stipulated that the decision or action of the National Electoral Commission, done in accordance with the provisions of the Constitution, cannot be questioned or investigated by any court of law (article 74(12)). This is indeed independence of an extreme order.

Apparently, it is for the purposes of underscoring the importance of the Commission's independence that a specific category of persons are excluded by the Constitution from eligibility for membership. These include Ministers and Deputy-Ministers, other persons so restricted by the law, members of the National Assembly, local government councillors or similar persons and people in the leadership of political parties (article 74(3)). Moreover, within the membership of the Commission are included for the positions of Chairperson and Vice-Chairperson, persons who are or were formerly judges of the High Court or Court of Appeal of Tanzania or persons who qualify to hold those positions or status of advocate of the High Court (article 74(1)). This is a class of persons who, by virtue of their office or profession, are expected to be independent of government control.

Yet, it is the way the Commission's membership is constituted that is the main subject of controversy in Tanzania. Opponents of the present ruling party invariably question the capacity of members of the Commission when they continue to be appointed by the President at his sole discretion in total disregard of the above-quoted recommendation of the Nyalali Commission. Whether that is true is not at issue here. Indeed, as retired Mr Justice Mwalusanya once put it, the National Electoral Commission should be 'independent beyond reproach like Caesar's wife, so that justice is not only done but seen to be done, as the maxim goes'.³⁶

Thus, opposition parties have ever since 1995 condemned as unfair all general elections (which they lost) conducted and supervised by the present National Electoral Commission. They have always alleged that the Commission cannot be free, fair and independent of government control when it is financially dependent on the latter, and that the interests of the opposition are not represented within its membership. Nevertheless, the members of the opposition have over time been

³⁶ JL Mwalusanya 'Conditions for the functioning of a democratic constitution' in CK Mtaki & M Okema (eds) *Constitutional reform and democratic governance in Tanzania* (1994) 27-28.

inconsistent on this issue. At the beginning of the practice of multi-party politics in early 1993, they tended to put the creation of a truly independent Commission as a condition precedent to their taking part in the October 1995 general elections.³⁷ Indeed, they even attempted some judicial solutions to this. In *Mabere Nyaicho Marando and Another v The Attorney-General*,³⁸ for example, the plaintiffs challenged the political legitimacy of the National Electoral Commission. Apart from the arguments mentioned above, they underscored the political affiliation of the members of the Commission because of the way they had so far been appointed. However, the court found it as a point of fact that the witnesses had failed to show how the Commission had, by reason of its composition, negatively influenced elections which it supervised.³⁹ Apart from this, the court also dismissed the plaintiffs' arguments that, by using the CCM government's employees as officers of the Commission, it was the CCM that had been controlling and supervising the elections in which it was also a contestant, against the rules of natural justice. The presiding judge, Mr Justice JM Mackanja, was not convinced that the above reasons alone vitiated the Commission's independence.⁴⁰ The court advised the plaintiffs either to include their reservations on the Commission's independence in their election manifestoes or to look for lawful means of pressuring the government to institute procedures for the amendment of the Constitution.

It is not exactly clear which of the two alternatives the opposition parties preferred, but when the political wind blew in their direction with the defection of some prominent members of the ruling party (CCM) to some of them,⁴¹ they decided to contest the 1995 general elections under the Commission. However, after the election results revealed their imminent defeat following a relatively successful campaign period, the same parties were back at the Commission's door. But this time it was in a joint action in the High Court of Tanzania accusing the latter of its responsibility in the partnership of the ruling party (CCM), for generally rigging the 1995 elections. They thus prayed that the results be nullified and, instead, a transitional government led by the Chief Justice be installed. Also, that the CCM and their presidential

³⁷ As above.

³⁸ High Court Civil Case 168 of 1993, Dar es Salaam Registry (unreported) (*Marando* case).

³⁹ As above.

⁴⁰ Relying on the interpretation of a similar situation by the European Court of Human Rights in the case of *Campbell and Fell v United Kingdom* 7 EHRR 165.

⁴¹ A typical example was the defection from the CCM to the NCCR-*Mageuzi* party of the populist former Deputy-Prime Minister and Minister of Home Affairs, Augustin Lyatonga Mrema, after having been demoted in December 1994 by President Ali Hassan Mwinyi for lack of discipline and a breach of the principle of collective responsibility in the National Assembly, to a mere Minister of Labour and Social Welfare, thereby raising the political fortunes of the NCCR-*Mageuzi* party to unprecedented heights.

contestant, Benjamin William Mkapa, be banned from political activity for a period of five years for their part in the election irregularities.⁴²

These accusations were strongly denied by the Commission, both in court and outside, emphasising its constitutional mandate and independence from any influence.⁴³ It is now part of history the fact that the court ultimately dismissed the claims of the petitioners. The same is true (as I stated above) of the fact that, since 1992, article 74 of the Constitution, which provided for the establishment, duties and composition of the Commission, has been amended four times and yet none of those amendments have changed the position that the members of the Commission are appointed by the President in his exclusive discretion, notwithstanding the recommendation of the Nyalali Commission to the contrary. This is political arrogance consistently expressed by the ruling party and its government in power, whose basis has been seen by one scholar in the following way:⁴⁴

[t]he arrogance of the ruling party in Tanzania to resist genuine political reforms was in part attributed to the presence of the father of the nation who could employ his charisma to rescue the country under crisis as he did in 1993 when he successfully aborted the restructuring of the Union into a clear federal structure of three governments.

In the same vein it has also been observed, correctly, that of the seven recommendations of the Nyalali Commission, only one was implemented, ie the formation of political parties.⁴⁵ Yet, it is also a fact that the political parties in the opposition in Tanzania actively participated in the following general elections in the years 2000 and 2005 under the same constitutional set-up, and indeed it is no secret that they were heavily defeated by the ruling party (CCM). However, this is aside from the argument I wish to present here, that the inconsistency in the position of opposition parties in this regard only unveils their opportunistic approach to politics, which is prejudicial to the whole democratic process. This weakens their case against the Commission. But, on the other hand, the Commission in their defence can only establish *de jure* independence, undoubtedly leaving unanswered the question as to

⁴² *IPS News* 'Tanzania politics: Opposition takes election battle to court', report by Paul Chitowa & Anacleto Rwegayura, Dar es Salaam, 1 November 1995.

⁴³ Refer to the Official Statement of the National Electoral Commission in (Radio Tanzania Dar es Salaam) (1995), broadcast on 8 November 1995.

⁴⁴ M Bakari 'Single party to multi-partism in Tanzania: Reality, challenges and lessons' in Peter & Kopsieker (n 7 above) 55-60.

⁴⁵ Other recommendations of the Nyalali Commission were the restructuring of the Union into a truly federal structure of three governments; the formation of a constitutional commission which would draft a constitution to be presented to the public for discussion and approval; repealing and amending laws that restrict freedom of association — about 40 laws were singled out for the exercise; the provision of civic education; the establishment of three independent electoral commissions, one for the union government, one for the mainland and one for Zanzibar; and a mixed electoral system — PR using the additional member system, etc. See Peter & Kopsieker (n 7 above) 61.

whether it commands the trust of all the voters, irrespective of their political affiliations. The issue is whether the Commission is *de facto* independent beyond reproach. Indeed, to this extent, neither the Commission itself nor the government can convincingly justify the failure to comply with the recommendations of the Nyalali Commission as to an appointing authority. This engenders the mistrust of the general public, as illustrated above.

Such mistrust has recently been demonstrated in the Kenyan December 2007 presidential election, where the opposition, led by the contender closest in terms of the declared results to the already sworn-in President Mwai Kibaki, Raila Odinga of the Orange Democratic Movement (ODM), strongly stressed that the election results were rigged by the Kenya Electoral Commission, because of the fact that its members were close friends of the President who had appointed them thereto on that basis.⁴⁶

This kind of tug-of-war between the government and the general public's opinion invariably invites the claim by a substantial part of the population that maybe this could justify the holding of a constitutional conference, followed by a referendum as a solution of last resort. It is worth at this juncture to turn our attention to the issue of whether it is now opportune for Tanzania to hold a constitutional conference.

2.5 The constitutional conference controversy

It is on account of the concerns set out in the foregoing section that there has been a cry for a constitutional conference as a minimum condition for the functioning of a democratic constitution. It has been argued that, without it, there can be no crystallisation of a national consensus necessary for enjoining, within the Constitution to result therefrom, of some political legitimacy.⁴⁷ These have always been the demands of at least three political parties in the Tanzanian opposition,⁴⁸ who have contended that each person and group of people needed to be satisfied that their interests were guarded by their Constitution.⁴⁹

Undoubtedly, the demand for a constitutional conference or even a referendum enforces the requirements of article 21(2) of the Constitu-

⁴⁶ Refer to Mr Raila Odinga's statement in a telephone interview during a TVT *Tuambie* Programme on 3 January 2008, Dar es Salaam: Tanzania Broadcasting Corporation. Ultimately the conflict, which left over 1 000 people dead and many more injured and displaced, ended with the formation of a coalition government under which Mr Odinga, holding the newly-created position of Prime Minister, shares some executive powers with President Mwai Kibaki.

⁴⁷ SEA Mvungi 'Democratic constitution making and the transition to multi-party democracy in Tanzania' in GM Fimbo & SEA Mvungi (eds) *Constitutional reforms for democratisation in Tanzania* (1993) 23.

⁴⁸ CHADEMA, NCCR-*Mageuzi* and NLD.

⁴⁹ See the Recommendations of the Seminar on the Constitutional Reforms for Democratisation in Tanzania' held in the British Council Conference Hall, Dar es Salaam, 27-28 November 1992, reproduced in Fimbo & Mvungi (n 47 above).

tion regarding the right of all citizens to be consulted in respect of decisions on matters which affect them. It had not been part of the political culture of the one-party regime in Tanzania to opt for referenda whenever there was a need to consult the people at instances of making major decisions.

There have also been a few unsuccessful attempts to use the courts to force the government to concede to the holding of a constitutional conference. For example, in the *Marando* case cited above, the High Court of Tanzania held that a constitutional conference was a remedy which could be sought and obtained through parliament.⁵⁰ Indeed, the same position was repeated by the 1993 *Mtikila* case, it being categorically stated that, while the court conceded unequivocally that every citizen is entitled to participate in making decisions on matters affecting their country, the only mode of participation available is the election of representatives to the National Assembly.

Thus, it seems that the present position on this issue represents a vicious cycle. It begins with mistrust of the National Electoral Commission by the members of the opposition parties whose demands for a constitutional conference to resolve the issue of the making of a politically legitimate constitution have been turned down by the courts of law, the latter directing the former to the ballot box, which again is under the control and supervision of the National Electoral Commission complained of in the first place. In the next section I will consider the prospects for reform, beginning with a brief discussion of the recommendations of the Kisanga Committee of 1999 in this regard.

3 Prospects for genuine political reforms towards true political succession

This section attempts to inquire into the possibility of identifying ways of effecting genuine political reform in Tanzania, taking the right to freedom of political participation as a working example. I begin by examining the recommendations of the Kisanga Committee which addressed a number of constitutional problems requiring redress.

3.1 The Kisanga Committee's recommendations on the right to freedom of political participation

Following many debates in public seminars, conferences and workshops (mostly involving educated people in urban areas) on the need for a new constitution, the government issued Government Circular 1 of 1998 (White Paper), listing 19 proposals for discussion by the general public throughout the country, including the rural areas. For these purposes, in July 1998, the then President of the United Republic of

⁵⁰ Also in *Mwalimu Paul John Mhozya v Attorney-General (No 2)* 1996 TLR 229 (HC).

Tanzania, Hon Benjamin William Mkapa (retired), appointed a Committee for the Collection of Views on the Constitution (popularly known as the Kisanga Committee) chaired by Hon Justice of Appeal Robert H Kisanga.⁵¹ After having concluded their mission, which took them 11 months to accomplish, and following a long survey, which took them to 25 regions of Tanzania Mainland and Zanzibar, the Committee submitted their report to the President on 20 August 1999.

It was the Seventh Proposal of the White Paper which dealt with the issue of independent candidates in elections, the government having posed the question as to whether there was a need for allowing independent candidates during presidential, parliamentary and civic elections, without their being members or nominated by political parties.⁵² The advice of the Committee, as I have already stated above, was as follows: firstly, that independent candidates should not be allowed in presidential elections; secondly, that independent candidates should be allowed only in parliamentary and civic elections at all levels; thirdly, that proper laws and regulations to oversee the above should be enacted. The government did not adopt these recommendations.

However, it suffices to say at this juncture that, by advising the government in the way that it did, the Kisanga Committee did not give fair treatment to this issue. Here was a clear conflict between the position of the government and that of the judiciary, initiated by the blatant disrespect of the revered principle of the independence of the judiciary. The Committee, chaired by a senior judge and with much wealth of expertise, should have acted in favour of the judicial opinion in this regard for the sake of guaranteeing the spirit of constitutionalism forming the bedrock of Tanzania's constitutional practice. No wonder that the High Court has vindicated itself by coming back to allow independent candidates against the will of the government and parliament, over a decade after the 2006 judgment in the *Mtikila* case mentioned above. Indeed, this is what is expected of a fearless, independent and open-handed judiciary in a developing country like Tanzania, where ruling regimes tend to control and monopolise political arenas through constitutional amendments eroding the fundamental cornerstones of constitutionalism, civil society and wider democracy.

As to the appointment of its members and therefore the independence of the National Electoral Commission, the issue came indirectly in the White Paper's Sixth Proposal, wherein the Committee advised

⁵¹ The other members were Mr Salim Juma Othman as Vice-Chairperson, the late Mr Siegfried KB Lushagara as Secretary, Mr Wilson Mukama, Mrs Moza Himid Mbaye, Mrs Dr Asha-Rose Migiro, Mr Issa Machano, Mrs Mary Chipungahelo, Mr Ali Abdallah Suleiman, Dr Maxmillian Mmuya, Mrs Salma Masoud Ebrahim, Mr Yahya B Msulwa, Dr Said Ghalib Bilal, Dr John Magoti, Mr Hassan Said Mzee and Mr Mohamed Balla.

⁵² See the Kisanga Committee Report (KCR) (1999), *Report of the Presidential Committee for the Collection of Views on the Constitution*, Book One on 'The views of the people and the Committee's advice thereon' Dar es Salaam: Ministry of Justice and Constitutional Affairs, Government Printer.

the government twofold: firstly, that the appointment of the Electoral Commission should be more constitutionally transparent than it is the case now, so that it may be seen to be free and legitimately acceptable to the people; secondly, that the Electoral Commission should be strengthened to enable it to perform its duties effectively. In its Eleventh Proposal, the White Paper proposed at length that the structure and appointment of the members of the National Electoral Commission do not take into account representation of political parties and that the Commission is appointed by the President who may happen to be the leader of the ruling party. On that basis, in performing their duties, members of the Commission may be bound to favour the ruling party in repayment of the privilege of having been so appointed thereto. Supporters of this opinion suggest that there must be established in the appointment procedure representation of all political parties, or that the names of prospective members of the Commission should first be scrutinised or vetted by an independent organ before the President makes the final appointments.

The Committee advised government that the President should be appointing the members of the Commission in consultation with the National Assembly under the following procedure: first, that the President should prepare a list of names of persons he intends to appoint as members of the National Electoral Commission, which he should present to the National Assembly to be debated upon by the House. Thereafter the names should be returned to the President with recommendations as to who should be appointed to the Commission's membership. Lastly, the Committee was not in favour of the involvement or participation of political parties in the appointment of members of the Electoral Commission, in order to safeguard the Commission's independence against inter-political party wrangles and politicking. The Kisanga Committee did not have in its terms of reference anything relating to the need for holding a constitutional conference and referendum on this aspect.

Of all the recommendations of the Committee discussed above relating to the National Electoral Commission's independence, only one can be said to have been implemented, that is, in relation to the strengthening of the National Electoral Commission. This was demonstrated, as I stated above, by the vast amendments article 74 of the Constitution has endured, particularly the redefinition of the qualifications for membership and the powers and responsibilities thereof, the creation of a permanent voters' register and the unequivocal restatement of the Commission's independence. But again, as I indicated earlier on, all of those amendments have added at best to the establishment of the Commission's *de jure* independence. Nothing has been done by the government to date, following the report of the Kisanga Committee in 1999, to make the Commission *de facto* independent, even to a limited extent, as had been advised by the Committee. The need for making the appointment procedure more transparent by involving the National

Assembly at some point in the procedure, in order to make it free and legitimately acceptable to all the people as was advised by the Committee, has not been addressed at all. This means that, about a decade after the publication of the Kisanga Committee report, members of the National Electoral Commission in Tanzania are still appointed by the President at his sole discretion. One wonders as to what is so special about the appointment of the National Electoral Commission. Indeed, this does invite the suspicion that the ruling regime must have an interest in retaining the current procedure, at least as an amulet of last resort, to guarantee its future political gains, probably in the style that has recently been adopted by the Mwai Kibaki regime in neighbouring Kenya. If that is by any chance true, it is indeed detrimental of the future interests of this country in terms of her much cherished national peace, security and tranquility.

Coming to the answer to the question as to whether there are any prospects for future reform, I will begin the discussion with Bakari's arrogance theory outlined above.⁵³ Bakari has found the basis for the Tanzanian ruling party (CCM) and its government's open desire to resist meaningful reform in the country in the popularity gained from its former charismatic leader, the late *Mwalimu* Julius Kambarage Nyerere. One could add to the theory that such popularity was not buried with Nyerere, as was demonstrated by the huge victory (80%) in the last general elections in 2005, of his political apprentice, the current President of Tanzania, Mr Jakaya Mrisho Kikwete. That, however, is irrelevant to the main argument here, because what is at stake in the present constitutional discourse in Tanzania is how and when to promote the development of pro-democratic governance, commensurate to the general will of all people beyond party affiliations, for the ultimate interest of this country. Having a government in a country that consistently defies and ignores the opinions on important matters related to political practice and general governance of a country is counterproductive to the national interests stated in the foregoing paragraph. In modern constitutionalism, a government which does not listen to the voices of its people from all walks of life is autocratic, however popular it might be.⁵⁴ As Berner and Phillips say, 'a[n] autocratic style of leadership based on patronage reinforces the prevailing inequality of the existing social structure'.⁵⁵ At worst, this creates some breeding ground for future disruption of the country's peace, security and tranquility, as happened in Kenya recently. Therefore, in order to achieve meaningful constitutional reforms, we must devise methods which transcend the governmental limitations and which have visions going beyond the ideological ambit of political parties, that is, the

⁵³ Bakari (n 44 above) 55-60.

⁵⁴ KC Wheare *Modern constitutions* (1966); DD Basu *Comparative constitutional law* (1984); BO Nwabueze *Constitutionalism in emergent states* (1973).

⁵⁵ Berner & Phillips (n 1 above) 9.

capturing of state authority. One such example is the mass-oriented discussions of the Constitution recently inaugurated by the Faculty of Law of the University of Dar es Salaam,⁵⁶ although the same movement is still at its infancy stage and has not yet really taken off. These are expected to involve all people at all levels of society, in order to enable them to know the main ideas comprised in the Constitution for making them decide for themselves what is wanting to justify major constitutional debates, including the holding of a constitutional conference free of government interference.

This is a programme of action that resists the use of law by the state to deny rights and shrink the arena of democracy, and instead argues for law to be used to expand them.⁵⁷ What is necessary is the identification of the immediate problem of the people, which is the ridding of society of any form of authoritarianism and political repression. Therefore, appropriate demands on the basis of the available rights may be put forward to form what Shivji refers to as a new democratic struggle.⁵⁸

4 Conclusion

This paper appraises the impact of the *Mageuzi* reforms on Tanzania's constitutional and socio-political scene with regard to the right to freedom of political participation during the past decade or so, while weighing its failures and successes by using international standards. It was insisted right from the beginning that, together with its sister right to freedom of political association, the right to freedom of political participation is a key to the enjoyment of all other fundamental human rights. Thus, while employing a historical perspective, the paper started with an examination of the contents of the right to freedom of political participation as provided by the Constitution of the United Republic of Tanzania. It then went on to trace the practice of this right from 1992 after the institution of *Mageuzi* to date.

The lack of political participation has thus been identified as the main problem to be resolved in the government's reluctance to effect meaningful constitutional reforms, even where its reaction conflicted with judicial opinion. The key areas noted in this regard were constitutional provisions which prohibited independent candidates in elections and the failure of these to guarantee the *de facto* independence of the National Electoral Commission.

⁵⁶ GM Fimbo *Tuijadili Katiba: Katiba Ya Jamhuri Ya Muungano Wa Tanzania* (2007).

⁵⁷ See, generally, A Seidman & R Seidman *State and law in the developing process: Problem solving and institutional change in the third world* (1994).

⁵⁸ IG Shivji 'The politics of liberalisation in Tanzania: Notes on the crisis of ideological hegemony' in H Campbell & H Stein (eds) *Tanzania and the IMF — The dynamics of liberalisation* (1992).

The main argument to be underscored here is that the existence of a government in a developing country such as Tanzania, which consistently defies and ignores opinions on important matters related to political practice and general governance of a country, restricts the promotion and development of pro-democratic governance, which corresponds with the general will of all the people. Indeed, it invites the elements of autocratic rule which can lead to the collapse of popular institutions which guarantee the country's peace, security and tranquility.

Public declaration of assets in Nigeria: Conflict or synergy between law and morality?

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Summary

The Nigerian Constitution seeks to prevent corruption and abuse of office through its provisions on the declaration of assets by public officers. Although they are not obliged to do so, many public officers have publicly declared their assets. This has in turn put pressure on others to do so. In forging a synergy between the law and practice of asset declaration in Nigeria, the paper examines the human rights implications of the recent trend and proffers suggestions for improvement.

1 Introduction

Before he took his oath of office as the President of the Federal Republic of Nigeria on 29 May 2007, President Umaru Musa Yar'Adua had declared his assets and liabilities as required by the 1999 Nigerian Constitution.¹ After about a month in office, on 28 June 2007, the President made his asset declaration public in fulfilment of his electioneering campaign. Records show that he also publicly declared his assets when he was elected as Governor of Katsina State in 1999. President Yar'Adua declared assets of N945 446 116 million.² President Yar'Adua, who said he was planning a Freedom of Information Bill that would make it mandatory for all public officers to declare their assets publicly, explained that the Code of Conduct Bureau had advised him

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¹ See para 11 of the Fifth Schedule to the 1999 Nigerian Constitution.

² *The Punch* 29 June 2007 4.

against making his assets public as this would put pressure on other public officers to do so.³

Since the President's public declaration of his assets, mixed reactions have been expressed by Nigerians. These range from the sublime to the ridiculous. His action has also attracted commendation and a considerable dose of cynicism and skepticism.⁴ A few days after the public declaration, the Kogi state Governor, Ibrahim Idris, former Governor of Zamfara state and Senate minority whip, Sanni Ahmed, and Governor Gbenga Daniel of Ogun state declared their assets publicly.⁵

One major fallout of the public declaration of assets by President Yar'Adua is the pressure being mounted on all his lieutenants and other public officers to do the same. The worst hit was the Vice-President, Dr Goodluck Jonathan. Nigerians naturally expected him to follow the footsteps of the President by declaring his assets publicly even though there is no legal obligation on him to do so. When they realised that the Vice-President was reluctant to declare his assets, formal calls were made to him. The calls were rebuffed by the Vice-President, who claimed that he had already declared his assets before the Code of Conduct Bureau, more than seven times as Deputy-Governor, twice as Governor and once before taking an oath of office as the Vice-President.⁶

In an editorial entitled 'The Vice-President's Assets',⁷ the *Guardian* newspaper asked if the Vice-President's reluctance was due to his attempt to conceal something from the public and urged him to act without further delay. It continued:⁸

By hiding under the letters of the law, the Vice-President lays himself open to a charge: Does he have something to hide? Morality is not law, but sometimes perception may be more important than morality. He should see this as an opportunity to cleanse his image. And he needs not pollute the issues by turning this into a matter for partisan politics.

The Vice-President caved in to pressure and made his assets declaration of N295 304 420 million public on the following day,⁹ probably after reading the editorial. Going by the public outrage against the Vice-President for his delay in making his asset declaration public, should penal sanctions attach to the failure to make an asset declaration public in Nigeria as opposed to a failure to declare assets? This brings to the fore the age-long conflict between law and morality.

Law is a set of rules aimed at regulating human conduct. It is usually, but not always, backed by sanctions. Morality, on the other hand, is a distinct domain of normative thinking about action and feeling, the

³ As above.

⁴ For the different reactions, see *This Day* 3 July 2007 7; *The Nation* 10 July 2007 48. *The Guardian* 10 July 2007.

⁵ *The Guardian* 1 August 2007 1.

⁶ *The Guardian* 7 August 2007 1.

⁷ As above.

⁸ *The Vanguard* 9 August 2007 1.

whole domain being the subject of ethics.¹⁰ Both law and morality are founded in norms essential to the well-being of society — thus has theft developed from the concept of private property. Moreover, morality and law occupy common ground, as numerous infringements of the law are also morally abhorrent.¹¹

Questions concerning the proper limits of the law are of particular interest to thinkers in the Western political tradition of individualism. In this tradition, the law is regarded as an instrument of coercion and the problem is to define the scope of the law in such a way that it fulfils its necessary purpose at minimum cost to individual liberty. The debate therefore centres on the proper end of legal coercion. Two law-limiting strategies are commonly adopted: the practical and the moral.¹²

As the most important ends of human life (salvation of the soul, or its secular equivalent, moral integrity) are taken to require the uncoerced ‘inward’ assent of the individual, the effective scope of the law is significantly limited on practical grounds by the regulation of ‘outward’ behaviour. On the moral question concerning what behaviour ought to fall within the purview of the law, conservatives contend that the society has a right to enforce its moral values by criminalising whatever behaviour its members regard as ‘sinful’.¹³

There can be little doubt that moral considerations do influence rules of law, but this aspect has to be distinguished from the question regarding how far laws should give effect to moral attitudes.¹⁴ Lord Mansfield went as far as to assert ‘that the law of England prohibits everything which is *contra bonos mores*’,¹⁵ but other judges have been more cautious.¹⁶ Also worth consideration is the question: On what basis should a failure to declare assets publicly, as opposed to a failure to declare it as stipulated by the Code of Conduct, attract criminal sanction? Is it on the basis of Mill’s harm-to-others principle or Dias’s calculus?¹⁷

Failure to make one’s asset declaration public after submitting the asset declaration form to the Code of Conduct Bureau does not in itself constitute any harm to anyone. It is only harmful when people hide behind the fact that members of the public do not have access to the declaration to make false declarations in order to cover up assets illegally acquired in corruption or abuse of office. This means that, although there is no legal obligation to publicise a declaration of assets

¹⁰ 1E Craig (ed) *Routledge encyclopedia of philosophy* (1998) 544.

¹¹ B Jones ‘A’ *level law* (1981) 4.

¹² Craig (n 10 above) 460.

¹³ As above.

¹⁴ RMW Dias *Jurisprudence* (1985) 215.

¹⁵ *Jones v Randall* (1774) 1 Cowp 17 39; *R v Delaval* (1963) 3 Burr 1438.

¹⁶ Eg Scrutton LJ in *In Re Wigzell, ex parte Hart* (1921) 2 KB 835 859.

¹⁷ For further explication on this, see HLA Hart *The concept of law*, cited in LB Curson *Jurisprudence* (1995) 234-235; Dias (n 14 above) 111.

in Nigeria, the refusal to do so is potentially harmful to the country. This view is strengthened by the fact that most public officers being tried for or convicted of corruption are found to have made a false declaration of their assets. This is engendered by the *lacunae* contained in the constitutional provisions on the declaration of assets in Nigeria, to which we now turn.

2 Constitutional provisions relating to asset declaration in Nigeria

2.1 Code of Conduct

Provisions on the declaration of assets by all public officers in Nigeria are entrenched in the Code of Conduct for Public Officers, contained in Part I of the Fifth Schedule to the 1999 Nigerian Constitution. The Code was first introduced into the Nigerian Constitution in 1979. It is meant to prevent corruption and abuse of office and to ensure transparency in public officers. Public officers for the purposes of the Code include the President¹⁸ and the Vice-President¹⁹ of the Federation, the President and Deputy-President of the Senate, the Speaker and Deputy-Speaker of the House of Representatives and Speakers and Deputy-Speakers of Houses of Assembly of states and all members of legislative houses,²⁰ Governors and Deputy-Governors of states,²¹ the Chief Justice of Nigeria, justices of the Supreme Court, the President and justices of the Court of Appeal, and other judicial officers and all staff of courts of law,²² the Attorney-General of the Federation and Attorney-General of each state.²³ Ministers of government of the Federation and commissioners of governments of the states,²⁴ Chief of Defence staff, Chief of Army staff, Chief of Naval staff, Chief of Air staff and all members of the armed forces of the Federation,²⁵ the Inspector-General of Police, the Deputy-Inspector-General of Police and all members of the Nigerian Police Force and other government security agencies established by law,²⁶ the Secretary to the government of the Federation, Head of Civil Service, Permanent Secretaries, Directors-General and all other persons in the civil service of the Federation or of the

¹⁸ Para 1, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

¹⁹ Para 2, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²⁰ Para 3, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²¹ Para 4, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²² Para 5, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²³ Para 6, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²⁴ Para 7, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²⁵ Para 8, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²⁶ Para 9, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

state,²⁷ ambassadors, high commissioners and the other officers of the Nigerian missions abroad,²⁸ the Chairperson, members and staff of the Code of Conduct Bureau and Code of Conduct Tribunal,²⁹ the Chairperson, members and staff of local government councils,³⁰ the Chairperson and members of the boards and other governing bodies and staff of statutory corporations and of companies in which the federal or state government has the controlling interest,³¹ all staff of universities, colleges and institutions owned and financed by the federal state or local government councils,³² and the Chairperson, members and staff of permanent commissions or councils appointed on a full-time basis.³³

It is curious to note the wide description of public officers in the Nigerian Constitution, which includes political office holders, but excludes special advisers at the federal and state levels. This is a grave omission as the offices of special advisers are established by the Constitution.³⁴ They assist the chief executives in the discharge of their functions and they play active roles as members of the executive. The implication of this omission is regrettable, but it is partly remedied by the fact that, by their oath of office, special advisers undertake to abide by the Code of Conduct.³⁵ According to Nwabueze,³⁶ the Directive Principles of State Policy and the Code of Conduct for public officers enshrined in the Nigerian Constitution perhaps represent the best attempt to give constitutional force to the democratic principles of the people and the republican ideal of civic virtues and political morality.³⁷

Acts prohibited by the Code include a public officer putting himself in a position where his personal interest conflicts with his duties and official responsibilities,³⁸ holding two posts from which he is being paid from public funds³⁹ and engaging or participating in the running of any private business, profession or trade when employed on a full-time basis.⁴⁰ This does not prevent a public officer from acquiring

²⁷ Para 10, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²⁸ Para 11, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

²⁹ Para 12, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

³⁰ Para 13, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

³¹ Para 14, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

³² Para 15, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

³³ Para 16, Part II, Fifth Schedule to the 1999 Nigerian Constitution.

³⁴ See secs 161 & 196 of the 1999 Nigerian Constitution; see also JOA Akintayo 'Pension rights of political office holders in Nigeria' (2005) 4 *University of Ibadan Journal of Private and Business Law* 107.

³⁵ See secs 152 & 196(4) of the 1999 Nigerian Constitution; see also Akintayo (n 34 above) 107.

³⁶ BO Nwabueze *Ideas and facts in constitution making* (1993) 156.

³⁷ As above.

³⁸ Para 1 Part I, Fifth Schedule to the 1999 Nigerian Constitution.

³⁹ Para 2(a) Part 1, Fifth Schedule to the 1999 Nigerian Constitution.

⁴⁰ Para 2(b) Part 1, Fifth Schedule to the 1999 Nigerian Constitution.

an interest in a private businesslike partnership. What he cannot do is to at the same time hold a managerial post or other position in such an undertaking.⁴¹ A public officer is, however, allowed to engage in farming. According to Aguda, the permission granted a public officer to engage in farming under the Code could lead to difficulties in enforcement because farming includes large-scale enterprises.⁴² The exemption given to farming might not be unconnected with the need to boost agricultural production in Nigeria.⁴³ Furthermore, any allegation that a public officer is engaged in private business must be strictly proved. It is not enough to find in possession of a public officer a form containing the names of directors of a company also bearing the public officer's name.⁴⁴

The Code also prohibits operations of foreign accounts by the President, Vice-President, Governor, Deputy-Governor, Ministers, commissioners and members of the National Assembly and Houses of Assembly of the states.⁴⁵ It prevents public officers, after retirement and while receiving a pension from public funds, from accepting more than one remunerative position as Chairpersons, directors or employees of a company owned or controlled by the government or any public authority.⁴⁶ Nor shall a retired public officer receive remuneration from public funds in addition to his pension and the emolument of such one remunerative position.⁴⁷ Retired public officers who have held offices as President, Vice-President, Chief Justice of Nigeria, Governor and Deputy-Governor of a state are also prohibited from service or employment in foreign companies or enterprises.⁴⁸ According to Akande, this provision is necessary in the overall interest of national security so that foreign powers might not use their financial power to undermine the security of the nation by getting the confidence of such top functionaries of the state.⁴⁹ However, to bar them for life from exercising their fundamental right of such employment 'is not justifiable', continues the professor. Akande then suggests that the ban should be limited to a number of years, preferably eight years after they have left office. After such a long period, if they have not been forgotten as having secrets which might be useful to foreign power, Akande

⁴¹ *Nwankwo v Nwankwo* (1995) 30 LRC 24 33.

⁴² O Aguda *Understanding the Nigerian Constitution 1999* (2000) 247.

⁴³ IB Lawal 'The code of conduct and the fight against corruption in Nigeria: A conspectus' (2006) 2 *Abakaliki Bar Journal* 107.

⁴⁴ *Onyeukwu v The State* (2000) FWLR (Part 6) 983.

⁴⁵ Para 3 Part I Fifth Schedule to the 1999 Nigerian Constitution.

⁴⁶ Para 4 Part I Fifth Schedule to the 1999 Nigerian Constitution.

⁴⁷ The justification of this provision is seriously doubted with the recently-introduced contributory pension scheme by the Pension Reforms Act of 2004.

⁴⁸ Para 5 Part I Fifth Schedule to the 1999 Nigerian Constitution.

⁴⁹ JO Akande *Introduction to 1999 Nigerian Constitution* (2000) 522.

contends, 'then perhaps the country does not deserve the security which it is seeking to protect'.⁵⁰

By paragraph 6 of the Code, a public officer shall not ask for or accept property or benefits of any kind for himself or any other person on account of anything done or omitted to be done by him in the discharge of his duties. He is, however, allowed to accept gifts or benefits from relatives and personal friends 'to such an extent and such occasions as are recognised by custom'. This provision seems to justify the acceptance of 29 new vehicles worth N174 700 000 million donated to President Musa Yar'Adua as a presidential campaign gift and similar gifts in the Vice-President's asset declaration.⁵¹ According to Akinseye-George, the non-prohibition of gifts recognised by customs may be exploited to continue with the practice of corrupt gift-giving. The situation is made worse by using 'relatives' and 'personal friends' to describe persons whose gift the public officers may be allowed.⁵²

The relationship between bribes and gifts is not devoid of controversy. According to Rose-Ackerman, gift-giving and bribery will be more common if legal dispute resolution mechanisms are costly and time-consuming, if legal guarantees are not possible, and trust is correspondingly more important.⁵³ The offence of bribery can be circumvented on the grounds that money given is based on altruistic considerations. This therefore creates a problem in drawing a line of demarcation between where the gift ends and bribery begins.⁵⁴ This is because the latter is a corrupt practice, while the former is not. Furthermore, gifts and bribes have one important similarity. In neither case can a disappointed individual go to court to demand payment or insist on the performance of the implicit contract. Alternative methods of ensuring compliance must be made if one wishes to induce others to act.⁵⁵ Moreover, when corruption becomes endemic, bribes lose much of their moral stigma in the eyes of those concerned. They blur the borderline between honesty and dishonesty, truth and lies.⁵⁶ In the absence of moral markers, the system becomes truly sick.⁵⁷ Bribery can also be distinguished from extortion. The crime of extortion is committed when a person unlawfully and intentionally obtains some advantage, which may be of either patrimonial or non-patrimonial nature, from another by subjecting the latter to pressure which induces him to hand over the advantage.⁵⁸

⁵⁰ n 49 above.

⁵¹ See *The Punch* 29 June 2007 54 and *The Vanguard* 9 August 2007 1, respectively.

⁵² Y Akinseye-George *Legal system, corruption and governance in Nigeria* (2000).

⁵³ S Rose-Ackerman *Corruption in government* (1999) 92.

⁵⁴ As above.

⁵⁵ As above.

⁵⁶ B Lightower *Corruption: Who cares?* (2008) 30.

⁵⁷ As above.

⁵⁸ CR Snyman *Criminal law* (1995) 372.

One of the most important provisions of the Code of Conduct relates to the declaration of assets by public officers. By paragraph 11 of the Code, every public officer shall immediately after taking office and thereafter, at the end of his term of office, submit to the Code of Conduct Bureau a written declaration of his properties, assets and liabilities and those of his unmarried children under the age of 18 years. The asset declaration form also requires a public officer to declare the assets and liabilities of his spouse. Any statement in such declaration that is found to be false by any authority or person authorised in that behalf to verify it is deemed to be a breach of the Code.⁵⁹ Similarly, any property or asset acquired by a public officer after the declaration which is not fairly attributable to income, gift or loan approved by the Code is deemed to have been acquired in breach of the Code unless the contrary is proved.⁶⁰ Furthermore, a public officer who does any act prohibited by the Code through a nominee, trustee or other agent is deemed *ipso facto* to have committed a breach of the Code.⁶¹ The National Assembly may, however, exempt any cadre of public officers from the asset declaration provisions, if it appears to it that their position is below the rank which it considers appropriate for the application of those provisions.⁶²

The asset declaration provisions have met with considerable criticism. While it is acceptable that a man may be able to declare his wife's assets and liabilities on the assumption that he knows about them, or, at worst, can force them out of her, 'one is skeptical about the assets of children', argues a critic.⁶³ It is further contended that an independent, self-sufficient child would not want parents to interfere in his private matters. Furthermore, if the children are also public officers, this would amount to a double declaration that may cause unnecessary and avoidable paper work for the Code of Conduct Bureau, more so when the Code of Conduct contains ample provisions against a false declaration.⁶⁴

As awkward as this provision is, its inclusion might have been influenced by the country's experience during the First and Second Republics when public officers did not only corruptly acquire assets through their friends and relatives, but also through their under-age children, as witnessed in *Lakanmi v Attorney-General, Western Nigeria*.⁶⁵ Many public officers are also engaged in similar acts during the present dispensation. This explains why the Deputy-Governor of Akwa-Ibom State, Chris Ekpeyong, was impeached by the state's House of

⁵⁹ Para 11(2) Fifth Schedule to the 1999 Nigerian Constitution.

⁶⁰ Para 11(3) Part 1, Fifth Schedule to the 1999 Nigerian Constitution.

⁶¹ Para 13 Fifth Schedule to the 1999 Nigerian Constitution.

⁶² Para 14(b) Fifth Schedule to the 1999 Nigerian Constitution.

