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### Editorial

This volume of the *Journal* appears as the African Union (AU) is embarking on the elaboration of an 'African Human Rights Strategy'. This process is unfolding in parallel with a quest by the AU to reflect upon and identify the common values that should guide the process of greater integration in Africa. The identification of shared values is important to give substance and impetus to the process of integration, and to make it more people-centred. However, such a process should be inclusive, and the value system should be based on the framework of AU and other international human rights instruments. Over the almost ten years of its existence, this *Journal* has given coverage and fostered debate and discussion on many of these values. From our perspective, the values of tolerance for diversity (which are found in articles 28 and 29(7) of the African Charter) and protection of and respect for the most marginalised should be given prominence in the AU process.

As previously, this volume contains articles on a wide variety of topics, ranging from thematic comparisons between African countries to analyses of aspects of national human rights institutions (NHRIs). A total of 32 NHRIs are in place across Africa. More research on and critical engagement with these institutions are required to ensure that they realise their full potential.

In a continuation of an editorial practice that started last year, we have this year again invited experts to review human rights developments in 2009 in three domains: the AU, African sub-regional arrangements, and international criminal justice, as it relates to Africa and Africans. These contributions provide an excellent update for any researcher in these areas. Recent developments that are highlighted include the adoption of an AU Convention on Internally Displaced Persons; recently decided cases, particularly by the Southern African Development Community (SADC) Tribunal and Court of the Economic Community of West African States (ECOWAS); and the investigations by the prosecutor of the International Criminal Court (ICC) in, for example, Kenya and Sudan and the ICC's preliminary decisions in cases concerning the Democratic Republic of the Congo, as well as discussions on the crime of piracy.

The editors convey their appreciation to the following independent reviewers, who so generously assisted in ensuring the high quality of the *Journal*: Aderomola Adeola, Jean Allain, Fareda Banda, Danny

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## **THIS JOURNAL SHOULD BE CITED AS (2010) 10 AHRLJ**

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# The promotion of regional environmental security and Africa's common position on climate change

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## Summary

*The African continent is vulnerable to the consequences of climate change. Climate change poses a serious threat to peace and security on the African continent since it may, for instance, result in competition for and conflict about scarce resources. The capacity to adapt may reduce potential conflict, but there are various constraints on the capacity of African countries. Thus, support for climate change adaptation is essential. Africa may increase their adaptive capacity through international negotiations, but African states lack the resources to pursue this goal. The African Union has therefore facilitated the establishment of a common African position on climate change aimed at international climate change negotiations. Accordingly, the main aim of the article is to discuss the pursuit of the enhancement of adaptive capacity and therefore environmental security of African states through Africa's common position on climate change.*

## 1 Introduction

All of Africa is very likely to warm during this century ... The warming is very likely to be larger than the global, annual mean warming ...<sup>1</sup>

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<sup>1</sup> Intergovernmental Panel on Climate Change IPCC Fourth Assessment Report Working Group I Report (2007) 866 <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1-chapter11.pdf> (accessed 31 March 2010).



The continent of Africa is warmer than it was 100 years ago.<sup>2</sup> During the twentieth century, an average warming of 0,5 degrees Celsius has occurred on the continent. Climate variability and change will have profound effects on water accessibility and water demand, the agricultural and health sectors, energy use, coastal zones, tourism, settlements, infrastructure, and aquatic and terrestrial ecosystems.<sup>3</sup> The African continent, in particular the sub-Saharan region, is the most vulnerable of all regions to the consequences of climate change.<sup>4</sup> Climate change may have various negative consequences on the African continent. The effects of climate change may hamper the achievement of the Millennium Development Goals<sup>5</sup> and the development of African states.<sup>6</sup> It is also becoming clear that the effects of climate change threaten the enjoyment of a range of human rights, such as the rights to life, adequate food, water, health, adequate housing and self-determination.<sup>7</sup> Thus, climate change may contribute to the further marginalisation<sup>8</sup> of the African continent.

The African contribution to climate change is negligible since most African states' emissions are low. African states had contributed merely 3,6 per cent of global greenhouse gas emissions by 2000 and the *per capita* contributions from most African states remain small.<sup>9</sup> An exception is South Africa,<sup>10</sup> which has one of the highest emissions in the

<sup>2</sup> M Hulme *et al* 'Global warming and African climate change: A reassessment' in PS Low (ed) *Climate change and Africa* (2005) 29-40.

<sup>3</sup> IPCC Fourth Assessment Working Group II Report (n 1 above) 444.

<sup>4</sup> IPCC Fourth Assessment Working Group II Report (n 1 above) 443.

<sup>5</sup> GA/RES/55/2 of 18 September 2000.

<sup>6</sup> IPCC Fourth Assessment Working Group II Report (n 1 above) 450.

<sup>7</sup> Resolution 7/23 of the United Nations Human Rights Council recognises the link and requests the United Nations High Commissioner for Human Rights to conduct a study on this relationship. In terms of Resolution 10/4, the Council decides to hold a panel discussion on the relationship between climate change and human rights. See the Annual Report of the UN High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General. Report of the Office of the UN High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, A/HRC/10/61 of 15 January 2009 <http://www2.ohchr.org/english/issues/climatechange/index.htm> (accessed 31 March 2010). See, for a general overview on the relationship between climate change and human rights, S Humphreys *Climate change and human rights: A rough guide* (2007).

<sup>8</sup> U Schuerkens 'Transformation of local socio-economic practices in a global world' in U Schuerkens (ed) *Globalisation and transformation of local socio-economic practices* (2008) 8.

<sup>9</sup> Africa Environment Outlook 2 *Our environment, our wealth* (2006) 59. It should, however, be borne in mind that African air pollution is increasing and emissions may rise.

<sup>10</sup> S Åke Bjørke (ed) *Vital climate graphics Africa: The impact of climate change* (2002) 14. See Greenhouse Gas Inventory South Africa 1990 to 2000. <http://www.pmg.org.za/files/docs/090812greenhouseinventory.pdf> (accessed 31 March 2010).

developing world.<sup>11</sup> It is therefore evident that Africa has not contributed significantly to the threat that it faces.

Climate change also poses a serious threat to peace and security on the African continent since it has the potential to exacerbate competition and conflict concerning scarce natural resources.<sup>12</sup> The capacity to adapt may reduce potential conflict. However, various constraints on the adaptive capacity of African states exist, such as poor governance and underdevelopment. The limited capacity of African states to respond to climate change, coupled with the dependence of citizens on natural resources<sup>13</sup> for their livelihood, makes it essential for African states to access assistance for climate change adaptation. Adaptive capacity and adaption thus emerge as critical areas for consideration on the continent.<sup>14</sup> The fact that African states have not contributed to the problem therefore does not imply that African states may remain passive. African states are among the most vulnerable and have the most to lose. Thus, capacity building pursuant to adaptation can contribute to the prevention of further insecurity on the African continent.

African states can pursue adaptive capacity through international negotiations with developed states. Individual African states, however,

<sup>11</sup> Subsidiary Body for Implementation The Sixth Compilation and Synthesis of Initial National Communications from Parties not Included in Annex I to the Convention <http://unfccc.int/resource/docs/2005/sbi/eng/18a02.pdf> (accessed 31 March 2010). South Africa ranks in the top 20 greenhouse gas emitters (1,8% of global emissions) and is responsible for 42% of Africa's emissions <http://www.africancarbontrust.org/> (accessed 31 March 2010).

<sup>12</sup> O Brown *et al* 'Climate change as the "new" security threat: Implications for Africa' (2007) 83 *International Affairs* 1141-1151. The notion of 'environmental security' has gained acceptance among international lawyers. 'Environmental security' refers first to the maintenance of an ecological balance, which is necessary to sustain resource supplies in life-support systems. Second, it includes the prevention and management of conflict over scarce or degraded resources. J Brunnée & SJ Toope 'Environmental security and freshwater resources: A case for international ecosystem law (1994) 5 *Yearbook of International Environmental Law* 46; J Brunnée and SJ Toope 'Environmental security and freshwater resources: Ecosystem and regime building' (1997) 91 *American Journal of International Law* 26-59; G Handl 'Environmental security and global change: The challenge to international law' (1990) 1 *Yearbook of International Environmental Law* 3. See also J Brunnée 'The role of international law in the twenty-first century: Environmental security in the twenty-first century: New momentum for the development of international environmental law?' (1995) 18 *Fordham International Law Journal* 1742. The second dimension emphasises the traditional dimension of security. See N Schrijver 'Natural resource management and sustainable development' in TG Weiss & S Daws (eds) *The Oxford handbook on the United Nations* (2007) 592. Conflicts concerning resources are a particular problem. Security Council Resolution 1807 of 2008, eg, recognises the link between the illegal exploitation of natural resources and the fuelling and exacerbating of conflicts in the Great Lakes region of Africa. See, for the latest authoritative legal contribution pertaining to environmental security, (2008) 19 *Oxford Yearbook of International Environmental Law*.

<sup>13</sup> Africa Environment Outlook 2 (n 9 above) 36-38.

<sup>14</sup> As above.

lack the capacity and bargaining power to pursue their interests at climate change negotiations. The African Union (AU) as a regional organisation has facilitated co-operation pursuant to a common African position on climate change with the goal of strengthening the voice of the African continent pertaining to negotiations. The Conference of the Parties in Copenhagen (COP 15),<sup>15</sup> for instance, presented the African continent with an opportunity to articulate a common position on climate change, which has the potential to pursue adaptive capacity and therefore further environmental security.