⁶³ Akande (n 49 above) 55 56.

⁶⁴ As above.

⁶⁵ *Lakanmi v Attorney-General, Western Nigeria* (1971) IUI LR 218.

Assembly for allegedly acquiring landed property abroad in the name of his under-age son and failing to reflect this in his asset declaration form during his first and second terms in office. He was later allowed to resign after the intervention of the political leaders in the state.⁶⁶ The provision, therefore, seems 'reasonably justifiable in a democratic society'.

There seems to be some air of uncertainty, at least in practice, about the time frame for the declaration of assets and submission of the asset declaration form to the Code of Conduct Bureau. For instance, the asset declaration form of the Vice-President, Goodluck Jonathan, shows that he declared his assets before Justice Muktar Dodo of Abuja High Court on 30 May 2007, a day after taking the oath of office.⁶⁷ There appears to be some slight variations in the constitutional provisions on declaration of assets and submission of the declaration forms in respect of political office holders. While political office holders are prohibited from performing the functions of their offices until they have declared their assets and liabilities and have subsequently taken and subscribed to the oath of allegiance and oath of office,⁶⁸ paragraph 11(1) of the Code of Conduct requires every public officer to declare his assets 'within three months' of the coming into effect of the Code or 'immediately after taking office'. Public officers are also obliged by the Code of Conduct Bureau to return their asset declaration forms within three months.⁶⁹ This seems to give the impression that the asset declaration forms of all public officers, including political officer holders, should be returned within three months. Many political office holders have hidden under this false impression to delay their asset declaration for months after assuming office and performing official functions.⁷⁰

The confusion about the correct interpretation of the provision seems to stem from the three months transition period allowed to public officers who were already in service before the Code of Conduct was introduced. The period of three months granted public officers to return their asset declaration forms further strengthens this view. From the foregoing analysis it seems correct to state that, while other public officers are expected to declare their assets immediately after taking office, political office holders are prohibited from performing the functions of their offices until they have declared their assets. Since the declaration of assets precedes the taking of oath of office and oath

⁶⁶ *The Nigerian Observer* 20 July 2005 4.

⁶⁷ *The Vanguard* 9 August 2007 1.

⁶⁸ See secs 140, 185, 52, 94 & 152 of the 1999 Nigerian Constitution on the President, Governor, Members of the National Assembly, Members of State Houses of Assembly and Special Advisers.

⁶⁹ This is contained on the asset declaration form.

⁷⁰ Eg, in July 2007 the Code of Conduct Bureau cried out that many state governors were yet to declare their assets about two months after assumption of office; *The Nation* 9 July 2007 1.

of allegiance, *a fortiori*, a political office holder cannot, strictly speaking, legally assume office before declaring his assets.

However, the reality points otherwise. Many political office holders do not declare their assets until months after assuming office and performing official duties. This raises some pertinent questions about the legal status of such official functions performed in default of the constitutional provisions on asset declaration as a condition precedent. Are those official duties void, voidable or valid? For administrative convenience, since most of those actions would have already altered the legal position of many innocent persons, it is submitted that, while sanctions should be applied to the erring political office holders for intentionally breaching the provisions of the Constitution, their previous actions should be presumed valid because of the presumption of regularity in official actions and business.⁷¹ The view has been expressed that the National Assembly should use its powers under paragraph 14 of the Code of Conduct to drastically reduce the number of public officers who have to submit asset declarations to the Code of Conduct Bureau considering the large number of public officers in local government and the federal civil service.⁷² It is argued that on purely administrative grounds, leaving aside any undue influence, it is doubtful if more than a very negligible part of asset declaration papers already in possession of the Code of Conduct Bureau can be put into any systematic use five years after submission.⁷³ The storage and retrieval system, it is further contended, would seem to be beyond the administrative capacity of the country at present. Besides that, the larger the number of forms the Bureau has to process and utilise in monitoring the conduct of public officers, the less effective the Bureau will be in checking anybody.⁷⁴ On the grounds that corruption of the junior staff is only made positive by the corruption or lack of vigilance of their superiors, it has been proposed that offices below grade level 8 be exempted from submitting asset declarations while their superiors should be held accountable for their lack of probity.⁷⁵ It has, however, been suggested that the National Assembly should be cautious in applying the exemption clause and should instead consider the actual duties being performed by the public officers rather than the post held.⁷⁶ As pragmatic as the view sounds, the problem with it is that it gives too much discretion to the National Assembly. Breaches of the Code of Conduct are reported to the Code of Conduct Bureau.

⁷¹ See sec 149(c) of the Evidence Act, Cap E 14 Laws of Federation of Nigeria, 2004.

⁷² Aguda (n 42 above) 249-250.

⁷³ As above.

⁷⁴ As above.

⁷⁵ As above.

⁷⁶ Akande (n 49 above) 105.

2.2 The Code of Conduct Bureau

The aims and objectives of the Code of Conduct Bureau include the establishment and maintenance of a high standard of morality in the conduct of public business and ensuring that the actions and behaviour of public officers conform to the highest standards of public morality and accountability.⁷⁷ The Bureau consists of a Chairperson and other members, each of whom shall not be less than 50 years at the time of appointment and shall vacate office at the age of 70 years.⁷⁸ The Chairperson and members of the Bureau are appointed by the President subject to confirmation by Senate.⁷⁹ With the exception of *ex officio* members, no person is qualified for appointment as a member of the Bureau if he is not qualified or if he is disqualified as a member of the House of Representatives, if within the preceding ten years he has been removed as a member of the federal executive bodies listed in section 153 of the 1999 Constitution⁸⁰ or as the holder of any other office on the ground of misconduct.⁸¹ Where a person employed in the public service of the federation is appointed as Chairperson or member, he is deemed to have resigned his former office from the date of the appointment.⁸²

The functions of the Bureau include receiving asset declarations from public officers,⁸³ examining the declarations in accordance with the requirements of the Code of Conduct or any law,⁸⁴ retaining the custody of such declarations and making them available for inspection by any citizen of Nigeria on such terms and conditions as the National Assembly may prescribe,⁸⁵ ensuring compliance with and, where appropriate, enforcing the provisions of the Code of Conduct or any law relating thereto,⁸⁶ investigating the complaint and, where appropriate, referring such matters to the Code of Conduct Tribunal,⁸⁷ appointing, promoting, dismissing and exercising disciplinary control

⁷⁷ Sec 2, Code of Conduct Bureau and Tribunal Act Cap C 151 Laws of Federation of Nigeria, 2004.

⁷⁸ Paras 1(a) & (b) Part I Third Schedule to the 1999 Nigerian Constitution.

⁷⁹ See sec 154(1) of the 1999 Nigeria Constitution.

⁸⁰ The Federal executive bodies are the Code of Conduct Bureau, the Council of State, the Federal Character Commission, the Federal Civil Service Commission, the Independent National Electoral Commission, the National Defence Council, the National Judicial Council, the National Population Commission, the National Security Council, the Police Service Commission and the Revenue Mobilisation and Fiscal Commission.

⁸¹ Secs 156(1) & (b) of the 1999 Nigerian Constitution.

⁸² See *proviso* to sec 156(b)(2) of the 1999 Nigerian Constitution.

⁸³ Part I para 3(a) Third Schedule to the 1999 Nigerian Constitution.

⁸⁴ Para 3(b) Third Schedule to the 1999 Nigerian Constitution.

⁸⁵ Para 3(c) Third Schedule to the 1999 Nigerian Constitution.

⁸⁶ Para 3(d) Third Schedule to the 1999 Nigerian Constitution.

⁸⁷ Para 3(e) Third Schedule to the 1999 Nigerian Constitution.

over the staff of the Code of Conduct Bureau⁸⁸ and carrying out other functions as may be conferred on it by the National Assembly.⁸⁹

In order to guarantee their independence and effective performance of their duties, the remunerations and salaries of the Chairperson and members of the Bureau are a charge on the consolidated revenue fund of the Federation.⁹⁰ Similarly, in exercising its power to make appointments or to exercise disciplinary control over persons, the Bureau is not subject to the direction and control of any other authority or person.⁹¹ Furthermore, the Chairperson and members of the Bureau can only be removed by the President acting on an address of a two-thirds majority of the Senate praying that they be so removed for their inability to discharge the functions of their office, whether arising from infirmity of mind or body or any other cause or misconduct.⁹²

The constitutional provision stipulating qualification as a member of the House of Representatives for eligibility for appointment as a member of the Code of Conduct Bureau needs a rethink. This is because membership of and sponsorship by a political party are some of the qualifications for election into the House of Representatives. This seems to suggest that only card-carrying members of political parties can become members of the Bureau. Considering the sensitive nature of the Bureau, it has been suggested elsewhere that the qualification as to the membership of and sponsorship by a political party be deleted from the qualifications of appointment into the Code of Conduct Bureau.⁹³ Other qualifications can still be retained. This is because partisan people are the least qualified for such appointment in order to give the Bureau some credibility and avoid political meanings being read into its actions.

Paragraph 3(c) of the Third Schedule to the 1999 Nigerian Constitution, to the effect that the Code of Conduct Bureau shall make asset declarations available for inspection on such 'terms and conditions as the National Assembly may prescribe', is about the most controversial provision on asset declaration in Nigeria. It is one of the main reasons for writing this article. This is because, despite the fact that Nigerians are desirous of knowing the content of asset declarations of public officers, especially the political office holders, the National Assembly has never deemed it fit to prescribe 'such terms and conditions' on which the Code of Conduct Bureau will make an asset declaration available for inspection by members of the public since the enactment

⁸⁸ Para 3(f) Third Schedule to the 1999 Nigerian Constitution.

⁸⁹ Para 3(g) Third Schedule to the 1999 Nigerian Constitution.

⁹⁰ See sec 84(4) of the 1999 Nigerian Constitution. According to Akintayo (n 34 above), the consolidated revenue fund relates to accounts maintained for the benefit of the Federal Government.

⁹¹ See sec 158(1) of the 1999 Nigerian Constitution.

⁹² See sec 157(1) of the 1999 Nigerian Constitution.

⁹³ Lawal (n 43 above) 114.

of the Constitution. This reluctance might not be unconnected to the fact that members of the National Assembly are also among the public officers whose asset declarations Nigerians would want to be made available for inspection. Therefore, the controversial provision should be reviewed or totally expunged from the Nigerian Constitution that asset declaration forms be treated as public documents within the meaning of section 109 of the Evidence Act⁹⁴ and upon the fulfilment of the conditions stipulated in section 111 thereof, every person should be entitled to inspect them. Furthermore, asset declarations of top government functionaries should be posted on the website of the Code of Conduct for easy access by members of the public.⁹⁵ Breaches of the Code of Conduct are tried by the Code of Conduct Tribunal.

2.3 The Code of Conduct Tribunal

The Code of Conduct Tribunal is established under paragraph 15 of Part 1 of the Fifth Schedule to the 1999 Nigerian Constitution. It consists of a Chairperson and two other persons.⁹⁶ The Chairperson must have held office or be qualified to hold office as judge of a superior court of record in Nigeria.⁹⁷ Like members of the judiciary, the members of Code of Conduct Tribunal are appointed by the President on the recommendation of the National Judicial Council.⁹⁸ However, unlike the judiciary, the Code of Conduct Tribunal is not classified under Judicature in chapter VII of the 1999 Nigerian Constitution.⁹⁹ The Chairperson and members of the Tribunal, like a judge of the Court of Appeal or Supreme Court, enjoy practically the same security of tenure with regard to their employment, discipline and retirement.¹⁰⁰

The retirement age of the Chairperson and members of the Tribunal is 70 years.¹⁰¹ Their remunerations and salaries are a charge upon the Consolidated Revenue Fund of the Federation and the Chairperson or any member of the Tribunal who has held office for a minimum of ten years shall, if he retires at the age of 70 years, be entitled to pension for life at a rate equivalent to his last annual salary in addition to other retirement benefits to which he may be entitled.¹⁰² Furthermore, the Chairperson or member of the Tribunal shall not be removed from

⁹⁴ Cap E 14 Laws of Federation of Nigerian, 2004. See also sec 7 of the Ugandan Leadership Code Act, 2002.

⁹⁵ B Owasanoye 'Transparency, accountability and good government under the 1999 Constitution' in IA Ayua *et al* (eds) *Nigeria: Issues in the 1999 Constitution* (2000) 234-238.

⁹⁶ Para 15(1) Part I Fifth Schedule to the 1999 Nigerian Constitution.

⁹⁷ Para 15(2) Part I Fifth Schedule to the 1999 Nigerian Constitution.

⁹⁸ Para 15(3) Part I Fifth Schedule to the 1999 Nigerian Constitution.

⁹⁹ A Emiola *Public servants and the law* (2001) 31.

¹⁰⁰ As above.

¹⁰¹ Para 17(1) Part I Fifth Schedule to the 1999 Nigerian Constitution.

¹⁰² Para 17(2) Part I Fifth Schedule to the 1999 Nigerian Constitution.

office on appointment by the President except upon an address supported by a two-thirds majority of each House of the National Assembly praying that he be so removed for inability to discharge the functions of his office (whether arising from infirmity of mind or body) or for contravention of the Code of Conduct.¹⁰³ According to Nwabueze, this provision does not seek to prescribe an exclusive method of removal, as in the case of judges, but merely to limit the President's removal power.¹⁰⁴

The removal of the Chairperson or member of the Code of Conduct Tribunal for breach of the Code of Conduct admits no argument. As for their inability to perform their duty, this could be either physical or mental.¹⁰⁵ For instance, a judge called John Pickering of the United States was insane for three years and was an incurable drunkard. He was impeached for presiding while drunk and delivering opinions contrary to law.¹⁰⁶ In either case, before the removal of a member of the tribunal is effected, it is proposed that the person concerned should be informed of the allegation against him and be given a chance to reply to it in such a way as appropriate, albeit not necessarily by an oral hearing.¹⁰⁷

Unlike the Code of Conduct Bureau, no power is directly conferred on the Code of Conduct Tribunal, but it is implied by paragraphs 18(1) and (2) of Part I of the Fifth Schedule stating the punishment that the Tribunal can impose. Moreover, the National Assembly may by law confer on the Tribunal such additional powers as may appear to it to effectively discharge the functions conferred on it.¹⁰⁸ In *Nwankwo v Nwankwo*,¹⁰⁹ the Nigerian Supreme Court held that the Code of Conduct Tribunal is the only body vested with jurisdiction to handle breaches of the Code of Conduct.¹¹⁰ However, different decisions were reached by Nigerian courts in *Ebiesuwa v Commissioner of Police*¹¹¹ and *Akinkunmi v Spiff*.¹¹²

The punishment which the Code of Conduct Tribunal may impose for breaching any provision of the Code includes vacation of office or seat in any legislative house,¹¹³ disqualification from membership

¹⁰³ Para 17(3) Part I Fifth Schedule to the 1999 Nigerian Constitution.

¹⁰⁴ BO Nwabueze *Nigerian presidential Constitution (1979-8)* (1985) 297.

¹⁰⁵ JO Sokefun 'Independence of the judiciary' in JO Sokefun (ed) *Issues in constitutional law and practice in Nigeria* (2002) 199.

¹⁰⁶ B Raoul *Impeachment: The constitutional problems* (1974) 183–184.

¹⁰⁷ *Rees v Crane* (1994) 2 AC 173.

¹⁰⁸ Para 15(4) Part I Fifth Schedule to the 1999 Constitution.

¹⁰⁹ (1995) 30 LRCN 24.

¹¹⁰ See also *Oguagbu v Oguagbu* 1981 2NCLR 600; *Oloyo v Alegbe* (1982) 3 NCLR 346.

¹¹¹ (1982) 3 NCLR 339 341.

¹¹² (1982) 3 NCLR 342 345. Since the Supreme Court's decision in *Nwankwo v Nwankwo* is the later in time, these cases seem to have been wrongly decided.

¹¹³ Para 18(2)(a) Part 1, Fifth Schedule to the 1999 Nigerian Constitution.

of a legislative house and from holding any public office for a period not exceeding ten years,¹¹⁴ and forfeiture to the state of any property acquired in abuse or corruption of office.¹¹⁵ These sanctions are without prejudice to the penalties that may be imposed where the conduct is also a criminal offence.¹¹⁶ This raises the question of whether the Code of Conduct does not offend the rule against double jeopardy. Commenting on a similar provision of the Code of Conduct in the 1979 Nigerian Constitution and the lackadaisical attitude of government towards its implementation, Nwabueze is of the view that:¹¹⁷

Given the necessity for penal sanctions which is implied in the prohibitory character of the provision as well as in the reference to penalties that may be imposed by any law, a duty clearly arises on the part of the government to enact penal sanctions to back up the disciplinary ones. And it seems right and proper that it should have been left to the government to enact the necessary penal sanctions, since it should not really be the place of the Constitution to create offences and to prescribe penalties for them. This is the function of government by ordinary legislation.

He states further that the duty thus imposed was utterly neglected by the government of the Second Republic. He therefore expresses no surprise that a government which neglected willfully to appoint members of the body established by the Code for the implementation and enforcement of its provision would ever want to enact penal sanctions for its breach.¹¹⁸ The shortcomings highlighted by Nwabueze seem to have been rectified by the enactment of the Code of Conduct Bureau and Tribunal Act,¹¹⁹ the Corrupt Practices and Other Related Offences Act¹²⁰ and other anticorruption legislation as well as the Constitution and the empowerment of bodies to implement all these legislations.

3 Public declaration of assets and the right to privacy

The concept of right is filled with difficulty, but the difficulty is indefinitely greater in relation to human rights. The particular difficulty with the concept of human rights springs from their very nature.¹²¹ Human rights are the conceptual products of the seventeenth and eighteenth centuries' philosophies of John Locke and Rousseau, in the context of the national state, so that in the final analysis they became rights of

¹¹⁴ Para 18(2)(b) Part I, Fifth Schedule to the 1999 Nigerian Constitution.

¹¹⁵ Para 18(2)(c) Part I, Fifth Schedule to the 1999 Nigerian Constitution.

¹¹⁶ Para 18(3) Part I, Fifth Schedule to the 1999 Nigerian Constitution.

¹¹⁷ BO Nwabueze *Military rule and constitutionalism* (1992), cited in Akinseye-George (n 52 above) 108.

¹¹⁸ As above.

¹¹⁹ Cap C 15 Laws Federation of Nigeria, 2004.

¹²⁰ Cap C 31 Laws of Federation of Nigeria, 2004.

¹²¹ BO Nwabueze *Constitutional democracy in Africa* (2003) 305.

citizens. In the context of Africa, the association between human rights and the state is strong primarily because of the fact that the significant abuse of human rights is perpetrated by the state so that their affirmation is a self-assertion by the citizenry against the state.¹²² According to Lien, human rights are:¹²³

universal rights or enabling qualities of human beings as human beings or as individuals of the human race, attaching to the human being wherever he appears without regard to time, place, colour, sex, parentage or environment.

The respect and primacy accorded to human rights are because, in the words of the Preamble of the two international covenants,¹²⁴ 'they derive from the inherent dignity of the human person'. According to Nwabueze, to say human rights derive from the inherent dignity of the human person seems to imply that the two (human rights and human dignity) are equivalent or synonymous. He asserts that human rights are not a spiritual or physical attribute of the human being but a concept invented by philosophers for the realisation of the inherent dignity of the human being; man is not born with human rights. Being innate in man, human dignity is coeval with him; he is born with it; not so with the concept of human rights.¹²⁵ An appreciation of the development of human rights in different societies calls for the study of history and sociology. To explain the extent of the inculcation of human rights in the political philosophy of people, it is necessary to have recourse to their culture, tradition and religion.¹²⁶

Human rights have been classified generally into civil and political rights, and economic, social and cultural rights. Civil and political rights impose limitations on the activities of government and are called negative rights. They are generally justiciable.¹²⁷ Economic, social and cultural rights, on the other hand, are called positive rights in that they enhance the power of the government to do something for the people to enable them to act in some way. They are generally non-justiciable; they require affirmative action by governments for their implementa-

¹²² FW Jjuuko 'The state and constitutionalism in Africa' (1995) 2 *East African Journal of Peace and Human Rights* 20.

¹²³ A Lien *A fragment of thought concerning the nature and fulfillment of human rights* (1973) 24.

¹²⁴ These are the International Covenant on Civil and Political Rights GA Res 2200 A (xxi), UN GAOR 21st session Supp No 1652 UN Doc A/6316 (1966) and the International Covenant on Economic, Social and Cultural Rights GA Res 2200A (xxi) UN GAOR 21st session Supp No 16 49 UN Doc A/6316 (1966).

¹²⁵ Nwabueze (n 121 above) 305.

¹²⁶ UO Umozurike *The African Charter on Human and Peoples Rights* (1997) 1.

¹²⁷ See eg Universal Declaration of Human Rights arts 1-21, GA Res 217A (iii) UN GAOR, 3rd session UN Doc A/RES/810 1948, International Covenant on Civil and Political Rights and ch IV of the 1999 Nigerian Constitution, secs 33-44.

tion.¹²⁸ According to Schmidt, civil and political rights are at the centre of upholding human dignity and their importance has gained recognition because of conflict over their violation and the development of legitimate claims for their protection. There is much to learn from the process in which civil and political claims gain legitimacy and are applied to the benefits of the world community.¹²⁹ He cautions that any assertion that civil and political rights are more important ignores the processual understanding of how rights arise out of claims and come to be legitimated.¹³⁰ The right to privacy belongs to civil and political rights.

The right to privacy is easily and often conflated with the right to (private) property and the right to liberty (of one's private affairs). In fact, the word 'private' figures in such an array of moral considerations that it is tempting to erroneously conclude that privacy is not a particular right at all, but a way of talking about a cluster of several rights that grant individuals sovereignty over various domains.¹³¹ Most of the theories on the right to privacy can be fairly characterised as claiming that the right to privacy is the right to restrict access to a personal domain. Many differences among privacy theories turn on different definitions of this domain. In some theories the right to privacy is the right to restrict access to the person himself or herself, in other theories the right to restrict access to personal information.¹³² The latter is of greater relevance to the theme of this paper.

The right to privacy is guaranteed by virtually all international and regional instruments on human rights. Article 12 of the Universal Declaration on Human Rights (Universal Declaration)¹³³ provides:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference and attacks.

According to Lillich, while commonly thought to protect the right to privacy, article 12 actually protects a number of somewhat 'disparate' rights.¹³⁴ The International Covenant on Civil and Political Rights (CCPR) in article 7 inserts the words 'or unlawful' before 'interference' and 'unlawful' before 'attacks' in the first sentence and upgrades the

¹²⁸ See International Covenant on Economic, Social and Cultural Rights and ch II of the 1999 Nigerian Constitution secs 13–24.

¹²⁹ PR Schmidt 'African configuration in the right to a cultural heritage' (1995) 2 *East African Journal for Peace and Human Rights* 41.

¹³⁰ As above.

¹³¹ http://goliath.ecnext.Com/coms2/summary_0199-2719260199-2719246_ITM (accessed 31 January 2009).

¹³² As above.

¹³³ GA Res 217A (iii) UN GAOR, 3rd session UN Doc A/RES/810 (1948).

¹³⁴ RB Lillich 'Global protection of human rights' in T Meron (ed) *Human rights in international law: Legal and policy issues* (1989) 147.

second sentence into a separate paragraph, but otherwise it follows article 12 of the Universal Declaration *in haec verba*.¹³⁵ While article 8 of the European Convention¹³⁶ and article 11 of the American Convention¹³⁷ substitute 'private life' in place of 'privacy', they both, especially the latter, reaffirm the general norms found in the Universal Declaration and CCPR.¹³⁸

The African Charter on Human and People's Rights (African Charter)¹³⁹ makes elaborate provision for the rights to life and integrity of the person,¹⁴⁰ respect for human dignity¹⁴¹ as well as liberty and security.¹⁴² There is unfortunately no mention of the right to privacy.

Section 37 of the 1999 Nigerian Constitution provides for the right to privacy as follows: 'The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.'

The right is not absolute. Like what obtains under the European Convention, section 45(1) of the Constitution allows derogation in certain circumstances. The section provides:

Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society —

- (a) in the interest of defence, public safety, public order, public morality, or public health, or
- (b) for the purpose of protecting the rights and freedoms of other persons.

While many believe that the right to privacy should be given expansive interpretation, others insist on a restrictive interpretation. According to Malherbe, factors usually taken into consideration to restrict the right to privacy include the nature of the right, the importance of the limitation, the nature and extent of the limitation, the relations between the limitation and its purpose as well as the possibility of less restrictive means of achieving the purpose.¹⁴³ Commenting on a derogation from the right to privacy under the Nigerian Constitution, Obilade is of the view that a limitation with respect to public morality is significant and that the idea of using legislative measures as instruments of social

¹³⁵ As above.

¹³⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221 136 140.

¹³⁷ American Convention on Human Rights (1969) 1144 UNTS 123, OASTS No 36; 124.

¹³⁸ Lillich (n 134 above).

¹³⁹ African Charter on Human and Peoples Rights (Banjul Charter) 1981 OAU Doc CAB/LEG/67/3Rev 5, 21 *International Legal Materials* 58.

¹⁴⁰ Art 4 African Charter.

¹⁴¹ Art 5 African Charter.

¹⁴² Art 6 African Charter.

¹⁴³ K Malherbe 'Stretching solidarity too far: The impact of fraud and corruption on social security in South Africa' 2000 5 *Law, Democracy and Development* 121.

progress is modern;¹⁴⁴ classical utilitarianism advocates the use of law as an instrument of social reform. According to Bentham's utilitarian principle, governmental and individual actions should aim at achieving 'the greatest happiness of the greatest number'.¹⁴⁵ In Bentham's view, law should promote the greatest possible happiness of all members of the community.¹⁴⁶ To him, the public good ought to be the object of the legislator, general utility ought to be the foundation of his reasoning. This is to be done by balancing the interests of the individual and that of the community.¹⁴⁷ Obilade is of the view that one means of balancing the interest of the individual in acquiring property and the interest of the community is enacting a law on corruption. The Code of conduct is undoubtedly one such law. Is a public declaration of assets now being proposed by Nigerians not a violation of public officers' right to privacy?

Prima facie, a public declaration of assets, especially when not a requirement of Nigerian law at present, seems to be a violation of this right. It has, however, been argued that public officers cannot lay claim to absolute privacy, especially in accounting for public funds entrusted to them.¹⁴⁸ It is further contended that there is an overriding public interest in the disclosure of information on the assets of public officers who obviously are trustees of the nation's wealth. There is, therefore, nothing inherently private in the affairs of such public officers.¹⁴⁹ The view has also been expressed that in declaring assets as required by the provisions of the Code of Conduct, public officers should be categorised and not lumped together; those public officers, such as the President, Vice-President, governors, deputy-governors, ministers, commissioners, legislators, advisers and other political office holders, rather than normal career officers, should declare their assets publicly.¹⁵⁰ According to Idowu, these people are in advantaged positions which could be easily abused because they have access to the wealth and opportunities of the nation. It is argued that, since they have decided to accept those responsible positions, there should be nothing secret in their assets.¹⁵¹ It is further argued that:¹⁵²

¹⁴⁴ AO Obilade 'The Corrupt Practices and Other Related Offences Act and the right to privacy' in AO Obilade *et al* (eds) *Contemporary issues in the administration of justice: Essays in honour of Justice Atinuke Ige* (2001) 126.

¹⁴⁵ J Bentham *An introduction to the principles of morals and legislation*, cited in Obilade (n 144 above) 126.

¹⁴⁶ As above.

¹⁴⁷ As above.

¹⁴⁸ T Osipitan *et al* 'Structuring measures against corruption for sustainable development' in *NALT Proceedings of the 38 Annual Conference Faculty of Law LASU* (2002) 334.

¹⁴⁹ As above.

¹⁵⁰ As above.

¹⁵¹ As above.

¹⁵² As above.

Many of them (political office holders) are catered for by the public, the public should know their worth. If their assets are publicly declared, it will be easy for the public to point out their assets after coming into office. Nigerians have been known to become millionaires having large properties after about a year in political office, even when there has been evidence that they found it difficult to make ends meet before appointment. The present practice of secret declaration should be limited to public officers in public career appointment.

I am in total agreement with this view.

4 Public declaration of assets and freedom of information

Freedom of information and the press is one of the indices to measure how democratic a given state is. This is underscored by the fact that regular access to information will not only lead to the empowerment of the people but will also prevent them from living on rumours and half truths.

Freedom of information is accorded pride of place among all freedoms. It is, as the General Assembly said at its first session, the touchstone of all the freedoms to which the UN is consecrated.¹⁵³ According to Humphrey, freedom of information is a somewhat, although not exclusively, political right.¹⁵⁴ It is a political right of a very special kind; for among other things, its exercise makes possible the criticism of government and exchange of information without which there can be no democracy.¹⁵⁵ A free press and other information media are instruments for the realisation of other rights because, in a country where there is freedom of information and where other information media is free, there is a great likelihood that other rights and freedoms will be respected.¹⁵⁶

Broadly speaking, freedom of information includes the right to access information and the right to free expression of opinion, that is, the right to freedom of speech and freedom to publish.¹⁵⁷ It subsumes the right to access information held by public institutions, that is, official information.¹⁵⁸ The practice has been recognised in Sweden since 1976. In the last few years, the doctrine of the right to information has

¹⁵³ GA Res 59 UN Doc A/64/Add. 1 a 95 (1946).

¹⁵⁴ JP Humphrey 'Political and related rights' in Meron (n 134 above) 182.

¹⁵⁵ As above.

¹⁵⁶ As above.

¹⁵⁷ S Hameso 'Politics of freedom of information in Africa' (1995) 26 *Focus on International and Comparative Librarianship* 156.

¹⁵⁸ V Ogwezzy 'Freedom of information as the fountain of all constitutional freedoms' unpublished LLB thesis, University of Ibadan, 2008 3.

gained widespread recognition in all regions of the world.¹⁵⁹ According to Mendel:¹⁶⁰

There has been a veritable revolution in last ten years in terms of the right to information, commonly understood as the right to access information held by public bodies. Whereas in 1990 only 13 countries had adopted national right to information laws, upwards of 70 of such laws have now been adopted globally, and they are under active consideration in another 20 to 30 countries. In 1990, no inter-governmental organisation had recognised the right to information; now all of the multilateral development banks and a number of other international financial institutions have adopted information disclosure policies. In 1990, the right to information was seen predominantly as an administrative governance reform whereas today it is increasingly being seen as a fundamental human right.¹⁶¹

This probably explains why the right to freedom of information is guaranteed by virtually all international and regional instruments on human rights. This right is contained in article 19 of the Universal Declaration thus:¹⁶²

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

According to Humphrey,¹⁶³ this right includes more than is indicated in the specific provisions of the second part of the article. The word 'seek' is used in the corresponding provisions of article 19 of CCPR¹⁶⁴ and in article 13 of the American Convention,¹⁶⁵ but not in the corresponding article 10 of the European Convention.¹⁶⁶ This seems to make the latter provision less expansive.

Article 29(2) of the Universal Declaration sets forth the circumstances under which the right to information may be restricted. It states:¹⁶⁷

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

¹⁵⁹ As above.

¹⁶⁰ T Mendel *Freedom of information: A comparative legal survey* (2008) 3.

¹⁶¹ As above.

¹⁶² Universal Declaration (n 127 above).

¹⁶³ Humphrey (n 154 above) 182.

¹⁶⁴ CCPR (n 124 above).

¹⁶⁵ American Convention (n 137 above).

¹⁶⁶ European Convention (n 136 above).

¹⁶⁷ See also arts 19(3)(a) & (b) CCPR; art 13(2)(a)(b) American Convention; art 10(2) European Convention.

The guarantee of the right to information in the African Charter¹⁶⁸ is not as elaborate as those of the Universal Declaration, CCPR and the European Convention. The word 'seek' is also omitted. The African Charter tersely provides for the freedom of information as follows:

- 1 Every individual shall have the right to receive information.
- 2 Every individual shall have the right to express and disseminate his opinions within the law.

Derogation from this right is also less restrictive as the only limitation is that the right should be exercised 'within the law'.

Section 39 of the 1999 Nigerian Constitution guarantees freedom of information and expression as follows: 'Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and in formation without interference.' Sub-section (3) thereof states the circumstances under which this freedom may be restricted. It declares:

- Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society —
- (a) for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or exhibition of cinematograph films; or
 - (b) imposing restrictions upon persons holding office under the government of the federation or of a state, members of the armed forces of the federation or members of the Nigeria police force or other government security services or agencies established by law.

The right to receive information is not simply the converse of the right to impart information but can be said to be an independent right. While freedom of information deals with the right to receive information, freedom of expression relates to the liberty of open discussion without fear of restriction or restraint.¹⁶⁹

It is interesting to note that, while the marginal note of section 39 of the 1999 Nigerian Constitution reads 'right to freedom of expression and the press', there is no mention of the word 'press' in the substantive provision. The question that has agitated the minds of many Nigerians is, if Nigeria has indeed adopted the American constitutional model, why has it stopped short of the American provision in this regard?¹⁷⁰

Nigerian courts have had cause to pronounce on constitutional provisions relating to freedom of information and expression. In *Tony Momoh v the Senate*,¹⁷¹ it was held that asking a new newspaper editor to disclose his source of information is a breach of his freedom of expres-

¹⁶⁸ African Charter (n 139 above).

¹⁶⁹ JA Yakubu *Press law in Nigeria* (1999) 10.

¹⁷⁰ A Ibidapo-Obe *Essays on human rights law in Nigeria* (2005) 120. The First Amendment to the American Constitution provides that 'Congress shall make no law ... abridging the freedom of speech, or of the press.'

¹⁷¹ *Tony Momoh v The Senate* (1981) 1 NCLR 105.

sion. A similar decision was also reached in *Oyegbemi and Others v AG of the Federation and Others*.¹⁷² However, in *The Queen v Amalgamated Press of Nigeria Ltd and Another*,¹⁷³ it was held that the Constitution could not be used to spread false news likely to cause false alarm to the public. Similarly, in *DPP v Chike Obi*,¹⁷⁴ the accused person was convicted of sedition, while in *Nwankwo v The State*,¹⁷⁵ the Nigerian Court of Appeal held that the offence of sedition was unconstitutional.

Apart from being formally prosecuted by the government in the course of their duties, journalists have also been dealt with ruthlessly through extra-judicial means, especially during military governments.¹⁷⁶ In order to reduce the risk faced by journalists in the course of their duties, and in order to promote transparency in governance through unhindered access to public information, many countries of the world have enacted freedom of information acts in addition to the constitutional provision on this right.

Over 70 countries worldwide have enacted freedom of information acts implementing one variant or the other of freedom of information legislation.¹⁷⁷ It is instructive to note that the countries with existing freedom of information legislation cut across developmental and ideological boundaries. As of 2006, 20 countries in Central and Eastern Europe have adopted freedom of information legislation, guaranteeing public access to government-held information, establishing procedures, the organisation and dissemination of such information, and providing for narrow exceptions.¹⁷⁸ On the African continent, only four countries have freedom of information legislation as at the time of writing this paper.¹⁷⁹ Being the first on the continent, the South African Act deserves some mention.

The Promotion of Access to Information Act (PAIA)¹⁸⁰ was approved by the South African Parliament in 2000 and came into effect in 2001. The objects of the Act, among other things, include giving effect to the

¹⁷² (1982) 3 NCLR 897.

¹⁷³ (1961) 1 ALL NLR 199.

¹⁷⁴ (1961) 1 ALL NLR 1.

¹⁷⁵ (1985) 6 NCLR 228.

¹⁷⁶ See, eg, *Amakiri v Iworari* (1974) 1 RSLR 5.

¹⁷⁷ Ogwezy (n 158 above) 2.

¹⁷⁸ The countries are Albania (1999); Armenia (2003); Bosnia and Herzegovina (2000); Bulgaria (2000); Croatia (2003); Czech Republic (1999); Estonia (2000); Georgia (1999); Hungary (1992); Latvia (1998); Lithuania (2000); Macedonia (2006); Moldova (2000); Montenegro (2005); Poland (2001); Romania (2001); Serbia and Montenegro (2004); Slovakia (2000); Slovenia (2003); Ukraine (1992); and Kosova (2003). These are as listed in JA Goldstone 'Public interest litigation in Central and Eastern Europe: Roots, prospects and challenges' (2006) 28 *Human Rights Quarterly* 520–521.

¹⁷⁹ These are South Africa (2001); Zimbabwe (2002); Angola (2005); and Uganda (2005).

¹⁸⁰ South Africa Promotion of Access to Information Act <http://www.info.gov.za> Vol 466 No 20852 — Cape Town 3 February 2000.

constitutional right of access to any information held by the state or by another person and that is required for the exercise or protection of any right;¹⁸¹ to establish voluntary and mandatory mechanisms or procedures to give effect to that right in a manner that enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible¹⁸² and to promote transparency, accountability and effective governance of all public and private bodies.¹⁸³

The Act allows any person to demand records from government bodies without showing a reason.¹⁸⁴ The Act also has a unique provision that allows individuals and government bodies to access information from private bodies.¹⁸⁵ Both public and private bodies must respond to a request for information within 30 days.¹⁸⁶ The Act does not, however, apply to the records of cabinet and its committees,¹⁸⁷ judicial functions of courts and tribunals,¹⁸⁸ judicial officers of such a court or tribunal¹⁸⁹ and individual members of parliament or a provincial legislature in that capacity.¹⁹⁰ The South African Human Rights Commission has been designated to oversee the functioning of the Act.¹⁹¹

The story of freedom of information legislation in Nigeria is in sharp contrast to what obtains in South Africa. The Freedom of Information Bill was first submitted to the Nigerian House of Representatives in 1999 as a private member bill. It was published in the federal government's official Gazette on 8 December 1999. It underwent a first reading on 22 February 2000. The second reading was on 13 March 2000. After much delays and hiccups, the Bill was eventually passed by the House of Representatives on 5 August 2004 and sent to the Senate in September 2004.

The first reading of the Bill was held at the Senate on 23 November 2004, while the second reading was on 22 February 2005. The Bill was then referred to the Senate Committee on Information. Since then many attempts have been made to frustrate the passage of the Bill, which explains why it has not yet been passed at the time of writing this paper.¹⁹²

¹⁸¹ Secs 9(a)(i) & (ii) of the Act.

¹⁸² Sec 9(d) of the Act.

¹⁸³ Sec 9(e) of the Act.

¹⁸⁴ Sec 11(e) of the Act.

¹⁸⁵ Sec 50 of the Act.

¹⁸⁶ See secs 25(1) & 56 of the Act respectively.

¹⁸⁷ See sec 12(a) of the Act.

¹⁸⁸ Secs 12(b) (i) & (ii) of the Act.

¹⁸⁹ Sec 12(b)(iii) of the Act.

¹⁹⁰ Secs 12(b) & (c) of the Act.

¹⁹¹ For a critique of the provisions of the Act, see J de Waal *et al* *The Bill of Rights handbook* (2001) 525–553.

¹⁹² For a detailed discussion of the Freedom of Information Bill in Nigeria, see Oguezzy (n 158 above) 5–10.

The symbiotic relationship between unhindered access to information and a public declaration of assets is self-evident. This is because access to information, especially that held by government, can promote transparency, accountability and effective governance. This in the long run will reduce corruptive tendencies, which is the aim of a public declaration of assets. If a Freedom of Information Act has been enacted in Nigeria, as was done in South Africa, Nigerians will be able to have access to the content of assets declared by public officers without any recourse to the 'terms and conditions as the National Assembly may prescribe'.¹⁹³ Therefore, it is suggested that the Nigerian judiciary should give a liberal interpretation to freedom of information under the Constitution while the National Assembly should speed up the passage of the Freedom of Information Bill in order to promote virtues of accountable and democratic governance.

5 Public declaration of assets and the right to democratic governance

The term 'democracy' is not amenable to an easy definition. However, it is generally believed to be a system of government whereby the people are ruled by their elected representatives through free and fair elections.

According to Diamond, governments chosen through free and fair competitive elections are generally better than those that are not.¹⁹⁴ They offer the best prospect for accountable, responsive, peaceful, predictable, good governance.¹⁹⁵ In the past decade, the theory of democracy has been dominated by two very different approaches. These are the deliberative democracy and social choice theories.¹⁹⁶

For deliberative democrats, the essence of democratic legitimacy is the capacity of those affected by a collective decision to deliberate in the production of that decision.¹⁹⁷ Deliberation involves discussion in which individuals are amenable to scrutinising and changing their preferences in the light of persuasion (but not manipulation, deception or coercion) from other participants. Claims for and against courses of action must be justified to others in terms that they can accept.¹⁹⁸

On the other hand, the social choice theory, whose proponents generally deduce far less optimistic results, believes that democratic

¹⁹³ Para 3(c) Part 1 Third Schedule to the 1999 Nigerian Constitution.

¹⁹⁴ L Diamond *Developing democracy* (1999) 3.

¹⁹⁵ As above.

¹⁹⁶ See generally JS Dryzek & C List 'Social theory and deliberative democracy: A reconciliation' (2003) 33 *British Journal of Political Science* 1.

¹⁹⁷ As above.

¹⁹⁸ J Rawls 'The idea of public reason revisited' (1997) 64 *University of Chicago Law Review* 771-772.

problems involve an aggregation of views, interests or preferences across individuals, not deliberation over their content.¹⁹⁹ According to Arrow, such aggregation is bedevilled by impossibility, instability and arbitrariness.²⁰⁰ The two theories are, however, not irreconcilable. According to Dryzek and List, although social theory practitioners may be unaware of it, their theory points to the functions deliberation can perform in making collective decisions both tractable and meaningful, thus providing a crucial service to deliberative democracy.²⁰¹

Irrespective of the theory to which one subscribes, democracy promotes freedom as no other feasible alternative can. According to Dahl, democracy is instrumental to freedom in three ways.²⁰² First, free and fair elections inherently require certain political rights of ‘expression, organisation and opposition’ and these fundamental political rights are unlikely to exist in isolation from broader civil liberties.²⁰³ Democracy also maximises the opportunities for self-determination and facilitates moral autonomy.²⁰⁴ Consequently, the democratic process promotes human development (the growth of personal responsibility and intelligence) while also providing the best means for people to protect and advance their shared interest.²⁰⁵

Upon a point consistent with the principles of constitutionalism and representative democracy, government is better when it is more democratic.²⁰⁶ However, a constitutional government is not the same thing and need not be a democratic government.²⁰⁷ Constitutional democracy combines the notions of a constitutional government and a democratic one, that is to say, it is a democratic government regulated and limited by a constitution.²⁰⁸

Democracy is also distinguishable from democratisation. According to Beetham, democracy should properly be conceptualised as ‘lying at one end of a spectrum’, the other end of which is a system of rule where the people are totally excluded from the decision-making process and any control over it.²⁰⁹ Beetham goes on to say that:²¹⁰

¹⁹⁹ Dryzek & List (n 196 above) 2.

²⁰⁰ K Arrow *Social choice and individual values* (1963), cited in Dryzek & List (n 196 above) 2.

²⁰¹ As above.

²⁰² R Dahl *Democracy and its critics* (1989) 88–89.

²⁰³ As above.

²⁰⁴ n 202 above, 88–89.

²⁰⁵ Diamond (n 194 above) 3.

²⁰⁶ As above.

²⁰⁷ Nwabueze (n 36 above) 4.

²⁰⁸ n 207 above, 5.

²⁰⁹ D Beetham ‘Liberal democracy and limits of democratisation’ in D Held (ed) *Prospects for democracy* (1999) 55, cited in Nwabueze (n 121 above) 8.

²¹⁰ As above.

The concept of democratisation expresses both a clear direction of change along the spectrum, and a political movement or process of change, which can apply to any given system, not only change from authoritarian forms of rule.

Beetham's conception of democratisation seems to suffer from a certain vagueness in failing to indicate at what point in the movement toward direction of change, after its initial commencement, that democratisation can be said to be taking or to have taken place.²¹¹

In externally-induced democratisation processes, the role of internal agents of democratisation determines the level of implementation.²¹² There seems to be many terms for defining various mechanisms of democratisation where international factors play a role, depending on whether they are actor or policy-oriented, major or minor processes, or whether they simply overlap.²¹³ Keeping in mind the fact that international factors play only a supportive role in democratisation efforts, Kubicek identifies four broad categories — control, contagion, convergence and conditionality.²¹⁴ The foregoing analysis has serious implications for democratic governance.

Governance, in contradistinction to democracy, is the process whereby public institutions conduct public affairs, manage public resources, and guarantee the realisation of human rights.²¹⁵ It is the structure of rules and processes that affect the exercise of power, particularly with regard to participation accountability, effectiveness and coherence.²¹⁶ Good government is the key to economic development and, therefore, must be participatory, transparent and accountable.²¹⁷ It must be effective and equitable in order to promote the rule of law.²¹⁸

The right to democratic governance has been defined as:²¹⁹

the subjective capacity of individuals and peoples to demand of their rulers a political regime based on the rule of law and separation of powers, in which citizens can periodically elect their leaders and representatives in free and fair elections, on the basis of the interaction between a number of politi-

²¹¹ Beetham (n 209 above) 9.

²¹² F Turkmen 'The European Union and democratisation in Turkey: The role of the elites' (2008) 30 *Human Rights Quarterly* 146.

²¹³ n 212 above, 8.

²¹⁴ PJ Kubicek 'International norms, European Union and democratisation: Tentative theory and evidence' in PJ Kubicek (ed) *The European Union and democratisation* (2003) 4–21, cited in Turkmen (n 212 above).

²¹⁵ NJ Udombana *Human rights and contemporary issues in Africa* (2003) 53.

²¹⁶ As above.

²¹⁷ N Woods (1999) 5 *Global Governance* 43.

²¹⁸ UN Development Programme, 'Governance for sustainable human development, UNDP Policy Document' <http://magnet.undp.org/policy/default.html> (accessed 31 January 2009).

²¹⁹ 'Promotion and consolidation of democracy' in UN ESCOR 53 session paragraph 81 UN Doc E/CN.4/Sub.2/2001/32.17 (2001).

cal parties, full respect for the exercise of freedom of expression, the press and association and the effective enjoyment of human rights.

One of the leading proponents of the right to democratic governance is Franck.²²⁰ He argues that democratic entitlement is a recognised and recognisable right. He bases his theory on two notions: the idea that governments derive their just powers from the consent of the governed and the idea that the international legitimacy of a state requires acknowledgment by mankind.²²¹ He further contends that a community expectation has emerged, to the intent that 'those who seek the validation of their empowerment patently govern with the consent of the governed'. Democracy, Franck insists, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.²²² The 'democratic entitlement', he maintains, is gradually being transformed 'from moral prescription to international legal obligation',²²³ largely because such entitlement results from 'the craving of governments for validation'.²²⁴

Apart from international jurists and scholars, there are also international and regional human rights instruments on the right to democratic governance. For example, in 1999, the UN Human Rights Commission adopted a resolution on the Promotion of the Right to Democracy.²²⁵ This was the first text approved in the UN recognising the existence of this right.²²⁶ Others having a bearing on democratic governance include the UN Charter,²²⁷ Universal Declaration,²²⁸ CCPR,²²⁹ which guarantees the right to self-determination, the International Convention on Elimination of All Forms of Racial Discrimination (CERD)²³⁰ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).²³¹

The African region is not left out in the fight for democratic governance. In addition to adopting and ratifying some of the international

²²⁰ TM Franck 'The emerging right to democratic governance' (1992) 86 *American Journal of International Law* 46.

²²¹ As above.

²²² As above.

²²³ As above.

²²⁴ As above.

²²⁵ See 'Promotion of the right to democracy' Commission on Human Rights Res 1999/57, UN Doc E/CN.4/RES/1999/57 (1999).

²²⁶ Udombana (n 215 above) 157.

²²⁷ Art 1(2) of the United Nations Charter proclaims the principle of equal rights and self-determination.

²²⁸ The Universal Declaration provides for democratic governance thus: 'Everyone has the right to take part in the government of his country, directly or through freely chosen representatives' (art 21(1)).

²²⁹ Art 1(1) CCPR.

²³⁰ Opened for signature on 21 December 1965, 660 UNTS 85.

²³¹ Opened for signature 1 March 1980, 1249 UNTS 14.

instruments on the right to democratic governance, the region also has its own instruments on the right to democratic governance. One such is the African Charter.²³² Article 13 of the African Charter guarantees to every citizen ‘the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with provisions of the law’.²³³ There are also the Addis Ababa Declaration,²³⁴ the Algiers Declaration,²³⁵ the Lomé Declaration²³⁶ and the Declaration on the Framework for an OAU Response to Unconstitutional Change of Government.²³⁷ Others include the African Union Act,²³⁸ the New Partnership for Africa’s Development²³⁹ and the Declaration on Principles of Democratic Elections in Africa.²⁴⁰

The 1999 Constitution of Nigeria is also replete with provisions relating to democratic governance. For example, section 1(2) of the Constitution expresses its displeasure with undemocratic government when it states that:

The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.

According to Akande, this subsection is a reassertion of the illegality of revolutions or *coups d’état* as a means of changing governments.²⁴¹ It cannot, however, by itself, prevent the actual occurrence of a *coup d’état*. It is also doubtful whether the legality of any *coup* can be chal-

²³² African Charter (n 139 above).

²³³ Art 13 African Charter.

²³⁴ See OAU Declaration on the political and socio-economic situation in Africa and the fundamental changes taking place in the world, adopted in Addis Ababa, Ethiopia, on 11 July 1990.

²³⁵ Algiers Declaration, OAU Assembly of Heads of State and Government 35th ordinary session Res AHG/Dec 1 (xxxv), OAU Doc DOC/OS/(XXVI) INE 17a (1999).

²³⁶ Lomé Declaration, OAU Doc AHG/Dec/.2 (XXXVI) 12 July 2000.

²³⁷ Declaration on the Framework for an OAU Response to Unconstitutional Change of Government, OAU Doc AHG/Dec/5 (XXXVI) (2000). This might be responsible for the random condemnation of the military *coup* of 24 December 2008 in Guinea by both the ECOWAS and the AU. The *coup* was led by Moussa Dadis Camara, an army captain.

²³⁸ African leaders adopted the AU on 11 July 2000, to replace the OAU Charter. See Constitutive Act of the AU (2000) 8 *African Yearbook of International Law* 479, art 33(1) 494.

²³⁹ See OAU The New Partnership for Africa’s Development (October 2001) http://www.iss.co.za/African_facts/RegOrganisations/unity_to_union/pdfs/oau/keydocs/NEPAD-PDF (accessed 31 January 2009).

²⁴⁰ See OAU/AU Declaration on the Principles Governing Democratic Election in Africa, OAU Assembly of Heads of State and Government, 38th ordinary session, Durban, South Africa, 8 July 2002 AHG/Decl 1 (XXXVIII).

²⁴¹ J O Akande *Introduction to 1979 Nigerian Constitution* (1982) 2.

lenged successfully through this provision.²⁴² To Nwabueze,²⁴³ one of the major reasons why the Constitution of the state in Africa lacks legitimacy in the eyes of the people, rulers and the ruled alike, is the frequent overthrow of the Constitution in a military *coup d'état* followed by a prolonged rule under a military absolutism.²⁴⁴

Section 14(1) of the 1999 Nigerian Constitution, under the fundamental objectives and directive principles of state policy, is apposite to the right to democratic governance. It states that the Federal Republic of Nigeria shall be a state based on 'the principles of democratic and social justice'. It further declares that sovereignty belongs to the people of Nigeria from whom government through the Constitution 'derives powers and authority',²⁴⁵ and that the participation by the people in their government 'shall be ensured in accordance with the provisions of this Constitutions'.

Democracy, it has been observed, is imbued with the greatest potential for engendering good governance, especially when bolstered by credible norms, institutions and a virile civil society.²⁴⁶ Social justice, on the other hand, is predicated on the notion that an organised society creates in its members certain reasonable expectations or claims which it would be unfair to disappoint.²⁴⁷

The inclusion of the right to democratic governance in Nigeria under the fundamental objectives and directive principles of state policy deserves some comment. These provisions are enshrined in chapter II of the Nigerian Constitution²⁴⁸ and contain such lofty ideals as the fundamental obligations of the government, the political objectives of the country, social objectives, educational objectives and the obligations of the mass media, among others. The symbolic significance of the provisions is that government is portrayed as a relationship of rights

²⁴² As above. In addition to this provision, the people can revolt against military adventurists through civil unrest and armed resistance. This has been effectively employed in Uganda, Somalia, Ethiopia, Mali and Liberia. In Nigeria, the former military leader, Ibrahim Babangida, was forced to 'step aside' due to intense civil unrest by pro-democracy groups and human rights activists after the annulment of the June 1993 elections, generally believed to have been won by Chief MKO Abiola.

²⁴³ Nwabueze (n 121 above) 37.

²⁴⁴ The last of such military takeover as at the time of writing this paper was in Guinea on 24 December 2008. The *coup* was led by Moussa Dadis Camara, an army captain who is thought to be in his mid-40s, and used to be in charge of fuel supplies. See *International Herald Tribune* 25 December 2008 1, and, for mixed reactions of African leaders, see *All Gambia.net* Editorial 12 January 2009 1.

²⁴⁵ Sec 14(2)(a) 1999 Nigerian Constitution.

²⁴⁶ FC Nwoke *et al* 'The rule of law as a cornerstone of democracy and good governance' in *39th Proceedings of Nigerian Annual Law Teachers Conference* (2003) 85.

²⁴⁷ Nwabueze (n 207 above) 140.

²⁴⁸ Secs 13-24 1999 Nigerian Constitution.

and duties, a social contract.²⁴⁹ While consent to political domination may precede an appraisal of the performance of the state or regime, legitimacy is conferred on the basis of the performance of the state or regime.²⁵⁰ According to Nwabueze, the affirmation or declaration of common beliefs and objectives has more than a symbolic value, it is part of the process of creating a national acceptance of and attachment to those beliefs and objectives with a view to an eventual growth of habits and a tradition of respect for them.²⁵¹

While section 13 of the 1999 Nigerian Constitution obligates all organs of government, and all authorities and persons exercising legislative, executive or judicial powers, to conform to observe and apply the provisions of the fundamental objectives and directive principles of state policy, section 6(6)(c) of the same Constitution reads that, except as otherwise provided by the Constitution, the judicial powers shall not extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or judicial decision is in conformity with the fundamental objective and directive principles of state policy. According to Okere,²⁵² this apparent contradiction could only mean that the spirit of the objectives and directive principles should inspire and inform judicial interpretations, while actions to enforce the fundamental objective and directive principles *per se* are not maintainable. In order to make the right to democratic governance and other rights included in the fundamental objectives and directive principles justiciable, it is suggested that these rights be transferred to the justiciable part of the Constitution.²⁵³ In the alternative, the judiciary is advised to give liberal and pragmatic interpretations to these provisions as the enjoyment of socio-economic rights will make the enjoyment of fundamental rights more meaningful.²⁵⁴

Lastly, the Nigerian Constitution, like what obtains in many international instruments on human rights, uses the principle of democratic governance as a yardstick for the justification of the derogation from fundamental human rights. For instance, section 45(1) of the 1999 Nigerian Constitution determines that nothing in section 37 (right to a fair hearing), section 38 (right to freedom of thought, conscience and religion), section 39 (right to freedom from discrimination), section 40 (right to peaceful assembly and association) and section 41 (right

²⁴⁹ EEO Alemika 'Fundamental objectives and directive principles of state policy within the framework of a liberal economy' in IA Ayua et al (eds) *Issues in 1999 Nigerian Constitution* (2000) 199.

²⁵⁰ n 250 above, 156.

²⁵¹ Nwabueze (n 207 above) 260.

²⁵² BO Okere 'Fundamental objectives and directive principles of state policy under the Nigerian Constitution' (1983) 32 *International and Comparative Law Quarterly* 214.

²⁵³ See IB Lawal 'The role of the judiciary in the promotion of human rights and sustenance of democracy' (2008) 2 *Igbinedion University Law Journal* 53.

²⁵⁴ As above.

to freedom of movement) shall invalidate any law that is ‘reasonably justifiable in a democratic society’, in the interest of defence, public safety, public morality or public health;²⁵⁵ or for the purpose of protecting the rights and freedoms of other persons.²⁵⁶

The above provisions underscore the importance attached to the right to democratic governance not only in Nigeria but also under international law. Since democracy promotes human rights and the rule of law, the recognition of the right to democratic governance as a justiciable right all over the world is a fight that calls for the involvement of everyone.

Next to be considered is the effect of a public declaration of assets on the right to democratic governance. A public declaration of assets is meant to promote transparency, accountability and reduce corruption, among others. Democratic governance, as already discussed, also promotes these virtues. The tendency for democracy to heighten corruption in certain instances makes the relationship between democratic governance and a public declaration of assets very intriguing.

Can democratisation itself trigger an increase in corruption, as opposed to merely promoting more vigilant reporting of corruption? According to Weyland,²⁵⁷ the dispersal of power that a transition from authoritarian to democratic rule extends a range of actors who need to consent to decisions over public resource-allocation. Using Brazil and many countries in Latin America as examples, Weyland further contends that the dependence of entrepreneurs on favourable political decisions and their capacity to pass on the cost of corruption to consumers through higher prices or to workers through lower wages facilitate the increase in bribery.²⁵⁸ He is, however, quick to admit that, while democratisation can extend the range of actors who have the power to demand bribes, it may also enhance overall accountability and thus prevent newly-empowered actors — as well as old power holders — from misusing their clout for illicit enrichment.²⁵⁹ According to Montinola and Jackman,²⁶⁰ political competition affects all levels of corruption, but the effect is non-linear. Corruption is typically lower in dictatorships than in countries that have democratized partially. But once past the threshold, democratic practices inhibit corruption.²⁶¹

The above analyses of the tendency of democracy to increase the levels of corruption are very true of Nigeria where there have been

²⁵⁵ Sec 45(1)(a) 1999 Nigerian Constitution.

²⁵⁶ Sec 45(1)(b) 1999 Nigerian Constitution.

²⁵⁷ K Weyland ‘The politics of corruption in Latin America’ (1998) 9 *Journal of Democracy* 112.

²⁵⁸ Weyland (n 257 above) 112.

²⁵⁹ Weyland (n 257 above) 113.

²⁶⁰ GR Montinola & RW Jackman ‘Sources of corruption: A cross-country study’ (2003) 32 *British Journal of Political Science* 147.

²⁶¹ As above.

many cases of allegations of corruption against many members of all arms of government and many are currently being tried and others already convicted.²⁶² In order to ensure that the current democratic experiment in Nigeria engenders transparency and accountability, rather than greed and corruption, a public declaration of assets by all political office holders is a *sine qua non*.

6 Declaration of assets in other jurisdictions

The declaration of assets by public officers is not limited to Nigeria. Some other African countries require their public officers to declare their assets and liabilities as well as those of their spouses, children and dependants within a prescribed period. There is, however, a high degree of variation in the mode of declaration and its frequency.

For example, by the provisions of the Public Officers' Ethics Act,²⁶³ public officers in Kenya are required to declare their assets and liabilities as well as those of their spouses and children under 18 years within 30 days of becoming a public officer.²⁶⁴ Thereafter an annual declaration of such assets will be made.²⁶⁵ The content of the declaration is confidential.²⁶⁶ However, unlike what obtains in Nigeria and Ghana, information on the asset declaration may be disclosed to authorised staff of the anti-corruption commission,²⁶⁷ the police and law enforcement agents,²⁶⁸ a person authorised by an order of court,²⁶⁹ and the person who provided the information or his representative.²⁷⁰ Unlike under Nigerian law, where no specific time is stipulated for public officers to declare their assets upon their vacation of office, the Kenyan Public Officers' Ethics Act obligates a public officer to declare his assets within 30 days of vacation of office.²⁷¹

The statutory provisions on asset declaration by public officers in Uganda appear to be fairly stringent. Public officers, called 'leaders' under the Leadership Code Act 2002, are required to declare their assets within three months of assumption of office²⁷² and thereafter

²⁶² IB Lawal 'Is executive immunity coterminous with executive corruption? (2006) 1 *International Journal of Law and Contemporary Studies* 325–346.

²⁶³ 4 of 2003.

²⁶⁴ Sec 25(1) Public Officers' Ethics Act 2003.

²⁶⁵ Sec 26(1) Public Officers' Ethics Act 2003.

²⁶⁶ Sec 29 Public Officers' Ethics Act 2003.

²⁶⁷ Sec 29(4)(a) Public Officers' Ethics Act 2003.

²⁶⁸ Sec 29(4)(b) Public Officers' Ethics Act 2003.

²⁶⁹ Sec 29(4)(b) Public Officers' Ethics Act 2003.

²⁷⁰ Sec 29(4)(c) Public Officers' Ethics Act 2003.

²⁷¹ Sec 27(5) Public Officers' Ethics Act 2003.

²⁷² Sec 4(a) Leadership Code Act 2002.

every two years.²⁷³ Furthermore, public officers are obligated to declare their assets before the expiration of their term of office if their term of office expires six months after their last declaration.²⁷⁴ Contrary to the situation in Nigeria, the contents of a declaration under the Leadership Code Act are treated as ‘public information’ and ‘shall be accessible to members of the public upon application to the Inspector-General’ in the form prescribed under the Code.²⁷⁵ As obtains under the provisions of other asset declaration laws discussed earlier, asset declarations in Uganda are subject to verification and penalties are stipulated for breach.²⁷⁶

The asset declaration regime in Ghana²⁷⁷ is governed by the Public Office Holders (Declaration of Assets and Disqualification) Act of 1998.²⁷⁸ The Act requires public officers to declare their assets on assumption of office and thereafter at intervals of four years.²⁷⁹ They are also required to declare their assets on vacation of office.²⁸⁰ Members of the armed forces are, however, exempted from declaration of assets.²⁸¹ Unlike what obtains in Kenya, Uganda and Nigeria, asset declarations in Ghana are not cross-checked or verified.²⁸² The right to privacy seems to have been taken to the extreme under the Ghana’s asset declaration laws as completed asset declaration forms are submitted to the Auditor-General in sealed envelopes. The Auditor-General, who is the authorised custodian of these declarations, has no authority to open the envelopes. Only a court of law can order them to be opened.²⁸³ Access to asset declarations in Ghana is, therefore, the most restrictive of all the countries considered.

7 Conclusion

Corruption is the bane of Nigeria’s socio-political and economic development. One of the ways by which the Nigerian Constitution tries to

²⁷³ Sec 4(b) Leadership Code Act 2002.

²⁷⁴ Sec 4(3) Leadership Code Act 2002.

²⁷⁵ Sec 7 Leadership Code Act 2002.

²⁷⁶ Sec 35 Leadership Code Act 2002.

²⁷⁷ This section is substantially based on Global Integrity 2006 Country Report on Ghana; available at <http://www.globaintegrity.org/reports/2006/Ghana/index.cfm>, and ‘Money laundering in relation to anticorruption commitments’ http://www.iss.co.za/pubs/other/ahsi/Goredema_Botha/pt1chap_4.pdf (accessed 31 January 2009).

²⁷⁸ Act 550.

²⁷⁹ Sec 4 of the Public Office Holders (Declaration of Assets and Disqualification) Act 1998; art 286 of the 1992 Constitution of Ghana.

²⁸⁰ As above.

²⁸¹ See ‘Money laundering’ (n 277 above) 39.

²⁸² n 278 above.

²⁸³ As above.

curb corruption is the entrenchment of a Code of Conduct for public officers. Among the numerous provisions of the Code are those that oblige public officers to declare their assets on assumption of office and cessation of same. The legal requirement is that public officers declare their assets before a High Court judge and submit the asset declaration to the Code of Conduct Bureau. The Bureau would retain the custody of such declarations and make them available for inspection by any Nigerian on 'such terms and conditions as the National Assembly may prescribe', which conditions the National Assembly is yet to prescribe. While many public officers are reluctant to declare their assets at the risk of penal sanction, others have promptly fulfilled their constitutional obligation. Some public officers, especially political office holders, have gone a step further to make their asset declarations public with the President, Shehu Musa Yar'adua, taking the lead.

This has taken the fancy of many Nigerians who now mount pressure not only on public officers who are yet to declare their assets, but also on those who have done so to make their declarations public. This is partly due to the reluctance of the National Assembly to prescribe the terms and conditions under which the Code of Conduct Bureau should make asset declarations available for inspection by members of the public, and partly to the belief that Nigerians have a right to know the worth of their leaders. In the eyes of most Nigerians, therefore, any political office holder who has not made his asset declaration public is a villain. This might not be totally true but all the same it is a moral judgment. According to Westermack, moral judgments are passed on conduct and character because such judgments spring from moral emotions, because moral emotions are retributive emotions, because a retributive emotion is a reactive attitude of mind, either kindly or hostile toward a living being (or something looked upon in the light of a living being), regarded as a true cause of pleasure or pain only in so far as it is assumed to be caused by his will.²⁸⁴

This has also brought to the fore the jurisprudential question of how far the law should go in upholding morality. While a public declaration of assets seems to violate the right to privacy under the Nigerian Constitution and some other international human rights instruments to which Nigeria is a signatory, it has been argued that there is nothing inherently private in the affairs of public officers in accounting for public funds entrusted to them, and that there is an overriding public interest in the disclosure of information on the assets of public officers as trustees of the nation's wealth. Therefore, legislative interventions aimed at making the assets of public officers accessible to the public can be justified on the basis of utilitarianism. It has also been demonstrated that such a move would be 'reasonably justifiable in a democratic society'. The National Assembly should as a matter of urgency prescribe the

²⁸⁴ E Westermack *The origin and development of moral ideas* (1971) 314.

terms and conditions under which asset declarations would be made available for inspection by the people, while the Nigerian Constitution should be amended to make it mandatory for political office holders to declare their assets publicly.

The failure of the Code of Conduct to indicate the time-frame within which public officers should declare their assets on vacation of office has left the affected officers with the discretion of choosing a time convenient to them. This approach does not afford the Code of Conduct Bureau the opportunity to verify the assets of public officers immediately upon cessation of their term of office and the whole essence of asset declarations is thereby thwarted. It is recommended that the provisions of the Code be amended to indicate the time-frame within which public officers must declare their assets at the end of their terms of office. A period of one month after leaving office has been suggested.²⁸⁵ Furthermore, asset declarations of top government functionaries should be posted on the website of the Code of Conduct Bureau. The frequency of asset declarations should also be reduced from four to two years, as is done in Uganda.

The Code of Conduct Bureau should take the verification of assets more seriously for early detection of foul play. The non-inclusion of local government Chairpersons among public officers prohibited from having foreign accounts is also a serious *lacuna* to be redressed, since financial allocations to local governments in recent times have increased tremendously and cases of diversion and misappropriation of local government funds are now a regular occurrence. The inclusion of eligibility to contest as a member of the House of Representatives as one of the conditions for appointment as a member of the Code of Conduct Bureau is another issue that can cast a pall on the image of the Bureau. This is because membership of, and sponsorship by a political party are conditions precedent to contesting as a member of the House of Representatives. This part of the qualification should be expunged while the others may be retained to give some modicum of credibility to the Bureau.

The concession given to public officers to engage in farming can be used to disguise ill-acquired wealth. So also should there be a review of the decision in *Nwankwo v Nwankwo*²⁸⁶ to the effect that public officers can acquire an interest in private business-like partnerships without holding a managerial post, in order not to provide a justification for incomes not fairly attributable to legitimate emoluments. There is also a need for a code of conduct for private persons so that they do not render nugatory probity and transparency being fostered among public officers. Besides that, many private individuals have also been found

²⁸⁵ AOO Ekpú 'Curbing corruption in Nigeria: The role of the Code of Conduct Bureau' (2004) 20 *Benin Journal of Public Law* 68-69. See also sec 27(5) of Kenyan's Public Officers' Ethics Act 2003.

²⁸⁶ (1995) 30 LRC 24 33.

guilty, either as principal offenders or accomplices, of corrupt practices and allied offences. There should be a positive change in our values and orientation. A situation in which corrupt persons and people of doubtful character are honoured with awards and chieftaincy titles should be deprecated.²⁸⁷ So also can the war against corruption and abuse of office never be successfully fought when pressures are mounted by sponsored kinsmen and associates to secure the release of corruption suspects without following due process, nor when a heroic welcome is given to corruption ex-convicts on completion of their terms.²⁸⁸ The war against corruption should never be tribalised or trivialised. The prosecution and trial of corruption cases should be handled with sincerity and dispatch. There should be a uniform application of the rules and selective prosecution and individualisation of justice should be avoided as much as possible. Sentences on conviction should always reflect the gravity of the offence in order to serve as a deterrent to others.

For us to make any meaningful headway in the fight against graft and greed, Nigerians must have access to information about the activities of government. An accelerated passage of the Freedom of Information Bill (as done in South Africa, Zimbabwe and Uganda) is, therefore, another means of ensuring probity and transparency in our public life. The fear is that the National Assembly may vacillate on the passage of the Bill, since its members are to be affected, the same way they have not been able to prescribe the terms and conditions under which asset declarations should be made available to the public. This view is buttressed by the fact that most political holders, including the members of the National Assembly, are generally reluctant to make their asset declarations public.²⁸⁹

As the only authoritative interpreter of the provisions of the Constitution and statutes, the judiciary should use the earliest opportunity to declare the asset declaration a public document within the meaning of section 109 of the Evidence Act²⁹⁰ to ensure easy access by members of the public. If the Freedom of Information Bill is eventually passed

²⁸⁷ Eg, President Olusegun Obasanjo allegedly nullified the nation awards conferred on some Nigerians by General Abdusalami Abubakar in 1998 because some murder suspects were included on the list.

²⁸⁸ Diepreye Solomon Peter Alamiyeseigha, the impeached Governor of Bayelsa State, was convicted and sentenced to 12 years' imprisonment for corruption and money laundering offences in 2007. The sentences ran concurrently from the day he was incarcerated in December 2005. On his release from prison, he was accorded a heroic welcome, a motorcade of four kilometres reportedly heralded his entry into Yenagoa, the state capital. A sitting government also joined the welcome team. For an incisive comment on this action, see 'Alams the hero' *The Vanguard Editorial* 6 September 2007 18.

²⁸⁹ As at the time of writing this paper, apart from the President, the Vice-President and the Secretary to the Government of the Federation, only three ministers had declared their assets publicly out of 39, four state governors out of 36 and one member of the National Assembly out of 469.

²⁹⁰ Cap E 14 Laws of Federation of Nigeria 2004.

into an Act, it is not unlikely that corrupt public officers will contest its constitutionality as they did to the Corrupt Practices and Other Related Offences Act²⁹¹ in *Attorney-General of Ondo State v Attorney-General of the Federation*.²⁹² It behoves the judiciary to rise in defence of probity and transparency by declaring the Act constitutional. This is the only way to engender a synergy, as opposed to conflict, between the *lex lata* and *lex feranda* on asset declaration in Nigeria.

²⁹¹ Cap C 31 Laws of Federation of Nigeria 2004.

²⁹² (2002) 27 WRN 1 SC. The constitutionality of the Corrupt Practices and Other Related Offences Act was challenged in this case. The Nigerian Supreme Court applied the blue pencil rule when all seven justices held that the plaintiff's action succeeded in part by holding that the Act is generally constitutional, while voiding secs 26(3) and 35 of the Act.

Mass expulsion of foreign nationals: A ‘special violation of human rights’ — Communication 292/2004 Institute for Human Rights and Development in Africa v Republic of Angola

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Summary

This discussion deals with the decision by the African Commission on Human and Peoples’ Rights in Communication 292/2004 Institute for Human Rights and Development in Africa v Republic of Angola. Whilst not the first decision by the African Commission touching on the issue of the mass expulsion of non-nationals by state parties to the African Charter on Human and Peoples’ Rights, it is one of the most comprehensive and progressive decisions in this regard, particularly in terms of its recommendations. However, in the absence of a demonstrable willingness on the part of the African Commission to follow up on its recommendations and a means by which to measure actual compliance, it is argued that the jurisprudential gains of this decision are likely to be short-lived.

1 Introduction

The treatment of foreign nationals by state parties to the African Charter on Human and Peoples’ Rights (African Charter) has in recent years received increasing attention by the African Commission on Human and Peoples’ Rights (African Commission). This is demonstrated by the appointment in 2004 of a Special Rapporteur on the Rights of

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Refugees, Asylum Seekers and Internationally Displaced Persons (IDPs) and the extension of the mandate to include issues of migration more generally. This is further illustrated by the adoption of resolutions, such as the one in 2008, condemning the treatment of non-nationals in South Africa.¹ Coupled with these moves, there has also been an emergence of a burgeoning jurisprudence in relation to the treatment of both refugees as well as migrants, particularly with regard to the expulsion of these groups from the territory of state parties to the African Charter. The first case to deal with the issue, *Organisation Mondiale Contre la Torture and Others v Rwanda*,² related to the expulsion of Burundian refugees from Rwanda, with the African Commission finding violations *inter alia* of articles 2, 7(1) and 12 of the African Charter.³ At the same session, the Commission held in *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*,⁴ that the detention and subsequent deportation of 517 West Africans from Zambia violated articles 2, 7(1)(a) and 12(5) of the African Charter. Violations of articles 2, 7(1)(a), 12(4) to (5), 14 and 18 of the African Charter were also found in *Union Interafricaine des Droits de l'Homme and Others v Angola*,⁵ where mass expulsions of West Africans from Angola had taken place. Similarly, in *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea*,⁶ it was held that a speech by the Guinean President urging the arrest, search and confinement of Sierra Leonean refugees to refugee camps, causing thousands to flee their homes — leaving many with no other choice but to return to Sierra Leone, with others being forcibly returned to their home country by the authorities — also violated a number of African Charter provisions as well as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.⁷

¹ See Resolution on the Special Rapporteur on Refugees, Asylum Seekers and IDPs, ACHPR/Res 72 (XXXVI). On the extension of the mandate of the Special Rapporteur, see ACHPR/Res 95(XXXIX)06. With regard to the situation in South Africa, see Resolution on the Situation of Migrants in South Africa, ACHPR/Res (XXXXIII) 08.

² (2000) AHRLR 282 (ACHPR 1996).

³ Of the four communications, which were grouped together by the African Commission, it was Communication 27/89, submitted on behalf of *Organisation Mondiale contre la Torture and Association Internationale des Juristes Démocrates*, which dealt specifically with the treatment of non-nationals. In this case, four individuals, Bonaventure Mbonuabucya, Baudouin Ntatundi, Vincent Sinarairaye and Shadrack Nkuzwenimana, all Burundian nationals who had been granted refugee status in Rwanda, were expelled from the latter country, ostensibly on security grounds. The Commission, in finding a violation of article 12(5), the prohibition against mass expulsions, held that '[t]here is ample evidence in this communication that groups of Burundian refugees have been expelled on the basis of their nationality ...' and, as such, the prohibition had been violated.

⁴ (2000) AHRLR 321 (ACHPR 1996).

⁵ (2000) AHRLR 18 (ACHPR 1997).

⁶ (2004) AHRLR 57 (ACHPR 2004).

⁷ Violations of arts 2, 4, 5, 12(5) & 14 of the African Charter were found, as well as art 4 of the OAU Convention Governing the Specific Aspects of Refugees in Africa.

Common to most of the aforementioned cases is the emphasis by the African Commission on the special nature of the violations where mass expulsions were found to have occurred.⁸ Thus, the Commission expressed the view in *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*⁹ that 'the drafters of the Charter believed that mass expulsion presented a special threat to human rights'.¹⁰ In *Union Interafricaine des Droits de l'Homme and Others v Angola*,¹¹ it further held that mass expulsions 'constitute a special violation of human rights'.¹² The rationale for this categorisation is apparent in the latter decision, with the African Commission noting that '[t]his type of deportation calls into question a whole series of rights recognised and guaranteed in the Charter ...'¹³ Implicit in these decisions, therefore, is an acknowledgment that the prohibition against mass expulsions is a right upon which a number of other rights are predicated.

2 The case of *Institute for Human Rights and Development in Africa v Republic of Angola*

The case of *Institute for Human Rights and Development in Africa v Republic of Angola*¹⁴ relates to a complaint filed on behalf of Mr Esmaila Connateh and 13 other Gambians, averring 'the capricious arrest and deportation, in violation of their human and peoples' rights, of the said Gambians who were alleged to have been legally residing and working in Angola'.¹⁵ These actions were alleged to have taken place in accordance with *Operação Brilhante* — a governmental campaign conducted between March and May 2004, which led to an

⁸ Art 12(5) of the African Charter, art 4 of Protocol 4 to the European Convention on Human Rights and art 22(9) of the American Convention all contain an express prohibition against the collective expulsion of non-nationals.

⁹ n 4 above.

¹⁰ See para 20 of the decision. This portion of the decision was also quoted with approval in the case of *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (n 6 above) para 69.

¹¹ n 5 above.

¹² See para 16.

¹³ See para 17. The African Commission then went on to detail examples of rights that are affected by expulsions, noting in this regard that the rights to property, work, education and family were all affected by such measures. Though not a case of mass expulsion, the case of *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 52, also illustrates the special nature of forcible expulsion, with the African Commission noting in this regard that '[b]y forcibly expelling the two victims from Zambia, the state has violated their right to enjoyment of all the rights enshrined in the African Charter'.

¹⁴ Communication 292/2004 23rd and 24th Activity Report of the African Commission on Human and Peoples' Rights, Annex II.

¹⁵ See para 2.

estimated 126 247 foreign nationals being deported from Angola.¹⁶ In their petition, the complainants advanced a number of grounds as constituting violations of their rights. These included conditions of detention amounting to cruel, inhuman or degrading punishment and treatment; violations of due process rights; violations of the rights to property, work, equal treatment before the law and non-discrimination as well as a violation of provisions in the African Charter prohibiting the mass expulsion of foreign nationals. As the government of Angola failed to respond to these allegations, the African Commission, in accordance with its own Rules of Procedure as well as previous jurisprudence in this regard, proceeded to consider the communication on the basis of the complainants' submission as well as other information at its disposal.¹⁷

2.1 Conditions of detention

The complainants alleged that the conditions under which foreign nationals were detained at three separate facilities violated article 5 of the African Charter, which provides as follows:

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.

In particular, they contended that the conditions under which they were detained were inhumane as the facilities were 'overcrowded and

¹⁶ Para 3.