It is accordingly the aim of this article to discuss the pursuit of the enhancement of adaptive capacity of African states through a common position on climate change. The first section of the article reflects briefly on the international climate change regime and the situation of Africa. The second section deals with the lack of a unitary African approach towards climate change. Regionalisation as a response to the marginalisation of Africa receives attention in the third section of the article. I address the deliberations of the AU pursuant to a common position on climate change, and this is followed by a critical evaluation of the common position. The last section presents a brief reflection on the Copenhagen accord. I conclude with a few general remarks.

## 2 The climate change regime

The United Nations (UN) Framework Convention on Climate Change of 1992 (UNFCCC) acknowledges the particular situation of African states and the importance of adaptation for the continent.<sup>16</sup> Article 4(4) of the UNFCCC states:

The developed country parties and other developed parties included in Annex II shall also assist the developing country parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.

In accordance with the common but differentiated responsibility principle,<sup>17</sup> African states did not incur any emission reduction targets

<sup>15</sup> COP 15 of the United Nations Framework Convention on Climate Change took place 7-18 December 2009.

<sup>16</sup> See art 4(3), read with arts 4(1)(e) & 4(4). These articles state that developed states shall provide new and additional financial resources to meet the agreed full costs of adaptation by developing states, especially African states and other that are particularly vulnerable to climate change.

<sup>17</sup> See art 3(1) of the UNFCCC. W Scholtz 'Different states, one environment: A critical southern discourse on the common but differentiated responsibilities principle' (2008) 33 *South African Yearbook of International Law* 113-136.

in terms of the Kyoto Protocol of 1997.<sup>18</sup> The climate change regime provides for various differential treatment provisions, which acknowledge the situation of developing states.<sup>19</sup> All states, including those in Africa,<sup>20</sup> have certain general obligations<sup>21</sup> in terms of the climate change regime, such as the establishment of national inventories of anthropogenic emissions as well as reporting obligations.<sup>22</sup> These states also have to formulate and implement national programmes to mitigate climate change by addressing anthropogenic emissions and adaptation measures.<sup>23</sup> African states also are required to 'take climate change considerations into account' in their relevant social, economic and environmental policies and actions.<sup>24</sup>

The climate change regime is not static. The first commitment period in terms of the Kyoto Protocol is restricted to 2012.<sup>25</sup> In November 2005, the 11th meeting of the Conference of the Parties to the UNFCCC (COP 11) convened to consider the post-2012 period.<sup>26</sup> It is important that African states ensure that their needs concerning adaptive capacity receive attention during the post-2012 period. It should be borne in mind that industrialised states have in general proved to be reluctant to play a leading role in terms of the climate change regime.<sup>27</sup> It is crucial for African states to articulate their needs in order to strengthen their adaptive capacity through negotiations.

<sup>18</sup> The Kyoto Protocol, which was adopted under art 17 of the Convention, follows the blueprint of the UNFCCC. Art 3(1) of the Protocol obliges parties included in Annex I of the UNFCCC to ensure, individually or jointly, that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases included in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B with a view to reducing their overall emissions of such gases by at least 5% below 1990 levels in the commitment period 2008-2012.

<sup>19</sup> L Rajamani *Differential treatment in international environmental law* (2006) 176.

<sup>20</sup> Art 4(1)(e) acknowledges the particular vulnerability of Africa and the need for adaptation to climate change.

<sup>21</sup> Art 4. In terms of art 4(3), developed country parties shall provide new and additional financial resources to assist developing states to fulfil their obligations.

<sup>22</sup> Arts 4(1)(a) & 4(2) read with art 12.

<sup>23</sup> Art 4(1)(b).

<sup>24</sup> Art 4(1)(f).

<sup>25</sup> See art 3(1) read with sub-art (9) of the Kyoto Protocol. See also arts 15 & 17 of the UNFCCC.

<sup>26</sup> Art 3(9) states that commitments for subsequent periods are to be determined through the Conferences of the Parties (COPs). See, for a discussion of the onset of the post-2012 process, C Bausch & M Mehling "'Alive and kicking": The first meeting of the parties to the Kyoto Protocol' (2006) 15 *Review of European Community and International Environmental Law* 196.

<sup>27</sup> See arts 3(1) & 4(1) of the UNFCCC. See also J Gupta 'Leadership in the climate regime: Inspiring the commitment of developing states in the post-Kyoto phase' (1998) 7 *Review of European Community and International Environmental Law* 180-190.

### 3 The lack of an African position

African states have previously failed to articulate an African position during the UNFCCC negotiations.<sup>28</sup> Mumma is of the opinion that this does not mean that Africa has not taken a stand on certain issues.<sup>29</sup> The problem is that Africa's stand is one of solidarity with the position of G77 states. The grouping together of African states with G77 states means that extremely under-industrialised African states are lumped together with industrialising states, such as India and China that emit a lion's share of global greenhouse gases. A possible reason for the grouping is the belief of smaller states that they do not have the power to negotiate with developed states and that it is therefore advantageous to co-operate with China and India.<sup>30</sup> The problem is, however, that the grouping results in the failure of African states to articulate the distinct interests of the continent.<sup>31</sup> Gray and Gupta also discuss Africa's climate change negotiating history and distinguish two periods: the pre-1996 and post-1996 periods.<sup>32</sup> During the pre-1996 period, Africa was 'more or less swept into the negotiating process', whereas the post-1996 period was characterised by an increasing awareness and preparatory work prior to the COP-meeting.<sup>33</sup> In general, however, African government participation has had little impact on the outcome of the negotiations and constituted a 'muted voice' during negotiations.<sup>34</sup> Africa lacks the necessary expertise to develop

<sup>28</sup> A Mumma 'The poverty of Africa's position at the climate change negotiations' (2000-2002) 19 *UCLA Journal of Environmental Law and Policy* 198. Mumma dissects the African Common Position on the Clean Development Mechanism, Paper 1: Uganda (on behalf of the African Group), UNFCCC COP, 4th session, FCCC/CP/1998/MISC 7/Add 2 (1998) in support of his argument. See 199-202. See also AM Halvorssen 'The Kyoto Protocol and developing states – The clean development mechanism' (2005) 16 *Colorado Journal of International Environmental Law and Policy* 366.

<sup>29</sup> Mumma (n 28 above) 199-202.

<sup>30</sup> W Gerber 'Defining "developing country" in the Second Commitment Period of the Kyoto Protocol' (2008) 31 *Boston College International and Comparative Law Review* 334.

<sup>31</sup> This situation also arises in the instance where African states are grouped together under the banner of a common African negotiating position, especially in relation to climate change. South Africa has very different interests from Lesotho or Madagascar. In this sense, a common position does not necessarily solve the problem of asymmetry. However, the pursuit of a regional common position may group states that have more aligned common interests based on shared problems and values. In general, African states have characteristic problems. The G77 consists of 130 members that exhibit vast differences and interests. In various instances, ideological considerations are the only glue that binds the states; <http://www.g77.org/doc/> (accessed 31 March 2010). Thus, the African forum presents a platform for co-operation based on more optimal common interests, which does not imply that asymmetry does not exist.

<sup>32</sup> KR Gray & J Gupta 'The United Nations climate change regime and Africa' in B Chaytor & KR Gray *International environmental law and policy in Africa* (2003) 75.

<sup>33</sup> As above.

<sup>34</sup> As above.

and articulate a common position at negotiations and it is therefore of particular importance that the capacity of African negotiators be increased.<sup>35</sup>

Furthermore, existing issues and interests on the continent have impeded the establishment of a common position on climate change.<sup>36</sup> Oil-producing states fear a shrinking of oil exports, while sub-Saharan states experience desertification because of climate change. Coastal states are concerned about the shrinking of coastlines and diminishing fish stocks. However, issues that serve as common ground for a united front are the vulnerability of African states, their lack of responsibility for the problem and their lack of resources to address it. It is important to use the latter shared concerns as a basis for co-operative measures regarding climate change.<sup>37</sup>

#### 4 Regional efforts towards a common position concerning a common concern

We must all accept that the African Union is the organisation in which the common good of the Continent is advanced and promoted. This will require the acceptance by us all to act in a manner that balances the collective interest of the continent over individual national interests.<sup>38</sup>

Individual African states<sup>39</sup> are unable to enhance their adaptive capacity through international negotiations. It is therefore important that African states co-operate in order to increase their collective bargaining power during international climate change negotiations. Further, capacity building concerning a common vision is crucial in order to advance

<sup>35</sup> Mumma (n 28 above) 202. See also para 7 of the Strategic Plan to Build Africa's Capacity to Implement Global and Regional Environmental Conventions (Annex 1 to the Action Plan of the Environment Initiative of NEPAD).

<sup>36</sup> Strategic Plan (n 35 above) 76-77.

<sup>37</sup> This means that it is important to focus on the commonalities in order to overcome the obstacles posed by differential interests. It does not imply that plural interests disappear.

<sup>38</sup> Statement of the outgoing Chairperson of the Executive Council of the Ministers of the AU, Nkosazana Clarice Dlamini Zuma (6 July 2003) [http://www.africa-union.org/Official\\_documents/Speeches\\_&\\_Statements/other/Dr%20Zuma%20Prime%20minister\(South%20Africa\)\\_%20July%206%20Maputo.htm](http://www.africa-union.org/Official_documents/Speeches_&_Statements/other/Dr%20Zuma%20Prime%20minister(South%20Africa)_%20July%206%20Maputo.htm) (accessed 31 March 2010).