¹⁷ See para 34 of the decision. Also see Rule 119(4) of the African Commission's Rules of Procedure which provides as follows: 'State parties from whom explanations or statements are sought within specified times shall be informed that if they fail to comply within those times the Commission will act on the evidence before it'. With regard to the African Commission's jurisprudence, see *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 40; *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 25; *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 86; *Constitutional Rights Project v Nigeria (1)* (2000) AHRLR 241 (ACHPR 1999) para 14; *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000) para 25; and *Centre for Free Speech v Nigeria* (2000) AHRLR 250 (ACHPR 1999) para 18, where the principle was laid out that 'where allegations of human rights abuses go uncontested by the government concerned, especially after repeated notification, the Commission must decide on the facts provided by the complainant and treat those facts as given'. Also see *Union Interafricaine des Droits de l'Homme & Others v Angola* (n 5 above), where the African Commission notes at para 10 that '... in view of the defendant state's refusal to cooperate with the Commission, the latter can only give more weight to the accusations made by the complainants and this on the basis of the evidence furnished by them'. The Commission has also held that the failure to respond to specific allegations may lead to a negative inferences being drawn — see eg para 101 of *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998), that 'where no substantive information is forthcoming from the government concerned, the Commission will decide on the facts alleged by the complainant' (see *Abubakar v Ghana* (2000) AHRLR 124 (ACHPR 1996) para 10).

unsanitary'.¹⁸ In this regard, it was alleged that the detention centre at Kisangili, which previously had been used to house animals, was not fit for the purpose as in converting the premises the authorities had failed to take into account the new function the buildings were to serve.¹⁹ Detainees at the detention centre in Saurimo were alleged to have been exposed to the elements, as the centre was said to have no roof or walls.²⁰ At the Cafunfu detention centre, bathroom facilities were purported to consist of only two buckets for over 500 detainees, located in the same room in which all detainees ate and slept.²¹ It was asserted, more generally, that the guards beat the Gambians and extorted money from them, that food was not provided regularly nor was medical attention readily available and that transportation between detention centres was conducted in overcrowded conditions.²² In addition it was also alleged that the lack of information in relation to the reasons and duration of their detention amounted to 'mental trauma'.²³ Having regard to all the above, the African Commission held that the conditions of detention amounted to inhuman and degrading treatment, which it indicated, with reference to previous case law, was to be interpreted so as to give the widest possible protection against physical as well as mental abuse.²⁴

2.2 Absence of due process

The complainants alleged that the authorities had failed to produce arrest warrants or 'any other document relating to the charges under which the arrests were being carried out'.²⁵ The African Commission therefore found Angola to have violated the prohibition against arbitrary arrest contained in article 6 of the African Charter. Related to this, the Commission also found a violation of article 7(1)(a) of the Charter, which provides that 'every individual shall have the right to have his cause heard', comprising 'the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force', as

¹⁸ Para 50.

¹⁹ As above.

²⁰ Para 51.

²¹ As above.

²² As above.

²³ Para 50.

²⁴ See para 52. In the same paragraph, the African Commission, referencing the case of *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999), went on to list the following as examples of abuse amounting to cruel, inhuman and degrading treatment: 'denial of contact with family and refusing to inform the family of where the individual is being held; conditions of overcrowded prisons and beatings; and other forms of physical torture, such as deprivation of light, insufficient food and lack of access to medicine or medical care'.

²⁵ Para 55.

the complainants had not been afforded the opportunity to challenge their arrest and subsequent deportation.²⁶

The general requirements relating to procedural fairness contained in articles 6 and 7, article 12(4) of the African Charter are as follows:

A non-national legally admitted in a territory of a state party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

The complainants alleged that at no point prior to deportation were they taken before a court of law.²⁷ Furthermore, they also claimed that when they presented documents entitling them to legally reside in Angola, these were either confiscated or destroyed.²⁸ Whereas the African Commission took great pains to emphasise that, although African states may expel non-nationals from their territory, it noted that such expulsions had to take place in accordance with the African Charter's requirements of due process.²⁹ As this had not occurred in the instant case, the African Commission held Angola to be in violation of article 12(4) of the African Charter.³⁰

2.3 The right to property and work

In addition to alleging that the state had failed to allow them an opportunity to challenge their deportation, the complainants further alleged that they had been denied an opportunity to make appropriate arrangements to transport or dispose of their belongings.³¹ Whilst recognising that the right to property in the African Charter is not absolute, the African Commission noted that the failure of the state to produce evidence which would indicate that its actions were 'necessitated either by public need or community interest' and the failure to provide for adequate compensation as 'determined by an impartial tribunal of competent jurisdiction', meant that it was in violation of article 14 of the Charter.³²

In this respect, the complainants also averred that they were in possession of official documentation allowing them to stay and work legally in Angola and that they had paid for permits to continue working in

²⁶ See paras 58-60.

²⁷ Para 62.

²⁸ As above.

²⁹ Para 63.

³⁰ Para 65.

³¹ Para 72.

³² Para 73. Art 14 of the African Charter provides as follows: 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'

the mines, in spite of which they had been deported.³³ The African Commission held this to violate article 15 of the African Charter, thus confirming that all individuals, nationals as well as non-nationals, have the 'right to work under equitable and satisfactory conditions' and are entitled to receive 'equal pay for equal work'.³⁴

2.4 Equal protection of the law and non-discrimination

Article 3(2) of the African Charter provides that '[e]very individual shall be entitled to equal protection of the law'. The complainants argued that this right had been violated by the actions of mass arrest, detention and expulsion of the Gambians from Angola.³⁵ The African Commission in turn held that, in order for a successful claim to be established, a complainant would have to show either that 'the respondent state had not given the victims the same treatment it accorded to the others', or that it had 'accorded favourable treatment to others in the same position as the victims'.³⁶ As the complainants were unable to demonstrate the extent to which they had been treated differently from 'other nationals arrested and detained under the same conditions', the Commission found no violation on this count.³⁷ It did, however, in keeping with previous case law, find a violation of the non-discrimination provision of the African Charter contained in article 2, which provides that the Charter rights are to be enjoyed by all without discrimination, as the various measures taken by the authorities were clearly aimed at foreigners or non-nationals.³⁸

2.5 Prohibition against mass expulsion

Article 12(5) of the African Charter expressly prohibits the mass expulsion of non-nationals, defined in terms which focus on the discriminatory nature of the measures, as 'that which is aimed at national, racial, ethnic or religious groups'.³⁹ This can be contrasted with the

³³ Para 74.

³⁴ See para 76.

³⁵ Para 45.

³⁶ See para 47.

³⁷ Para 48.

³⁸ See para 82. With regard to prior case law on this issue, see notes 2, 4, 5 & 6 above.

³⁹ It is clear from this that mass expulsions are defined not in terms of the number of individuals affected, but rather by who is targeted. Notably absent from the definition are categories specifically enumerated in relation to art 2 of the African Charter, such as sex, political opinion, social or other status. Thus, it would appear that a decision to expel, eg, non-national women or homosexuals from the territory of a party to the African Charter, whilst likely to constitute a violation of the non-discrimination provision of the Charter, would not qualify *prima facie* as a mass expulsion for the purposes of art 12(5) of the Charter.

position adopted first by the European Commission of Human Rights⁴⁰ and later by the European Court of Human Rights, which underscores, instead, the arbitrariness of such expulsions. Thus, the European Court has held that collective expulsions are ‘any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group’.⁴¹ The emphasis therefore is not on the targeting or singling out of groups for expulsion, but rather on the procedural requirement that there was an objective and reasonable review of the individual case. Whilst neither the Inter-American Commission on Human Rights or Court on Human Rights has explicitly given content to the notion of the prohibition against the collective expulsions of aliens, as set out in article 22(9) of the American Convention on Human Rights, the Inter-American Commission emphasised in its 1991 Annual Report in relation to the expulsion of Haitians from the Dominican Republic, the need to ‘consider the individual situation of persons accused of violating immigration law and to grant them the right to present their defence in the framework of a formal hearing’.⁴²

In signalling a move away from the formal requirements of the African Charter, which characterises mass expulsions as involving the targeting of individuals for reasons of nationality, race, ethnic or religious affiliations, the African Commission held in *Institute for Human Rights and Development in Africa v Republic of Angola* that article 12(5) had been violated in spite of the fact that the victims had not been singled out and discriminated against specifically on the basis of their nationality as Gambians or their racial, ethnic or religious affiliation, but rather because they formed part of a broader group of non-nationals from

⁴⁰ See *Henning Becker v Denmark* (Application 7011/75) <http://www.unhcr.org/refworld/docid/3ae6b7058.html> (accessed 1 February 2009).

⁴¹ See *Andric v Sweden* (Application 45917/99) para 1 <http://www.unhcr.org/refworld/docid/3ae6b7048.html> (accessed 1 February 2009). Also see the subsequent case of *Čonka v Belgium* (Application 51564/99) <http://www.unhcr.org/refworld/docid/3e71fd4.html> (accessed 1 February 2009), in which the Court reaffirmed this decision and went further in stating that, even in instances where the measure of expulsion is taken on the basis of reasonable and objective examination of the particular case of each individual alien of the group, this does not mean that ‘... the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with article 4 of Protocol No 4’ (ie the prohibition against collective expulsion) (para 59).

⁴² See ch V of the Annual Report of the Inter-American Commission on Human Rights 1991, OEA/Ser L/V/II 81, Doc 6 Rev 1, 14 February 1992 <http://www.cidh.oas.org/annualrep/91eng/TOC.htm>. (accessed 1 February 2009). The Inter-American Commission ruled the case of *Benito Tide Méndez Antonio Sensión, Andrea Alezi, Janty Fils-Aime, William Medina Ferreras, Rafaelito Pérez Charles, Berson Gelim et al v Dominican Republic*, Report 68/05, Petition 12.271 <http://www.cidh.oas.org/annualrep/2005eng/DominicanRep.12271eng.htm> (accessed 1 February 2009) admissible and found that it was competent to examine the complaint in relation to alleged violations *inter alia* of art 22 of the American Convention.

West and Central African countries.⁴³ This has important implications for future cases, as it potentially paves the way for the possibility of categories not specifically mentioned in article 12(5) from being afforded protection in terms of this provision.⁴⁴ The African Commission further held that the fact that the arrests and deportations took place over a period of several months did not negate the '*en masse* element of the expulsions'.⁴⁵ This too is important, as it emphasises the fact that deportations need not take place within a single defined time-frame in order for article 12(5) to be engaged. Thus, governments cannot escape culpability for mass expulsions by simply deporting individuals forming part of a group of non-nationals over an extended period of time.

Although not calling into question the rights of governments to regulate the entry, exit and stay of foreign nationals, the African Commission emphasised in this case that 'a state's right to expel individuals is not absolute and it is subject to certain restraints'.⁴⁶ These restraints include a 'bar against discrimination based on national origin' as well as procedural safeguards that would allow affected individuals to 'challenge the order or decision to expel them before competent authorities, or have their cases reviewed, and have access to legal counsel, among others'. These safeguards, the Commission noted, ensure that individuals receive equal protection of the law, prohibit arbitrary interference with their lives and further ensures that individuals are not sent back, deported or expelled to countries or places they are likely to suffer from torture, inhuman or degrading treatment, or death.⁴⁷ The latter requirement has particular resonance in a world where terror suspects are routinely rendered to countries where they are likely to be subjected to torture, inhuman or degrading treatment and is the first express acknowledgment by the Commission that article 12(5) extends to prohibit expulsions in cases where there is a risk of torture.

⁴³ Para 69. It was similarly held in *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (n 4 above) that there had been a violation of art 12(5), in spite of the Zambian authorities arguing that the expulsions were not discriminatory because 'nationals of several West African countries and other foreign countries were all subject to the same treatment' (see para 24 of this decision).

⁴⁴ n 39 above. This is also borne out by the African Commission's decision in *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (n 4 above) para 22, where the Commission emphasises that art 2 imposes an obligation 'to secure the rights protected in the Charter to all persons within their jurisdiction, nationals or non-nationals'.

⁴⁵ Para 69.

⁴⁶ Para 79.

⁴⁷ See paras 79 & 84.

2.6 Recommendations

Subsequent to the landmark decision in *Malawi African Association and Others v Mauritania*,⁴⁸ the African Commission's recommendations in general have tended to be more comprehensive.⁴⁹ This is also reflected in the decision of *Institute for Human Rights and Development in Africa v Republic of Angola*, which for the first time requires a government found to have violated the prohibition against mass expulsions to take very detailed and specific action to remedy such violations.⁵⁰ These recommendations include requiring that the authorities ensure non-discrimination on the basis of race, colour, descent, national, ethnic origin or any other status, in relation to immigration policies, measures and legislation, having particular regard to 'the vulnerability of women, children and asylum seekers'. In relation to detention, the recommendations insist that the government take measures to ensure the provision of a 'proper medical examination and medical treatment and care' as well as the regular supervision or monitoring of places of detention by qualified and experienced persons or organisations. In relation to the latter, it was additionally recommended that representatives of the African Commission, relevant international organisations, the International Committee of the Red Cross, non-governmental organisations (NGOs), concerned consulates and others be given access to detainees and places of detention. Moreover, it was suggested that mechanisms be put in place allowing all detained persons access to effective complaint procedures as well as procedural safeguards to ensure that they are given effective access to competent authorities involved in overseeing prisons and matters of detention. It was further recommended that a commission of inquiry be established 'to investigate the circumstances under which the victims were expelled and ensure the payment of adequate compensation of all those whose rights were violated in the process'. Importantly, it was recommended that safeguards be instituted 'to ensure that individuals are not deported or expelled

⁴⁸ (2000) AHRLR 149 (ACHPR 2000).

⁴⁹ Prior to this decision, the African Commission's recommendations were more often than not limited to a formulaic finding that the respondent state was in violation of specific provisions of the African Charter.

⁵⁰ These detailed recommendations are to be found in para 87 of this decision. The African Commission made simple declaratory findings in the cases of *Organisation Mondiale Contre la Torture & Others v Rwanda* (n 2 above) and *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (n 4 above) and made only limited recommendations in the two other cases in which violations of the prohibition against mass expulsions had been found. Thus, in one case, it merely urged both the respondent government and complainants to 'draw all the legal consequences arising from the present decision' and in the other recommended the establishment of a joint Commission 'to assess the losses by various victims with a view to compensation' (see *Inter Union Interafricaine des Droits de l'Homme & Others v Angola* (n 5 above) and *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (n 6 above), respectively).

to countries where they might face torture or their lives could be at risk'. In the final instance, the government of Angola was requested to institute human rights training programmes for 'law enforcement agencies and relevant civil servants dealing with matters involving non-nationals on non-discrimination, due process, and the rights of detainees ...'

Whereas the African Commission's recommendations have, as has already been noted, become increasingly comprehensive and far-reaching in nature, compliance with these decisions has lagged behind significantly. Thus, the Commission noted in 1998 that, at that point, only one state had complied with its decisions and a study examining compliance with the Commission's decisions between 1987 and mid-2003 recorded full compliance in only six cases.⁵¹ In response to this dismal situation, the African Commission began to request that states report back to it — either in its periodic state party reports,⁵² or within a specified period of time.⁵³ The failure of governments to comply with these measures appears to have resulted in the adoption by the Commission in 2006 of a Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties.⁵⁴ This document requests that states found in violation of the provisions of the African Charter 'indicate the measures taken and/or the obstacles in implementing the recommendations of the African Commission within a maximum period of ninety (90) days starting from the date of notification of the recommendations', and further provides that the Commission is to 'submit at every session of the Executive Council a report on the situation of the compliance with its recommendations by the state parties (annexed to its Annual Activity Report)'. To date, no such report has been submitted to the African Commission. This can perhaps be ascribed to the absence of a formal mechanism to monitor compliance, as well as a willingness on the part of the Commission to engage with states on this issue.

⁵¹ See Non-Compliance of States Parties to Adopted Recommendations of the African Commission: A Legal Approach, 24th ordinary session, Banjul, 22-31 October 1998, DOC/OS/50b(XXIV) para 5 and F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 1 *American Journal of International Law* 1, in particular 8-11.

⁵² *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001); *241/2001 Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003); and *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003).

⁵³ *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005).

⁵⁴ See ACHPR/Res 97(XXXX)06.

3 Conclusion

The African Commission's broadening of the categories recognised in terms of article 12(5), the recognition of the principle of not returning individuals to countries where they might potentially face torture and the broad range of recommendations contained in this decision are particularly commendable, but the fact that the Commission simply required that 'the Republic of Angola report back to it, at a later stage', rather than reiterate its position taken in the 2006 Resolution, is of grave concern. Not only does this recommendation represent a clear regression with regard to the implementation of the African Commission's recommendations, but the absence of a formal mechanism to monitor compliance means that any gains made by one of the most progressive judgments in relation to the treatment of non-nationals in Africa to date are likely to amount to naught.

Developments in international criminal justice in Africa during 2008

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Summary

The year 2008 saw important developments in international criminal justice in Africa. In 2008, all cases before the International Criminal Court involved African states. An overview of these cases is provided. The International Criminal Tribunal for Rwanda in 2008 rendered its decision in the Bagosora case, and further implemented its completion strategy. This contribution provides an overview of these developments. In respect of the Special Court for Sierra Leone, the authors provide a summary and analysis of the Appeals Chamber's judgments in the Brima, Kamara and Kanu case and the case concerning the Civil Defence Forces. Developments towards the establishment of a Special Tribunal for Kenya, following the post-electoral violence in late 2007, are also reviewed.

1 Introduction

This is the first review on recent developments pertaining to international criminal justice published in this journal, signalling the intent of the editors to reflect the growing importance of such issues.

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Undoubtedly, the field of international criminal justice has grown tremendously over the past 15 years. Dormant since the International Military Tribunals of Nuremberg and Tokyo, established in the aftermath of World War II,¹ international justice was re-awakened in the early 1990s, at the end of the Cold War, notably with the establishment by the United Nations (UN) of the International Criminal Tribunals for the Former Yugoslavia² and for Rwanda.³

The success of these two jurisdictions boosted the project to create a permanent and universal international criminal court, which was concretised in Rome in July 1998, when 120 states signed the Statute of the International Criminal Court (ICC). This Statute entered into force in 2002, triggering the temporal jurisdiction of the ICC.⁴

Parallel to the establishment of the ICC, other efforts in the fight against impunity for grave international crimes led to the creation of so-called 'hybrid' courts, established by way of an agreement between the UN and the government of the country concerned, and mixing international and local judges, prosecutors and personnel, as well as elements of substantive international criminal law and of domestic laws. Hybrid courts include the Special Panels in East Timor,⁵ the Extraordinary Chambers in the Courts of Cambodia,⁶ the Special Court for Sierra Leone⁷ and the War Crimes Chamber in the Court of Bosnia-

¹ The International Military Tribunal of Nuremberg was established by the London Charter issued on 8 August 1945. The International Military Tribunal for the Far East (Tokyo Tribunal) was established by the Charter of the International Military Tribunal for the Far East proclaimed on 19 January 1946.

² United Nations Security Council Resolution 808 (1993) http://www.icty.org/x/file/Legal%20Library/Statute/statute_808_1993_en.pdf and Resolution 827 (1993) http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf (accessed 31 January 2009).

³ United Nations Security Council Resolution 955 (1994) <http://69.94.11.53/ENGLISH/Resolutions/955e.htm> (accessed 31 January 2009).

⁴ The ICC is competent for the following grave international crimes: war crimes, crimes against humanity and genocide, as defined in its Statute. It will also be competent over the crime of aggression when state parties to the Rome Statute agree on a definition of this crime.

⁵ The Special Panels of the Dili District Court (the East Timor Tribunal) were created in 2000 by the United Nations Transitional Administration in East Timor (UNTAET) to try cases of 'serious criminal offences', including murder, rape and torture, which took place in East Timor in 1999.

⁶ The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (the Khmer Rouge regime 1975-1979) was created jointly by the government of Cambodia and the UN <http://www.eccc.gov.kh/> (accessed 31 January 2009).

⁷ The Special Court for Sierra Leone was set up by an agreement between the government of Sierra Leone and the UN to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996 <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=200>. This was further to Security Council 1315 (2000) of 14 August 2000 which requested the Secretary-General 'to negotiate an agreement with the government of Sierra Leone to create an independent special court consistent with this resolution ...' (para 1).

Herzegovina.⁸ Discussions are ongoing in Kenya to create a special tribunal for Kenya, as reviewed hereunder.

Significantly, the institution of these many hybrid and international criminal jurisdictions has been accompanied by a recrudescence of activities by some national domestic criminal systems to investigate and prosecute grave crimes, either committed in their territory or by their nationals, or sometimes through the use of universal jurisdiction. Looking specifically at Africa, countries like Ethiopia and Liberia have investigated and tried some of their nationals responsible for grave crimes over the recent years. Interestingly, Senegal is the first African country to have recourse to the principle of universal jurisdiction for grave crimes and appears ready to use it against Hissène Habré, the former president of Chad.⁹

The repression of international crimes is thus becoming more generalised, although regrettably still not systematic. This development reflects the importance, to further advance human rights, of credible sanctions against those violating these human rights. Far too often, those responsible for grave violations of human rights benefit from impunity for their crimes. The regrettable truth is that one is more likely to be held accountable for a single murder than for orchestrating the slaughter of hundreds of people. The weight of states' structures, often behind such mass crimes, makes it difficult and unlikely that the national police and criminal system will fully investigate and hold accountable those responsible. However, what this review illustrates is that the deterrent effect of sanctioning those that bear the greatest responsibility for the violation of international humanitarian law is bearing fruit at a small yet increasingly significant rate.

This is the first in a series of reviews that will examine the main developments of international criminal justice in Africa, notably those concerning jurisdictions based in Africa, such as the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), international judicial bodies such as the ICC competent

⁸ The War Crimes Chamber is fully integrated into the domestic Bosnian legal system. Its mandate extends not only to cases referred to it by the ICTY, but also to trying the most sensitive cases brought at a national or local level <http://www.sudbih.gov.ba/?jezik=e> (accessed 31 January 2009).

⁹ Hissène Habré is allegedly responsible for the torture and death of about 40 000 individuals. He was first indicted in Senegal in 2000 before courts ruled that he could not be tried there. His victims then turned to Belgium. After a four-year investigation, a Belgian judge issued, in September 2005, an international arrest warrant charging Hissène Habré with crimes against humanity, war crimes and torture. Pursuant to a Belgian extradition request, Senegalese authorities arrested him in November 2005 and asked the African Union to recommend 'the competent jurisdiction' for his trial. On 2 July 2006, the African Union called on Senegal to prosecute Hissène Habré 'in the name of Africa'. In 2007-2008, Senegal removed all legal obstacles to prosecuting Habré by amending its Constitution and laws to permit the prosecution of genocide, crimes against humanity, war crimes and torture no matter when and where the acts occurred.

to investigate and prosecute international crimes committed on the continent, or of some selected national jurisdictions seeking to prosecute international crimes. These reviews will concentrate on efforts to investigate, prosecute and try those individuals responsible for 'core international crimes', namely war crimes, crimes against humanity and genocide. This first issue aims to provide a brief overview of some of the major developments which took place in 2008 at the ICC, ICTR, SCSL and in Kenya. A more detailed review of selected important cases and decisions is offered, but readers are advised to refer to the specific decisions and material cited for complete and further information.

2 The International Criminal Court

The ICC Statute, which was negotiated in 1998 and entered into force in 2002, is mandated to try those responsible for grave international crimes over which it has jurisdiction. Coincidentally, all the cases currently before it concern crimes committed in Africa by African nationals. This focus on Africa has been criticised by many, with the Court sometimes perceived as a 'court for Africa'. However, save for the referral by the Security Council of the situation in Darfur, Sudan, all cases were referred to the ICC Prosecutor by African states. Interestingly, the ICC Prosecutor has chosen not only to investigate crimes committed against civilians, but also those that are perpetrated against peacekeepers.

Below is a review of the main developments which took place in 2008, looking at (1) the first case brought before the ICC, concerning Thomas Lubanga Dyilo; (2) the other cases pertaining to the Democratic Republic of the Congo (DRC); (3) the case against Jean-Pierre Bemba Gombo, former Vice-President of the DRC, charged with crimes committed in the Central African Republic; (4) the situation in Uganda; (5) the situation in Sudan; and (6) the investigation of attacks against peacekeepers in Darfur.

2.1 Thomas Lubanga Dyilo (Democratic Republic of the Congo)

The DRC was the first state signatory to the Statute of the ICC to refer a situation to the ICC, in 2003, in what has become known as a 'self-referral', namely requesting the international court to investigate crimes committed in its own territory.¹⁰ On this basis, the Prosecutor opened investigations in Eastern DRC. The first resulting arrest warrant, unsealed in 2006, concerned Thomas Lubanga, the former President of the primarily Hema ethnicity political group, *Union des Patriotes Congolais* (UPC). Having been arrested previously for another alleged crime

¹⁰ The referral was made on 3 March 2004 http://www.icc-cpi.int/NR/rdonlyres/477CC240-07A5-4FAC-80AC-3A743C2CD649/279970/LRCIS_Thomas_Lubanga_Dyilo_Eng.pdf (accessed 31 January 2009).

by the authorities of the DRC, he was transferred to the seat of the ICC in The Hague in March 2006. The charges against Thomas Lubanga were confirmed on 29 January 2007 following a series of postponements. The trial on merits is due to start in February 2009.¹¹

As the first case before the ICC, this case has experienced considerable teething problems. Issues of fair trial and the disclosure of confidential material obtained by the Prosecutor from third parties to assist with the investigations have been the source of considerable debate before the Trial Chamber. On 13 June 2008, the Trial Chamber ruled that 'the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial',¹² holding that the Prosecutor had incorrectly applied article 53(3)(e) of the ICC Statute when entering into agreements with information providers, with the consequence that a significant body of potentially exculpatory material would be withheld from the accused 'improperly inhibiting [his] opportunities ... to prepare his defence'.¹³ As a result, the Trial Chamber indefinitely stayed the proceedings and ordered the unconditional release of Lubanga in July 2008 on the basis that 'a fair trial of the accused is impossible, and the entire justification for his detention has been removed'.¹⁴

Following an appeal by the prosecution, the Appeals Chamber agreed to grant the Prosecutor's request to suspend the Trial Chamber's decision to release Lubanga and to ensure his presence, agreed to keep him in custody until the appeal was heard.¹⁵ This acted as a catalyst for the Prosecutor to engage in extensive negotiations with the relevant information providers, including the UN. In October 2008, the Prosecutor announced that he had reached agreements with the information providers to disclose all the material to the Trial Chamber. Upon review of the material, the Trial Chamber confirmed, in November 2008, that the trial could proceed.¹⁶ However, it appears from subsequent complaints by the defence counsel that the resultant

¹¹ An analysis of this procedure and of the salient issues of the trial will be provided in the next issue.

¹² *The Prosecutor v Thomas Lubanga* Case ICC-01/04-01/06 (*Lubanga* trial), Decision on the consequences of non-disclosure of exculpatory materials covered by art 54(3) (e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008 para 93.

¹³ *Lubanga* trial (n 12 above) para 92.

¹⁴ *Lubanga* trial, Decision on the release of Thomas Lubanga Dyilo, 2 July 2008 para 34.

¹⁵ *The Prosecutor v Thomas Lubanga* Case ICC-01/04-01/06 (*Lubanga* appeal), Decision on the request of the Prosecutor for suspensive effect of his appeal against the Decision on the release of Thomas Lubanga Dyilo, 7 July 2008 and Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the Decision on the release of Thomas Lubanga Dyilo, 22 July 2008.

¹⁶ *Lubanga* trial, Decision to lift the stay of the proceedings in the *Lubanga* case, 17 November 2008.

effect of this decision was that the documents disclosed were so heavily edited that they were not of much use to the accused.¹⁷

A lesson to be learnt from this experience is that information provided to the Prosecutor in confidence for the purpose of generating new evidence should be just that, and that the Prosecutor should not rely on this information to the extent that it creates tension with the defence because the providers do not or cannot consent to its disclosure. The concerns of the providers may be rooted in a justifiable measure to protect information that could otherwise adversely affect, for instance, operations of an ongoing peacekeeping mission or the physical integrity of those on the ground. It must be borne in mind that many of the documents that may be made available to the Prosecutor, in this and future cases, will very likely pertain to the activities of ongoing peacekeeping operations, some of which are highly sensitive, containing information that would not only compromise the confidential internal decision-making processes of inter-governmental organisations such as the UN, but also endanger the safety and security of the troops and civilians working on the ground. It is to be hoped that the Prosecutor and the Court will continue to carefully balance the rights of the accused to a fair trial with the need to protect confidential information provided by third parties for purposes of investigation to generate new evidence. In its clarification of which right should be given precedence, the Appeals Chamber noted that the ICC chambers should respect both the right to disclosure and the right to confidentiality.¹⁸

Another landmark development in the *Thomas Lubanga* case was the clarification of the role of victim participation. One distinguishing feature of the ICC from its *ad hoc* predecessors is the inclusion of the possibility for victims to directly participate in the proceedings. In a Trial Chamber decision dated 18 January 2008,¹⁹ and Appeals Chamber decision dated 6 August 2008,²⁰ the ICC sought to provide a meaningful role to victims and to clarify the aspects of their participation. Among the principal issues addressed were at what stage victims may participate; which victims may participate; what would participating victims be permitted to do; and matters concerning reparations. The Appeals Chamber confirmed that, although the harm suffered by victims does not necessarily have to be direct, it would need to constitute personal harm under rule 85(a). In addition, participating victims may possibly

¹⁷ S Hanson 'Africa and the International Criminal Court' 24 July 2008 <http://www.globalpolicy.org/intljustice/icc/2008/0724africa.htm> (accessed 31 January 2009).

¹⁸ *Lubanga* appeal, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled Decision on the consequences of non-disclosure of exculpatory materials covered by art 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 21 October 2008.

¹⁹ *Lubanga* trial, Decision on victim participation, 18 January 2008.

²⁰ *Lubanga* appeal, Decision on the participation of victims in the appeal, 6 August 2008.

lead evidence pertaining to the guilt or innocence of the accused when requested, and challenge the admissibility or relevance of evidence in the trial proceedings.²¹

2.2 Other cases concerning alleged crimes committed in the DRC (Germain Katanga and Mathieu Ngudjolo, Bosco Ntaganda)

The arrest in February 2008 of Mathieu Ngudjolo, former leader of the National Integrationist Front (FNI) and a colonel in the national army of the government of the DRC, was the result of an effective co-ordinated effort between the Congolese government, the ICC and Belgian authorities, unique in that Mathieu Ngudjolo was not in custody when the ICC warrant of arrest was unsealed. What makes this case one to watch in 2009 are reports that in August 2006, Mathieu Ngudjolo signed a peace agreement with the Congolese government and was granted amnesty, prior to his appointment to the rank of colonel in October 2006 in the regular armed forces of the DRC.²² During his first appearance before the Court, Mathieu Ngudjolo also argued that the case against him amounted to double jeopardy in view of the trial previously held against him in the DRC, where he was acquitted of all charges based on identical facts to those described in the warrant of arrest. This matter will probably be raised again during the trial.

The arrest and transfer of Mathieu Ngudjolo followed that of 31 year-old Germain Katanga in October 2007, former leader of the Patriotic Resistance Force in Ituri (FRPI) and the youngest person to be brought before the ICC for trial. Germain Katanga is alleged to have been an ally to the FNI. In March 2008, Pre-Trial Chamber I decided to join the cases of Mathieu Ngudjolo and Germain Katanga further to a request from the prosecution who argued alleged co-responsibility for crimes committed during and after the attack on the village of Bogoro.²³ On 30 September 2008, after almost four months of hearings, which included the participation of 57 victims, the Pre-Trial Chamber confirmed seven counts of war crimes and three counts of crimes against humanity, including the enlistment of children under the age of 15 to actively participate in hostilities.²⁴

On 29 April 2008, the ICC unsealed the fourth warrant of arrest issued in the DRC context for Bosco Ntaganda, alleged former Deputy-Chief

²¹ As above.

²² Statement of the Deputy Prosecutor, Fatou Bensouda, to the media regarding the surrender of Mathieu Ngudjolo, 7 February 2008 3.

²³ *The Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui* Case ICC-01/04-01/07 (*Katanga & Ngudjolo* trial), Decision on the joinder of the cases against Germain Katanga and Mathieu Ngudjolo Chui, 10 March 2008.

²⁴ *Katanga & Ngudjolo* trial, Decision on the confirmation of charges, 30 September 2008. The Pre-Trial Chamber found insufficient evidence to try them for inhuman treatment, outrages upon personal dignity and inhumane acts.

of the general staff of the *Forces Patriotiques pour la Libération du Congo* (FPLC), and alleged current chief of staff of the *Congrès national pour la défense du peuple* (CNDP) armed group, active in North Kivu.²⁵ Bosco Ntaganda, a co-accused in the trial of Thomas Lubanga, is charged with three war crimes, including the enlistment and conscription of children under the age of 15 to actively participate in hostilities. He is yet to be arrested by the Congolese authorities who, it is reported, are considering appointing him to a senior position in the Congolese army.²⁶

2.3 Jean-Pierre Bemba Gombo (Central African Republic)

Interestingly, Jean-Pierre Bemba Gombo, the first person to be indicted by the ICC for crimes committed in the Central African Republic (CAR), was one of four vice-presidents in the DRC transitional government from 2003 to 2006. He was the President and Commander-in-Chief of the *Mouvement de Libération du Congo* (MLC), a rebel group which became the main opposition party in the DRC. After receiving the second highest number of votes in the 2006 Presidential elections, Jean-Pierre Bemba was elected to the DRC Senate in 2007.

According to the ICC Prosecutor, Jean-Pierre Bemba and his MLC forces were invited by the then President of the CAR, Ange-Félix Patassé, to assist in putting down a *coup* attempt led by François Bozizé, Patassé's former army Chief of Staff. It was in this context that Jean-Pierre Bemba's MLC forces are alleged to have carried out horrific crimes, including mass rapes, killings and looting against the civilian population in the CAR. François Bozizé succeeded in the *coup* and in 2004 requested that the ICC investigate crimes committed during the 2002-2003 rebellion. In May 2007, the office of the Prosecutor of the ICC announced the opening of an investigation in the CAR.

On 23 May 2008, the Pre-Trial Chamber found that there were reasonable grounds to believe that Jean-Pierre Bemba bore individual criminal responsibility for war crimes and crimes against humanity committed in the CAR from 25 October 2002 to 15 March 2003. Jean-Pierre Bemba was arrested in May 2008 in Brussels and transferred to the ICC in July 2008 on the basis of a warrant of arrest for three counts of war crimes and five counts of crimes against humanity.²⁷ The confirmation of charges hearing in the case against Jean-Pierre Bemba has been postponed on three separate occasions and is now scheduled to be heard in 2009.

²⁵ *The Prosecutor v Bosco Ntaganda* Case ICC-01/04-02/06, Warrant of Arrest, 22 August 2006, which was made public pursuant to the Pre-Trial Chamber's Decision to unseal the warrant of arrest against Bosco Ntaganda, 28 April 2008.

²⁶ Bosco Ntaganda was General Laurent Nkunda's second-in-command until General Nkunda was arrested by the Rwandan authorities in January 2009. The DRC have issued an international warrant for his arrest.

²⁷ *The Prosecutor v Jean-Pierre Bemba Gombo* Case ICC-01/05-01/08, Warrant of Arrest, 23 June 2008.

2.4 The situation in Uganda

In the case against Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, judicial developments in 2008 were limited due to the lack of arrest of any suspects. In an effort to bring peace to Northern Uganda, a deal was signed in February 2008 in Juba, Sudan, envisaging that certain 'international crimes' would be tried in a special section of the High Court of Uganda, in a bid to suspend action by the ICC. However, the failure of Joseph Kony to appear to sign the peace agreements resumed the violence in Uganda in April 2008. The Prosecutor, during the spate of new attacks by the Lord's Resistance Army in 2008, reiterated the urgent need to arrest its leadership. In May 2008, President Museveni created the Special War Crimes Court with the competence to try the leaders of the Lord's Resistance Army for 'international crimes' as was envisaged in Juba. Nevertheless, the ICC indictments against the three accused still stand.

The investigation by the ICC of the situation in Northern Uganda and the resulting arrest warrants illustrate the tensions between criminal accountability and justice, on the one hand, and ongoing peace mediation efforts, on the other.

2.5 The situation in Sudan

The investigation by the ICC of the situation in Darfur, Sudan, was triggered by the UN Security Council acting under chapter VII in Resolution 1593 (2005) of 31 March 2005. In its resolution, the Security Council called upon the government of Sudan to co-operate fully and provide any necessary assistance to the ICC, despite it not being a state party to the ICC.

The ICC has since opened a formal investigation and issued warrants for the arrest of State Minister for Humanitarian Affairs, Ahmed Harun, and a militia leader, Ali Kushayb, for crimes committed in the Darfur region. Sudan has to date refused to co-operate with the ICC and hand over the suspects. The Prosecutor has stressed the non-compliance of the Sudanese government with Resolution 1593 (2005) on several occasions in his regular reports to the Security Council and the General Assembly.²⁸ During the introduction of his seventh report at the Security Council meeting held on 5 June 2008, the Prosecutor emphasised the need for a Security Council presidential statement requesting full co-operation from the Sudanese authorities in accordance with Resolution 1593 (2005). On 16 June 2008, the Security Council issued a presidential statement urging Sudan's co-operation with the Prosecutor.²⁹

²⁸ See *Fourth Report of the International Criminal Court to the UN for 2007/08* (A/63/323) of 22 August 2008; 5905th Meeting of the Security Council, 5 June 2008; 6028th Meeting of the Security Council, 3 December 2008.

²⁹ Statement by the President of the Security Council, 16 June 2008, S/PRST/2008/21.

The Prosecutor's application to the Pre-Trial Chamber on 14 July 2008 seeking a warrant for the arrest of the Sudanese President, Omar al-Bashir, has been met with nothing if not controversy and widely disparate views.³⁰ The timing of this request, its political context and possible consequences and, more generally, the possible tension between this request and ongoing peace-making efforts have been the subject of heated debate in all circles, from the halls of the African Union (AU) to the carpeted floors of the Security Council. The Prosecutor in his application states that there are reasonable grounds to believe that Omar al-Bashir bears criminal responsibility for genocide, crimes and war crimes committed in Darfur. The government of Sudan has since made every effort to persuade other member states, especially those in the AU, that the security situation on the ground in Darfur is improving, with the aim of securing a suspension of the case by the Security Council. Several member states and regional bodies, such as the AU and the League of Arab States, have indeed called for the Security Council to pass a resolution deferring the case for 12 months pursuant to article 16 of the Statute of the ICC. The ramifications of such a decision are complex and will certainly impact on the credibility of the ICC, testing its independence from political intervention.

So far, the government of Sudan has eluded its responsibility to protect its own people and its obligation to co-operate with the ICC. If the assertions by the Sudanese government of progress on the ground in stopping the violence are genuine and substantiated, if there are genuine efforts directed at peace negotiations in Darfur and advancing the North-South Comprehensive Peace Agreement, and if the interests of peace justify such a course of action, the Security Council could justifiably exercise its power under article 16 of the Rome Statute to suspend any prosecutions against Omar al-Bashir for 12 months. Failing that, the Security Council should be seeking alternative measures to effectively pressure Khartoum to stop the violence and let the court process proceed.

2.6 Attacks against African Union peacekeepers in Darfur

On 20 November 2008, the ICC Prosecutor took a momentous step when he requested the first-ever warrants of arrest for an attack against the AU Mission in Sudan (AMIS) based in Haskanita, Darfur.³¹ The attack, which took place on 29 September 2007, killed 12 peacekeepers and civilian police officers. Since July 2008, the United Nations-African Union Mission in Darfur has also been subject to several attacks from both rebel

³⁰ The Situation in Darfur, Sudan: The Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir, 14 July 2008 http://www2.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary_20081704ENG.pdf (accessed 31 January 2009). The ICC issued the arrest warrant against President Bashir on 4 March 2009.

³¹ The Situation in Darfur, Sudan: Summary of the Prosecutor's Application under Article 58, ICC- 02/05, 20 November 2008.

and Sudanese government forces. Attacks against international peace-keeping operations not directly involved in hostilities are prohibited by the laws of war and the ICC Statute. Such attacks pose a significant threat to the international community's ability to protect civilians, conduct humanitarian activities in general, and maintain international peace and security. This was starkly illustrated by the response by AMIS after this attack to adopt stricter security guidelines, curtail all its activities and confine staff to their bases. Ultimately, the repression of crimes committed against peacekeepers is crucial to guarantee their protection, which in turn is critical to the civilian population they guard.

3 The United Nations International Criminal Tribunal for Rwanda

The ICTR, an *ad hoc* jurisdiction which was established by the UN Security Council in 1994, is due to complete all its activities in the coming years and to close its doors.³² Important developments in the course of 2008 have been (1) efforts to clear the judicial docket; (2) the judgment rendered in the case of Theoneste Bagosora and others; and (3) the developments pertaining to the completion strategy, especially those relating to the Rule 11 *bis* Prosecutor's request to transfer cases to Rwanda.

3.1 Clearing the judicial docket: Overview of judicial activities

A significant development for the ICTR in 2008 was the conclusion of all but one of the multi-accused cases.³³ The long-running *Butare* case came to a close in November after seven and a half years of trial;³⁴ and the so-called *Government II* case,³⁵ as well as the *Military II* case,³⁶ likewise after five-year trials.

By the end of 2008, the ICTR had rendered several major judgments, notably in the cases concerning Athanase Seromba,³⁷ Tharcisse

³² The Completion Strategy proposed by the ICTR was endorsed by UN Security Council Resolution 1503. Other documents on the completion strategy are available at <http://69.94.11.53/default.htm> (accessed 31 January 2009).

³³ The exception concerns the case of *Karempera & Others* (Case ICTR-98-44), involving three accused.

³⁴ Case ICTR-98-42.

³⁵ Case ICTR-99-50.

³⁶ Case ICTR-00-56.

³⁷ Case ICTR-2001-66. Athanase Seromba was a Catholic priest at Nyange Parish, Kivumu Commune, Kibuye Prefecture. His trial commenced on 20 September 2004, and he was originally convicted and sentenced on 13 December 2006. The Appeals Chamber on 12 March 2008 overturned the conviction of Athanase Seromba for aiding and abetting genocide and extermination as a crime against humanity and substituted convictions for committing genocide and extermination as a crime against humanity for his role in the destruction of the church in Nyange Parish, causing the death of approximately 1 500 Tutsi refugees sheltering inside. The Appeals Chamber increased his sentence from 15 years' imprisonment to imprisonment for the remainder of his life.

Muvuni,³⁸ Siméon Nchamihigo,³⁹ Simon Bikindi⁴⁰ and Protais Zigiranyirazo.⁴¹ Another three additional judgments were pending, in the cases of Tharcisse Renzaho,⁴² Emmanuel Rukundo⁴³ and Bizimungu and Others.⁴⁴

Two important trials commenced in 2008 in the case concerning Lieutenant-Colonel Ephrem Setako, a former senior officer in the Rwandan armed forces and director of the Judicial Affairs Division of the Rwandan Ministry of Defence,⁴⁵ and the case concerning Callixte Kalimanzira, former Acting Minister of the Interior of Rwanda in April and May 1994, began on 5 May 2008 before Trial Chamber III.⁴⁶

3.2 The judgment in *The Prosecutor v Théoneste Bagosora and Others*

On 18 December 2008, the ICTR rendered judgment in one of its most important cases: concerning Colonel Théoneste Bagosora, the *directeur*

³⁸ Case ICTR-2000-55. Tharcisse Muvunyi served as lieutenant-colonel in the Rwandan armed forces, stationed at the *École des sous-officiers* in Butare Prefecture in 1994. He was convicted by a trial chamber on 12 September 2006. On 29 August 2008, the Appeals Chamber overturned his conviction for genocide, direct and public incitement to commit genocide based on a speech he gave in Gikonko, and other inhumane acts as a crime against humanity. The Appeals Chamber also quashed Muvunyi's conviction for direct and public incitement to commit genocide and ordered a retrial limited to the allegations considered in relation to this incident. Tharcisse Muvunyi remains detained by the ICTR pending retrial.

³⁹ Case ICTR-01-63. On 12 November 2008, Siméon Nchamihigo was convicted by a trial chamber for genocide, murder and extermination as crimes against humanity, and for other inhumane acts as a crime against humanity. He was sentenced to life imprisonment. His case is currently before the Appeals Chamber.

⁴⁰ Case ICTR-01-72. On 2 December 2008, a trial chamber found Bikindi guilty of direct and public incitement to commit genocide based on his exhortations to kill Tutsi in a vehicle outfitted with a public address system on the main road between Kivumu and Kayove in late June 1994. He was sentenced to 15 years' imprisonment. Bikindi was acquitted on all other five counts.

⁴¹ Case ICTR-01-73. On 18 December 2008, a trial chamber convicted Protais Zigiranyirazo of genocide and extermination as a crime against humanity and sentenced him to 20 years' imprisonment. The trial chamber acquitted him of conspiracy to commit genocide, complicity in genocide and murder as a crime against humanity. The case is currently before the Appeals Chamber.

⁴² Case ICTR-97-31. Renzaho is charged with genocide, alternatively complicity in genocide, and with murder as a crime against humanity.

⁴³ Case ICTR-01-70. Rukundo is charged with genocide and crimes against humanity for murder and extermination.

⁴⁴ Case ICTR-99-50. The accused in this case are charged with conspiracy to commit genocide, genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity and violations of art 3 common to the Geneva Conventions and Additional Protocol II.

⁴⁵ Case ICTR-04-81. Setako is indicted for genocide or, in the alternative, complicity in genocide, murder and extermination as crimes against humanity; as well as serious violations of art 3 common to the Geneva Conventions and Additional Protocol II.

⁴⁶ Case ICTR-05-88-I. Kalimanzira is charged with genocide or, in the alternative, complicity in genocide, and direct and public incitement to commit genocide.

de cabinet of the Ministry of Defence; General Gratien Kabiligi, the head of the Operations Bureau (G-3) of the army general staff; Major Aloys Ntabakuze, the commander of the elite Para Commando Battalion; and Colonel Anatole Nsengiyumva, the commander of the Gisenyi operational sector.⁴⁷ The accused were charged with conspiracy to commit genocide, genocide, crimes against humanity and war crimes, based on direct or superior responsibility, for crimes committed in Rwanda in 1994. Three of the accused, Bagosora, Ntabakuze and Nsengiyumva, were convicted and given life sentences, while Kabiligi was acquitted. The judgment is currently before the Appeals Chamber.

Because of the high-ranking positions of the three convicts and of their particular individual responsibility, the factual findings of this judgment cast an important light on the historical events that unfolded in Rwanda in 1994 and on the planning and commission of the genocide against the Tutsis and the targeting of moderate Hutus. Of particular relevance are the details given pertaining to the events from 6 to 9 April 1994, giving a detailed account of the days immediately after the assassination of the President of Rwanda, including the circumstances of the assassination of the Prime Minister, Agathe Uwilingiyimana.⁴⁸

As noted by the Trial Chamber when it orally rendered its judgment:⁴⁹

The evidence of this trial has reiterated that genocide, crimes against humanity and war crimes were perpetrated in Rwanda after 6 April 1994. The human suffering and slaughter were immense. These crimes were directed principally against Tutsi civilians as well as Hutus who were seen as sympathetic to the Tutsi-led Rwandan Patriotic Front (RPF) or as opponents of the ruling regime. The perpetrators included soldiers, gendarmes, civilian and party officials, *Interahamwe* and other militia, as well as ordinary citizens.

While the elaborate legal analysis mainly reiterates existing jurisprudence, it offers interesting developments pertaining to the crime of conspiracy to commit genocide although, ultimately, the Chamber found that the prosecution had failed to prove beyond reasonable doubt that the accused had conspired amongst themselves or with others to commit genocide.⁵⁰

3.3 Completion strategy

The closing of the ICTR has been expected for some time, and the Tribunal has been preparing for it by endeavouring to clear its docket, and transferring cases to domestic jurisdictions, in line with Security Council Resolutions 1503 (2003) of 28 August 2003 and 1534 (2004)

⁴⁷ Case ICTR-98-41-T.

⁴⁸ Case ICTR-98-41-T, judgment and sentence, 18 December 2008 166-199.

⁴⁹ Oral summary of the judgment, *The Prosecutor v Théoneste Bagosora & Others* Case ICTR-98-41-T para 7, available online.

⁵⁰ n 48 above, para 2113.

of 26 March 2004.⁵¹ The most critical component of the completion strategy of the ICTR relies on the possibility to transfer the cases involving lower-ranking accused to domestic courts.⁵²

Despite consultations with several countries in Africa and beyond, it became progressively clear that most, if not all, of the cases earmarked to be transferred by the ICTR to domestic jurisdictions would have nowhere to go but Rwanda. Yet, despite the willingness of the government of Rwanda to receive these pending ICTR cases for trial and the efforts it has made to this end, including the abolition of the death penalty, any transfer is yet to take place, if it ever takes place. It is only in 2008 that the ICTR trial chambers ruled on the motions requesting the referral of cases concerning five indictees to Rwanda, which had been filed by the Prosecutor the year before, in 2007.⁵³ These motions, filed under Rule 11*bis* of the ICTR Rules of Procedure and Evidence, were rejected. In the first decision concerning a request for referral of a case to be tried in Rwanda, the Trial Chamber, having noted that Rwanda has made notable progress in improving its judicial system, declares that it is not satisfied that the accused would receive a fair trial in Rwanda.⁵⁴ Of particular concern were that he would not be able to call witnesses residing outside Rwanda to the extent and in a manner which would ensure a fair trial, that he would face difficulties in obtaining witnesses residing in Rwanda because they would be afraid to testify, and that, if convicted to life imprisonment in Rwanda, he may risk solitary confinement.⁵⁵ The ICTR Appeals Chamber upheld the denial of the referral of a case to Rwanda, notably on the ground that the accused would not obtain the attendance and examination of defence witnesses under the same conditions as the prosecution's witnesses, and also because of the inadequacy of the penalty structure in Rwanda.⁵⁶

Despite the considerable work done by the ICTR to bolster the domestic Rwandan judicial capacity to take on these trials, the likelihood that the ICTR will transfer cases to Rwanda appears to be remote

⁵¹ For a detailed analysis of the completion strategy of the ICTR and its residual issues, see C Aptel 'Closing the UN International Criminal Tribunal for Rwanda: Completion strategy and residual issues' (2008) 14 *New England Journal of International and Comparative Law* 169.

⁵² In addition to the transfer of these cases, the ICTR prosecutor can and has also transferred the dossiers concerning suspects who were investigated but not indicted by the ICTR. Many of these cases have been transferred to Rwanda and others to other relevant States, eg those where the suspects reside. One such file was communicated to Belgium.

⁵³ These motions concern Yussuf Munityakazi, Jean-Baptiste Gatete, Gaspard Kanyarukiga, Idelphonse Hategekimana and Fulgence Kayishema. Fulgence Kayishema is a fugitive; all four others are detained by the ICTR.

⁵⁴ Case ICTR 2002-78-R11*bis*, *Prosecutor v Kanyarukiga*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008 para 104.

⁵⁵ As above.

⁵⁶ Case ICTR 97-36-R11*bis*, *Prosecutor v Munityakazi*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis*, 8 October 2008.

and it is a very real possibility that this will impact negatively on its timely completion which, as already noted, relies on the possibility to transfer cases for trial to domestic jurisdictions.

The ICTR, which was established because of the incapacity of the Rwandese domestic judiciary to deal with the case load created by the genocide, now, to close down, relies on these very courts. This eventually illustrates the possible complementarity between the international and the national levels in terms of justice. While this was not the original idea behind the establishment of the ICTY and the ICTR, their completion strategies have articulated a model where the international community steps in temporarily, giving time to states to rebuild their capacity to render justice.

4 The Special Court for Sierra Leone

In the course of 2008, the hybrid SCSL commenced the much-anticipated and notorious trial of Charles Taylor, the former President of Liberia. Charles Taylor is charged with 11 counts of war crimes, crimes against humanity and other serious violations of international law committed in Sierra Leone from 30 November 1996 to 18 January 2002. The basis of the prosecution's case is Charles Taylor's alleged role as a major backer of the Sierra Leone rebel group, the Revolutionary United Front (RUF), and close association with a second warring faction, the Armed Forces Revolutionary Council (AFRC). He is also allegedly responsible for Liberian forces fighting in support of the Sierra Leonean rebels. The prosecution has attempted to show a plausible link between Charles Taylor and those who committed atrocities in Sierra Leone, with an emphasis on the role of diamonds and arms sales in the Sierra Leonean conflict.

While Charles Taylor is being tried in The Hague for his alleged responsibility in crimes committed in Sierra Leone, the Truth and Reconciliation Commission of Liberia (TRCL), which is holding hearings on the institutional and thematic contexts of the Liberian war, sought an audience with him on 1 September 2008. Through his lawyer, Charles Taylor declined to be interviewed by the TRCL. This is a significant missed opportunity for the TRCL and more generally for Liberia, relegating a part of the historical record of the Liberian conflict to an empty chapter. Coming after the early tensions that had plagued the relationship between the SCSL and the Sierra Leone Truth and Reconciliation Commission, it magnifies once again the difficulties to ensure full co-operation and mutual reinforcement between different transitional justice mechanisms.

Another significant development at the SCSL has been the closing in August 2008 of the longest-running trial before the Court, the case of three former leaders of Sierra Leone's RUF, Issa Hassan Sesay, Morris Kallon and Augustine Gbao. This was the last trial to be held in

Freetown before the Special Court, leaving only the ongoing trial of Charles Taylor in The Hague. The RUF trial, which lasted for almost four years, heard evidence from 170 prosecution and defence witnesses.⁵⁷

Also, two major final judgments were rendered by the Appeals Chamber of the SCSL: (1) in the case of Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, members of the Armed Forces Revolutionary Council (AFRC); and (2) in the case of Moinina Fofana and Allieu Kondewa, members of the Civil Defence Forces (CDF). They are succinctly analysed below.

Finally, as far as the SCSL is concerned, the issue of funding remains critical, and has been particularly problematic in 2008. The SCSL is funded from voluntary contributions from member states and, during its short life, has suffered from a hand-to-mouth existence that is likely to reach critical levels as it concludes its mandate. The lack of funds will affect residual functions — extending beyond the SCSL's existence — such as the future assistance that will be required by protected witnesses.

4.1 Appeals judgment in the case of Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu

In a landmark appellate judgment of 22 February 2008, the Appeals Chamber of the SCSL held that gender crimes are no longer limited to rape and sexual violence, making a significant contribution to the recognition that the offences of sexual slavery and forced marriage, individually and collectively, form a part of mainstream offences under international criminal law.

On 20 June 2007, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu were convicted of six counts of violations of article 3 common to the 1949 Geneva Conventions and of Additional Protocol II, four counts of crimes against humanity, and a count of other serious violations of international humanitarian law.⁵⁸ The Trial Chamber did not enter convictions under counts which charged the offence of sexual slavery and any other form of sexual violence and forced marriage,⁵⁹ the majority holding that the charge for the offence of sexual slavery and other forms of sexual violence violated the rule against duplicity.⁶⁰ The Chamber also dismissed the count on forced marriage on the ground that the evidence led in support of that count did not establish any offence distinct from sexual slavery.⁶¹ The

⁵⁷ The final judgment is expected in late February 2009 and will be analysed in the next issue.

⁵⁸ *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*, judgment (AFRC Trial Judgment) 20 June 2007 paras 2113, 2114, 2117, 2118, 2121 & 2122.

⁵⁹ n 58 above, paras 2116, 2120 & 2123.

⁶⁰ n 58 above, para 696.

⁶¹ n 58 above, paras 704-714.

Trial Chamber also acquitted Brima and Kamara of the crime of other inhumane acts as a crime against humanity, charged under count 11 of the indictment.⁶² In its analysis of the charge, the Trial Chamber rejected novel arguments that the crime of forced marriage existed independently of related war crimes and crimes against humanity of rape, sexual slavery, imprisonment, forced labour and enslavement, and instead chose to marry sexual and non-sexual aspects into the single crime of sexual slavery. The Trial Chamber dismissed the forced marriage charges for redundancy, ruling that the convictions for sexual slavery encompassed all the alleged conduct of the accused under article 2(g).⁶³ According to the Trial Chamber, there was ‘no *lacuna* in the law which would necessitate a separate crime of “forced marriage” as an “other inhumane act”.’⁶⁴ The crime of forced marriage had also been charged as the war crime of committing ‘outrages upon personal dignity’ (as prohibited by common article 3 of the Geneva Conventions), but the Trial Chamber determined that the facts adduced by the prosecution did not indicate the commission of a non-sexual crime of forced marriage that did not wholly overlap with the crime of ‘sexual slavery’.⁶⁵

The Appeals Chamber, vindicating the dissent by Judge Doherty, disagreed with this analysis and unequivocally held that the crime of forced marriage was not exclusively, or even predominantly, sexual and as such was not encompassed in the crime of sexual slavery. The Chamber saw ‘no reason why the so-called “exhaustive” listing of sexual crimes under article 2(g) of the Statute should foreclose the possibility of charging as “other inhumane acts” crimes which may among others have a sexual or gender component’.⁶⁶ There was evidence before the Trial Chamber of the severe physical and mental trauma that the victims had suffered, heightened by social stigmatisation from their communities for their association with members of the warring factions. The Appeals Chamber elaborated that the taking of a so-called ‘bush wife’ went beyond the desire for sex, as the statistics on rape in Sierra Leone revealed that non-consensual sex was readily available to the warring parties.⁶⁷ The Appeals Chamber importantly asserted that forced marriage involved the imposition of the status of marriage and a conjugal association by force, or threat of force, including, but not limited to, non-consensual sex in exchange for support and protection.

⁶² n 58 above, paras 2116 & 2119.

⁶³ n 58 above, paras 720-722.

⁶⁴ n 58 above, para 713.

⁶⁵ n 58 above, para 714.

⁶⁶ *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu* (AFRC Appeals Judgment) 22 February 2008 para 186.

⁶⁷ n 66 above, paras 190-200.

Although the Appeals Chamber ultimately did not enter new convictions for forced marriage, it noted that⁶⁸

society's disapproval of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against the civilian population, is adequately reflected by recognising that such conduct is criminal and that it constitutes an 'other inhumane act' capable of incurring individual criminal responsibility in international law.

What this case acutely demonstrates are the pitfalls associated with misunderstanding a gender-based crime solely as a crime of a sexual nature.

Another major aspect dealt with by the Appeals Chamber in this judgment concerns the joint criminal enterprise theory of liability. On 20 June 2007, the Trial Chamber held that 'with respect to joint criminal enterprise as a mode of criminal liability, the indictment [had] been defectively pleaded' and that it would not consider it as a mode of criminal responsibility.⁶⁹ The joint criminal enterprise theory of liability is not without its critics and the jurisprudence of the International Tribunal for the Former Yugoslavia has repeatedly illustrated the unease with which some international judges reluctantly handle this concept. While this theory of liability is not explicitly provided for in the Statute of the SCSL, the Prosecutor chose to allege it in this case. The Trial Chamber noted in its judgment that 'to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone' was not criminal conduct within the Statute.⁷⁰ The Appeals Chamber disagreed with the Trial Chamber and held that⁷¹

[a]lthough the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute. The Trial Chamber took an erroneously narrow view by confining its consideration to paragraph 33 and reading that paragraph in isolation. Furthermore, the Trial Chamber erred in its consideration of 'evidence' adduced at trial to determine whether the indictment was properly pleaded.

It is interesting to note that the Prosecutor has similar allegations in his case against Charles Taylor. It is highly likely that, in view of the completion strategy of the SCSL that may result in a roster of judges to sit on the possible appeal of Charles Taylor, the Appellate Chamber may be composed of judges other than those that currently serve on the SCSL Appeals Chamber. This 'new' bench may not be as forgiving, and the prosecution would therefore be wise to ensure that it pleads all material facts, including the precise mode of liability under article 6 of the Statute that it intends to rely on.

⁶⁸ n 66 above, para 202.

⁶⁹ n 66 above, para 85.

⁷⁰ AFRC Trial Judgment, paras 66-70.

⁷¹ Afrc Appeal Judgment, para 84.

4.2 Appeals judgment in the case concerning the Civil Defence Forces

The second appeals judgment rendered in 2008 concerns Moinina Fofana and Allieu Kondewa, accused persons in the ‘controversial’ case of the Civil Defence Forces, also known as the CDF.⁷² This case was previously joined to that of the late Samuel Hinga Norman, a man many in Sierra Leone considered a hero, and whose trial before the Court was baffling to those who testified to ‘his’ liberation of Sierra Leone from the rebel forces. On 2 August 2007, the majority of the Trial Chamber, Judge Thomas dissenting and acquitting both defendants on all counts, found Moinina Fofana and Allieu Kondewa guilty of very serious and multiple violations of international humanitarian law.⁷³

While the blanket acquittal by the Sierra Leonean judge was predictable, many were caught by surprise by the mitigating circumstances put forward by the Trial Chamber when sentencing the accused. Despite finding the accused guilty of acts of a ‘barbaric’, ‘brutal’ and ‘very serious’ nature, many of which were committed ‘on a large scale’,⁷⁴ the Trial Chamber mitigated the sentences because the ‘CDF/Kamajors was a fighting force that was mobilised and was implicated in the conflict in Sierra Leone to support a legitimate cause which ... was to restore the democratically elected government of President Kabbah ...’⁷⁵ Although there is a broad discretion afforded to international judges in determining the appropriate mitigating and aggravating considerations in their application to individual cases, this discretion is, and should be, constrained by principles that are consistent with international criminal and humanitarian law. This was the response from the Appeals Chamber which held, Judge King dissenting, that the Trial Chamber had erred in considering political motives or fighting in a ‘just cause’ as mitigating factors in sentencing an accused standing trial for crimes against humanity and serious violations of international humanitarian law.⁷⁶ All parties to a conflict are equally obligated to respect and adhere to international humanitarian law principals, irrespective of the side of the conflict they belong to. To hold otherwise wholly defeats the fundamental purpose of laws of war and established principles enacted to protect those not taking part in the conflict.

⁷² In addition to the issues summarised below, the Appeals Chamber, by majority, entered two new convictions against both accused for murder and inhumane acts as crimes against humanity and increased Moinina Fofana’s sentence from six to 15 years and Allieu Kondewa’s sentence from eight to 20 years. *Prosecutor v Fofana & Kondewa* Special Court for Sierra Leone, Case SCSL-04-14-T, judgment (CDF Trial Judgment) 2 August 2007 paras 187–192.

⁷³ *Fofana & Kondewa* (n 72 above) paras 290–292.

⁷⁴ *Fofana & Kondewa* (n 72 above) Sentencing Judgment, 9 October 2007 paras 45–58.

⁷⁵ *Fofana & Kondewa* (n 72 above) paras 82 & 83.

⁷⁶ *Fofana & Kondewa* (n 72 above) Appeals Judgment, 28 May 2008 paras 529–535.

Although the Appeals Chamber, in part, criticised the Trial Chamber's approach in not permitting the amendment of the indictment to include forced marriage as a separate crime, it was not able to correct the stark omission created in what will comprise of the final record of the CDF's atrocities during the conflict in Sierra Leone.⁷⁷ In contrast to the AFRC judgment reviewed above, this is a classic example of how a trial record can be irrevocably altered by the unbalanced exclusion of gender-based crimes.

5 Developments in Kenya

Following the post-electoral violence and crimes committed in Kenya in late 2007 and early 2008, several transitional justice initiatives have been launched, including the establishment of a Commission of Inquiry into Post-Election Violence, mandated to investigate the facts and circumstances surrounding the violence, and the conduct of state security agencies in their handling of it.⁷⁸ In its report issued in October 2008, the Commission recommended, *inter alia*, the establishment of a Special Tribunal for Kenya to investigate, prosecute and try those bearing the greatest responsibility for the crimes, particularly crimes against humanity, related to the 2007 general elections in Kenya.⁷⁹ It was envisaged that the Special Tribunal would be a Kenyan court applying predominantly Kenyan law, sitting in that country, and composed of Kenyan and international judges, prosecutors and staff.

The Commission included a schedule for the establishment of this Tribunal, and stipulated that, if the Tribunal failed to be enacted, established or commence functioning by a given date, 'a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Special Prosecutor of the International Criminal Court'.⁸⁰ Interestingly, the Commission itself prepared the list and apparently handed over copies to the top political leadership of Kenya, as well as to Kofi Annan, who headed the Panel of Eminent African Personalities which mediated the Kenya national dialogue and reconciliation.

It seems that the prospect that the ICC could investigate the situation in Kenya has prompted a foison of activities around the establishment

⁷⁷ CDF Trial Judgment (n 72 above) para 429.

⁷⁸ This is one of the commissions established by the National Dialogue and Reconciliation which was brought about by the political crisis ensuing from the disputed general elections results at the end of 2007. Its terms of reference were published in the *Kenya Gazette* of 23 May 2008.

⁷⁹ Report of the Commission of Inquiry into Post-Election Violence, 15 October 2008. The full report is available at <http://www.dialoguekenya.org/docs/PEV%20Report.pdf> (accessed 31 January 2009).

⁸⁰ n 79 above, Recommendation 5 473.

of a Special Tribunal. Several drafts have been prepared and discussed by the parliament of Kenya, prompting numerous debates in Kenya on the need for accountability for grave crimes, and the best mechanism to do so.⁸¹ What appears particularly challenging and important in the case of Kenya is that most observers agree that sanctioning those bearing the greatest responsibility in past political violence is likely to deter further crimes and political unrest.

6 Concluding remarks

This selective synopsis of the major developments uniquely illustrates the growing importance of such issues. It demonstrates that the fight against impunity has taken hold in all four corners of the continent in a manner that deserves further scrutiny, particularly in its connection with the evolving political landscape. Future reviews will attempt to capture the growing trends in Africa in this area and analyse the consequences in both the international and domestic arenas.

The landmark legacies that will be inherited from the ICTR and the SCSL will serve the ICC and domestic jurisdictions well as they find their own way down bumpy roads on similar jurisprudential journeys. The year 2009 will not prove to be an easy year. The conclusion of the Charles Taylor trial is heavily dependent on the generosity of the SCSL's donors at a time of global financial constraints and 'tribunal fatigue'. The ICTR is yet to find willing and legally-able recipients for its pending cases if it is to meet its completion deadlines. The decision whether to establish a special tribunal in Kenya or request the ICC Prosecutor to investigate the alleged crimes will certainly impact on the country's future. There have been rumblings in Liberia regarding the establishment of a Special Tribunal and 2009 will confirm if they will bear fruit.

As for the ICC, while lauding its efforts to further accountability in Africa, it is important to reiterate that for the credibility of international justice in general, and of the Court in particular, it should begin to cast its net further afield to other parts of the world. In addition, as a lesson learned from the heavily-laden indictments exhibited at the ICTY and the ICTR that led to lengthy and cumbersome trials, the ICC Prosecutor should be commended for his decision to issue concise indictments. However, charges should be calibrated carefully, not only to fully reflect the full extent of grave violations of international criminal law and of the criminal responsibility, but also to ensure that victims are given a forum to seek justice, and that their rights to participate in the proceedings, and to eventually seek reparation, are recognised.

⁸¹ An official draft bill was due to be examined in early 2009. This will be analysed in the next issue.

Human rights developments in the African Union during 2008

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Summary

The year 2008 saw significant developments towards harnessing the institutional framework for the promotion and protection of human rights in Africa. More financial resources were allocated to the system. The African Commission and Court adopted interim Rules of Procedure which, by the end of the year, were still not harmonised to enable the Commission to submit its first case to the Court. The slow progress towards making the Court operational impedes the impact of the African human rights system. Another impediment is the inadequate response of AU policy organs to gross human rights violations, undemocratic rule, and the question of impunity.

1 Introduction

The transformation of the Organisation of African Unity (OAU) to the African Union (AU) in 2000 brought with it a spate of changes that have re-defined, at least in theory, the political, socio-economic, security and human rights landscape on the continent. In the field of human rights, the transformation signifies a paradigm shift that has seen human rights issues moving from the fringes of the OAU towards the centre

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of the AU. Despite this shift, however, developments in the promotion and protection of human rights in the continent are modest, seeing progress juxtaposed with retrogression. Recent developments within the African regional human rights system (African system) reveal this pattern.

This note reviews these developments. It covers the period January 2008 to December 2008. The focus is on the main human rights treaty bodies that compose the African system's supervisory mechanism: the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court). The note also covers developments with regard to the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and the main AU organs.

2 The African Commission on Human and Peoples' Rights

In existence now for 20 years, the African Commission remains the only fully operational human rights treaty body within the African system. In 2008, the African Commission held two ordinary sessions and two extraordinary sessions.¹ As usual, the ordinary sessions were preceded by the NGO forum. Significant developments emanating from these sessions and during the inter-session period are highlighted below.

2.1 Budget

A chronic problem that has impeded the African Commission's efficiency in conducting its mandate is the lack of adequate financial and human resources. Knowing too well that he who pays the piper calls the tune, the AU (and initially the OAU) has not been keen to financially empower the African Commission. In the words of Viljoen:²

[The] AU's schizophrenic attitude of praising the Commission for its accomplishments, yet starving it of resources, suggests that the AU does not wish to see the Commission become more effective and forceful.

As a consequence of its financial incapacitation, the African Commission has long relied on external donors to finance some of its activities;³

¹ The 43rd ordinary session was held in Ezulwini, Swaziland, in May and the 44th ordinary session in Abuja, Nigeria, in November 2008. The 4th and 5th extraordinary sessions were held in Banjul, The Gambia, in February and July 2008.

² F Viljoen *International human rights law in Africa* (2007) 416.

³ The African Commission has established a practice of acknowledging its external funders in its activity reports. Some of these funders include the Danish Institute for Human Rights, Rights and Democracy (a Canadian-based NGO) and the Danish International Development Agency (DANIDA).

a reliance that has opened the Commission to the criticism that it is subject to external manipulation.⁴

The financial position of the African Commission, however, changed for the better in January 2008 after it presented and defended, for the first time, its proposed budget for the 2008 fiscal year before the relevant AU policy organs.⁵ In supporting its case for increased resources, the Commission cited three reasons: the need to facilitate the effective implementation of its mandate; the need to remove the Commission's reliance on donor funding; and the need to ensure that the Commission is seen as independent.⁶ Consequently, US\$ 6 million was approved for the activities of the African Commission in the year 2008, marking a huge leap forward from the US\$ 1,2 million allocated to it in 2007.⁷ An important effect of the new dispensation is that activities such as missions can now be approved by the Chairperson of the Commission 'subject to the availability of funds as advised by the Secretary' rather than by the AU Commissioner for Political Affairs, as was previously the case.⁸ This arrangement brings a greater sense of the Commission's autonomy over finances allocated to it. The fact that the Commission was able to hold two extraordinary sessions in 2008 is another visible outcome of the increased funding.

While the increase in funding for the African Commission is lauded, the financial allocation, however, does not yet reflect the fact that the Commission is the only fully-operational human rights treaty body in the region. The African Court receives a higher financial allocation despite of its limited mandate as compared to that of the African Commission. Arguably, the African Court, being in its infancy stage, requires more funds to facilitate its establishment and full operation. However, if this argument is to hold, then the African Children's Committee, equally in its infancy stage, should receive more funding than it currently does. In essence, in the absence of an official public record

⁴ Zimbabwe, eg, in response to the resolution on the human rights situation in Zimbabwe, adopted at the Commission's 38th ordinary session in 2005, stated as follows: 'The resolution of ACHPR is an improper reproduction of the Amnesty International resolution ... This brings to question the relationship of the ACHPR with Western NGOs, more particularly those based in Europe, like Amnesty International, which use their financial contributions to the ACHPR budget to unduly influence ACHPR decisions in pursuit of the agendas of Western countries to effect regime change in Zimbabwe. It follows therefore that the funding of the ACHPR by donors and influential NGOs should be brought under close scrutiny of the Executive Council. Failure to act could further compromise the mandate, the independence and the integrity of the ACHPR.' See response by the government of the Republic of Zimbabwe to the resolution on the human rights situation in Zimbabwe, African Commission's 20th Activity Report, EX CL/279 (IX) annex III, 106.

⁵ Before January 2008, the budget allocation from the AU to the African Commission was subsumed under that of the AU Commission's Political Affairs Department.

⁶ 23rd & 24th Activity Report para 39.

⁷ 23rd Activity Report para 113; 24th Activity Report para 246.

⁸ 24th Activity Report para 234(vi).

outlining the criteria for allocating finances to the three human rights supervisory mechanisms, much is left to speculation.

2.2 Rules of Procedure

Although calls for the revision of the Rules of Procedure of the African Commission date back several years, it is only with the recent creation of the African Court that the necessity of these calls became clear and urgent. Thus, in May 2005 the Commission established the Working Group on Specific Issues Relevant to the Work of the African Commission.⁹ Its mandate included the revision of the Commission's 1995 Rules of Procedure. Following a series of meetings, the Working Group finalised its consideration of the new draft Rules of Procedure in July 2008. The interim Rules of Procedure were adopted by the Commission in November 2008.

The interim Rules embody some improvements from its current Rules of Procedure. For instance, the interim Rules provide for increased transparency with regard to the Commission's work in providing for the publication of non-confidential information on its website.¹⁰ Rule 66(1) states that '... official documents of the Commission and its subsidiary mechanisms shall be documents for general distribution unless the Commission decides otherwise'. However, rule 66(2) provides that '[u]pon their adoption by the Commission, reports shall be published in accordance with article 59(2) of the Charter'. This appears to require the decision of the AU Assembly before the publication of any reports, despite article 59(2) only being applicable to individual communications.

A useful feature of the Commission's work has been that it sometimes holds sessions outside its headquarters in Banjul. The Commission has always used this opportunity to engage the host country in a 'constructive dialogue' on human rights issues. Rule 30(5) of the interim Rules, however, stipulates that such sessions may not be held in a state under any sanction of the AU or which is in arrears with its reports to the Commission in terms of article 62 of the Charter. This rule will unnecessarily reduce the potential impact of the Commission by drastically reducing the number of potential hosts.

With regard to the relationship between the African Commission and the African Court, the interim Rules note that the Commission shall refer a case against a state party to the Court Protocol to the Court if the state does not comply with the Commission's recommendations.¹¹

⁹ See Resolution on the Creation of a Working Group on Specific Issues Relevant to the Work of the African Commission on Human and Peoples' Rights, ACHPR/Res 77 (XXXVII)05.

¹⁰ Rules 18(i), (j), 39(3), 40(1), 66(3), (4), 80(4) & 113(5). See also rules 62(2) & 63(1).

¹¹ Rule 119.

The state has up to a year to show its compliance.¹² In cases of serious and massive violations, the Commission may refer the case directly to the Court.¹³ When the Commission refers a case, it will inform the parties and 'invite the complainant to pursue the case and make representations before the Court'.¹⁴

Co-operation with other AU organs is important. The interim Rules thus provide that the Commission shall 'establish formal relations of co-operation ... with all African Union organs, institutions and programmes that have a human rights element in their mandate'.¹⁵ If put into practice efficiently, the co-operation envisaged in the interim Rules will have the effect of instilling a sense of co-ordination and synergy within the African human rights system.

It is suggested that when the Rules of Procedure have been finalised, the Working Group on Specific Issues should turn its focus on its other mandates. In particular, it should, in fulfilling its mandate, give attention to the establishment of a mechanism for following up the decisions and recommendations of the Commission. The lack of such a follow-up mechanism is largely responsible for the scepticism that surrounds the impact of the Commission and it being described as weak and ineffectual.¹⁶

2.3 State reporting

The examination of state party reports constitutes a core component of the promotional mandate of the African Commission. Thus, at each of its ordinary sessions, the Commission examines a number of state reports. As such, the periodic reports of the Sudan and Tanzania were examined at the 43rd session.¹⁷ Consideration of the periodic report of the Democratic Republic of the Congo (DRC), which had been scheduled to take place at the same session, was abandoned when the state representatives failed to attend the session.¹⁸ At the 44th session, only the periodic report of the host country, Nigeria, was considered.¹⁹ The examination of the report of a session's host, as was the case with

¹² Rule 115.

¹³ Rule 119(4). Such cases may also be referred to the Court by the African Commission on its own initiative without any communication having been received; compare rule 124(2).

¹⁴ Rule 124(1). The role of the African Commission before the Court is described as *amicus curia* though the Commission seems to have misunderstood this concept in that it provides that Commission shall submit pleadings, motions, etc before the Court; compare rule 115.

¹⁵ Rule 126(1).

¹⁶ See H Steiner *et al* (eds) *International human rights in context: Law, politics, morals* (2008) 1062.

¹⁷ 23rd-24th Activity Report para 21.

¹⁸ 23rd-24th Activity Report para 22.

¹⁹ 25th Activity Report para 106.

respect to Nigeria, is a practice that should be encouraged. Such a practice would have the effect of increasing the visibility of the state reporting procedure amongst the citizens of the host country.

Concluding observations on the Tanzanian and Nigerian reports were adopted in the sessions at which these reports were considered.²⁰ Due to time constraints, however, concluding observations on the report of Sudan were not adopted at the session at which it was considered.²¹ While the adoption of concluding observations is gradually being entrenched, their publicity and dissemination remain minimal at best. The concluding observations adopted in respect of the aforementioned countries were at the time of writing not available on the African Commission's website. The inaccessibility of these concluding observations undermines the efforts of civil society to follow up on the implementation of the African Commission's recommendations by the respective countries.

A chronic problem that continues to face the African Commission's reporting procedure is the high number of member states who are in arrears in the submission of their reports.²² Ironically, some of the states that have never submitted a report under the African Charter have a relatively better record of reporting under some of the United Nations (UN) treaties.²³ As such, one would surmise that, save for countries that are emerging from or are in civil conflict, the problem with the non-reporting states lies more in their attitude towards the reporting mechanism under the African Charter than in their capacity to report.

2.4 Resolutions

The adoption of resolutions has become an established practice in the sessions of the African Commission. Since its inception, it has adopted more than 100 resolutions on thematic, procedural and country-specific issues.²⁴ Through these resolutions, the African Commission has defined the contents of some of the rights in the African Charter; condemned human rights violations in specific African countries; and addressed administrative and procedural issues pertinent to its work.

²⁰ 23rd-24th Activity Report para 23.

²¹ 23rd-24th Activity Report para 24.

²² Thirteen state parties to the African Charter have never presented a report to the Commission. The states are Botswana, Comoros, Côte d'Ivoire, Djibouti, Equatorial Guinea, Gabon, Guinea Bissau, Liberia, Malawi, São Tomé and Príncipe, Sierra Leone and Somalia. See 25th Activity Report para 108.