<sup>39</sup> It is important to bear in mind that the colonial scramble resulted in the fragmentation of Africa. Thus, the colonial legacy bequeathed the continent with mini-states with small populations, miniscule internal markets and a lack of infrastructure. SKB Asante *Regionalism and Africa's development expectations, reality and challenges* (1997) 28.

an articulate African position.<sup>40</sup> Regional integration<sup>41</sup> can facilitate the strengthening of its bargaining power, which may offer greater voting power to African states.<sup>42</sup> It should be borne in mind that Africa is the largest negotiating bloc<sup>43</sup> as it represents more than 25 per cent of the parties to the UNFCCC.<sup>44</sup> Regional integration may also serve as a vehicle for consensus building concerning common objectives. A common objective in this particular instance will be the threat to the African continent posed by climate change. This imminent threat is a catalyst which sparks a common position on climate change and must spawn the required regional legal framework to address the problem. Regional arrangement measures may provide a framework for co-operation on shared resources (in this particular instance the atmosphere) and shared problems (such as the threat of climate change).<sup>45</sup> Regional co-operation may also facilitate the pooling of resources pursuant to an enhancement of capacity and expertise on a common position.

African leaders view regional integration as a response to the challenges of globalisation and the marginalisation of the African

<sup>40</sup> Expanding capacity in order to establish and advance the interest of Africa concerning climate change must form part of a holistic strategy to address the woes of Africa. It is important to promote the interests of the African continent as a whole and not merely the governing elite that focuses on self-preservation. In this regard, the promotion of good governance on the continent may create a more accountable system that responds to the needs of the people, which could break the culture of authoritarianism that impairs the mobilisation of African resources pursuant to solutions. See AP Mutharika 'Some thoughts on rebuilding African state capability' (1998) 76 *Washington University Law Quarterly* 285.

<sup>41</sup> Integration refers to a process where the economies of states merge into a regional economy. R Davies 'The case for economic integration in Southern Africa' in PH Baker & A Boraine (eds) *South Africa and the world economy in the 1990s* (1993) 217. See also M Lundahl & L Petersson 'Economic integration efforts in Southern Africa' in M Lundahl (ed) *Globalisation and the Southern African economies* (2004) 92. See, however, A Smith 'The principles and practice of regional economic integration' in V Cable & D Henderson (eds) *Trade blocs? The future of regional integration* (1994) 17.

<sup>42</sup> RJ Langhammer & U Hiemenz *Regional integration among developing states: Opportunities, obstacles and options* (1990) 9-10.

<sup>43</sup> See, on the role of negotiating blocs and climate change, OR Young *International governance: protecting the environment in a stateless society* (1994) 38. See, for a discussion of the potential dangers of blocs, D Snidal 'Endogenous actors, heterogeneity and institutions' in RO Keohane & E Ostrom (eds) *Local commons and global interdependence: Heterogeneity and co-operation in two domains* (1995) 66.

<sup>44</sup> Gray & Gupta (n 32 above) 75.

<sup>45</sup> Economic Commission for Africa Accelerating Regional Integration in Africa Item 1. Thus, regional integration is a multidimensional process that also includes political and security dimensions; Asante (n 39 above) 7. The first wave of regionalism occurred during the 1950s and primarily related to economic integration. The second wave began by mid-1980. For a theoretical discussion concerning regionalism, see L Fawcett & A Hurrell *Regionalism in world politics: Regional organisations and world order* (1995) 37-73.



continent.<sup>46</sup> African states previously experimented with the idea of pan-African regional co-operation pursuant to common interests.<sup>47</sup> Heads of State established the Organisation of African Unity (OAU) in May 1963 in Addis Ababa. The eradication of colonialism was one of the most important purposes of the OAU.<sup>48</sup> Different opinions existed on the level of economic integration and political unity that states had to pursue. The OAU applied a policy of non-intervention and as such did not succeed in its efforts to influence the policies of its members.<sup>49</sup> In effect, the OAU was a 'toothless talk shop'. With the end of the Cold War and the fall of apartheid, the opportunity presented itself to reform the OAU.<sup>50</sup>

The OAU Assembly of Heads of State and Government convened on 8 and 9 September 1999 in Sirte, Libya, to establish the AU.<sup>51</sup> The Constitutive Act of the AU was signed on 11 July 2000 in Lomé, Togo, and entered into force on 26 May 2001. The AU was officially inaugurated on 9 July 2002 in Durban, South Africa.

The AU emerged in the context of globalisation and was established to confront the various challenges<sup>52</sup> faced by the continent.<sup>53</sup> The objectives of the AU are *inter alia* to accelerate political and socio-economic integration;<sup>54</sup> to promote peace and security;<sup>55</sup> democratic principles

<sup>46</sup> M Spicer 'Globalisation, regional integration, economic growth and democratic consolidation' in JB Macedo & O Kabbaj *Regional integration in Africa* (2002) 163-170; T Murithi *The African Union: Pan-Africanism, peacebuilding and development* (2005) 5; M Ndulo 'The need for harmonisation of trade laws in SADC' (1996) 4 *African Yearbook of International Law* 222.

<sup>47</sup> C Heyns *et al* 'The African Union' (2003) 46 *German Yearbook of International Law* 252-283.

<sup>48</sup> Art 2(1) contains the five purposes of the OAU.

<sup>49</sup> Murithi (n 46 above) 26.

<sup>50</sup> Heyns *et al* (n 47 above) 259.

<sup>51</sup> CAA Packer & D Rukare 'The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 365-379; T Maluwa 'The Constitutive Act of the African Union and institution building in post-colonial Africa' (2003) 16 *Leiden Journal of International Law* 157-170.

<sup>52</sup> Africa is the world's poorest and most underdeveloped continent. The African continent is characterised by deadly diseases, governments that commit serious human rights violations, military conflict, grinding poverty, illiteracy, malnutrition and inadequate water supply and sanitation, as well as poor health and environmental degradation. The bottom 25 ranked nations of the UN's Human Development Report of 2003 are all from Africa. It is, in particular, the sub-Saharan region that displays underdevelopment and extreme poverty. An estimated 40% of the population live on less than \$1 a day. This region accounts for less than 2% of world trade and global GDP. The African continent therefore is in dire need of development in order to better the lives of its people. Human Development Index of the Human Development Report 2003 Millennium Development Goals: A compact among nations to end human poverty <http://hdr.undp.org/en/reports/global/hdr2003/> (accessed 31 March 2010). See in this regard S Naidu & B Roberts *Confronting the region: A profile of Southern Africa* (2005) 47.

<sup>53</sup> See the Preamble and art 3 of the Constitutive Act of the AU.

<sup>54</sup> Art 3(c).

<sup>55</sup> Art 3(f).



and good governance;<sup>56</sup> human and peoples' rights;<sup>57</sup> sustainable development<sup>58</sup> and 'co-operation in all fields of human activity to raise the living standards of African peoples'.<sup>59</sup>

The AU is the appropriate regional organisation to facilitate the development of a common African position on climate change.<sup>60</sup> This is in line with the objectives of the AU amongst others to promote and defend African common positions;<sup>61</sup> establish the required conditions to enable the African continent to take its rightful place in international negotiations;<sup>62</sup> to encourage international co-operation;<sup>63</sup> and to promote sustainable development.<sup>64</sup> It is accordingly necessary to reflect briefly on the development of the African common position and to analyse this position.

The Action Plan of the Environment Initiative of the New Partnership for Africa's Development (NEPAD) affirms the concerns of Africa regarding climate change, since it is one of eight priority programmes.<sup>65</sup> Further, the AU Assembly made important decisions that sparked the development of a common position on climate change. The 8th ordinary session instructed members and Regional Economic Communities (RECs) to integrate climate change in their respective development programmes.<sup>66</sup> The 12th session of the Assembly in 2009 approved the Algiers Declaration on Climate Change, which is to serve as the platform for the common position of African states during the COP

<sup>56</sup> Art 3(g).

<sup>57</sup> Art 3(h).

<sup>58</sup> Art 3(j).

<sup>59</sup> Art 3(k). Furthermore, the establishment of an African Economic Community is a priority of the AU as this is viewed as a mechanism to promote the socio-economic development of the continent. Regional Economic Communities (RECs), such as the Southern African Development Community, constitute building blocks for the achievement of the objectives of the AU. See art 3(l) of the Act. The AU serves as an example of a multidimensional process of regional integration.

<sup>60</sup> See, for a discussion on a common position concerning natural resources in the context of regional integration, C Ayangafac 'Utilising the management of natural resources to forge a union government for Africa' in T Murithi (ed) *Towards a union government for Africa. Challenges and opportunities* (2008) 161-170.

<sup>61</sup> Art 3(d).

<sup>62</sup> Art 3(i).

<sup>63</sup> Art 3(e).

<sup>64</sup> Art 3(j).

<sup>65</sup> <http://www.nepad.org/2005/files/documents/113.pdf> 29 (accessed 31 March 2010).

<sup>66</sup> Assembly of the AU, 8th ordinary session, 29-30 January 2007, Addis Ababa, Ethiopia, Assembly/AU Dec 134/(VIII) Decision on Climate Change and Development in Africa Doc Assembly/AU/12/(VIII). See Item 5. See also the AU Assembly/AU Dec 4/(VIII) Declaration on Climate Change and Development. The Sirte Declaration also expresses the concern of the Ministers concerning the threat that climate change poses to the African continent; 10th session of the African Ministerial Conference on the Environment, 29-30 June 2004, Sirte, Libya, Sirte Declaration on the Environment and Development [http://www.unep.org/roa/Amcen/ Meeting\\_Documents/default6.asp](http://www.unep.org/roa/Amcen/Meeting_Documents/default6.asp) (accessed 31 March 2010).

negotiations.<sup>67</sup> Furthermore, the Assembly emphasised that global carbon trading mechanisms emerging from the COP 15 negotiations should give African states the opportunity to demand compensation for damage caused to the economies of these states by climate change.<sup>68</sup> The Assembly approved the decision that a single delegation should represent African states.<sup>69</sup> The Assembly mandated the AU Commission to work out ways in which such representation could be achieved. The Commission accordingly submitted its recommendations to the Assembly.<sup>70</sup> The 13th ordinary session in Sirte, Libya, *inter alia* established the Conference of African Heads of State and Government on Climate Change (CAHOSCC).<sup>71</sup> CAHOSCC is to spearhead Africa's negotiations on climate change. The Assembly authorised the accession of the AU to the UNFCCC and Kyoto.<sup>72</sup> Furthermore, the Summit urged CAHOSCC, AU ambassadors and African negotiators to make use of the approved African common position on climate change.

The African Ministerial Conference on the Environment (AMCEN)<sup>73</sup> has played an important role in the African response to climate change. The work of AMCEN is primarily based on Decision Two on Climate Change, made at its 12th session in Johannesburg. This consists of two parts: Africa's preparations for the development of a common position on climate change and a comprehensive framework of African climate change programmes.<sup>74</sup> The first part is concerned with the involvement

<sup>67</sup> Assembly of the AU, 12th ordinary session, 1-3 February 2009, Addis Ababa, Ethiopia, Assembly/AU Dec 236/XII Decision on the African Common Position on Climate Change Doc Assembly/AU/8 (XII) Add 6. See item 3.

<sup>68</sup> Item 5.

<sup>69</sup> Item 6.

<sup>70</sup> See Executive Council, 15th ordinary session, 24-30 June 2009, Sirte, Libya EX CL/Dec 500(XV) Decision on the Implementation of the Decision on the African Common Position on Climate Change Doc EX.CL/525(XV).

<sup>71</sup> Assembly of the AU, 13th ordinary session, 1-3 July, Sirte, Libya Assembly/AU/Dec 257(XIII) Rev 1 Decision on the African Common Position on Climate Change including the Modalities of the Representation of Africa to the World Summit on Climate Change.

<sup>72</sup> Assembly of the AU, 13th ordinary session, 1-3 July, Sirte, Libya Assembly/AU/Dec 248(XIII) Decision of the Accession of the African Union to the United Nations Framework Convention on Climate Change and the Kyoto Protocol.

<sup>73</sup> AMCEN is a specialised technical committee of the AU. AMCEN is currently discussing the harmonisation and links between itself and the AU Commission. AMCEN's mandate is *inter alia* to provide advocacy for environmental protection in Africa. Since its creation in 1995, it has fulfilled several roles, such as the development of common positions pursuant to negotiations of international environmental treaties and capacity building in the field of environmental management; <http://www.unep.org/ROA/amcen/> (accessed 31 March 2010).

<sup>74</sup> Decision 2 deals with the issue of climate change and *inter alia* refers to the decision of AMCEN to request the 'United Nations Programme, in collaboration with the Commission of the African Union, the secretariat of NEPAD, the United Nations Economic Commission for Africa, the African Development Bank and other relevant intergovernmental institutions to organise a series of preparatory meetings for Africa's climate change negotiators and to provide the negotiators with substantive

of negotiators from African states in regional consultative meetings<sup>75</sup> that must lead to the development of a common position on climate change as well as capacity building of negotiators. The second part of the deliberations of AMCEN involves sub-regional meetings of experts and negotiators aimed at a better understanding of the issues concerned with the negotiations under the UNFCCC and Kyoto Protocol and the preparation of the framework of African Climate Change programmes.<sup>76</sup>

It is in particular the third special session of the AMCEN held in Nairobi on 29 May 2009 that marked a decisive event in the response of Africa to the threats of global climate change.<sup>77</sup> This meeting was significant since it was the first meeting of the African Group of Negotiators with AMCEN and the first meeting of the African High Level Expert Panel on Climate Change. The Ministers adopted the Nairobi Declaration on the African Process for Combating Climate Change,<sup>78</sup> which serves as a unified expression of the African continent's resolve to be part of the solution to the climate change challenge. The Declaration emphasises the major challenges and opportunities that the African negotiators face. The Declaration highlights the priorities for Africa, which include adaptation, capacity building, financing and technology development and transfer and it urges the international community to base increased support for the continent on these priorities.<sup>79</sup> The document affirms the importance of the adopted common position on climate change<sup>80</sup> and the need to establish a 'comprehensive framework of African climate change programmes'.<sup>81</sup> AMCEN accordingly reaffirmed the

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technical and policy analysis support to strengthen their preparations'. Further, the deliberations of the expert segment of the AMCEN resulted in the development of an 'indicative conceptual outline of a comprehensive framework of African climate change programmes'. This framework is based on the primary priority of adaptation and the need for mitigation, supported by finance, capacity building and technology. See the Decisions adopted by the African Ministerial Conference on the Environment and its 12th session [http://www.unep.org/roa/Amcen/Amcen\\_Events/12th\\_Session\\_AMCEN/index.asp](http://www.unep.org/roa/Amcen/Amcen_Events/12th_Session_AMCEN/index.asp) (accessed 31 March 2010).

<sup>75</sup> Several regional consultations have taken place [http://www.unep.org/roa/amcen/docs/AMCEN\\_Events/climate-change/Briefing-Phase2-ClimateChange.pdf](http://www.unep.org/roa/amcen/docs/AMCEN_Events/climate-change/Briefing-Phase2-ClimateChange.pdf) (accessed 31 March 2010).

<sup>76</sup> [http://www.unep.org/ROA/amcen/Projects\\_Programme/climate\\_change/default.asp?ct=SR](http://www.unep.org/ROA/amcen/Projects_Programme/climate_change/default.asp?ct=SR) (accessed 31 March 2010).

<sup>77</sup> This session was a follow-up to the 12th session held in Johannesburg, 10-12 June 2008, which also dealt with climate change.

<sup>78</sup> UNEP/AMCEN/12/9 <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=589&ArticleID=6199&l=en&t=long> (accessed 31 March 2010). The Executive Council has endorsed the Declaration. See 15th ordinary session of the Executive Council 24-30 June 2009, Sirte, Libya EX CL/Dec 502(XV) Decision on the Report of the African Ministerial Conference on the Environment (AMCEN) Special Session on Climate Change Doc EX CL/519(XV).

<sup>79</sup> See eg item 3.

<sup>80</sup> See items 1 & 2.

<sup>81</sup> See item 34. This is in line with art 4(1)(b) of the UNFCCC.

Conceptual Framework of African Climate Change Programmes.<sup>82</sup> It is further interesting to note that the Declaration emphasises the resolve of AMCEN to integrate adaptation measures into national and regional development plans, policies and strategies, where appropriate, in order to ensure adaptation to climate change in such areas as the environment and energy security.<sup>83</sup>

The Nairobi meeting also resulted in the updated Algiers Declaration,<sup>84</sup> which served as a reference document for the African negotiators at the AWG-KP9<sup>85</sup> and the AWG-LCA 6<sup>86</sup> held in Bonn from 1 to 12 June 2009.

## 5 Common African position on climate change

This document is based on the pillars of the Bali Action Plan,<sup>87</sup> namely, adaptation, mitigation, financing and technology transfer. It embodies the shared vision<sup>88</sup> of Africa concerning climate change, which emphasises that a climate regime must be 'inclusive, fair and effective' and that it should recognise that a solution to the problem will only be

<sup>82</sup> The Decision on the African process for combating climate change emphasises that 'Africa's priorities are to implement climate change programmes in such a way as to achieve sustainable development'. UNEP/AMCEN/12/9, annex II.

<sup>83</sup> See item 23.

<sup>84</sup> Paper 2: Algeria on behalf of the African Group, AWG-LCA 6, FCCC/AWGLCA/2009/MISC 4 (Part I). The initial Algiers declaration served as a reference document for African negotiators at COP 14/CMP 04 held in Poznan, Poland, in December 2008. Prior to this document, a draft African position paper for COP 12 and COP/MOP 2 was the outcome of a meeting organised by AMCEN and UNEP in September, 2006 in Naivasha, Kenya.

<sup>85</sup> Session 9 of the *Ad Hoc* Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol. COP 11 serving as the Meeting of the Parties (CMP1) to the Kyoto Protocol established the *Ad Hoc* Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) in order to discuss future commitments for industrialised states under the Protocol. See Decision\_/CMP01.

<sup>86</sup> Session 6 of the *Ad Hoc* Working Group on Long-term Co-operative Action under the Convention (AWG-LCA). This subsidiary body was established at COP 13 and is responsible to conduct a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term co-operative action, now, up to and beyond 2012, in order to reach an agreed outcome at COP 15. See Bali Action Plan, FCCC/CP/2007/6/Add 1 1, Decision 1/CP 13.