²³ Eg, all the states that have never submitted a state report to the African Commission, save for Somalia, have submitted at least one report under the Convention on the Rights of the Child (CRC).

²⁴ Press releases by Special Rapporteurs during the inter-session period play an equally important and similar role as resolutions.

The resolutions have also formed a source of advocacy tools for human rights activists on the continent.

The African Commission adopted two resolutions at its 4th extraordinary session,²⁵ two at its 43rd session,²⁶ and nine at its 44th session.²⁷ The Resolution on Elections in Africa, adopted during the Commission's 44th session, deserves some mention here. In this resolution, the Commission deplored 'the emerging trends in establishing governments of national unity, which in certain circumstances legitimise undemocratic elections'. Clearly targeting the formation of governments of national unity in Kenya and Zimbabwe, this resolution would seem to be at variance with the AU position which has encouraged the creation of such governments in these two countries.²⁸ The depth of this variance may have been mitigated, however, by the Commission's recommendation in the same resolution that 'where necessary the establishment of a government of national unity must be inclusive and reflective of the election results'. The variance nevertheless speaks of the lack of a harmonised perspective within the AU on topical issues affecting the continent.

2.5 Missions

Members of the African Commission often undertake missions to African countries, either in terms of the Commission's promotional or its protective mandate. On these promotional visits, the Commission seeks to engage the state in question in a constructive dialogue concerning the state's obligations under the African Charter. A mission falling under the Commission's protective mandate is usually in response to specific allegations of human rights violations. Such missions often

²⁵ Resolution on the human rights situation in Kenya; and Resolution on the human rights situation in Somalia.

²⁶ Resolution on the human rights situation of migrants in South Africa; and Resolution on the run-off elections in Zimbabwe.

²⁷ Resolution calling on state parties to observe a moratorium on the death penalty; Resolution on the human rights situation in the DRC; Resolution on joint promotional missions; Resolution on the human rights situation in the Republic of The Gambia; Resolution on maternal mortality in Africa; Resolution on the human rights situation in Somalia; Resolution on elections in Africa; Resolution on the human rights and humanitarian situation in Zimbabwe; Resolution on access to health and needed medicines in Africa. See 25th Activity Report para 117. The resolutions are available at http://www.achpr.org/english/_info/44th_Com%20Activity.html (accessed 20 March 2009).

²⁸ The negotiations that led to the creation of a government of national unity in Kenya were done under the auspices of the AU with former UN Secretary-General, Kofi Annan, as the chief mediator. Although Zimbabwe's negotiations for a government of national unity were principally conducted under the auspices of the Southern African Development Community (SADC), it was backed by the AU. Indeed, the then AU Chairperson, President Jakaya Kikwete of Tanzania, attended the ceremony at which the power-sharing pact for Zimbabwe was signed.

take the form of a fact-finding mission and sometimes the mission may be linked to a communication pending before the Commission.²⁹

In 2008, promotional missions were undertaken to Libya, Tunisia, Liberia and Togo.³⁰ In addition, members of the Commission visited three prisons in Swaziland during its session hosted in that country. A fact-finding mission was undertaken to Botswana in August by the Special Rapporteur on Refugees. The mission sought to investigate the protection regime for refugees, asylum seekers and migrants in light of the increased influx of people from Zimbabwe to Botswana. A significant development in relation to missions involves the mission carried out to Togo by the Special Rapporteur on Human Rights Defenders jointly with her UN counterpart.³¹ This was the first mission of its kind conducted jointly between the African Commission and a UN Special Rapporteur.

2.6 Communications

The number of communications disposed of by the African Commission in its ordinary sessions has been minimal over the years. Eighty communications were tabled before the Commission at the 43rd session. However, only three cases were decided: *International Human Rights and Development in Africa (IHRDA) v Angola*; *IHRDA and Zimbabwe Lawyers for Human Rights (ZLHR) v Zimbabwe*; and *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire*.³² The Commission convened the 5th extraordinary session to address its backlog. However, it only adopted two decisions on admissibility and two on the merits.³³ Three of these decisions were not included in the 25th Activity Report, but 'will be attached to the next Activity Report'.³⁴ At the 44th session, the Commission decided two cases: *Majuru v Zimbabwe*, discussed

²⁹ It has been the practice of the African Commission to defer action on a communication when it is intending to conduct a mission to a country in respect of which the communication is filed against. See *SOS-Enclaves v Mauritania* (2000) AHRLR 147 (ACHPR 1999); *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000); *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

³⁰ The Special Rapporteur on Human Rights Defenders and the Special Rapporteur on the Rights of Women undertook promotional missions to Libya and Tunisia in June 2008. The Chairperson of the Commission, the Chairperson of the Robben Island Guidelines follow-up committee and the Special Rapporteur on Prisons undertook a mission to Liberia in September 2008. See 25th Activity Report para 79.

³¹ 25th Activity Report para 79(vi).

³² 24th Activity Report para 256.

³³ 25th Activity Report paras 123-124. The report indicates that three cases were decided on the merits. However, the decision on Communication 262/2002, *MIDH v Côte d'Ivoire*, was adopted already at the 43rd session (see 24th Activity Report para 256).

³⁴ 25th Activity Report para 125. These cases are Communications 302/05, *Maitre Mambeolo v DRC*, 242/01, *Interights & IHRDA v Mauritania* and 262/02, *MIDH v Côte d'Ivoire*.

below, and *Wetshioconda v DRC*, where the Commission held that the state party had violated the African Charter. However, the latter case was not included in the 25th Activity Report because 'translation and harmonisation ... [are] still pending'.³⁵ The African Commission thus finalised nine cases in 2008 of which five had been published at the time of writing.

In *IHRDA v Angola*,³⁶ the complainants, who were mine workers in Angola, were arrested and deported as part of a government campaign of expelling foreigners from the country. In finding Angola in violation of the African Charter, the Commission noted that, whereas states may deny entry to or withdraw residence permits from non-nationals, the affected individuals should be allowed to challenge the order to expel them before competent authorities, or to have their cases reviewed. The Commission reiterated its position that the mass expulsion of non-nationals is unacceptable. With regard to individual redress, the Commission only recommended the government to take the necessary measures to redress the violations. However, the Commission recommended several measures aimed at making the Angolan policy on the treatment of non-nationals human rights-compliant. The government was requested to report back on the measures it took to implement these recommendations.

In *IHRDA and ZLHR v Zimbabwe*,³⁷ the African Commission laid down a test for determining a disparaging statement under article 56(3) of the African Charter. The Commission noted that article 56(3) must be interpreted bearing in mind article 9(2) of the African Charter, which provides for freedom of expression. The test was stated thus:

In determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, or any other state institution, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully or intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the institution. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute.

The test no doubt brings certainty to the question as to what constitutes 'disparaging language' in the context of article 56(3) of the African Charter. Until this test was laid down, the case law on the issue lacked uniformity.³⁸

³⁵ 25th Activity Report para 114.

³⁶ Communication 292/2004, 24th Activity Report.

³⁷ Communication 293/2004, 24th Activity Report.

³⁸ See *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997); *Ilesanmi v Nigeria* (2005) AHRLR 48 (ACHPR 2005); *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 43 (ACHPR 2004).

In *MIDH v Côte d'Ivoire*,³⁹ the complainant challenged provisions in the Ivorian Constitution which restricted the right to stand for election and provisions providing for amnesty for those involved in the *coup d'état* of 1999 and the rulers of the military transition period which followed. The Commission found the communication admissible, as the constitutional review process which could have challenged the provisions could only be initiated by the President or members of the National Assembly.⁴⁰ On the merits, the Commission held that to require that the parents of the President must be Ivorian by birth was unreasonable.⁴¹ The Commission further held that the amnesty violated the African Charter as it prevented victims from seeking redress and encouraged impunity.⁴²

In *Socio-Economic Rights and Accountability Project v Nigeria*,⁴³ it was alleged by the complainant that the respondent state had failed in its obligations to provide the minimum content of the right to education. The communication was declared inadmissible on the grounds that Nigerian case law showed that socio-economic rights were justiciable in Nigeria and that the complainant had therefore failed to exhaust local remedies.⁴⁴ This is a questionable conclusion, not fully supported by the case law cited by the Commission in the decision.⁴⁵ Arguably, the Commission could instead have declared the communication inadmissible based on article 56(2) of the African Charter as its vagueness could be seen as making it incompatible with the Charter.

In *Majuru v Zimbabwe*,⁴⁶ Mr Majuru alleged that Zimbabwe had violated his human rights, forcing him to flee to South Africa. However, the Commission found that 'there is no concrete evidence to link the complainant's fear to the respondent state'.⁴⁷ He could therefore have exhausted the local remedies, especially because Zimbabwean law does not require that a complainant is physically present in the country to access the courts.⁴⁸ The Commission also, for the first time, declared a communication inadmissible due to not having been submitted within a reasonable time. The Commission held that to submit a complaint

³⁹ Communication 246/02, 25th Activity Report.

⁴⁰ Para 49.

⁴¹ Para 85.

⁴² Para 98.

⁴³ Communication 300/2005, 25th Activity Report.

⁴⁴ Para 69.

⁴⁵ See S Ibe 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 225 241-243. The Commission seemingly in para 66 misquotes one of the Nigerian judgments, *Abacha v Fawehinmi*, to include a statement on the justiciability of socio-economic rights.

⁴⁶ Communication 308/2005, 25th Activity Report.

⁴⁷ Para 94.

⁴⁸ Para 100.

almost two years after the alleged violations was unreasonable.⁴⁹ As to Mr Majuru's submission that his reason for the late submission of the communication was that he thought the situation in Zimbabwe might improve, the Commission made the following bizarre statement: 'The complainant does not supply the Commission with medical proof to indicate he was suffering from mental problems, he does not indicate what gave him the impression that things might improve in Zimbabwe ...'⁵⁰

3 The African Court on Human and Peoples' Rights

The African Court, now in its third year, is yet to be fully operational. Primarily charged with the function of complementing the protective mandate of the African Commission, the Court has not entertained even a single case thus far. However, following developments in 2008, the Court is now set to receive its first case.

3.1 Election of new judges

The first batch of judges of the African Court was elected on 22 January 2006 at the 6th ordinary session of the Assembly of the AU, held in Khartoum, Sudan. Four of these judges were elected for a period of two years. As such, their term of office came to an end in July 2008. Accordingly, the AU Assembly at its 11th ordinary session re-elected Judges Sophia Akuffo (Ghana) and Bernard Makgabo Ngoepe (South Africa) to six-year terms. Two new judges were elected: Githu Muigai (Kenya) and Joseph Nyamihana Mulenga (Uganda).

Article 14(3) of the African Court Protocol provides that in the election of the judges, the Assembly shall ensure that there is adequate gender representation. It is thus not clear what proportional number of male and female judges will constitute 'adequate gender representation'. While it is clear that the phrase does not mean equal representation since the Court is composed of 11 judges, it is nevertheless submitted that, with only two women currently sitting as judges of the African Court, the gender balance in the composition of the Court is skewed. In contrast, seven of the 11 members of the African Commission are women.

3.2 Rules of Procedure

The process of formulating the Rules of Procedure of the African Court commenced in July 2006 at the African Court's first session held in Banjul, The Gambia, in which the Court constituted a committee of judges responsible for preparing a draft of the Rules. Consideration of the

⁴⁹ Para 110.

⁵⁰ As above.

draft Rules of Procedure then followed during the third session of the African Court, held in Addis Ababa, Ethiopia, in December 2006. The Court finally published its 'interim' Rules of Procedure in June 2008. It is unclear why it has taken so long to develop rules that to a large extent simply repeat what is already stated in the Protocol establishing the Court. At the time of writing, the African Commission and the African Court were in the process of harmonising their Rules.

With the Court's Rules of Procedure in place, the Court is now set to receive its first case. However, since the Court can neither solicit cases nor act *sua moto*, the challenge falls upon the African Commission, member states, African inter-governmental organisations, non-governmental organisations (NGOs) and individuals to present cases to the Court. It is, however, unlikely that the African Commission will present a case to the Court before its Rules of Procedure are harmonised with that of the Court. Moreover, with only two member states having made a declaration in terms of article 34(6) of the Court Protocol, NGOs and individuals are still limited in their access to the Court.

3.3 Merger with the African Court of Justice

An important development in 2008 was the adoption, at the 11th session of the AU Assembly, of the Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR Protocol), which will merge the African Court on Human and Peoples' Rights with the African Court of Justice. The Statute of the African Court of Justice and Human Rights (ACJHR Statute) is annexed to the ACJHR Protocol. The Protocol will enter into force 30 days after the deposit of the instrument of ratification by 15 member states of the AU.

The ACJHR will be the main judicial organ of the AU. The ACJHR Protocol, upon coming into force, shall replace the two Protocols establishing the African Court, on the one hand, and the Court of Justice of the AU on the other. However, the African Court Protocol will remain in force for a transitional period of one year or as the Assembly of the Union may decide, so as to enable it to transfer its prerogatives, assets, rights and obligations to the ACJHR. The ACJHR will have its seat in Arusha, Tanzania, the current seat of the African Court. It will have two sections — a general affairs section and a human rights section — with eight judges each. As such, the full Court will have 16 judges elected from state parties. With the exception of the President and the Vice-President, all the judges of the ACJHR will serve on a part-time basis.

Unfortunately, individuals and NGOs accredited to the AU or its organs may only access the Court in respect of a state party that has made a declaration accepting the jurisdiction of the Court over cases submitted by individuals and NGOs. The restriction which follows from article 34(6) of the African Court Protocol is thus retained and dashes the hopes of human rights activists and NGOs that the new Court, unlike the African Court, would have allowed direct access for

individuals and NGOs. This restriction is a clear demonstration that, despite the lofty ideas embodied in the AU Constitutive Act, African states are yet to let go of the cloak of sovereignty and genuinely commit themselves to human rights protection on the continent.

4 The African Committee of Experts on the Rights of Welfare of the Child

Since it was established in 2001, the African Children's Committee has very little to show in terms of progress. Some progress was made when the Committee met for its 11th ordinary session in Addis Ababa from 26 to 31 May 2008. For the first time, it discussed state reports submitted to the Committee.⁵¹

5 The African Union's main organs and human rights

The AU Constitutive Act provides extensively for human rights in its Preamble, objectives and founding principles. As such, the AU Constitutive Act is the AU's 'authoritative and overriding normative beacon', guiding 'all its organs towards the accomplishment of human rights in all their activities'.⁵² In this regard, human rights issues are increasingly included on the agenda of the Executive Council and the Assembly. AU organs, such as the AU Commission, the Peace and Security Council, the Pan-African Parliament and the Economic, Social and Cultural Council (ECOSOCC) also have a role to play in improving the situation of human rights in Africa. Human rights are also included in the mandate of the African Peer Review Mechanism.

5.1 Standard setting

The AU has adopted a large number of treaties and declarations of relevance for human rights. In 2008, one such development relates to the process of developing an AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa. A draft has been prepared and a Special Summit of Heads of State and Government on Refugees, Returnees and Internally Displaced Persons is scheduled to take place in the course of 2009.⁵³ The African Commission's Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons

⁵¹ BD Mezmur & J Sloth-Nielsen 'An ice-breaker: State party reports and the 11th session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 596 597-598.

⁵² Viljoen (n 2 above) 180.

⁵³ Decision on the report on the situation of refugees, returnees and internally displaced persons in Africa, Doc EX CL/460 (XIV), EX CL/Dec.462 (XIV).

and Migrants has participated in the process of drafting the new legal instrument.

Another development in standard setting relates to the process, which is now underway, of establishing a normative framework for the protection of older persons in Africa. In this regard, the mandate of the focal person on older persons of the African Commission includes spearheading the process of developing a Protocol to the African Charter on the Rights of Older Persons in Africa.⁵⁴ As part of this process, a consultative meeting on the rights of older persons was held in Mauritius in October 2008.⁵⁵

While arguably the focus should now be on the implementation of existing instruments, the focus on the creation of new instruments will probably continue, as evidenced by the adoption of the Statute of the AU Commission on International Law by the AU Assembly in February 2009.⁵⁶ The mandate of the Commission includes 'codification and progressive development of international law on the African continent'.⁵⁷

5.2 Peace and security

The greatest challenge for the AU remains the maintenance of peace and security on the continent. Conflicts in countries such as Burundi, DRC, Somalia and Sudan continue to simmer in varying degrees with grave implications for human rights. Moreover, the post-election violence in Kenya in early 2008 and the xenophobic attacks in South Africa in May 2008 have demonstrated that even those African countries considered bastions of peace are, nevertheless, prone to conflicts accompanied by violations of human rights. Worth noting, the xenophobic attacks in South Africa undermined the spirit of pan-Africanism that underlies the AU. It made a mockery of the determination of Africa's founding fathers to 'promote unity, solidarity, cohesion and co-operation among the peoples of Africa and African states'.⁵⁸

5.3 Democracy

The principles of non-interference in the internal affairs of member states and state sovereignty continue to be embedded in the practice of the AU, even in the face of gross human rights violations and the

⁵⁴ Resolution on the Establishment and Appointment of a Focal Point on the Rights of Older Persons in Africa, adopted at the 42nd ordinary session of the African Commission, November 2007, <http://www.achpr.org> (accessed 23 March 2009).

⁵⁵ 25th Activity Report para 63(xi).

⁵⁶ Decision on the Draft Statute of the African Union Commission on International Law, Assembly/AU/Dec 209 (XII).

⁵⁷ *Note verbale* on the election of the members of the African Union Commission on International Law, BC/OLC/42.23/1353.09 vol II.

⁵⁸ AU Constitutive Act, Preamble para 1.

collapse of the rule of law. The response of the AU in the wake of the election violence and political stalemate in Kenya and Zimbabwe in 2008 serves to demonstrate this claim. While it was deeply concerned with the spate of violence and loss of life in these two countries,⁵⁹ the AU Assembly steered away from expressly questioning the alleged manipulation of elections by the incumbent governments. It is worth noting that while the response of the Assembly was muted, the election observer mission to Zimbabwe of the Pan-African Parliament found that the elections were not 'free, fair and credible'.⁶⁰

The lack of a common AU position on Zimbabwe's election is yet another pointer to the lack of a harmonised position on topical issues on the continent. Increasingly, therefore, there is a need to foster co-ordination and co-operation amongst all institutions within the AU that have a human rights mandate. Some progress was made towards this end in September 2008, when a meeting was held in Burkina Faso to discuss the relationship between the African Commission and other organs of the AU.⁶¹ In the main, however, there is yet to be a proper framework of co-ordination amongst AU institutions in general and those with a human rights mandate in particular.⁶²

5.4 Impunity

In February 2008, a Spanish investigative judge issued an indictment against members of the Rwandan Defence Forces (RDF) on charges including genocide and crimes against humanity.⁶³ In the same vein, Rose Kabuye, the Rwandan Chief of Protocol, and one of those against whom an arrest warrant had earlier been issued by a French investigative judge, was arrested in Germany in November 2008, and later appeared before a French court.⁶⁴

Clearly enraged by these incidents, the AU established a Commission on the Abuse of the Principle of Universal Jurisdiction. In July 2008, the

⁵⁹ See AU Assembly Decision on the Situation in Kenya Following the Presidential Election of 27 December 2007, Assembly/AU/Dec 187(X); and AU Assembly Resolution on Zimbabwe, Assembly/AU/Res.1(XI).

⁶⁰ Report of the Pan-African Parliament election observer mission, presidential run-off elections and House of Assembly by-elections, Republic of Zimbabwe, 27 June 2008, PAP/S/RPT/76/08, para 18.1. During 2008, the Pan-African Parliament also undertook election observer missions to Angola, Ghana and Swaziland.

⁶¹ 25th Activity Report para 64(vi).

⁶² See generally K Kindiki 'The African human rights system: Unnecessary overlaps or useful synergies?' (2006) 12 *East African Journal of Peace and Human Rights* 319.

⁶³ 'Spanish judge charges Rwanda's current military with genocide' *Associated Press* 6 February 2008 <http://www.ihf.com/articles/ap/2008/02/06/europe/EU-GEN-Spain-Rwanda.php> (accessed 25 March 2009).

⁶⁴ C McGreal 'Top Rwandan aide chooses French terror trial' *Guardian* 10 November 2008 <http://www.guardian.co.uk/world/2008/nov/10/rwanda-congo-kabuye> (accessed 24 March 2009).

AU Assembly took note of the report of the Commission and stated that:⁶⁵

The political nature and abuse of the principle of universal jurisdiction by judges from some non-African states against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these states.

Another development in this area involves the request made by the Prosecutor of the International Criminal Court (ICC) in July 2008 for the indictment of the President of Sudan, Omar al Bashir, for genocide, crimes against humanity and war crimes.⁶⁶ The AU, warning of widespread anarchy in Sudan if Al Bashir was indicted, called for the deferment of the decision to indict him.⁶⁷ Some observers have argued that the ICC is giving too much attention to Africa. However, it is important to note that all the situations examined by the ICC in Africa, except for Sudan, have been referred to the Court by the governments themselves as state parties to the Statute establishing the ICC.

6 Conclusion

This note reveals that 2008 saw significant developments towards harnessing the institutional framework for the promotion and protection of human rights. The African Commission began walking the path of financial stability and independence. It also adopted its interim Rules of Procedure, a step that is necessary in defining its relationship with the African Court. For its part, the African Court similarly adopted its Rules of Procedure and it is ready to receive its first case for adjudication. The African Children's Committee also recorded some developments in so far as it considered state party reports under the African Children's Charter. At the normative level, the ACJHR Protocol was adopted, establishing the framework for the merger between the African Court on Human and Peoples' Rights and the African Court of Justice and Human Rights. In addition, processes for adopting regional treaties to secure the rights of internally-displaced persons and older persons were initiated.

Despite these positive developments, the realisation of human rights in Africa is still challenged by a myriad of obstacles. At the AU level, a salient drawback is its ambivalent reaction to gross human rights violations, undemocratic rule, and the question of impunity. Moreover, there is a lack of co-ordination amongst AU institutions with a human

⁶⁵ Decision on the report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec 199 (XIII).

⁶⁶ Decision on the application by the International Criminal Court for the indictment of the President of the Republic of the Sudan, Assembly/AU/Dec.221 (XII).

⁶⁷ 'AU warns of *coups*, anarchy if Sudan President indicted' <http://sudan.net/news/posted/16105.html> (accessed 2 August 2008).

rights mandate, a factor that continues to see divergent opinions on topical issues on the continent emanating from these institutions. In general, therefore, the challenge for the African human rights system lies in maximising the gains made so far and tackling the obstacles that still hamper the full realisation of human rights on the continent.

Human rights developments in sub-regional courts in Africa during 2008

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Summary

The year 2008 saw very significant developments in the budding human rights activities of regional economic communities in Africa. This was especially prominent in the area of supranational judicial protection of human rights by sub-regional courts. In East Africa, Southern Africa and West Africa, sub-regional courts concluded cases with considerable implications for the protection of rights on the continent. As human rights litigation before sub-regional courts is still a new trend, the jurisprudence that emerged from these courts in 2008 provides opportunities for improving a popular understanding of the processes of the courts. It also allows for reflections on the real value of these developments.

1 Introduction

The long-awaited supranational judicial protection of human rights in Africa is finally becoming a reality, not before the struggling African Court on Human and Peoples' Rights (African Court), but before judicial organs of regional economic communities (RECs) in different parts of the continent.¹ Originally founded as rallying points for progressive economic integration aimed at improving the living standards of their citizens, RECs have inevitably evolved to involve varying degrees of

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¹ The African Court on Human and Peoples' Rights, which was established to complement the protective mandate of the African Commission on Human and Peoples' Rights, had not heard a single case as at 31 March 2009, even though the judges of the Court took office in January 2006.

political integration. With the realisation that economic integration can succeed better in stable and conflict-free political environments, African RECs have found themselves increasingly drawn into different forms of human rights promotion and protection in order to prevent, address or contain conflicts directly or indirectly linked to human rights violations.

Similar to the configuration of domestic governments, RECs have organs that carry out legislative, executive and judicial functions. While they may be identified differently in different RECs, organs common to African RECs include plenary assemblies of heads of state and government, subsidiary plenary bodies, parliamentary bodies, administrative organs and judicial bodies. Plenary assemblies and subsidiary plenary bodies, which are political organs, usually exercise legislative powers and determine the general policy direction of the organisation.² These assemblies and bodies are thus crucial for the development of human rights content in the RECs. Parliamentary bodies in African RECs are still mostly consultative forums. Administrative organs exercise various degrees of executive powers and functions that have had varying implications for human rights. It is, however, the judicial bodies with original competence over the interpretation and application of founding treaties that have had the most obvious and far-reaching impact in the field of human rights. While the contributions of other organs to the development of human rights in the RECs are highlighted where they have occurred, this contribution focuses on the human rights developments in the sub-regional courts in the period under review.

The Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ) set the ball rolling as far back as 2005 when it began to receive human rights cases on the basis of an expanded jurisdiction.³ The growing role of the ECCJ in the realm of human rights protection continued in 2008 with the Court's decision in the case of *Ebrimah Manneh v The Gambia (Manneh case)*.⁴ This was soon followed by another decision in the widely publicised case of *Hadijatou Mani Koraou v Niger (Koraou case)*.⁵ In Southern Africa, the Southern African Development Community (SADC) Tribunal attracted attention with its judgments in *Ernest Francis Mtingwi v SADC Secretariat (Mtingwi*

² The subsidiary plenary bodies consist mostly of national ministers.

³ Since 2005, the ECCJ has handed judgment in no less than 16 cases, most of which touch on aspects of human rights. See generally ST Ebobrah 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 7 *African Human Rights Law Journal* 307.

⁴ Unreported Suit ECW/CCJ/APP/04/07, Judgment ECW/CCJ/JUD/03/08, judgment delivered on 5 June 2008.

⁵ Unreported Suit ECW/CCJ/APP/08/08, Judgment ECW/CCJ/JUD/06/08, judgment delivered on 27 October 2008. The *Koraou* case received wide publicity in the media and on the internet and has brought attention to the work of the ECCJ.

case)⁶ and *Campbell and 78 Others v Zimbabwe (Campbell case)*.⁷ The East African Court of Justice (EACJ), for its part, recently concluded the case of *East African Law Society and 3 Others v Attorney-General of Kenya and 3 Others (East African Law Society case)*.⁸

Considering that human rights litigation before sub-regional courts is still a new phenomenon in Africa, these cases present invaluable opportunities for an understanding of this emerging trend. Focusing on procedural and substantive issues in the decisions, this contribution seeks to contribute to the understanding of the human rights processes of sub-regional courts by engaging in a critical analysis of these recent judgments of the EACJ, the ECCJ and the SADC Tribunal. Analysis of the issues in the decisions will be preceded by a brief factual background of each case.

2 The East African Community

Attempts at regional co-operation in East Africa apparently dates back to the colonial era under the management of British colonial authorities.⁹ However, formal regional integration in the sub-region first occurred in 1967 with the founding of the original East African Community (EAC) by Kenya, Tanzania and Uganda. In 1977, the original EAC was dissolved following disagreements among the then member states over several issues.¹⁰ Efforts to revive the EAC began in 1991 and culminated in the signing of a new EAC Treaty in 1999.¹¹ By article 5 of the EAC Treaty, the objectives of the Community 'shall be to develop policies and programmes aimed at widening and deepening co-operation ... in political, economic, social and cultural fields, research, defence, security and legal and judicial affairs ...' The EAC aims to ultimately result in the establishment of a political federation in East Africa.¹²

Under the 1999 Treaty establishing the EAC, member states of the EAC undertook to pursue integration, guided by the principles of good governance, democracy, the rule of law, social justice and human rights.¹³

⁶ SADC (T) Case 1/2007, judgment delivered on 27 May 2008.

⁷ SADC (T) Case 2/2007 in which judgment was delivered on 28 November 2008. The *Campbell* case was filed in 2007 and became famous with an interim ruling by the Tribunal in December 2007.

⁸ Reference 3 of 2007.

⁹ See F Viljoen *International human rights law in Africa* (2007) 490; W Braude *Regional integration in Africa* (2008) 62.

¹⁰ Braude (n 9 above) 63.

¹¹ The 1999 Treaty of the EAC, which was adopted and ratified by Kenya, Tanzania and Uganda, entered into force on 7 July 2000. Burundi and Rwanda acceded to the EAC Treaty on 18 June 2007. The EAC Treaty is available at <http://www.eac.int> (accessed 20 March 2009).

¹² See art 5(2) of the 1999 EAC Treaty.

¹³ See art 7(2) of the 1999 EAC Treaty.

However, the organs of the EAC have exercised restraint in the pursuit of human rights within the framework of the organisation.¹⁴ Although the EAC Treaty indicates an intention by the Community to grant jurisdiction to the EACJ over human rights, this has not yet occurred.¹⁵ While the political organs have not appeared too eager to engage in human rights issues, the EACJ has had opportunities to decide on cases dealing wholly or partly with human rights.¹⁶ In 2008, the EACJ delivered judgment in the *East African Law Society* case, with implications for human rights in the administration of the Community.

2.1 *East African Law Society and 3 Others v Attorney-General of Kenya and 3 Others (EACJ)*

The East African Law Society, the Tanganyika Law Society, the Uganda Law Society and the Zanzibar Law Society brought this action against the Attorneys-General of Kenya, Tanzania and Uganda and the Secretary-General of the East African Community, claiming that amendments made to the EAC Treaty by partner states were unlawful.¹⁷ Although the main thrusts of the application were that the Treaty amendments were done without compliance with procedural regulations in article 150 of the EAC Treaty and that the amendments were done in bad faith, issues of the right to participation and independence of the judiciary emerged. On the right to participation it was argued that the failure by the partner states to consult their citizens on the amendments deprived the citizens of their right to participate in the integration process.¹⁸ The application also sought to demonstrate that the amendments to the EAC Treaty

¹⁴ The organs of the EAC are the Summit, the Council of Ministers, the Co-ordinating Committee, the Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly and the Secretariat.

¹⁵ See art 27(2) of the EAC Treaty.

¹⁶ In the 2007 case of *Katabazi & 21 Others v Secretary-General of the EAC & Another*, Ref 1 of 2007, the EACJ had to deal with allegations of human rights violations contrary to the EAC Treaty. See also *Prof Nyung'o & 10 Others v The Attorney-General of Kenya & Others*, Ref 1 of 2006 (*Nyung'o* case). In the *Nyung'o* case, the application was for invalidation of the process and the rules made by the Kenyan National Assembly for the purposes of selecting Kenyan representatives to the East African Legislative Assembly (EALA). The application was brought on the grounds that the process and the rules violated art 50 of the EAC Treaty, which requires the election of persons to the EALA by national assemblies. The EACJ found that there had been a violation of art 50 of the EAC Treaty.

¹⁷ The amendments were made in 2007 by Kenya, Tanzania and Uganda while Rwanda was formalising its membership. The amendments were to restructure the EACJ into two divisions: a First Instance and an Appellate Division; to expand the grounds for removal of judges of the Court, to limit the jurisdiction of the Court, to set time limits for the filing of cases by individuals and legal persons, and to set grounds for appeal and deem current judges as First Instance judges and past decisions as First Instance decisions.

¹⁸ *East African Law Society* case (n 8 above) 17.

were as a result of a reaction by a partner state to the proceedings in the *Nyungo'o* case and was intended to influence the EACJ in that case.¹⁹

Dealing with the preliminary question whether the case was properly before the Court in accordance with the EAC Treaty, the EACJ took the view that provisions in the Treaty that granted residents of partner states the right of access to the Court were added to ensure participation by the people. In this context, the Court reasoned that the people had a right to challenge an alleged infringement of the Treaty.²⁰ In taking this position, the EACJ did not allow itself to be forced into adopting a restrictive approach to the interpretation of the EAC Treaty. Further on the right to participation, the EACJ concluded that article 150(5) of the EAC Treaty did not expressly require EAC partner states to carry out consultations.²¹ However, the Court was convinced that under article 7 of the EAC Treaty, participation by the people was an operational principle of the Community that required partner states to carry out consultations in relation to integration. To get to this conclusion, the Court reasoned that treaty interpretation had to be done in context, in accordance with article 31 of the Vienna Convention on the Law of Treaties.²² The approach adopted by the Court suggests that, increasingly, fundamental principles contained in founding treaties of African RECs are seen as a sufficient basis for the enjoyment of rights at the sub-regional level in the absence of organisation-specific human rights catalogues.²³ Considering the novelty of this approach, perhaps the Court could have engaged in a more detailed analysis of the connection between fundamental principles and the enjoyment of human rights.

On the question of the independence of the judiciary and interference with the processes of the EACJ, the Court came to the conclusion that the amendment extending the grounds for the removal of judges of the EACJ violated the duty of EAC partner states not to disrupt the resolution of cases before the Court.²⁴ However, the Court was not satisfied that there had been sufficient evidence to indicate that the amendments were done in bad faith. In the face of the limited evidence presented before the Court, the difficulty that confronted the Court with respect to a finding of bad faith on this issue has to be appreciated, yet it is obvious that the issue raises questions on the propriety of the response of political organs of the EAC to the Court's engagement with cases involving human rights issues.

¹⁹ One outcome of the EACJ decision in the *Nyungo'o* case was that the East African Legislative Assembly could not be inaugurated. See *East African Law Society* case (n 8 above) 33–34.

²⁰ *East African Law Society* case (n 8 above) 14–16.

²¹ *East African Law Society* case (n 8 above) 25.

²² *East African Law Society* case (n 8 above) 23–25 28.

²³ As will be shown shortly, the SADC Tribunal also relied on fundamental principles to claim competence over human rights.

²⁴ *East African Law Society* case (n 8 above) 32–34.

Questions of popular participation are generally touchy issues in the realm of national politics in most African states. Despite the provisions of article 13 of the African Charter on Human and Peoples' Rights (African Charter) which guarantee the right to participation, issues around this area have remained largely domestic matters that have managed to avoid effective scrutiny by continental human rights supervisory bodies. With respect to regional integration, popular participation becomes even more difficult to monitor as integration has essentially been an elitist affair. Coupled with the fact that RECs are not parties to the African Charter and therefore ordinarily do not fall within the jurisdiction of its supervisory bodies, the decision by the EACJ takes on special significance for a vindication of the right to participation. In the absence of any other supranational judicial forum with competence over the issues raised, the opportunity presented by the EACJ is even more significant for East African peoples.

2.2 Enforcement and implementation

As the EACJ does not have judgment enforcement mechanisms of its own, the EAC Treaty saddles its partner states with the duty of implementing the judgments of the Court.²⁵ Effectively, implementation of the judgments of the Court depends on the political will of the partner states and, to some extent, the collective pressure of other partner states on the auspices of the political organs. Since the EACJ did not invalidate the amendments, the question of implementation does not immediately arise. However, the order to review the amendments would involve action by all the partner states and the political organs of the EAC. This is yet to take place. It is important to note that there was compliance with the decision in the *Nyungo'o* case.²⁶ There is therefore an expectation that partner states would comply with the present orders of the Court.

3 The Economic Community of West African States

ECOWAS came into existence with the signing of its founding treaty in 1975.²⁷ The main aim of ECOWAS under its 1975 Treaty was to 'promote co-operation and development in all fields of economic activity ... for the purpose of raising the standard of living of its peoples

²⁵ See art 38(2) of the EAC Treaty.

²⁶ This comes out in the *East African Law Society* case (n 8 above) 37.

²⁷ At inception, there were 15 member states that made up ECOWAS. These were Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Sierra Leone and Togo. Cape Verde subsequently acceded to the ECOWAS Treaty of 1975, bringing the membership to 16. In 2000, Mauritania withdrew its membership, bringing the membership of the organisation once again to 15.

... and contributing to the progress and development of the African continent'.²⁸ Faced with the challenge of pursuing economic integration in the midst of political instability in the region, often involving armed conflicts, ECOWAS was compelled to veer into the unpredictable field of politics and security.²⁹ These and other events led to the setting up of a committee to re-examine the foundations of ECOWAS.³⁰ The results of the various activities that took place in the late 1980s and the early 1990s were the drafting and subsequent adoption of a revised ECOWAS Treaty in 1993.³¹ The aims of the organisation under the 1993 revised Treaty differ only to the extent that it envisages the establishment of an economic union in West Africa 'in order to raise the living standards of its peoples ... and contribute to the progress and development of the African continent'.³²

While there is almost no reference to human rights in the 1975 ECOWAS Treaty, the 1993 revised ECOWAS Treaty has arguably mainstreamed human rights in the agenda of ECOWAS. Building on the inclusion of the promotion and protection of human rights as fundamental principles of ECOWAS integration, political, administrative and judicial organs of ECOWAS have severally been involved in the field of human rights.³³ The ECOWAS Authority of Heads of State and Government (Authority) has adopted instruments with human rights implications, one of the most prominent of which is a supplementary protocol that empowers the ECCJ to receive and determine human rights cases.³⁴ The ECOWAS Commission has been involved in aspects of human rights work, especially in the areas of conflict resolution, election monitoring and trafficking in persons.³⁵ It was in the exercise of its expanded mandate that the ECCJ heard the cases discussed below.

²⁸ Art 2(1) of the 1975 ECOWAS Treaty.

²⁹ The intervention of the ECOWAS Monitoring Group (ECOMOG) in Liberia and Sierra Leone in the late 1980s and the early 1990s illustrates this trend. See generally F Olonsakin & EK Aning 'Humanitarian intervention and human rights: The contradictions in ECOWAS' (1999) 3 *The International Journal of Human Rights* 17.

³⁰ In 1992, a Committee of Eminent Persons was appointed to review the 1975 ECOWAS Treaty. The report of the Committee is available at the ECOWAS Commission Abuja (on file with the author).

³¹ The ECOWAS Revised Treaty was signed in Cotonou, Benin on 24 July 1993 and entered into force on 23 August 1995. The 1993 revised Treaty was signed by the then 16 member states of the organisation before the withdrawal of Mauritania in 2000.

³² Art 3(1) of the 1993 revised ECOWAS Treaty.

³³ See art 4 of the 1993 revised ECOWAS Treaty on the principles of ECOWAS. The organs or institutions of ECOWAS include the Authority of Heads of State and Government, the Council of Ministers, the Community Parliament, the Economic and Social Council, the Community Court of Justice and the ECOWAS Commission.

³⁴ Supplementary Protocol A/SP 1/01/05 Amending Protocol A/P 1/7/91 relating to the Community Court of Justice adopted in 2005.

³⁵ In 2008, the ECOWAS Commission was involved in election monitoring in Guinea, Guinea Bissau and Ghana. The ECOWAS Commission also organised workshops on trafficking in persons, including on issues of victim rehabilitation.