<sup>87</sup> The COP 13 of the UNFCCC and the COP/MOP 3 were held in Bali in 2007. The conference delivered a 'road map' that includes the Bali Action Plan on how to reach a post-2012 agreement before the expiry of the first commitment period of 2008-2012. See, for a discussion of the Bali Action Plan, L Rajamani 'From Berlin to Bali and beyond: Killing Kyoto softly?' (2008) 57 *International and Comparative Law Quarterly* 909-939; C Spence *et al* 'Great expectations: Understanding Bali and the climate change negotiating process' (2008) 17 *Review of European Community and International Environmental Law* 142-153; J Depledge 'Crafting the Copenhagen consensus: Some reflections' (2008) 17 *Review of European Community and International Environmental Law* 154-165.

<sup>88</sup> Para 1.

possible if it is undertaken in the context of 'developing states' need for development space'.<sup>89</sup>

Paragraph 2 addresses the issue of adaptation, the vulnerability of the continent and the need for international co-operation in this regard. The common position calls for the establishment of an Adaptation Action Programme that must be country-driven. This Programme must provide 'scaled-up new, additional, adequate, predictable and sustainable financial, technological and capacity building support' to address the key areas of the programme. The target for financial adaptation support to developing states should be at least \$67 billion *per annum* by 2020. Adaptation as such is not a controversial issue since consensus exists that it should be a priority in the post-2012 regime.<sup>90</sup> The World Bank estimates that the cost of adaptation will be \$75 to \$100 billion *per annum* for the period 2010-2050.<sup>91</sup> The problem is the financing<sup>92</sup> of adaptation in developing states by developed states. Several complex questions arise concerning the sources of funding and the mechanisms thereof. It is most probable that the issue of adaptation may be stalled by the lack of agreement on financial contributions. This may further deepen the divide between developing and developed states. The Adaptation Fund<sup>93</sup> serves as an example. It is estimated that the Fund will have approximately \$500 million available until 2012.<sup>94</sup> Furthermore, the current financial economic crisis may have a negative impact on the financial capacity of developed states to provide further funding for adaptation.

In relation to mitigation, the document proposes the maintenance of a 'firewall' between mitigation actions by developed states and devel-

<sup>89</sup> Art 2 of the UNFCCC prescribes that the stabilisation of greenhouse gases should be achieved within a period to enable *inter alia* 'economic development to proceed in a sustainable manner'.

<sup>90</sup> Negotiating text of the *Ad Hoc* Working Group on Long-term Co-operative Action under the Convention, FCCCA/AWGLCA/2009/8; Revised negotiating text of the *Ad Hoc* Working Group on Long-term Co-operative Action under the Convention, FCCC/AWGLCA/2009/INF 1; Reordering and Consolidation of text in the Revised Negotiating text of the *Ad Hoc* Working Group on Long-term Co-operative Action under the Convention, FCCC/AWGLCA/2009/INF 2 and Non-paper 31 of 20 October 2009 of the Contact Group on Enhanced Action on Adaptation and Its Means of Implementation. Refer also to Decision 1/CP.10, FCCC/CP/2004/10/Add 1 and FCCC/CP/2005/5/Add 1, Decision 1 CP 11.

<sup>91</sup> <http://beta.worldbank.org/content/economics-adaptation-climate-change-study-homepage> (accessed 31 March 2010).

<sup>92</sup> On the issue of financing: MJ Mace 'Funding for adaptation to climate change: UNFCCC and GEF developments since COP-7' (2005) 14 *Review of European Community and International Environmental Law* 225-246.

<sup>93</sup> Art 12.8 of the Kyoto Protocol. See para 8 of the FCCC/CP/2001/13/Add 1 Decision 5/CP 7. See also FCCC/KP/CMP/2008/11/Add 2, Decision 1/CMP 4.

<sup>94</sup> <http://climate-l.org/guest-articles/ga25.html> (accessed 31 March 2010). On 31 August 2009, the Fund held in trust \$15,48 million. See Status of Resources of the Adaptation Trust Fund, AFB/B 7/10.

oping states.<sup>95</sup> Subsequent paragraphs clarify this point of departure. Paragraph 1(b)(i) of the Bali Action Plan refers to 'measurable, reportable and verifiable nationally appropriate mitigation commitments or actions'. The reference to 'action' may be an indication that options other than commitments, such as targets, may be appropriate. This viewpoint finds support because of the import of the term 'including quantified emission limitation and reduction objectives'. The African position does not allow for this option. It clearly states that developed states have mitigation commitments and developing states mitigation actions. Thus, only developed states should incur quantified emission reduction commitments (QERCs).<sup>96</sup> Annex I Parties must reduce their greenhouse gas emissions by at least 40 per cent below 1990 levels by 2020 and at least 80 per cent to 95 per cent below 1990 levels by 2050.<sup>97</sup> In this regard, the aggregate number is for all developed states, irrespective of whether they have ratified the Kyoto Protocol or not. The ambitious targets may prove to be unacceptable for Annex I states.<sup>98</sup> Most Annex I states did not comply with the previous tar-

<sup>95</sup> Para 3. This issue relates to the two-track structure of the negotiating process under the AWG-KP and the AWG-LCA. In general, Annex I states are reluctant to accept new emission targets under Kyoto for the post-2012 period unless other major emitters accept emission commitments as well. They accordingly prefer a single new comprehensive agreement that would replace the Protocol. Developing states oppose a one-track approach and emphasise that the AWG-KP process should receive equal attention in order to make progress. They do not want to replace the established 'fire-wall' between Annex I and non-Annex I states with a new legal agreement. It must, however, be borne in mind that developing states hold different views concerning the AWG-LCA result. For instance, Brazil, South Africa, India and China (BASIC group) have demanded that developed states accept a second commitment period under Kyoto, but have opposed the establishment of a new legal agreement that addresses their emissions. Some small island states are in favour of a new legal agreement that would address the emissions of more advanced developing states. See, for a discussion in this regard, K Kulovesi & M Gutiérrez 'Climate change negotiations update: Process and prospects for a Copenhagen agreed outcome in December 2009' (2009) 18 *Review of European Community and International Environmental Law* 229-243.

<sup>96</sup> Para 3.1. The document uses the language of the Bali Action Plan since it refers to developing and developed states instead of Annex I and non-Annex I parties. The only reference to the latter categorisation occurs when reference is made to numerical targets. The document does not define developing and developed states.

<sup>97</sup> This is in accordance with the IPCC Report, which prescribes reductions of 10-40% for developed states by 2020 and 40-95% by 2050. IPCC Fourth Assessment Working Group III Report 90. The position does not state whether mitigation should be taken on a national or international level. This is in line with paragraph 1(b) of the Bali Action Plan that leaves this option open since it refers to national/international action on climate change.

<sup>98</sup> This was also an issue of disagreement during COP 14, which was held in Poznań. IISD Reporting Services Earth Negotiations Bulletin <http://www.iisd.ca/climate/cop14/> (accessed 31 March 2010). The African Group recently walked out from negotiations at Barcelona (AWG-KP 9 and AWG-LCA 6) to protest the 'business as usual' attitude of developed states. The African bloc complained that the industrialised states' carbon cut was too small and they refused to return until more was done by the rich nations <http://www.guardian.co.uk/environment/2009/nov/04/africa-walk-out-climate->

gets. Furthermore, future projections are pessimistic since an increase in emissions is expected.<sup>99</sup> The position of developed states such as the USA may also impede international consensus.<sup>100</sup> The African group refuses to differentiate between advanced developing states and developing states.<sup>101</sup> However, the US has been insistent on a classification between developed, more advanced developing states and developing states. It is the position of the USA that advanced the need for developing states to adopt national mitigation strategies based on a deviation from business-as-usual emissions. In accordance with the African proposal, 'the aggregate number is for all developed states, regardless of whether they have ratified the Kyoto Protocol or not'. A refusal of developed states to agree to post-2012 commitments based on a disagreement concerning this classification may therefore further encumber other developed states with unrealistic commitments if one adheres to the African position.

In accordance with the viewpoint of the African group, developing states will not be encumbered with QERCs. The common position states that developing states 'choose from a toolbox of voluntarily registered, nationally appropriate mitigation actions (NAMA)',<sup>102</sup> 'including sustainable development policies and measures (SD-PAMS),<sup>103</sup> programmatic CDM and others'.<sup>104</sup> The mitigation actions of developing states are conditional on the provision of technology, financing and capacity building in a 'measurable, reportable and verifiable' manner.<sup>105</sup> The African group accordingly sets a target of financial flows

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talks-barcelona (accessed 31 March 2010).

<sup>99</sup> See NH Stern *The economics of climate change: The Stern Review* (2007) 201-202.

<sup>100</sup> The USA under the new administration took a u-turn on American climate change policy and returned to the negotiations in 2009. The US announced their reluctance to ratify the Kyoto Protocol since the goal that they had to commit to was unfeasible. The USA will have to make up for lost time and reduce emissions by 2012 below 1990 levels. This will prove extremely difficult. The US favours a bilateral approach under a multilateral umbrella. See US Submission on Copenhagen Agreed Outcome, AWG-LCA 6, FCCC/AWG-LCA/2009/MISC 4 (Part III). See further T Skodvin & S Andresen 'An agenda for change in US climate policies: Presidential ambitions and congressional powers' (2009) 9 *International Environmental Agreements* 263-280. See also the American Clean Energy and Security Act (the Waxman-Markey Bill) <http://www.govtrack.us/congress/bill.xpd?bill=h111-2454> (accessed 31 March 2010).

<sup>101</sup> This is also the position of most developing states. The issue of differentiation was rejected during COP 14.

<sup>102</sup> It seems that no general definition of this concept exists. Various states have made proposals concerning the link between NAMAs and other mitigation mechanisms. The African group identifies two registries, namely, a registry on national actions that are nationally funded and a registry for actions with international (multilateral) support. The UNFCCC will implement MRV measures in relation to the second registry.

<sup>103</sup> See in this regard Submission from South Africa, Dialogue Working Paper 18, UNFCCC, Dialogue on Long-Term Co-operative Action to Address Climate Change by Enhancing the Implementation of the Convention.

<sup>104</sup> Para 3.2.

<sup>105</sup> This is in line with art 4.7 of the UNFCCC.



at \$200 billion by 2020.<sup>106</sup> Developed parties will have to report their progress through national communications.

It is interesting to compare the African position with the prescription of the actions required by developing states in the Bali Action Plan. Paragraph 1(b)(ii) refers to 'nationally appropriate mitigation actions by developing country parties in the context of sustainable development, supported and enabled by technology, financing and capacity building, in a measurable, reportable and verifiable manner'. The language in the Bali Action Plan is dubious. Does the MRV clause apply to the actions of developing states only, to the support of developed states or to both? The African position clarifies this since paragraph 3.3 explicitly states that MRV applies to mitigation actions and support.

The insistence on a 'firewall' between mitigation commitments of developed states and actions of developing states must also be understood in the context of the need of developing states for development space. However, development does not have to be unsustainable and an investment in environmentally-friendly technology may have various advantages.<sup>107</sup> It is in this regard important to recall that adaptation is the first priority for African states pursuant to their own survival. These states are not responsible for the consequences of climate change and developed states need to assist them in order to adapt to climate change. The African position makes provision for mitigation in order to cater for the industrialisation of African states. This is important for the promotion of continental sustainable development. Adaptation, however, is the primary priority pursuant to environmental security.

The African Group furthermore supports the creation of an enhanced financial mechanism as proposed by the G77 and China.<sup>108</sup> The source of funding will be developed states through the realisation of their commitment under article 4.3 of the UNFCCC. Funding will be 'new and additional' and over and above overseas development assistance. Furthermore, funding pledged outside of the Convention shall not be regarded as a fulfilment of article 4.3 obligations. In general, the financial expectations of Africa may be incompatible with the financial capability of industrialised states.

In relation to forestry, the common position is in favour of a REDD-Plus mechanism<sup>109</sup> that should accommodate 'different national circumstances and respective capabilities'. Funds should be 'adequate, predictable and sustainable' from a variety of sources, which include

<sup>106</sup> Para 3.3.

<sup>107</sup> See R Howse & MJ Trebilcock 'The free trade-fair trade debate: Trade, labour, and the environment' in JS Bhandari & AO Sykes (eds) *Economic dimensions in international law: Comparative and empirical perspectives* (1997) 224-30.

<sup>108</sup> G 77 and China Proposal Financial Mechanism for Meeting Financial Commitments under the Convention, AWG-LCA 3, FCCC/AWGLCA/2008/MISC 2/Add 1.

<sup>109</sup> This refers to the potential to reduce emissions from deforestation and forest degradation.



global carbon markets.<sup>110</sup> This position allows for support from public and private resources.<sup>111</sup>

## 6 Critical thoughts on a common African position<sup>112</sup>

The discussed common position of Africa raises a few general issues of importance in the context of the current discussion.

First, it is important to bear in mind that the African group is not homogeneous.<sup>113</sup> The African group consists of oil-producing states, coastal states, island states and agricultural states that have unique interests concerning climate change. These states have different interests, which may hinder the development of a 'common interest'<sup>114</sup> among African states. It is therefore difficult to establish a truly unitary position that could present the interests of all of the states on the continent. States may accordingly betray the common position in order to realise their own interests at negotiations.<sup>115</sup> Unfortunately, member states of the AU exhibit a lack of commitment to real integration. These states still cling to

<sup>110</sup> Para 3.2.

<sup>111</sup> See, for a discussion of this issue, I Fry 'Reducing emissions from deforestation and forest degradation: Opportunities and pitfalls in developing a new legal regime' (2008) 17 *Review of European Community and International Environmental Law* 166-182.

<sup>112</sup> This part of the discussion does not represent an analysis of the content of the common position since this is the concern of para 5.

<sup>113</sup> This is not unique to the African continent. The European Union, eg, also has to grapple with asymmetry between member states, but have produced a common position on climate change and a comprehensive regulatory framework. See M Peeters 'European climate change policy: Critical issues and challenges for the future' (2005) 16 *Yearbook of International Environmental Law* 179-210. Various institutional differences, however, exist between the AU and the EU. The degree of differentiation between member states is not the same in both organisations and political will and commitment concerning co-operation often falls short in the AU. See also W Scholtz 'Environmental harmonisation in the SADC region: An acute case of asymmetry' in K Meesen *et al* (eds) *Economic law as an economic good: Its rule function and its tool function in the competition of systems* (2009) 385-397.

<sup>114</sup> In the instance of climate change, the survival of humankind is the common interest of all states. States therefore need to co-operate pursuant to the common interest. The common interest of states may serve as a driving force in the creation of rules that address the common concern. For a discussion of the incorporation of common interest in the matrix of state behaviour pursuant to environmental security, see W Scholtz 'Collective (environmental security): The yeast for the refinement of international law' (2008) 19 *Oxford Yearbook of International Environmental Law* 150.

<sup>115</sup> This was indeed the case during COP 15. See para 7. A discussion of state behaviour usually reflects that states pursue their own national interests. See D Armstrong *et al* *International law and international relations* (2007) 270. This statement does not imply that state interest is the sole explanation for state behaviour. See M Koskeniemi *From apology to utopia: The structure of international legal argument* (2006) 59. The pursuit of individual state interest may not be beneficial to other member states of the AU.

nationalism and pursue shortsighted self-interest. It is therefore important that African states do not merely pay lip service to the common position. Further, African states have different levels of development. South Africa serves as an example of an advanced developing country that contributes to climate change and that may have to contribute more actively to the global solution through mitigation actions. Emissions from other states are miniscule. It is possible for more powerful states, such as South Africa, to ensure that an African position is not contrary to its national interests. This results in a situation where African states (with negligible emissions) are grouped with South Africa. The situation that arises is ironic. A lack of capacity among African states necessitates a pooling of resources pursuant to a common position on climate change. This lack of capacity, however, also creates the opportunity for more powerful states to dominate the outcome of the co-operation. This means that the voices of less powerful states may be drowned through the capacity of the powerful in a regional grouping. The refusal to distinguish between advanced developing and other developing states may be to the benefit of South Africa, but from a pragmatic point of view is not of relevance to most African states. It may be based on an ideological consideration of historic responsibility that, however, does not promote the interests of African states if one considers that African states are the victims of greenhouse gasses, irrespective of whether it stems from developed or advanced developing states.

A practical illustration of the effect of the asymmetry between African states is evident in the instance of technology transfer. Clearly, South Africa does not have the same needs concerning technology transfer as Lesotho. However, the presence of South Africa can also have positive advantages since it may enhance the capacity of the African negotiators. It is therefore important to optimise the positive influence of South Africa. South Africa must assume a leading role pursuant to the interests of the African continent. Thus, African states should indeed aim to act and speak with one voice based on solidarity<sup>116</sup> and acknowledge that the continent faces a threat which requires collective measures.<sup>117</sup>

<sup>116</sup> My statement implies that solidarity, as a moral principle of international law, should form the basis for the actions of African states in this regard. This implies that states should not take into consideration only their own interests in shaping their international interests, but also those of other members or the interests of the AU, or both. This may amount to wishful thinking, but wishful thinking is required. See R Wolfrum 'Solidarity amongst states: An emerging structural principle of international law' in P-M Dupuy *et al* (eds) *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat* (2006) 1087-1101. Art 3(a) includes 'solidarity between the African states and the peoples of Africa' as one of the objectives of the AU.

<sup>117</sup> The implication of this statement is that instances may arise where individual state interest may defer to the collective continental interest. This requires political will and commitment of member states to the objectives and principles of the AU, which needs to counter criticism that the AU is a 'mere "talk shop" for travel-loving ministers'. See J Hall 'Politics: African Union struggles to achieve concrete goals' *The New York Amsterdam News* 19-25 June 2003 2. This viewpoint adheres to the Action

Second, the existence of a common position on climate change does not mean that Africa has won the battle. Negotiators should put forward the common position of Africa in such a manner that it influences negotiations pursuant to an agreement beneficial to the African continent. This raises a few important issues. The relationship between the African group and CAHOSCC is not clear. CAHOSCC is supposed to spearhead the negotiations. It is important to ensure that this group possesses the necessary capacity in order to pursue the interests of Africa during climate change negotiations. Thus, this group should ultimately serve as a regional negotiating force of African expertise concerning climate change. In this manner, regionalism will cater for environmental security. It is therefore necessary to ensure that the common position co-ordinates the interests of member states of the AU. This means that political goodwill concerning climate change as reflected by the common position needs to be translated into concrete actions at the upcoming negotiations and beyond. The AU must be a force to be reckoned with.

Third, the second important phase concerning the deliberations of AMCEN requires action. This refers to the implementation of the African framework for climate change programmes. RECs,<sup>118</sup> such as the Southern African Development Community (SADC) and Economic Community of West African States (ECOWAS),<sup>119</sup> will have to play an important role in relation to the implementation of these programmes at sub-regional level. The African continent in the past has lacked the capacity<sup>120</sup> for a co-ordinated implementation of environmental measures and it is important to address this issue in order to ensure that action speaks louder than words.<sup>121</sup>

Fourth, multi-stakeholder involvement concerning the response of the AU to climate change is vital to ensure that the needs of interested parties are taken into account. The enhancement of the capacity of

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Plan of the Environment Initiative of the New Partnership for Africa's Development (NEPAD), which recognises that inter-African partnerships as well as partnerships between African states and the international community are key elements of a common vision pursuant to sustainable development.