3.1 *Ebrimah Manneh v The Gambia* (ECCJ)

According to the facts placed before the ECCJ, in July 2006, Ebrimah Manneh, a Gambian citizen working as a journalist in The Gambia, was arrested by officials of the Gambian National Intelligence Agency in Banjul. The arrest was allegedly effected without any warrant of arrest and no reasons were given for the arrest. Between July 2006 and 16 March 2007, when a letter demanding his release was sent to the government of The Gambia by his lawyers, Manneh was denied access to his family, friends and lawyers. He was allegedly moved between police stations and detained under conditions that were 'dehumanising as detainees are made to sleep on bare floors in overcrowded cells'. Manneh was also said to have been held in solitary confinement and denied access to adequate medical care.³⁶

In his action before the ECCJ, Manneh sought a declaration that his arrest and detention by the Gambian National Intelligence Agency violated articles 4, 5, 6 and 7 of the African Charter. He also asked the ECCJ for an order mandating The Gambia or its agents to release him immediately. Manneh further asked for compensation of US \$5 million for the violations of his rights to dignity, liberty and a fair hearing. Despite being served with the processes of the court, the government of The Gambia opted not to defend the action, without giving reasons for the decision.³⁷ Considering that the government of The Gambia had voluntarily participated in a previous case brought against it before the ECCJ, it is not clear why the decision was taken not to participate in this case.³⁸ The reasons for the refusal to participate can only be the subject of speculation, yet it is significant because it is the first time a member state of ECOWAS has refused to participate in proceedings before the Court.

Notwithstanding the refusal of The Gambia to participate in the proceedings, the ECCJ proceeded to hear the case. It would be noted that the *Manneh* case was brought directly before the ECCJ without any prior attempt to approach the domestic courts of the defendant state.³⁹ While the non-participation of the defendant meant that admissibility of the case could not be challenged by the state, article 90 of the Rules of Procedure of the ECCJ allows the Court to make an admissibility determination.⁴⁰ Thus, this case affirms that the exhaustion of local remedies is not a requirement for admissibility of cases before the ECCJ.⁴¹ It has to be observed that, despite the refusal of the defendant state to react to the processes served on it in relation to the

³⁶ *Manneh* case (n 4 above) para 5.

³⁷ *Manneh* case (n 4 above) para 4.

³⁸ See *Essien v The Gambia*, unreported Suit ECW/CCJ/APP/05/05, judgment delivered on 14 March 2007.

³⁹ *Manneh* case (n 4 above) para 9.

⁴⁰ See art 90(4)(a) of the rules of procedure of the ECCJ.

⁴¹ See Ebobrah (n 3 above) on this point.

case, the ECCJ did not defer to the state for too long before taking the decision to proceed with its determination of the case. This is a refreshing departure from the practice of the African Commission on Human and Peoples' Rights (African Commission) which waits for long periods to allow state parties to the African Charter to react to complaints filed against them.⁴²

From a substantive perspective, attention has to be drawn to certain issues ignored or overlooked by the ECCJ. First, it would be noticed that in its summarisation of the plaintiff's claim, the ECCJ appears to have omitted the claims based on articles 4 and 5 of the African Charter while it added article 2 of the African Charter which does not appear in the Court's initial formulation of the claim.⁴³ Even though in the course of its determination of the issues, mention is made of the plaintiff's entitlement to the right to dignity,⁴⁴ the Court eventually still failed to consider the claim that the right to dignity of the plaintiff had been violated. In failing to determine the claims based on articles 4 and 5 of the African Charter, the Court missed the chance to pronounce on the human rights implications of overcrowded prisons and the *incommunicado* detention of persons. This contrasts with the practice of other institutions, such as the African Commission, that generally considers every single claim put forward by an applicant.⁴⁵ It is also arguable that the quantum of compensation ordered by the Court may have been higher had there been a determination and finding of liability for a violation of the right to dignity. This, it must be conceded, is now mostly academic.

The interpretation of article 2 of the African Charter by the ECCJ also makes for interesting reading. According to the ECCJ, article 2 'affirms the recognition and protection of the basic rights of the individual'.⁴⁶ While the Court's usage of article 2 to support the assertion that the African Charter confers rights on individuals and imposes duties on states is not novel,⁴⁷ it differs slightly from the common understanding of article 2 of the African Charter as a non-discrimination provision.⁴⁸

⁴² In certain cases, complaints before the African Commission are postponed for periods of three to six months or more to enable state parties to respond to the communication against them.

⁴³ Compare paras 3 & 11 of the *Manneh* case (n 4 above).

⁴⁴ See para 24 of the *Manneh* case (n 4 above). This, it can be argued, is based on art 5 of the African Charter.

⁴⁵ See *Zegveld & Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003), eg, where the detention of persons *incommunicado* and solitary confinements were held to be gross violations of Charter-based human rights.

⁴⁶ Para 25 of the *Manneh* case (n 4 above). The ECCJ quotes the whole of art 2 in this para.

⁴⁷ See eg C Heyns 'Civil and political rights in the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights* (2004) 144–145. Heyns uses the same approach by severing the first limb of art 2 for that purpose.

⁴⁸ Compare *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 49, where the African Commission stated that arts 2 and 3 of the African Charter basically form the anti-discrimination and equal protection provisions of the Charter.

The fact cannot be denied that the ECCJ is entitled to its own interpretation of the African Charter. However, the unity of human rights law in Africa would be protected if the ECCJ could take previous decisions of continental institutions such as the African Commission into account in its determination of cases. This is especially so as the Court itself recognises that 'it can draw useful lessons' from the judgments of other international courts.⁴⁹ It would further be observed, for instance, that the Court finds 'a presumption of innocence in favour of the liberty of the individual' in article 6 of the African Charter.⁵⁰ This is a strange formulation as the presumption of innocence is an express provision in article 7 of the African Charter relating to the right to a fair trial. It is thus not clear what the Court means by the formulation in question.

Another significant aspect of the *Manneh* case relates to reparation for a violation of rights in the event of a finding of state liability. The ECCJ seems to have gone into detailed research to support its resolve not to order punitive damages against the defendant state. Relying on jurisprudence from other international and municipal courts, the ECCJ came to the conclusion that the essence of human rights litigation was to terminate human rights abuses and restore rights where abuse has ended. Thus, reasoning that compensation under the African Charter is aimed at ensuring 'just satisfaction' rather than to punish violators, the Court awarded \$100 000 to the plaintiff.⁵¹ Overall, the *Manneh* case is a demonstration of a new era for human rights litigation. It remains to be seen how the defendant state will react to the award against it.

3.2 *Hadijatou Mani Koraou v Niger (ECCJ)*

In pursuit of her action at the ECCJ, Hadijatou Mani Koraou told the Court that she was about 12 years old in 1996 when she was sold for 240 000CFA in a private tribal transaction to one El Hadj Souleymane Naroua. The tribal transaction, known as *Wahiya*, consists of the acquisition of young slave girls to serve dual purposes as domestic servants and concubines. In this practice, the slave girl is called *Sadaka* and does not acquire the status of a legal wife under Islamic recommendations, even though the *Sadaka* has to be at the service of her master. Under this condition, Hadijatou worked in the fields of Naroua and suffered sexual abuse from him for the first time when she was barely 13 years old. In the course of nine years as Naroua's *Sadaka*, Hadijatou bore four children for her master of which two children survived.

⁴⁹ Para 33 *Manneh* case (n 4 above). One wonders whether the fact that the African Commission is not a court in the strict sense of the word is partly responsible for the failure by the ECCJ to consider the jurisprudence of the Commission. This is because the court makes reference to decisions of other international courts in its judgments.

⁵⁰ Para 26 *Manneh* case (n 4 above).

⁵¹ See para 39 *Manneh* case (n 4 above).

Some time in 2005, Naroua supposedly issued a slave liberation certificate to Hadijatou, but he refused to allow her to leave the household, insisting that she was from then on his lawful wife. These and other events led Hadijatou to file a complaint in the civil and customary tribunal of Konni for a declaration that she was free to lead her own life. The Konni Tribunal's finding that there was no proper marriage between Naroua and Hadijatou was subsequently, in 2006, overturned on appeal by the court of first instance of Konni. In response, Hadijatou brought an appeal before the Judicial Chamber of the Supreme Court of Niamey seeking 'application of the law against slavery and slavery-related practices'. By its decision of December 2006, the Supreme Court quashed the appeal decision of the court of first instance of Konni on grounds of a violation of the provisions of certain domestic procedural law without making a pronouncement on the slavery aspect of the application. The Supreme Court then referred the case back for review by a new panel of the lower court.

While the domestic legal processes were ongoing, Hadijatou married someone of her choice. This resulted in Naroua initiating bigamy proceedings. In May 2007, the parties to Hadijatou's marriage were found guilty of bigamy. Hadijatou and her brother were jailed despite an appeal having been lodged against the conviction. In response, counsel on behalf of Hadijatou filed a criminal complaint against Naroua for slavery in violation of Nigerian criminal laws. While this matter was still pending, the court of first instance of Konni in the returned proceedings reversed its previous position, granted Hadijatou 'a divorce', requiring a three month interval before she contracted another marriage. Soon after Naroua filed an appeal against this decision before the Supreme Court, the Criminal Division of the Niamey Court of Appeal suspended the bigamy conviction pending 'an absolute decision by the divorce judge'. It was in the face of this web of concluded and pending domestic proceedings that the action before the ECCJ was filed in September 2007.

At the ECCJ, Hadijatou sought a declaration that Niger was in violation of articles 1, 2, 3, 5, 6 and 18(3) of the African Charter. She also invited the Court to request Niger to adopt legislation to protect women against discriminatory customs, to empower courts to protect victims of slavery, to abolish harmful customary practices founded on the idea of the inferiority of women and to order the payment of fair reparation to her for the wrong she survived in the nine years of her captivity. For its part, Niger raised preliminary objections to the admissibility of the case on the grounds that domestic remedies had not been exhausted and that proceedings relating to the matter were pending before domestic courts. On the issue of the exhaustion of domestic remedies, Niger argued that the exclusion was an omission that the ECCJ ought to fill to comply with prevailing international practice.

The question of the exhaustion of domestic remedies has been a fascinating aspect of the human rights mandate of the ECCJ and this case revived the debate around this issue. In responding to the objection

raised by Niger, the Court reiterated that the non-inclusion of a requirement to exhaust domestic remedies before accessing the Court was a deliberate choice of the ECOWAS legislator.⁵² To demonstrate that this was not an unknown practice, the Court had to resort to the jurisprudence of the European Court of Human Rights (European Court) in *De Wilde, Ooms and Verspy v Belgium*.⁵³ More importantly, however, the ECCJ expressed the view that the effect of article 4(g) of the revised ECOWAS Treaty was to empower the Court to protect rights on the basis of the African Charter without necessarily following the procedure recommended for the African Commission in the African Charter.⁵⁴ In a sense the ECCJ has been consistent in its position that it can make use of the primary rules in the African Charter without having to apply the secondary rules in the Charter as those rules are directed to the African Commission.⁵⁵ The pressing question, however, is whether the existing rules of procedure of the ECCJ are sufficient for its expanded competence. Although the Court may be right that states may elect in a treaty to exclude the requirement to exhaust domestic remedies, the long-term consequences of such a practice may not be very good.

Besides the question of the exhaustion of domestic remedies, the objection on grounds of *lis pendens* raises complications in the procedure of the ECCJ. As it has been previously argued elsewhere,⁵⁶ the ECCJ has given the impression that it would not be eager to entertain cases that have been previously decided by national courts of ECOWAS member states because the ECCJ is not a court of appeal over national courts.⁵⁷ Clearly, in this case, Hadijatou had several cases pending before the national courts on the issue. It is therefore not obvious whether the ECCJ is moving away from its initial approach with respect to its relationship with national courts. That having been said, it can still appear that the ECCJ found itself able to entertain this case only because the national courts all effectively avoided the aspect of slavery in the proceedings before them.⁵⁸ If this is so, then it can be argued

⁵² Paras 40-45 *Koraou* case (n 5 above).

⁵³ European Court of Human Rights Applications 2832/66; 2835/66; 2899/66, judgment of 18 June 1971. See J Allain '*Hadijatou Mani Koraou v Niger* (2009) 103 *American Journal of International Law*. Allain takes issue with the Court's findings and especially the application of the European Court's decision.

⁵⁴ Para 42 *Koraou* case (n 5 above).

⁵⁵ See eg *Essien* case (n 38 above) para 27, where the ECCJ took the position that the requirement in art 56 of the African Charter is directed at the African Commission specifically.

⁵⁶ ST Ebobrah 'A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice' (unpublished research report submitted to the Danish Institute for Human Rights in December 2008) 15.

⁵⁷ See eg *Ugokwe v Federal Republic of Nigeria*, unreported Suit ECW/CCJ/APP/02/05 para 32 and *Keita* case (n 24 above) para 31.

⁵⁸ In para 83 of the *Koraou* judgment (n 5 above), the ECCJ expressed displeasure that the national courts did not denounce the slave status of Hadijatou.

that the Court has not moved away from an approach that will create difficulties for the creation of judicial hegemony in its favour.

Not for the first time, the case presented an opportunity for the ECCJ to exercise its authority to move from the usual seat of the court to locations within the ECOWAS community when the circumstances of a case so require.⁵⁹ The benefit this holds for indigent litigants cannot be overemphasised.

The ECCJ also used the chance to clarify the purport of article 10(d)(ii) of the 2005 Supplementary Protocol of the ECOWAS Court. The ECCJ emphasised that the provision was aimed at avoiding the exercise of conflicting jurisdiction by international judicial *fora*.⁶⁰ Effectively, this interpretation means that *lis pendens* can be raised as a bar in relation to international judicial proceedings but not in relation to national proceedings. Two important points arise here. First, one possible consequence of the absence of a requirement to exhaust domestic remedies is invoked in the sense that concurrent proceedings can emerge before national courts and the ECCJ on human rights issues in West Africa. This potentially may lead to the abuse of judicial processes. The second point is whether the approach adopted by the ECCJ will apply to proceedings before the African Commission since that body is a quasi-judicial body rather than an international court. If such an approach is adopted, the threat of fragmentation would certainly become bigger. There is therefore a need for the relevant institutions to address these concerns. Niger's final attempt to prevent the case from being determined was in the form of an argument that Hadijatou was not qualified to bring the claim as she was no longer a slave at the time she commenced the action.⁶¹ Despite declaring the late objection inadmissible, the ECCJ went on to state that 'it should be underlined that since human rights are inherent to human beings, they are "inalienable, imprescriptible and sacred" and do not suffer any limitation'.⁶² While the intention of the Court may be positive to the extent that the formulation is used to affirm Hadijatou's right to make the claim, the formulation is problematic. It fails to acknowledge the fact that human rights litigation may be limited in several ways, including by statutory limitation provisions.⁶³

In terms of restricting itself to judicial powers granted under ECOWAS law, the ECCJ used this case to express its reluctance to exceed its mandate. Reacting to the invitation by Hadijatou for it to request Niger to engage in legislative reforms, the Court stressed that its mandate with

⁵⁹ The ECCJ applied art 26 of the 1991 Protocol of the Court when it moved to Mali in the case of *Keita v Mali*, unreported Suit ECW/CCJ/APP/05/06.

⁶⁰ Paras 49 to 53 *Koraou* case (n 5 above).

⁶¹ This argument was raised in the final brief submitted by counsel for Niger. See para 54 *Koraou* case (n 5 above).

⁶² Para 54 *Koraou* case (n 5 above).

⁶³ Art 56(6) of the African Charter is a good example of such statutory limitation.

respect to human rights was restricted to an examination of concrete cases in terms of article 9(4) of the 2005 Supplementary Protocol of the Court. The message being sent out here appears to be that the Court does not intend to replace the African Commission as a supervisory body over the African Charter. Restrictive as this may appear, it is consistent with the principle of limited powers in article 6(2) of the revised ECOWAS Treaty and in international institutional law generally. In the same vein, the ECCJ declined the invitation to interpret slavery as a crime against humanity in terms of the Rome Statute of the International Criminal Court.⁶⁴ In light of the possibility of state resistance to its enlarged competence, it is arguable that the approach of the Court in this regard is understandable and sustainable.

Having disposed of the state's objections to the admissibility of the case, the ECCJ had to address the complaints of discrimination on grounds of gender and social status, violations for slavery and slave-related practices as well as arbitrary arrest and detention. While finding that Hadijatou suffered discrimination, the Court took the view that the discrimination could not be attributed to the state of Niger. It would appear that the Court's finding of a violation in this regard was based on social origin rather than discrimination based on sex.⁶⁵ Thus, it may be that, in the Court's opinion, Hadijatou suffered inferior treatment as a result of her social status rather than as a result of her sex. The other aspect of the finding on discrimination that attracts attention is the question of state responsibility (or the lack of it) for the discrimination suffered by Hadijatou. It is difficult to justify the finding that the state had no responsibility for the discrimination suffered by Hadijatou. The obligation of states in respect of human rights includes the duty to protect people from a violation by third parties. This the state has to do by putting legislative and other measures in place for the benefit of individuals, including the most vulnerable.⁶⁶ In absolving the state of responsibility, there is nothing to indicate that the ECCJ made an assessment of the measures put in place by the state to protect Hadijatou from discrimination on grounds of her social origin. Such an assessment could have strengthened the finding on this ground.

On the issue of a violation for slavery and slave-related practices, the ECCJ had no difficulty in finding that the conditions in which Hadijatou found herself in the nine years of her forced stay in the household of Naroua satisfied the definition of slavery in various instruments. In reaching its decision, the Court had to resort to aspects of international criminal law to the extent that it referred to the case law of the

⁶⁴ Paras 87 to 89 *Koraou case* (n 5 above).

⁶⁵ Para 96(1) *Koraou case* (n 5 above).

⁶⁶ See *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003) para 51, where the African Commission stated that a state violates art 1 of the African Charter only when it fails to enact relevant legislation to give force to Charter rights.

International Criminal Tribunal for Yugoslavia (ICTY).⁶⁷ In reaching its decision on this point, the Court searched deep for state responsibility for the violation caused by an individual. Hence, even though it found that Niger had appropriate legislation to criminalise *Wahiya* and related slave practices, the Court still found administrative and judicial protection provided by the state to be inadequate.⁶⁸ This is a significant departure from the approach adopted in relation to the issue of discrimination. Its importance is that it defines state obligation under article 1 of the African Charter beyond the mere enactment of legislation, and requires active enforcement of legislations so enacted.

In relation to the claim that Hadijatou's arrest and detention were arbitrary, the ECCJ once again demonstrated its reluctance to evoke judicial tension *vis-à-vis* national courts. The Court came to the conclusion that as far as detention is founded upon a judicial decision, it constitutes a legal basis that the ECCJ could not assess whether it was ill-founded or not.⁶⁹ The difficulty with this position is that the Court fails to take into account the possibility of domestic laws and domestic judicial proceedings failing to meet 'internationally laid down norms and standards'.⁷⁰ In this regard, it is submitted that the Court has to abandon the 'ostrich' approach to its relation with national courts if it wants to remain relevant for the protection of human rights in West Africa.

In a number of ways, the *Koraou* case represents one of the most complicated human rights cases that have come before the ECCJ. In terms of procedural and substantive issues, the case gives insights to some of the challenges that the ECCJ has to address in order to effectively exercise its expanded jurisdiction and live up to the expectation of people in West Africa.

The difficulties that exist with respect to human rights litigation before continental human rights supervisory bodies apparently amplify the importance of the decisions taken by the ECCJ. Delays, complications of the requirement to exhaust local remedies, the quasi-judicial nature of its decisions and difficulties with implementation are some of the issues that the African Commission has continued to struggle with. The African Court has not yet commenced full operations. Even when it does, the obstacle posed by qualified access to individuals and non-governmental organisations (NGOs) makes the African Court an unlikely forum for immediate human rights litigations of this nature. As such, the human rights competence of the ECCJ and its ability to deliver judgments of this nature are viable alternatives for victims of violations. The risk in the absence of the requirement to exhaust local remedies has been mentioned already. It remains a thorny issue with respect to the human rights work of the ECCJ. On the other hand, however, the

⁶⁷ See paras 77 to 79 *Koraou* case, (n 5 above).

⁶⁸ Paras 84 to 86 *Koraou* case, (n 5 above).

⁶⁹ Para 91 *Koraou* case (n 5 above).

⁷⁰ See *Purohit v The Gambia* (n 48 above) para 64.

benefits of ease of access to the human rights jurisdiction of the ECCJ cannot be overemphasised. For the most vulnerable and the very poor, the practice brings a ray of hope. The ability of the ECCJ to move to its sitting for the benefit of the poor and vulnerable is also a factor that improves access to judicial mechanisms.

3.3 Enforcement and implementation

Article 24 of the 2005 Supplementary Protocol of the ECCJ requires ECOWAS member states to implement judgments of the ECCJ in accordance with the civil procedure rules of the member state against which judgment has been given. Failure by a member state to fulfil obligations to ECOWAS attracts sanctions to be imposed by the Authority.⁷¹ This provision arguably gives the Authority a role to play in ensuring compliance with decisions of the ECCJ. The *Manneh* case raised an opportunity for the Authority to apply its powers to sanction a member state as The Gambia has refused to comply with the judgment. Since there seems to be no procedure by which the Authority may be moved to act, counsel in the *Manneh* case resorted to sending a letter to the President of the ECOWAS Commission to act against The Gambia.⁷² Despite the letter, there has been no indication that the Commission will seek to enforce the judgment as it has no role in the process. This raises the question of the will of the political organs to enforce the human rights judgment of the ECCJ, just as much as it raises issues around the procedure to move the Authority. Notwithstanding this challenge and in spite of its reinforcement of the enforcement difficulties of international tribunals, it has to be pointed out that this is not a peculiar problem of international tribunals. Much as it is argued that domestic courts do not have problems of enforcement, it has to be pointed out that ease of enforcement in domestic systems is usually in relation to judgments against individuals. Municipal law also lacks processes to compel pariah states to comply with decisions of their own domestic courts. Governments comply with judgments only because they deem it in their interest to comply. It is worth noting, however, that Niger indicated an intention to comply with the judgment in the *Koraou* case.⁷³

4 The South African Development Community

In 1980, the Southern Africa Development Co-ordination Conference (SADCC) was founded as an alliance of Southern African states to

⁷¹ Art 77 of the 1993 revised ECOWAS Treaty.

⁷² 'Nigerian lawyer writes Chambas on detained Gambian journalist' *Panapress*, <http://www.panapress.com/newslatf.asp?code=eng045982&dte=05/08/2008> (accessed 12 April 2009).

⁷³ Niger's Minister of African Integration quoted in portlandtribune.com/us_world_news/story.php? (accessed 11 April 2009).

respond to the challenges raised by the policies of the then minority government in the Republic of South Africa.⁷⁴ It was the transformation of the SADCC that resulted in the establishment of the Southern African Development Community (SADC) in 1992.⁷⁵ Following the amendment of the SADC Treaty in 2001, the Community increased its objectives to include the promotion of⁷⁶

sustainable and equitable economic growth ... that will enhance poverty alleviation ... enhance the standard of living and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.

SADC also aims to 'consolidate, defend and maintain democracy, peace, security and stability'; 'combat HIV and AIDS or other deadly and communicable diseases' and 'mainstream gender in the process of community building'.⁷⁷ In its present character, SADC is arguably not restricted to economic integration.

Similar to the EAC and ECOWAS, SADC recognises human rights, democracy and the rule of law as principles in accordance with which it will act in pursuit of integration.⁷⁸ Unlike the other RECs, however, SADC has adopted its own human rights catalogue in the form of a Charter of Fundamental Social Rights. Implementation of the Charter lies with national institutions and the regional structures.⁷⁹ While not much seems to have been achieved under the Charter, the SADC Summit of Heads of State and Government (Summit) adopted a Regional Protocol on Gender and Development in 2008.⁸⁰ Though it does not have a clear human rights mandate, the SADC Tribunal, in 2008, heard cases with implications for human rights.

4.1 *Ernest Francis Mtingwi v SADC Secretariat (SADC Tribunal)*

Mtingwi brought this action against the SADC Secretariat alleging unlawful and unfair termination of a contract of employment. The main thrust of Mtingwi's case is that the decision to revoke or terminate the appointment violated the principles of natural justice as he

⁷⁴ See Viljoen (n 9 above) 492; also see generally GH Oosthuizen *The Southern African Development Community: The organisation, its policies and prospects* (2006). The founding members of the SADCC were Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

⁷⁵ The Treaty of SADC was signed in Windhoek, Namibia, on 17 August 1992 but was amended in 2001. The current member states of SADC are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

⁷⁶ See art 5(1)(a) of the Consolidated SADC Treaty. The Treaty is available at <http://www.sadc.int/index> (accessed 11 April 2009).

⁷⁷ Generally see art 5 of the Consolidated SADC Treaty.

⁷⁸ Art 4 of the Consolidated SADC Treaty.

⁷⁹ Art 16 of the SADC Charter of Fundamental Social Rights.

⁸⁰ See Final Communiqué of the 28th Summit of SADC Heads of State and Government, <http://www.sadc.int/index/browse/page/203> (accessed 17 February 2009).

was not given an opportunity to be heard. He also argued that the decision amounted to unfair industrial or labour practices under the International Labour Organisation (ILO) Termination of Employment Convention. The main defence put forward by the Secretariat was that the appointment only took effect from the date that an employee arrives in the country where the duty station is located.⁸¹ Thus, it was further argued, the contract of employment had not become effective. In its judgment, the SADC Tribunal concluded that the rights in the ILO Termination of Employment Convention 1982 could only be enjoyed by persons who are employees and as such could not be apply in favour of Mtingwi.⁸²

Clearly, this case relates more to labour law and the law of contract than it does to human rights. However, it is important to observe the position that rights contained in the ILO Convention can be enjoyed by employees of SADC even though SADC as an organisation is not a party to the ILO Conventions. While it would be understandable to apply such international human rights instruments against member states that are parties to those instruments, the basis for the application of international instruments to the organisation as an entity is not clear. A considered pronouncement by the Tribunal in this direction would have been invaluable to the development of jurisprudence in this regard.⁸³

4.2 *Campbell and 78 Others v Zimbabwe (SADC Tribunal)*

The *Campbell* case is interesting for the issues that arise from the main judgment itself as well as from the rulings relating to the interim applications that were attached to the case.⁸⁴ The original application in the case was filed in October 2007 by Mike Campbell (PVT) Limited and William Michael Campbell (original applicants) against Zimbabwe (respondent). The application challenged the acquisition of applicants' farmland by the Zimbabwean authorities under section 16B of the Constitution of Zimbabwe as introduced by Amendment 17 of 2005.⁸⁵ Along with the main application, the original applicants filed an application for interim measures to maintain the *status quo* in

⁸¹ This is based on a joint reading of the letter of employment and Rule 14.2.6 of the *SADC Administration Rules and Procedures handbook*.

⁸² *Mtingwi* case (n 6 above) 15.

⁸³ Compare the arguments whether the European Union as an organisation should be bound by the European Convention on Human Rights (ECHR) without a formal accession to that instrument, separate from the ratification of the ECHR by individual member states.

⁸⁴ The *Campbell* case (n 7 above) is seminal in the sense that it is the first matter brought to the Tribunal by an individual seeking protection for human rights against a member state of SADC. Between October 2007 and November 2008 when final judgment was delivered, the SADC Tribunal entertained and gave its ruling in five different interim applications.

⁸⁵ See the *Campbell* case (n 7 above) 8.

respect of the land, the subject of the application.⁸⁶ These applications were made while a similar matter was pending before the Supreme Court of Zimbabwe. In addition to objections that the application missed procedural timelines, Zimbabwe argued at the hearing of the interim application that local remedies had not been exhausted so that the matter was not admissible.⁸⁷

First satisfying itself that it had jurisdiction over the claim and overruling the objections raised by Zimbabwe, the Tribunal granted the interim order sought by the original applicants pending the determination of the main action before the Supreme Court of Zimbabwe. Soon after the grant of the order, an application was made by 77 other persons to intervene in the proceedings on grounds of similar interests against Zimbabwe. The new applicants also requested interim measures against Zimbabwe. On 28 March 2008, when the applications to intervene and for interim measures were granted in favour of the new applicants, the Tribunal also consolidated the new application with the original action.⁸⁸ On the same day, another application to intervene was filed by other persons claiming interest against the original applicants.⁸⁹ This application was dismissed on the grounds that the Tribunal did not have competence over disputes between individuals.⁹⁰ On 17 June 2008, another application to intervene was filed by some others claiming interests against the original applicants and this was also dismissed on the grounds of being a dispute between individuals.⁹⁰ It was after this barrage of interim applications and rulings that the case was finally set for determination.

It has to be stated that the rulings themselves contain matters of great importance to clarifying human rights litigation before the SADC Tribunal. The granting of interim measures before the Tribunal was properly seized of the main matter demonstrates a preparedness not to make orders that would turn out to be academic. More interesting, however, is the Tribunal's position that in the decision to entertain an application for interim measures in urgent situations, the requirement to exhaust local remedies does not apply.⁹¹ While it may appear controversial since a case has to be filed before an application for interim measures can be brought, the position of the Tribunal in this regard

⁸⁶ *Campbell & Another v Zimbabwe (Campbell interim 2007)*, SADC (T) Case 2/2007, ruling of 13 December 2007 2.

⁸⁷ *Campbell interim 2007* (n 86 above) 7.

⁸⁸ See *Gideon Stephanus Theron v Zimbabwe & 2 Others*, Case SADC (T) 2/08; *Douglas Stuart Taylor-Freeme & 3 Others v Zimbabwe & 2 Others*, Case SADC (T) 03/08; *Andrew Paul Rosslyn Stidolph & 58 Others v Zimbabwe & 2 Others*, Case SADC (T) 04/08; and *Anglesea Farm (Pvt) Ltd v Zimbabwe & 2 Others*, Case SADC (T) 06/08 (consolidated) 8. The interim measure was not ordered in respect of the last three applicants as their eviction had been completed at the time of the application.

⁸⁹ *Albert Fungai Mutzie & Others v Campbell & 2 Others*, Case SADC (T) 8/08.

⁹⁰ *Nixon Chirinda & Others v Campbell & 2 Others*, Case SADC (T) 9/08.

⁹¹ *Campbell interim 2007* (n 86 above) 7-8.

is logical as holding otherwise would have meant that states can use all available means to delay a pending matter in order to destroy the *res* in the matter before the Tribunal can properly be seized. It is also significant that the Tribunal found itself as lacking the competence to adjudicate in matters between individuals in two of the interim applications. If for nothing else, the lack of competence to hear disputes between individuals is part of what qualifies the Tribunal as an international court.⁹² Another very important issue that arose as an interim matter in this case is the question of the enforcement of decisions of the Tribunal. Although the records indicate that the representative of the Zimbabwean government had undertaken to comply with the interim measures ordered by the Tribunal, the applicants adduced evidence to show the intention not to comply.⁹³ Following proceedings that established non-compliance by the government of Zimbabwe, the Tribunal took a decision in accordance with article 32(5) of the Protocol on the Tribunal to make a report of non-compliance to the Summit of SADC.⁹⁴ This procedure shows the handicap of international judicial institutions in terms of ability to enforce their own decisions, but it also demonstrates that political organs of international institutions are vital for the creation of a culture of compliance.

At the hearing of the substantive action, the applicants argued that the enactment and implementation of constitutional Amendment 17 by Zimbabwe were in breach of the state's obligation under the SADC Treaty. The applicants argued further that Amendment 17 also denied them access to court in relation to acquisition of their lands, subjected them to racial discrimination and denied them compensation in respect of the acquisition.⁹⁵ It is important to note that in the formulation of their claims, the applicants relied essentially on the SADC Treaty as the source of the rights. From a human rights perspective, the most important challenge raised by the respondent was that the Tribunal lacked jurisdiction to entertain the action under the SADC Treaty. In response to the claims, the state's approach was to deny that it violated the rights of the applicants by enacting and implementing Amendment 17.⁹⁶ This, arguably, is a recognition that compulsory acquisition of land on racially-discriminative grounds, without granting access to court for determination of the validity of the acquisition and payment of compensation, is a violation of rights.

Clearly, the most important question in this case as distilled by the Tribunal was whether or not the Tribunal had jurisdiction to entertain

⁹² Compare the ECCJ which entertained a dispute with only individuals as parties in *Ukor v Laleye*, unreported Suit ECW/CCJ/APP/01/04.

⁹³ See the ruling of 18 July 2007 in the *Campbell* case (on file with the author).

⁹⁴ By the organisational structure of SADC, the Summit of Heads of State and Government is the highest authority of SADC.

⁹⁵ *Campbell* case (n 6 above) 12-13.

⁹⁶ *Campbell* case (n 6 above) 15-16.

an application claiming the violation of human rights by a SADC member state. This is especially as, unlike the ECCJ, the Tribunal has no express statement of competence to determine human rights cases. As far as the Tribunal was concerned, its competence to determine disputes relating to the interpretation and application of the SADC Treaty was sufficient to cover human rights cases.⁹⁷ In this context, the Tribunal was not convinced that the absence of an instrument cataloguing human rights under the SADC framework constituted a bar to its jurisdiction. In determining whether the action of the state has violated the principles of human rights, democracy and the rule of law that member states were obliged to respect under the SADC Treaty, the Tribunal did not consider itself as 'borrowing standards from other treaties' or as 'legislating for the member states'.⁹⁸ The Tribunal even interpreted article 21(b) of its Protocol to mean that it can 'look elsewhere to find answers where the Treaty is silent'.⁹⁹ Considering that human rights protection is not listed as an objective of SADC and the Tribunal does not have a clear mandate in the field of human rights, a more detailed consideration of the objections by Zimbabwe would have been invaluable.

The approach taken by the Tribunal suggests that it considers the statement of fundamental principles contained in treaties as important tools to shape the conduct of member states and the organisation itself. The views of the Tribunal are also important to the extent that they give room for human rights claims based on the SADC Treaty to be linked with rights in instruments such as the African Charter. Other restatements of international law that emerge at this early stage of the judgment were the recognition of the requirement to exhaust local remedies and exceptions to the application of the rule,¹⁰⁰ and the fact that states cannot rely on national law to avoid international treaty obligations.¹⁰¹

It is also important to note that in the determination of the substantive issues in the matter, the Tribunal considered the jurisprudence of treaty supervisory bodies in the three main regional human rights systems as well as case law from certain national systems. In doing this, the Tribunal does not only give life to the otherwise empty obligation in article 4(c) of the SADC Treaty, but seemingly prepares itself to avoid a decision that would conflict with the interpretations of the other bodies. This is important for the purpose of preserving the unity

⁹⁷ *Campbell case* (n 7 above) 17-18.

⁹⁸ See the arguments put forward by the respondent state on 23 of the *Campbell case* (n 7 above).

⁹⁹ As above. Art 21(b) of the Protocol on the Tribunal enjoins the Tribunal to develop its own jurisprudence 'having regard to applicable treaties, general principles and rules of public international law'.

¹⁰⁰ *Campbell case* (n 7 above) 19-21.

¹⁰¹ See 25 of the *Campbell case* (n 7 above).

of international law, especially with regard to the African Commission. This attitude, it is submitted, is preferable to the approach of the ECCJ which does not appear eager to refer to decisions of the African Commission even though it applies the African Charter directly.

The Tribunal's consideration and pronouncements on the substantive issues of denial of access to court and non-payment of compensation are essentially straightforward and uncontroversial statements of applicable law. With regard to the question of racial discrimination, complications appear in the divergence of opinion among the judges.¹⁰² While the majority of the judges seemed to recognise that affirmative action was permissible, they appeared to take the view that if land acquisition was undertaken to benefit few in the political class, that would amount to discrimination.¹⁰³ Clearly, like their dissenting brother judge, the majority did not find the Zimbabwean law under consideration discriminatory on face value. They therefore had to dig into General Comments of the Committee on Economic, Social and Cultural Rights to import and apply theories of formal and substantive equality as well as direct and indirect discrimination.¹⁰⁴ This, together with the robust reference to other human rights instruments ratified by Zimbabwe, demonstrates a recognition of the universality of human rights. However, taking into account the dissenting opinion on the issue of racial discrimination, perhaps the majority should have shown a stronger link between Amendment 17 of the Zimbabwean Constitution and an intention to subject the applicants to an unfavourable treatment by the simple reason of their race.

Notwithstanding the fact that the judges of the SADC Tribunal were not appointed by reason of specific qualifications in human rights, the Tribunal has shown strong judicial character in its determination of the *Campbell* case. It has clearly positioned itself as a forum to which citizens of SADC member states can turn when national courts are unable or unwilling to protect human rights. This layer of protection is vital and should be encouraged to grow. In the face of the difficulties already identified above in relation to human rights litigation before continental bodies and the peculiar circumstances of Zimbabwe, the courage of the Tribunal is commendable. It is also significant that fundamental principles and other provisions in the SADC Treaty have been brought to life in favour of human rights.

¹⁰² It is interesting that, unlike some other systems, there is room for dissenting judgments and the dissenting opinion of Judge OB Tshosa on whether Amendment 17 amounted to racial discrimination is relevant.

¹⁰³ See 53 of the *Campbell* case (n 7 above).

¹⁰⁴ See 49-50 of the *Campbell* case (n 7 above).

4.4 Enforcement and implementation

Article 32 of the SADC Protocol on Tribunal and Rules of Procedure deals with enforcement and execution of the judgments of the SADC Tribunal. It places a duty on member states against which judgment is given to enforce such judgments in line with the municipal procedure for the enforcement of foreign judgments. The provision requires the Tribunal to make the determination whether there has been a failure to comply with its judgment. However, the duty to take measures to ensure compliance lies with states and their institutions, while the Summit has the ultimate duty to take appropriate action after a finding by the Tribunal of non-compliance. In the *Campbell* case, the Tribunal's finding that Zimbabwe had failed to comply with the interim measures was a litmus test for the Community, but especially for the Summit. The approach adopted by the Summit has been to request the Ministers of Justice of SADC member states to advise the Summit on the appropriate action to be taken. The result of this process is fundamental as it will determine how member states will react to judgments of the Tribunal. Short of sanctions, the only other tool at the disposal of the Summit may be political pressure. It would be interesting to see which way the Community will go in this regard.

5 Conclusion

The protection of human rights in Africa is an ongoing struggle that is inextricably linked to the wellbeing of Africans. The pursuit of the goals of economic integration on the continent would be meaningless if conflicts prompted by human rights violations at national levels are allowed to continue unabated. Thus, in moving into the field of the judicial protection of human rights, sub-regional courts are only contributing to the consolidation of economic integration. They have therefore not really deviated from their original purpose. If there were questions about their suitability for the role of guardians of human rights, they have not gone away completely but these cases are an indication that sub-regional courts are by no means capable protectors.

The challenges that emerge with RECs taking on greater and increasing powers similar to governmental powers of member states without being subject to judicial control in the exercise of these powers are ones that the traditional continental human rights bodies may not have been able to meet. In this regard, the involvement of sub-regional courts in the field of human rights is a positive development. Similarly, the clear difficulties that have trailed the functioning of the African Commission and the consequent effect on human rights protection in Africa had long demonstrated the need for alternative *fora* for supranational human rights litigation. The obvious benefits that the involvement of sub-regional courts in human rights litigation brings for the most

vulnerable in the context of easy access to justice, speed in the conclusion of cases, rendering of binding decisions and relative progress in implementation are attractive incentives for support of these emerging systems. In light of the continuing struggles of the African human rights court, the potential of these sub-regional mechanisms cannot be overemphasised. There are obvious difficulties in the practices and lessons to be learnt, but these systems can only get better as time goes by. It is only hoped that human rights practitioners, activists and lawyers will contribute to the proper growth of the sub-regional systems.

Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child

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Summary

The 12th and 13th meetings of the African Children's Committee were held in November 2008 and April 2009 respectively. With the African Children's Charter entering its 10th year since entry into force, the real work of the African Committee is now beginning. With the consideration of the first country reports to the African Committee, the benefits of a regionally-specific child rights treaty has begun to become apparent. The recent establishment of a formal grouping of civil society organisations and individuals dedicated to furthering the regional influence of the African Children's Charter (first mooted in 2004!) comes at an opportune time. Despite some of the recurring shortcomings in the work of the Committee, it is hoped that the development of a strategic plan for the Committee's work for the period 2010 to 2014 will lay some of these concerns to rest.

1 Introduction

The 11-member African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) monitors

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the implementation of the African Charter on the Rights and Welfare of the Child (African Children's Charter).¹ The 12th session of the African Children's Committee, first inaugurated in 2001, took place in Addis Ababa, Ethiopia, from 3 to 5 November 2008. It was attended by nine members, above the seven members required to form a quorum,² and the meeting was, in some respects, a breakthrough due to the consideration of the first state reports under the African Children's Charter. The 13th session took place in Addis Ababa, Ethiopia, from 20 to 22 April 2009, and was followed by a pre-session for the consideration of five state party reports. This occasion, to an extent, developed further the emerging Committee role regarding the consideration of state party reports submitted under the Charter.

As is customary,³ this overview of the proceedings of the two most recent sessions of the Committee is provided both in order to popularise the African Children's Charter, and to give broad support to the work of the African Children's Committee. In this update, attention is paid to the new membership of the Children's Committee that took effect at the 12th session; to expert presentations made at the meetings under discussion; to the question of the electronic availability and accessibility of information pertinent to the developing work of the African Children's Committee and other related matters. Under discussion will also be the presentation of the two country reports that were made at the 12th session, as well as the pre-session meetings held to consider five submitted reports following the 13th session, and a brief highlight to the first children's rights discussion at the Civil Society Forum that

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 *International Journal on Children's Rights* 127; D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child (2002) 10 *International Journal on Children's Rights* 157; A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Children's Committee of Experts: Raising the gauntlet' 2002 (10) *International Journal on Children's Rights* 179; M Gose 'The African Charter on the Rights and Welfare of the Child', Community Law Centre, University of the Western Cape, 2002.

² Art 38(1) African Children's Charter.

³ For a report on the 5th, 6th and 7th meetings of the African Children's Committee, see B Mezmur(a) 'The African 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; J Sloth-Nielsen & B Mezmur 'Win some, lose some: The 10th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 207; and B Mezmur & J Sloth-Nielsen 'An ice-breaker: State party reports and the 11th session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 596.

preceded the 44th meeting of the African Commission on Human and Peoples' Rights (African Commission) on 8 November 2008. Significantly, attention is also drawn to a Civil Society Forum to support the interactions of civil society around the African Children's Committee that was inaugurated prior to the 13th meeting of the Children's Committee in April 2009.

2 Some procedural and administrative matters

The 12th meeting of the African Children's Committee was initiated by the inauguration of four new committee members, the terms of office of four members having come to an end immediately prior to this. These committee members were appointed at the meeting of the African Union's Executive Council at its meeting in June 2008 in Sharm El Sheikh, Egypt. They are Mrs Agnes Kabore (Burkina Faso), Mr Ramasoely Andianirainy (Madagascar), Mr Cyprien Yanclo (Benin) and Mrs Maryam Uwais (Nigeria). They replace members from Burkina Faso, Ethiopia, Nigeria and Togo.

The conclusion is inescapable that there is now a bias towards French-speaking membership of the current committee. In addition to the four new appointees, of whom three are French-speaking, an examination of the language of committee members whose terms did not expire revealed that three members were also French-speaking. However, it is beneficial that the new Chairperson, Mme Diakhate Seynabou, is proficient in both English and French.

The African Children's Committee is also predominantly female — only four members are male.⁴ That the position continues to attract nominees of high calibre is evident (even though the nomination and appointments process is shrouded by secrecy and *curricula vitae* of applicants are not made publicly available). It appears, for instance, that the new member from Nigeria was previously the Ombud for Children, a position which carried with it 'hands-on' expertise in human rights protection involving children. However, this by no means should be taken to condone the non-transparent process followed in nominating persons to the Committee.

It could also be argued that there is a tendency towards West African domination of the membership of the current Committee, with members from Benin, Burkina Faso, Mali, Niger, Nigeria and Senegal (virtually more than half of the Committee).⁵ This has been reinforced

⁴ The requirements of gender and geographical diversity amongst the members are discussed in Sloth-Nielsen & Mezmur (n 3 above).

⁵ See F Viljoen 'Promising profiles: An interview with the four new members of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 238, highlighting the need for geographical representation in the context of the African Commission.

by the fact that former committee members from Burkina Faso and Nigeria whose terms expired were replaced by fellow nationals.

On a different note, the 13th session, which was attended only by seven committee members, once again witnessed the absence of Mrs Pholo Mamosebi from her fourth consecutive session of the African Children's Committee. During the 11th meeting, it was agreed that, in accordance with article 14 of the Rules of Procedure, a reminder would be sent to her.⁶ The 13th session was informed that 'a draft letter had already been prepared', unfortunately hinting that communication of the situation to her was still forthcoming.

As far as the term of office of committee members is concerned, the non-eligibility of committee members for re-election has been a recurring theme. And, as has been observed before, '[t]rying to address this set-back at the eleventh hour when committee members' term of office is about to expire ... is too little, too late'.⁷ At this stage, there seems to be no follow-up being taken to address this limitation despite the fact that, under Decision EX/CL/233(VII) of 2005, paragraph 8, the Executive Council of the African Union (AU) had requested the AU Commission to study measures to renew the terms of office of committee members for another term.

During the 13th session, a closed session was held among the committee members following the opening ceremony of the session, and the agenda and programme of work were considered and adopted by the Children's Committee. The theme 'Planning and budgeting for the well-being of the child: A collective responsibility' was adopted for the 2010 Day of the African Child (DAC). The main agenda item for the 13th meeting would appear to have been the adoption of the Committee Plan of Action 2010-2014.

The Chairperson opened by referring to the fact that the AU Commission had indicated that the two annual meetings were to be reduced to one for 2009, but that this was heavily resisted by the Committee who would be unable to complete the barest minimum of work in one meeting. The concession was made that there would therefore be two meetings in 2009. Given the increased workload of the Committee consequent upon the need to consider country reports from far more countries that have been submitted,⁸ it is clear that additional Committee meetings are a necessity. The Chairperson also referred to a number of international events to which the Committee had been invited, and had participated.

⁶ Mezmur & Sloth-Nielsen (n 3 above) 597.

⁷ Mezmur & Sloth-Nielsen (n 3 above) 599.

⁸ The Committee had received reports from Burkina Faso, Kenya, Mali, Niger, Tanzania and Uganda, in addition to the reports from Egypt and Nigeria which were considered at the 12th meeting, and that of Rwanda, which should have been considered during that session. A pre-session meeting to formulate the Committee's initial response to these reports was scheduled for the two days immediately following the 13th meeting.

3 Delays in taking forward the Committee programme, and length of meetings

The highlight of the 12th meeting was intended to be the presentation by government delegations of the first four country reports received under the African Children's Charter. The reports of Egypt, Mauritius, Nigeria and Rwanda had been considered at a pre-sessional working group convened by the African Children's Committee at its 11th session in May 2008. Notably, however, no delegation from either Rwanda or Mauritius materialised at the 12th meeting, hence only the delegations of Egypt and Nigeria appeared before the Committee. The contents of these sessions are described in more substantive detail below.

It has been observed that the process leading to the consideration of the first two country reports was probably unduly protracted, as the Rapporteurs from amongst the members of the African Children's Committee were appointed in May 2007, and the process of getting to the point where engagement with representatives from the state party concerned took (in all) four meetings (May 2007, November 2007, May 2008 and November 2008). The Children's Committee should take steps to address this time lag, by speeding up and telescoping processes to co-ordinate activities such as appointing Rapporteurs (can this not be done before the meetings, electronically?) and then by convening pre-sessional hearings more effectively. More frequent meetings may be required. Alternatively, it has previously been pointed out⁹ that Rule 1 of the Rules of Procedure of the Committee 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'.¹⁰ There, it was suggested that longer periods of time than the current practice of three days should be set aside for Committee meetings in order to achieve a higher output of work.

As will become evident, the scheduling of four presentations of country reports was manageable administratively in the three-day period devoted to the 12th meeting by the Secretariat. However, there is no doubt that the non-appearance of two government delegations who were scheduled to present resulted in unpressurised and relaxed periods during which those that did appear could take the floor. It remains to be seen how the Committee programme might be managed in a three-days session should the stream of state party reports start to increase dramatically.¹¹

⁹ Sloth-Nielsen & Mezmur (n 3 above).

¹⁰ Our emphasis.

¹¹ This seems more or less inevitable, given that the reporting cycle provided for under the Charter is a three-year one, in contradistinction to the five-year cycle for reporting under the UN Convention on the Rights of the Child.

This having been stated, it is notable that, although the 13th meeting of the African Children's Committee was set down for three days, as has been the usual practice, two additional days thereafter were allocated for the pre-sessional meetings. At the 12th meeting, committee members had been assigned responsibility as Rapporteurs for the five reports to be considered in the pre-sessional meetings which were to follow the 13th meeting. For the first time, the 12th meeting saw African Children's Committee members assigned to take responsibility for various themes related to the children's rights in the Charter.¹² However, since debates which gave rise to this development took place in a closed session, it is not clear what particular mandate or duties individual members are expected to fulfil in relation to the themes selected, nor how this may (or may not) advance the overall work of the Committee.

At both the 12th and the 13th meetings, the Children's Committee reported having participated in various meetings and international events, including meetings in Dakar, in Banjul and in Addis Ababa. It was noted at the 12th meeting that discussions were underway with the senior executive team of the AU to develop a strategic plan for the work of the Committee 2009-2014, linked to a budget. Indeed, this strategic plan was firmly on the table for discussion at both the Civil Society Forum meeting which preceded the 13th meeting (discussed further below), and at the meeting itself.

In terms of enhanced capacity being availed to the African Children's Committee, it emerged at the 12th meeting that a dedicated UNICEF liaison officer had taken up office as a link to the AU, which could provide for more structured co-operation, and possibly financial support, as well as acting formally as the interface between the African Children's Committee and UNICEF regional and country offices on Charter-related matters (such as the DAC).¹³ The liaison officer specially noted her role as providing support to country offices to celebrate the DAC.

4 Electronic resources and the work of the African Children's Committee

Engagement with the content of the two country reports discussed below is unfortunately at present limited to those who have access to

¹² The allocations were as follows: Children in Conflict and Natural Disaster Situations (Mr Moussa Sissoko); Violence against Children (Mme Diakhate Seynabou); Child Labour, Trafficking and Exploitation (Mrs Agnes Kabore); Education of Children (Mrs Boipelo Sheiltlamo); Administration of Justice to Minors (Mrs Maraim Uwais); Participation of Children (Mr Cyprien Yanco); The Right to an Identity (Mrs Dawlat Hassan); Integral Early Childhood Development (Mrs Koffi Marie Chantal); Vulnerable Children (Mrs Martha Koome), Survival and Development of Children (Mrs Koffi Marie Chantal), Responsibility of the Family (Mr Rasamoely Andrianirainy).

¹³ The theme for the DAC for 2009 was decided at this meeting, and is to be 'Africa Fit for Children: Call for Accelerated Action Towards Their Survival'.

paper copies or who downloaded these in the first half of 2008: For a short while, the first four country reports due to be considered by the African Children's Committee were available electronically via the website of the AU, but evidently due to pressure for web space, these could not remain permanently on the site. The website of the Children's Committee itself is completely out of date and allegedly subject to the same pressure of lack of space which resulted in the four mentioned country reports being available for a very short period only. In addition, as much as these writers could ascertain, no electronic information concerning the actual details, dates, venue or programme of the 12th or the 13th meeting ever appeared on the AU website, indicative both of the degree of marginalisation of the African Children's Committee within AU programmes, and of the desperate need for a dedicated internet domain for the dissemination of information relevant to the implementation of the African Charter and its monitoring mechanism.¹⁴ Indeed, the agenda for the 13th meeting became available only at the meeting itself, whereupon it emerged that the entire second day and all but 45 minutes of the third day were to be held in closed session, thereby excluding civil society organisation (CSO) participation practically from all but the first day's proceedings. The absence of reliable, regular and timeous information about the meetings schedule and agenda of the African Children's Committee enjoyed much attention from CSOs who participated in the Civil Society Forum, who deplored the existing situation in which there was an information vacuum.

5 State party reporting

5.1 Presentation of country report: Egypt

The Egyptian government delegation, historically, opened the floor for consideration of country reports by the African Children's Committee. An impressive government delegation, led by the head of the National Commission for Motherhood and Childhood (a co-ordinating mechanism), who is also a member of the African Children's Committee, appeared to explain the report and to answer questions. This was an exceptionally lively and thorough session, characterised by the provision of a great deal of detail in relation to legal reforms, harmonisation of law and policy with international and regional human rights standards, innovative programmes and research undertaken to strengthen programmatic development (especially concerning vulnerable groups such as street children and girls). Particular attention was paid to the recent law review process that has culminated in progressive legal reforms coming into

¹⁴ See Save the Children Sweden & Plan International *Advancing children's rights: A guide to civil society organisations on how to engage with the African Committee of Experts on the Rights and Welfare of the Child* (2009) (available only electronically).

force in June 2008, including reforms for the creation of a new juvenile justice system and the banning of the harmful cultural practice of child marriage and female genital mutilation (FGM). The successful 'social marketing programme' targeting the retention of girls in education was also highlighted as a positive way to influence traditional attitudes which are not in conformity with a children's rights approach.

It was noted by the Egyptian delegation that great strides had been made in addressing budgeting from a children's rights perspective; so too, figures showed considerable progress over time in achieving the Millennium Development Goals (MDGs); relevant indicators, such as the maternal mortality rates (68% decline between 1992 and 2005) and infant mortality rates (67% decline between 1990 and 2008), whilst the under five mortality rates showed a 72% decline over more or less the same period.

Mention was made of the challenge of giving effect to article 4(2) of the African Children's Charter in Egyptian society, since child participation was not traditionally a feature of community life. Achievements in establishing a Children's Parliament were cited, as was the central role played by Egypt in the 2006 study of the Secretary-General on Violence against Children, in so far as the country hosted the regional consultation with children. During the course of the presentation, allusions were made to the involvement of children in policy formulation, and of the simplification of key policy proposals for debates by children's forums. It was evident, though, that no children formed part of the government delegation at the African Children's Committee meeting.

There was, however, some discussion about the positive effects of the introduction of a telephone 'hotline' for children with disabilities, especially effective for poor families who can then access legal and medical advice, as well as assistive devices. It was noted by the presenter that the Egyptian legal review process did not ultimately succeed in parliament in respect of the proposal to prohibit corporal punishment in the home, as this proposal failed to attract parliamentary approval.

The government's detailed presentation was followed by trenchant questions put by members of the African Children's Committee, centring on a wide range of issues. They ranged from discussions about children who beg, children attending religious schools, child labour, street children, a discussion of a specific recent instance of a serious case of child abuse inflicted upon a child by a teacher, resulting in the death of that child, and the impact of technological innovation on child protection, including the possibility of e-mailing complaints related to abuse.

5.2 Presentation of country report: Nigeria

The overall thrust and import of the report submitted by Nigeria to the African Children's Committee has been described as follows:¹⁵

¹⁵ n 14 above, 37.

Nigeria's initial and first periodic report to the African Committee is very comprehensive and follows the outline given in the African Committee guidelines closely. It draws extensively from its recent first and second CRC periodic reports. However, it is not simply a duplication of the CRC report since the drafting process for the African Charter report involved a consultative meeting with members of civil society, international organisations and development partners. It was also validated at a stakeholders' workshop at which members of the Children's Parliament were present. The information has been updated since the CRC report was submitted and also incorporates their response to the UN Committee's Concluding Observations.

This quotation ably encapsulates the approach followed by the Nigerian delegation in its presentation to the African Children's Committee. As was the case with the delegation from Egypt, that from Nigeria can only be described as high-powered. Moreover, child representation on the team was worthy of praise, especially since the contribution was articulate and in no way tokenistic.

Much attention was focused in the presentation on the progress of the Nigerian Children's Act of 2003, which has been adopted at federal level, but is still awaiting adoption by several states, notably Islamic states (at the time of the presentation, 22 out of 36 states had passed the Act). Problems stem from the recognition in the Act of the possibility of adoption, which is generally regarded as not being recognised under Islam. However, it was also pointed out that the problematic consequences of inheritance and adoptive children can be mitigated by a will made to give a share to the adoptive child during the lifetime of the testator, and that this has encouraged people from all faiths to adopt. The age of marriage — set at 18 — also poses a formidable challenge to some states. The development of child-friendly institutions — such as family courts, a dedicated children's rapporteur in the National Human Rights Commission, a National Child Rights Implementation Committee, and the introduction of child helplines using cellular phone technology (in an environment characterised by low access to landlines) — were alluded to as substantiation for the claim that Nigeria was making considerable progress in the domestic realisation of children's rights. The creation of 34 children's parliaments in 19 states was the vehicle for giving effect to hearing children's views, and many children's clubs had been set up at state level.

The African Children's Committee raised numerous questions in response to the presentation, focusing on areas such as trafficking of children, FGM, child labour, children in prison with their mothers and corporal punishment. Programmes which respond to these concerns were thereafter highlighted, including the establishment of transit centres for trafficked children, and legislative developments to prohibit FGM and curb trafficking were explained. In addition, a Bill on the Elimination of Violence submitted in 2006 was before the National Assemblies of 10 states, which would apply for the protection of all members of the family, including children. The issue of child care centres and model crèches came up for discussion, as did child justice and

the detention of children. It was argued that, by law, children cannot be held in prison, and child desks at police stations see to it that detained children are referred back to court.

The Rapporteur, Mrs M Koome, congratulated the delegation on the collaborative effort made in preparing the state party report, which included line ministries, CSOs and children. She noted further that much progress had been made in domesticating the African Children's Charter, and that the report had been compiled with the African Children's Committee's guidelines as a framework.

In conclusion, with the consideration of the first country reports to the African Children's Committee, the benefits of regionally-specific child rights treaties have begun to become apparent. The members of the treaty-monitoring body are sufficiently familiar with local exigencies to be able to engage immediately and with authority on African issues, such as children who beg, harmful cultural practices, religious and secular conflicts of law, to cite but three specificities which rear their head in most places on the continent.

Second, it is evident that state parties are taking their reporting obligations seriously, and providing extensive and detailed data to underpin their presentations. This bodes well for the monitoring role that the African Children's Committee can play in future. In addition, the presence of a true spirit of 'constructive dialogue' between the government and the Committee is promising.

5.3 Pre-session for consideration of five reports (from Burkina Faso, Kenya, Mali, Niger, Tanzania and Uganda)

At the time of writing, the report from the pre-session working group was not available. Nonetheless, it is observed once again that, in the absence of a formal guideline, the question of who should be allowed to take part in the pre-session for the consideration of the state party reports remained unclear. In order to usher clarity, the need for guidelines along the lines of the CRC Guidelines for the participation of partners (NGOs and individual experts) in the Pre-sessional Working Group of the Committee on the Rights of the Child (CRC Pre-Sessional Guidelines) is still evident.

Since 'complementary reports' (also known as 'alternative reports'), according to rule 69 of the Rules of Procedure of the African Children's Committee, are the preserve of NGOs,¹⁶ a selected number of NGOs from the respective countries whose reports were scheduled for consideration had submitted complementary reports to the African Children's Committee. This, of course, had a major role in increasing

¹⁶ Rule 69(1) of the Rules of Procedure provides that '[t]he Committee may invite RECs, the AU, specialised agencies, the United Nations organs, NGOs and CSOs, in conformity with article 42 of the Children's Charter, to submit to it reports on the implementation of the Children's Charter and to provide it with expert advice in areas falling within the scope of their activities'.

the information base of the Committee in the consideration of the state party reports.

In connection with the pre-session, it is also important to mention that, if indeed the government delegations from Rwanda and Mauritius were invited and did not appear for the second time during the second pre-session, it would be apposite for the Committee to be pro-active and take measures. In the main, one of these measures includes considering the reports in the absence of a government delegation.

Finally, unfortunately, the concluding observations in relation to the first country reports considered were not released prior to the 13th meeting, nor was this important initial jurisprudence made available during the meeting itself. If indeed the concluding observations had not actually been prepared by this time, it would indicate some loss of momentum between the 12th and the 13th meeting. However, the official draft report from the 13th meeting highlights in passing that the concluding observations would be shared amongst committee members soon.

6 Communications (individual complaints)

Although the African Children's Committee had been seized with a communication prepared by the Centre for Human Rights of the University of Pretoria as early as 2005, the consideration of the communication was postponed until the 13th meeting.¹⁷ The appearance of this item on the agenda of the Children's Committee during the 13th session was a long-awaited positive move.

In any event, the 13th meeting session at which the communication featured on the programme was held in closed session. At the end of the 13th session, the communication had still not been dealt with and it was agreed that a response be sent to the Centre for Human Rights acknowledging receipt, and reassuring it that the necessary actions were being taken to consider the communication. The urgent need to translate the communication into French and disseminate it to all committee members was also underscored.

It is this backdrop that mainly motivated the CSO Forum to include a recommendation on the need to consider communications submitted to the African Children's Committee within a reasonable period of time. The longer the consideration of a communication takes, the more it allows the perpetuation of the violation of children's rights.

To mention but one irony, the concept of provisional or interim measures, the purpose of which is avoiding irreparable damage to victims,

¹⁷ In the official report of the 12th meeting, the communication is erroneously referred to as having emanated from the University of the Western Cape, and in the official agenda for the 13th meeting refers to the communication as having come from the University of Cape Town.

or sometimes complainants, during the course of the consideration of a communication, has received the attention of the African Children's Committee.¹⁸ If the Children's Committee takes an unduly long period of time in the consideration of a communication, the role that interim measures would play to protect and promote children's rights in Africa would be dealt a major blow.

During the 13th meeting, the attention of the African Children's Committee was drawn to the fact that another communication had been received from the Institute for Human Rights and Development in Africa based in The Gambia. It is hoped that the consideration of these communications is not unduly prolonged further.

7 Civil society collaborations and related matters

CSOs have been actively involved in African Children's Committee meetings since they began their work in 2002. There is now a growing network of support and collaboration amongst CSOs around the Children's Committee. This was alluded to substantively by Sloth-Nielsen and Mezmur in 2008.¹⁹ This trend continued in the ever-widening number of representatives and delegates who attended both the 12th and the 13th meeting, and was given a further boost with the establishment of the first Civil Society Forum around the African Children's Committee, fashioned deliberately to mirror the NGO Forum which precedes the African Commission meetings.²⁰ Significantly, the African Children's Committee meetings traditionally commence with introductory comments provided to the forum by 'partners' (as the Committee terms the diverse array of international donor organisations, academic institutions, humanitarian relief and service delivery agencies, experts and networks that attend the bi-annual meetings on a frequent basis). They share recent events, like conferences hosted or activities planned, books launched or measures taken to promote the African Children's Charter, thereby creating a solid platform for regional sharing of experience, and updating of committee members on relevant matters. Below is a highlight of the work of CSOs related to the activities of the Children's Committee,

¹⁸ Ch 2, art 2(IV)(1) Guidelines for Communications. The state concerned in a communication is to be given the chance to present an explanation or written statement containing its observations on a communication within six months. Ch 2, art 2(II)(4) Guidelines for Communications. However, if this deadline is not respected, the Committee may decide to consider the communication anyway. Ch 2, art 2(III)(4) Guidelines for Communications.

¹⁹ See Sloth-Nielsen & Mezmur (n 3 above). See also J Sloth-Nielsen & B Mezmur 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7 *African Human Rights Law Journal* 352.

²⁰ Presentation by Ms Hannah Foster of the African Centre for Democracy and Human Rights Studies at the 1st Civil Society Forum in and around the African Charter on the Rights and Welfare of the Child, Addis Ababa, 18-20 April 2009.

7.1 Observer status

It must be noted that the 'partners' mentioned above do not equate to being accorded observer status: The African Children's Committee had, by the conclusion of the 13th meeting, yet to grant observer status to any organisation, although any number of applications are known to have been submitted.²¹ The Children's Committee approved the 'Criteria for Granting Observer Status in the African Committee of Experts on the Rights and Welfare of the Child to Non-Governmental Organisations (NGOs) and Associations' in 2007, and it is possible that applications submitted before the release of these practice guidelines may not be fully compliant with the criteria that were subsequently laid out. But further to this, the criteria are also such that qualifying for the award of observer status may be out of reach for many CSOs: Not only are those who qualify required to have an organisational structure headed by a majority of persons who are African or are of African descent in the Diaspora but, in addition, they must have child representation on their governing structure. Clearly international organisations based abroad, even those working extensively with children's rights in Africa, will have difficulty meeting the first requirement, whilst most local CSOs are unlikely in practice to meet the second requirement at this stage. That the criteria for eligibility for observer status may have to be revised was debated with some ardour at the Civil Society Forum preceding the 13th meeting.

The 13th meeting was supposed to have considered applications for observer status already received in a closed session, but this item was deferred. It was agreed that the Rapporteur of the Committee (who was not present during the 13th meeting), who had been requested to compile a list of all applications received for observer status and prepare a report on them, should be sent an e-mail to request him to send the applications.²² It is predicted that the issue of who successfully obtains observer status, and what criteria are applied, may occupy the attention of both the African Children's Committee and organs of civil society in future, as this is presently an area of contention.

7.2 Presentations of research

Recent sessions of the African Children's Committee have been characterised, in addition to general partner information sharing, by more detailed presentations of research or of jurisprudential interpretation of key articles of the African Children's Charter. Accordingly, the unique

²¹ The report of the 12th meeting notes the receipt of an application for observer status from Save the Child, Sweden, from the Institute for Human Rights and Development in Banjul, and from the Botswana Centre for Human Rights. The Community Law Centre of the University of the Western Cape is known to have submitted an application before the Committee criteria were released.

²² It was also agreed that the organisations that have applied for observer status should be requested to re-send their applications in both English and French.

provisions of article 31 of the Charter (focusing on the duties of the child) were flagged, as was the best interests of the child under the 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 in Cairo, Egypt, in November 2007.²³ The discussion of the best interests principle under the Charter, as requested by the African Children's Committee, took place at the 12th session.

The presentation first highlighted an overview of the principle and underscored its historical roots in the private law domain of parental separation and divorce disputes. Its gradual extension to cover all matters affecting children was described. This was followed by a discussion of some of the complexities that are generated by the principle. Particular focus was placed on cultural relativism, and the question whether the best interests of the African child could accommodate positive African cultures and values as incorporated under article 4 of the African Children's Charter was answered in the affirmative. Concrete recommendations for the African Children's Committee to consider in relation to the principle were made, including how the principle should be expansively be utilised, in the African context, to permit an inquiry into the best interests of children beyond the contribution of state parties. Here the role of international donor agencies, that of CSOs and other actors such as multi-nationals in promoting or impeding the realisation of children's best interests comes to mind.

The Children's Committee welcomed the presentation and remarked on the need for training of judges and other stakeholders in order for them to have a balanced view of what the principle of a child's best interests entails. The need for further research on the implications of the principle in specific thematic areas was also underscored.

This presentation was followed by the sharing of research on children's mental health in the context of sexual abuse, trafficking and HIV/AIDS in selected jurisdictions in West Africa, based on a research report 'Psychosocial support to children in difficult circumstances in West Africa'. It was highlighted that there was a lack of social reintegration and support programmes for child victims who are in need of these services.

A third substantive input, from the Southern African Network to End Corporal Punishment, exhorted the African Children's Committee to take all necessary measures to support the campaign for the eradication of the scourge of corporal punishment against children, in particular through supporting calls for this form of violence to be removed as a legal sanction in the criminal justice system, in schools, as a disciplinary measure in child care institutions, and in the home.

²³ J Sloth-Nielsen & B Mezmur 'A dutiful child: The implications of article 31 of the African Children's Charter' (2008) *Journal of African Law* 159.

7.3 NGO Forum preceding the 44th session of the African Commission and children's rights

It is to be noted that, in November 2008, during the NGO Forum preceding the African Commission's 44th session, held in Lagos, Nigeria, a half-day of panel discussions on children's rights was held.²⁴ It is believed that this is the first time that children's rights have been placed at the forefront of the agenda, and the programme included addresses by Prof A Adeyemi of Nigeria, Dr Tilley Gyado of Plan International and others. Strictly speaking, the presentations during the NGO Forum held before the African Commission meeting shortly after the meeting of the African Committee on 8 November 2008 should not form part of the subject matter of an article on the proceedings of the African Children's Committee. Yet it is included here for two reasons: First, it historically placed children's rights at the centre of the African Commission's agenda and, second, it reinforces and supports the claim that better integration between the various structures of the AU stand to benefit the overall development of a regional children's rights focus.

7.4 The first Civil Society Organisations Forum in and around the African Children's Committee

As noted earlier, the first Civil Society Forum was held during the three days immediately preceding the 13th meeting. Several organisations initiated the Forum, including Plan International, the Save the Children Alliance, and the African Child Policy Forum. The Forum gathered over 60 participants from all over Africa. It was also attended by committee members and the Secretary of the Children's Committee. In fact, one part of the meeting was dedicated especially to giving input into the 2010-2014 Strategic Plan/Plan of Action of the African Children's Committee, by request from the Committee itself. By the conclusion of the event, a permanent structure had been agreed, which will ensure that the contribution of civil society to the African Committee is taken forward.

Probably the first important output of the group was a submission to the Committee itself, presented during the Committee's 13th session. It motivated for a range of proposals, not only targeting the African Children's Committee, but also suggesting a specific and concrete role for civil society.²⁵ These recommendations included a number of different issues pertaining to communications, state party reporting, and the sharing of information. It is true that the formal endorsement of the

²⁴ See CRIN 'Nigeria: Towards child survival and development: Improved partnerships for the promotion and protection of the rights of the African child' (2008) <http://www.crin.org/resources/infoDetail.asp?ID=18887> (accessed 22 April 2009).

²⁵ For a detailed report on the Civil Society Forum, see CRINMAIL http://www.crin.org/email/crinmail_detail.asp?crinmailID=3134 (accessed 29 April 2009).

CSOs Forum on and around the African Children's Committee by the participating organisations was also an important accomplishment.

8 Conclusions

With the African Children's Charter entering its 10th year since entry into force, the real work is now beginning. With the consideration of the first country reports to the African Children's Committee, the benefits of regionally-specific children's rights treaties have begun to become apparent. The task now remains for the African Children's Committee to compile and publicise its concluding observations, and to begin to develop its own jurisprudence around Charter provisions. However, with a number of additional state party reports already clamouring for attention, there is a real danger that backlogs will arise, as the second meeting of the African Children's Committee for 2009 was already under threat. We have previously argued that more time should be set aside for the Children's Committee meetings to enable existing work to be completed, a call which we reiterate. Even more to the point, it appears that little interaction between committee members amongst themselves, or between the committee members and the Secretariat, takes place between meetings, which is leaving matters falling between the cracks. The failure to promptly agree and finalise concluding observations to the state party reports presented in November 2008 is an example in point. The communication submitted in 2005 has not yet been formally responded to, and the question of observer status for applicants remains unresolved.

However, it is hoped that the development of a strategic plan for the Children's Committee's work for the period 2010 to 2014 will lay some of the above concerns to rest. A strategic plan will hopefully see the Children's Committee not only plan for the growing workload but, in addition, will draw funders to the table to enable more frequent interaction between the committee members, and between them and their Secretariat. As the Committee Chairperson noted during her opening presentation at the 13th meeting, the absence of financial resources to support the work of the African Children's Committee remains an enormous challenge.

That the CSO community is waiting in the wings to support this is evident. The establishment of a formal grouping of organisations and individuals dedicated to furthering the regional influence of the African Children's Charter (first mooted in 2004) comes at an opportune time. Members of the Committee attended the first CSO Forum as observers and participants, and later expressed the wish to work collaboratively and in partnership with the civil society community. Such collaboration can only hold promise for improving children's rights in Africa.

Finally, it must be noted that, at the time of writing, the African Children's Charter is on its way to achieving universal ratification amongst

member states of the AU, with 45 ratifications now having been received (the latest country to deposit its instrument of ratification being Zambia). The steady progress towards near universal ratification must be credited to the work of the previous Committee, and to civil society, for popularising the Charter and encouraging ratification by state parties.

Recent publication

J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective*

Ashgate (2008), 341 pages

Frans Viljoen

Professor of Human Rights Law and Director, Centre for Human Rights,
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The notion that children are rights-bearers, rather than passive recipients of their parents' and the state's paternalistic favour and largesse, is of relatively recent origin. Under international law, a treaty dealing with children's rights, specifically, was only adopted in 1989, following a similar development in respect of women. In Africa, the Organisation of African Unity (OAU) followed suit by adopting the African Charter on the Rights and Welfare of the Child (African Children's Charter) in 1990. This treaty only entered into force in 1999. In the intervening period, a number of post-1990 constitutions of African states started incorporating children's rights. In many African states, one of the prominent features of legal reform in the twenty-first century has been the further elaboration and adoption of national laws pertaining to children.

By taking stock of these developments, *Children's rights in Africa: A legal perspective* provides a very valuable survey of the emerging legal landscape. It provides a rich resource of information about the role of the United Nations (UN) Convention on the Rights of the Child and the African Children's Charter, in particular, in African states. It further collects and discusses national responses to give effect to the provisions of these treaties.

The work consists of an introduction and 17 further chapters, and is divided into two parts.

In the first part, the protective legal framework established by the African regional human rights system is very thoroughly introduced. This exposition may have benefited from a broader view of the potential role of African Union (AU) institutions such as the Pan-African Parliament, the AU Commission and the AU Economic, Social and

Cultural Council. Three issues of overarching concern are then dealt with, namely the domestication of international child rights norms; the intersection between children's rights and African customary law; and the (limited) actual and potential role of combating child poverty through justiciable socio-economic rights.

The second part covers issues of particular concern to children. The chapters in this part first survey international law standards, and proceed to assess the extent to which these norms have become reflected in the legal systems of selected African states. By collecting and unearthing a wide range of examples, these chapters collectively represent a huge advance in understanding the landscape of children's (legal) rights in Africa. The inclusion of often neglected issues, such as child participation, girl child soldiers and children living with disabilities, deserves special mention.

One of the book's most remarkable features is the richness of detail about legal reforms and developments related to children's 'legal' rights in numerous African states. A slight point of criticism is the dominance of particular countries in the surveys. Countries in East and Southern Africa, in particular South Africa, feature prominently. This imbalance may be ascribed to the location and research reach of the authors, many of whom are based in South Africa. Another contributing factor is that the most noticeable developments in this field have taken place in East and Southern African countries. It would be a challenge, but a worthwhile one, to also expand the focus of future work in this field to better represent 'francophone' Africa, so as to do justice to the diversity of the African experience.

The contributions in the book all rely heavily on the applicable legal texts provided for at the global, regional and national level. This focus is indeed reflected in the sub-title 'A legal perspective'. The editor, in the introduction, acknowledges that the 'central objective of all the contributions' is to reflect on the 'specific role that the law can play' in furthering children's rights in Africa (p 4). Contributors ably set out and discuss the provisions of international instruments and national laws. However, most of them at some point acknowledge that assessment of the actual application of the law remains problematic.

It is an almost inherent limitation that a legal analysis of children's rights will fall short of giving the reader insight into the reasons for the shortfalls of the legal discourse, and alternatives to the legal route of protection. However, the enduring tension between traditional African cultural understandings, as they relate to children, is not sufficiently accounted for. Discussions of children's rights, for example to participation, invite debates about cultural relativism and universality of human rights. Although the book includes a contribution on contextualising the issues within traditional African understandings, the focus remains on the legal dimension – customary law – rather than a broader engagement with culture.

Obviously this book only paints part of the picture concerning the plight of children and the realisation of their rights. In fact, it does not deny, and implicitly (in some instances, explicitly) evokes the need to supplement the ground covered with the insights from other disciplines. Children's rights is an area, *par excellence*, in which multidisciplinary (or inter-disciplinary) approaches may be very fruitfully explored. *Children's rights in Africa: A legal perspective* marks a significant contribution from a particular perspective, and should be located and considered in conjunction with other relevant writings on children's rights. The book's contribution is to provide an easily accessible source of existing insights - from a legal perspective.

Editorially, the book is very well conceived and rounded off. The contributions of an excellent pool of authors have been integrated and edited to read as parts of a whole.

Children's rights in Africa: A legal perspective is a path-breaking work. It is both an extremely useful source for lobbying and activism, and an indispensable starting point for research on children's rights in Africa.

Book announcement

Rwanda: Death, despair and defiance

Rwanda: Death, despair and defiance is a book about the 100 days' genocide in Rwanda that was unleashed on 6 April 1994 and that is one of the most horrific episodes of modern history. This is the first detailed account of the mass killing, its causes and consequences. The reality behind the genocide and mass murder is recounted by the survivors themselves. In words of haunting simplicity, they detail the terror and pain, the cruelty of those who possessed the power of life and death over them, the misery and degradation to which people were reduced, and the betrayal of friends and neighbours. The dozens of detailed first-hand accounts also describe the solidarity in the face of a genocidal state — the courage, compassion and resilience of so many ordinary Rwandese. This book builds up a comprehensive picture of the genocide, at a personal, communal and national level. It names those guilty of planning and implementing the killing, details their methods, and analyses the ideology of Hutu extremism. It examines violence against children and the rape of women; attacks against churches and hospitals, and the efforts of the extremists to reorganise in refugee camps. The book also examines the failure of the international community to respond effectively to the murder and genocide.

For 22 years, Dr Susan Allen has been the director of an HIV research organisation, the Rwanda Zambia HIV Research Group, and through this experience she has taken part in the international war crimes tribunal established by the United Nations for the Rwandan genocide criminals. On 27 November 2008, the organisation hosted a panel discussion including Ambassador Andrew Young, Dr Deborah Lipstadt, members of the Department of Justice and the Rwandan ambassador to talk about the state of post-genocide Rwanda and what is being done to capture the criminals today. Information and a full transcript may be viewed at <http://www.rzhr.org/genocide.htm>.

From this, we have set up the Genocide Prevention and Justice Foundation to continue hosting such seminars and work with human rights experts to seek justice for Rwandans.

The cost of the book is US \$140,00 plus shipping and handling. Contact the Genocide Prevention and Justice Foundation by e-mail at rzhrinfo@emory.edu.

AFRICAN HUMAN RIGHTS LAW JOURNAL GUIDE FOR CONTRIBUTORS

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- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34 above) 243.

- Use UK English.
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CHART OF RATIFICATIONS : AU HUMAN RIGHTS TREATIES

Position as at 31 December 2008

Compiled by: I de Meyer

Source: <http://www.africa-union.org> (accessed 30 April 2009)

	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	African Charter on Democracy, Elections and Governance
COUNTRY	Ratified/ Acceded	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			09/06/08	
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			05/12/08
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	19/06/08		19/06/08	
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	01/08/07		14/12/07	
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	09/09/08	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	07/07/08
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	30/07/05			
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	02/12/08		02/05/06	
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	53	45	45	25	24	2

* Additional declaration under article 34(6)

Ratifications after 31 July 2008 are indicated in bold