<sup>118</sup> See art 3(l) of the Constitutive Act of the AU.

<sup>119</sup> ECOWAS has already adopted a common position on climate change <http://allafrica.com/stories/200909170199.html> (accessed 31 March 2010).

<sup>120</sup> See FDP Situma 'Africa's potential contribution to the implementation of international environmental law' (2000) 10 *Transnational Law and Contemporary Problems* 415.

<sup>121</sup> It is important to recall that the AU also faces various challenges, such as funding, that may have an influence on the implementation of environmental measures. See, eg, H Richardson 'The danger of oligarchy within the pan-Africanist authority of the African Union' (2003) 13 *Transnational Law and Contemporary Problems* 255-275; D Obowu 'Regional integration, development, and the African Union agenda: Challenges, gaps and opportunities' (2003) 13 *Transnational Law and Contemporary Problems* 211-253.

regional NGOs,<sup>122</sup> community organisations and research groups will ensure a constructive contribution to the implementation of frameworks in Africa.<sup>123</sup>

Fifth, it is interesting to note that the common position does not make any explicit mention of the important relationship between climate change and human rights in the AU context. The impact of climate change on human rights has been explicitly recognised by the African Commission on Human and Peoples' Rights (African Commission) in its Resolution on Climate Change and Human Rights and the Need to Study its Impacts in Africa.<sup>124</sup> The AU Resolution 'calls on the Assembly of Heads of State and Government to take all necessary measures to ensure that the African Commission on Human and Peoples' Rights is included in the African Union's negotiating team on climate change'. It must be borne in mind that article 24 of the African Charter on Human and Peoples' Rights (African Charter) provides for the right of peoples to a 'general satisfactory environment favourable to their development'. Article 16(1) stipulates that 'every individual shall have the right to enjoy the best attainable state of physical and mental health'. In the *SERAC* case the African Commission held, *inter alia*, that article 24 of the African Charter imposes an obligation on the state to take reasonable measures 'to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources'.<sup>125</sup> It is therefore possible to argue that member states of the AU have an obligation to take specific action in order to address climate change pursuant to human rights protection. Constructive participation at international climate change negotiations based on a common position aimed at the enhancement of adaptive capacity, mitigation and the transfer of technology and financial resources may constitute a reasonable measure to secure sustainable development. Thus, the common position on climate change may have the potential to contribute to the promotion of human rights in Africa.

Sixth, the marginalisation of the continent in the global economic and political decision-making system means that Africa in general finds it difficult to make its voice heard.<sup>126</sup> It is therefore possible to learn from

<sup>122</sup> Climate Network Africa is an example of a Civil Society Organisation that plays an active role concerning climate change in Africa [http://www.unep.org/civil\\_society/Registration/index2.asp?idno=2561](http://www.unep.org/civil_society/Registration/index2.asp?idno=2561) (accessed 31 March 2010).

<sup>123</sup> This is in line with the objective of art 3(g) of the Constitutive Act, which is to 'promote democratic principles and institutions, popular participation and good governance'.

<sup>124</sup> ACHPR/Res 153 (XLV09).

<sup>125</sup> *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC* case) paras 52-53. See for a discussion D Shelton 'Decision regarding communication 155/96' (2003) 96 *American Journal of International Law* 937-942.

<sup>126</sup> Mutharika (n 40 above) 283.

the way in which the common position concerning climate change has been developed and carried forth.

Seventh, the common position provides the African continent with an opportunity to contribute to an agreement<sup>127</sup> on post-2012 measures to address climate change that is fair and equitable. In this manner it may ensure that the AU contributes constructively to the future development and implementation of international environmental law.

## 7 Copenhagen Conference<sup>128</sup>

The Copenhagen Conference (COP 15)<sup>129</sup> constituted a deadline to resolve questions concerning the post-2012 climate regime.<sup>130</sup> The Conference, however, could not meet expectations. Instead, it resulted in the Copenhagen Accord of 18 December 2009, which reflects a political agreement. Ethiopia (on behalf of the African group) and South Africa were among the states that reached an agreement on the accord.<sup>131</sup> The accord therefore does not represent a detailed legal Protocol pertaining to the post-2012 period.<sup>132</sup> The Copenhagen Accord rather serves as the basis for further international negotiations. In this sense, it represents a point of departure rather than a final product.<sup>133</sup> This implies that the African common position will continue to fulfil an important role during upcoming negotiations at COP 16<sup>134</sup> and COP

<sup>127</sup> The deliberations of AWG-LCA 6 provided input for a negotiating text prepared by its chair (FCCC/AWGLCA/2009/8) and resulted in a revised negotiating text (FCCC/AWGLCA/2009/INF 2). See art 20(2) of the Kyoto Protocol.

<sup>128</sup> It is not my intention to dissect COP 15 and its outcomes in detail. I shall briefly refer to issues of relevance for the current discussion. For an analysis, see D Bodansky 'The Copenhagen Climate Change Conference: A post-mortem' [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1553167](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553167) (accessed 31 March 2010).

<sup>129</sup> COP 15 took place from 7-19 December 2009 in Copenhagen; <http://unfccc.int/2860.php> (accessed 31 March 2010).

<sup>130</sup> This view was reflected in the unofficial slogan for the conference, 'seal the deal'.

<sup>131</sup> Reportedly, 29 states reached the accord. These states represent major emitters, the most vulnerable as well as least developed states. For a discussion of the Copenhagen Accord and COP 15, see L Rajamani 'Neither fish nor fowl' <http://www.cprindia.org> (accessed 31 March 2010). States may associate themselves with the accord through notification and are included in the list of states in the chapeau; [http://unfccc.int/files/parties\\_and\\_observers/notifications/application/pdf/notification\\_to\\_parties\\_20100118.pdf](http://unfccc.int/files/parties_and_observers/notifications/application/pdf/notification_to_parties_20100118.pdf) (accessed 31 March 2010).

<sup>132</sup> Due to objections by a group of states (led by Sudan, Venezuela and Bolivia), the COP was unable to adopt the accord. Instead the COP took 'note of' it.

<sup>133</sup> This seems to be in line with para 1 of the Bali Action Plan, which reads that the COP 'decides to launch a comprehensive process ... in order to reach an agreed outcome ...' The inclusion of 'agreed outcome' implies that the Bali Action Plan is not prescriptive on the legal form or content of the COP 15 result.

<sup>134</sup> Mexico will host COP 16 during December 2010.

17<sup>135</sup> pursuant to the enhancement of the adaptive capacity of African states.

It is interesting to reflect on the actions of the African group during COP 15. African states boycotted negotiations on 14 December in order to compel developed nations to adopt a second round of commitments.<sup>136</sup> This was done in protest against the perceived efforts of the developed states to kill Kyoto. African nations' call threw the negotiations in disarray. Africa is in favour of an agreement with emission reduction targets in order to avoid the catastrophe of climate change. The real impact of this display of power is questionable, but it indicates a more active and co-ordinated negotiating partnership that pursues the interests of the continent in a forceful manner.

However, the African consensus was disrupted after Ethiopian Prime Minister Meles Zenawi, who is the co-ordinator of CAHOSCC, unilaterally departed from the common position and submitted the Joint Appeal of France and Ethiopia, Representing Africa, for an Ambitious Copenhagen Accord.<sup>137</sup> Sudan's chief negotiator and Chairperson of the G77, Lumumba Di-Aping, accused Zenawi of capitulating under pressure from rich states. The actions of Zenawi and the response thereto accordingly led to the demise of the common negotiating strategy of the African group.<sup>138</sup>

The current discussion also warrants a brief reflection on the Accord. The Accord reiterates the particular vulnerability of Africa and that developed states shall support the implementation of adaptation action in developing states through 'adequate, predictable and sustainable financial resources, technology and capacity building'.<sup>139</sup> Developed states have committed themselves to new and additional funding 'approaching \$30 billion for the period 2010-2012 with balanced allocation between adaptation and mitigation'.<sup>140</sup> Africa will have priority access to adaptation funding. Furthermore, by 2020, developed states commit to a goal of \$100 billion, but this is linked to 'meaningful mitigation actions and transparency on implementation'. The Accord establishes the Copenhagen Green Climate Fund,

<sup>135</sup> South Africa will host COP 17 during December 2010.

<sup>136</sup> <http://www.iisd.ca/vol12/enb12455e.html> (accessed 31 March 2010).

<sup>137</sup> The appeal constitutes a new proposal for the negotiations and some see it as a betrayal of the African continent. The most controversial issue was the provision for a start-up fund of \$10 billion per annum for 2010-2012; <http://ecadforum.com/News/2166> (accessed 31 March 2010).

<sup>138</sup> The AU Assembly recently endorsed the leadership of Zenawi for COP 16 and COP 17. AU Assembly, 14th ordinary session, 31 January 2010-3 February 2010, Addis Ababa, Ethiopia, AU/Assembly/Dec 281 (XIV), Decision on the 15th Conference of the Parties to the United Nations Framework Convention on Climate Change and the Kyoto Protocol, Doc Assembly/AU/10 (XIV).

<sup>139</sup> Para 3.

<sup>140</sup> Para 8.

which shall operate as an entity of the financial mechanism.<sup>141</sup> The commitment of the developed world seems to be a far cry from the support envisaged in the common position, which refers to \$67 billion *per annum* for adaptation and \$200 billion in support of mitigation by 2020. The MRV clause applies in relation to financial support. The Accord does refer to the establishment of a High Level Panel under the COP 'to study the contribution of the potential sources of revenue'.<sup>142</sup> It is not clear what the exact powers of this Panel will be.

It is too early to determine whether the calls for ambitious QER targets, as reflected in the common position, will be agreed upon. The Accord specifies that industrialised states will commit to implement (individually or jointly) quantified economy-wide emission targets for 2020, to be submitted to the secretariat by 31 January 2010.<sup>143</sup> The MRV clause will also apply in this regard. This means that Annex I states may define their own target level and base year.

Developing states will implement mitigation actions.<sup>144</sup> The Accord therefore underwrites the distinction between the commitments of industrialised states and the national actions of developing states. Mitigation actions will be submitted to the UNFCCC secretariat. Mitigation actions that do not receive financial support will be subject to domestic MRV and states will report through national communications with provisions for 'international consultation'. The Accord makes provision for a registry for the listing of NAMAs that will receive support. Supported NAMAs will be subject to international measurement, reporting and verification in accordance with guidelines adopted by the COP. This approach is in line with the distinction that the African position makes between supported NAMAs and other actions.

The Accord also establishes a technology mechanism as called for in the common position.<sup>145</sup> The Accord calls for the immediate establishment of a mechanism in order to mobilise funds for REDD-plus from developed states.<sup>146</sup> However, it does not resolve the issue of private versus public sources.

In general, it seems that not all of the concerns of Africa as embodied in the common position have been met since no agreement has been reached on the emission targets of industrialised states. Furthermore, financial contributions clearly fall short from that required by developing states. The AU Assembly, however, recently endorsed the Accord

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<sup>141</sup> Para 10.

<sup>142</sup> Para 9.

<sup>143</sup> The Accord makes provision for a system of 'pledge and review' for mitigation commitments and actions. For a list of QER pledges, see <http://unfccc.int/home/items/5264.php> (accessed 31 March 2010).

<sup>144</sup> Para 5. For a list of NAMA pledges, see <http://unfccc.int/home/items/5265.php> (accessed 31 March 2010).

<sup>145</sup> Para 11.

<sup>146</sup> Para 6.



and urged members to make individual submissions to the UNFCCC Secretariat.<sup>147</sup>

## 8 Concluding remarks

Regional integration, through the AU, has the potential to facilitate co-operation pursuant to the articulation of African interests at international environmental negotiations. The aforementioned discussion of the common position on climate change indicates that regional integration can pursue much-needed adaptation through international negotiations and in this sense even promote environmental security since an enhanced adaptive capacity could curb conflicts concerning scarce resources in the context of the threats that climate change pose. However, recent practice pertaining to the common position and the actions of the African group during COP 15 indicate that the continent needs more than a 'common position on paper' in order to realise adaptive capacity through international climate change negotiations. The establishment of a common position and experiences during COP 15 provide valuable lessons and insights for future climate change negotiations. It is important that the African group learns from mistakes made during COP 15. It is unacceptable that the Ethiopian President decided to depart from the agreed position. It is even stranger that the AU Assembly subsequently endorsed his position for upcoming negotiations. Thus, heterogeneity of the group may continue to haunt these states. It is therefore important that African states aspire to the objectives and principles of the AU in order to overcome this obstacle. African states must stay committed to the agreed position and act together forcefully in order to further adaptive capacity. How will African states be able to develop and implement a comprehensive framework of African climate change programmes if they are unable to carry forth a common position?

The narrative concerning the actions of African states, however, also contains positive features. The grouping of African states based on shared vulnerability places the continent in a more powerful position which may counter marginalisation. The walk-out of African states during COP 15 supports this viewpoint. Pan-Africanism,<sup>148</sup> which is after all the underlying rationale for regional integration on the African continent, may therefore set the stage to address the threat of climate change. However, the outcome of further negotiations in 2010 and 2011 will indicate whether the fruits of pan-Africanism can amplify the voice of a marginalised continent for the well-being of its people.

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<sup>147</sup> See AU Assembly (n 138 above).

<sup>148</sup> Murithi (n 46 above) 7-38.



# Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights

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## Summary

*An extensive literature has evolved around the relationship between the African Commission on Human and Peoples' Rights and non-governmental organisations with observer status. Not much has been written about the nature of the relationship between the African Commission and national human rights institutions. This article seeks to scrutinise this relationship. In particular, it examines the role of national human rights institutions in the activities of the African Commission and, concomitantly, how their role could be strengthened in order to enhance human rights protection in Africa. The paper further examines the rationale behind their greater participation in the workings of the African Commission and ascertains whether there is a need for a more elaborate and meaningful relationship.*

## 1 Introduction

There is increased interaction between the African Commission on Human and Peoples' Rights (African Commission) and national human rights institutions (NHRIs). This interaction presents opportunities and

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challenges in the promotion and protection of human rights in Africa. More than 30 African countries have national human rights institutions, with a greater or lesser degree of independence depending on the situation in a particular country.<sup>1</sup> The number of NHRIs with affiliate status before the African Commission is currently 21.<sup>2</sup> Their relationship with the African Commission stands in stark contrast to the more robust and unique relationship of the African Commission and non-governmental organisations (NGOs). The relationship between the African Commission and NHRIs draws its legitimacy from articles 26 and 45(1)(c) of the African Charter on Human and Peoples' Rights (African Charter).<sup>3</sup> Article 26 of the African Charter places a duty on states to establish appropriate national institutions entrusted with the promotion and protection of rights embodied by the Charter, whilst section 45(1)(c) equally enjoins the African Commission to work with such institutions once established.

NHRIs are then supposed to interact with the African Commission in accordance with the Resolution on Granting Observer [Affiliate] Status to National Human Rights Institutions in Africa, adopted in 1998 (1998 Resolution on Affiliate Status).<sup>4</sup> This Resolution sets out the rights and duties of NHRIs as well as the requirements necessary for a national human rights institution to attain affiliate status before the African Commission. Accordingly, NHRIs are to assist the African Commission in the promotion and protection of human rights at the national level.<sup>5</sup> NHRIs are given affiliate status if they conform to the United Nations (UN) Principles Relating to the Status of National Human Rights Institutions (Paris Principles).<sup>6</sup> Their 'affiliate status' — as conferred upon them by the 1998 Resolution on Affiliate Status — does not clearly define their role and relationship with the African Commission<sup>7</sup> and remains to be clarified.<sup>8</sup>

Apart from the lack of clarity as to the role of NHRIs in the workings of the African Commission by the aforementioned instruments, there are a number of issues that affect both NGOs and NHRIs, such as their role in the drafting of state reports and their participation during the state reporting process. It is due to this anomaly that, at the 43rd session of the African Commission, the South African delegation called for a

<sup>1</sup> CH Heyns & M Killander *Compendium of key human rights documents of the African Union* (2007) 269.

<sup>2</sup> Para 14 26th Activity Report AU Doc EX CL/529(XV).

<sup>3</sup> F Viljoen *International human rights law in Africa* (2007) 412.

<sup>4</sup> Resolution on Granting Observer [Affiliate] Status to National Human Rights Institutions in Africa (1998 Resolution on Affiliate Status), adopted at the Commission's 24th session, Banjul, The Gambia, 22-31 October 1998.

<sup>5</sup> 1998 Resolution on Affiliate Status, para 4(d).

<sup>6</sup> n 5 above, para 4(a).

<sup>7</sup> Viljoen (n 3 above) 412.

<sup>8</sup> Viljoen (n 3 above) 413.

proper model that could better espouse the interface between the African Commission and NHRIs.<sup>9</sup> Among other things, the South African delegation called for the adoption of general guidelines to regulate the relationship between the African Commission and NHRIs.<sup>10</sup>

Whilst there are calls for the development of a more detailed relationship between the African Commission and NHRIs, there is an ongoing debate as to the nature and role of such institutions at international and regional levels. Although the role of NHRIs domestically does not admit of any doubt, their participation at the international and regional sphere is not at all clear.

Against the preceding background, the first section of this article takes a look at issues that affect and afflict the relationship between NHRIs and the African Commission. The second section of the article traces the trajectory of NHRIs and focuses on their origins, nature and role as well as their international and regional formal standing in the light of the Paris Principles. Third, a discussion on the emerging status of NHRIs as global actors is proffered by examining their engagement with the African Commission. The fourth section, forming the crux of this article, takes a detailed look at the participation of NHRIs in the workings of the African Commission. The fifth section investigates areas of possible collaboration between the African Commission and NHRIs. The final section is a summary of the conclusions drawn from the article.

## 2 The trajectory of national human rights institutions

Nudged on and supported by donors and the UN, NHRIs started flourishing in Africa in the 1990s.<sup>11</sup> This proliferation of NHRIs may easily be attributed to the recommendation by the African Commission to states urging them to establish institutions that will conduct studies and research.<sup>12</sup> Perhaps, also, this was due to the recognition that international and regional institutions cannot in themselves suffice as the primary sites of the struggle(s) for human rights.<sup>13</sup> Quashigah is of the view that these institutions are a product of the resurgence of democratisation in many parts of the world, and in Africa in particular.<sup>14</sup>

<sup>9</sup> Para 61 24th Activity Report AU Doc EX.CL/466(XIII).

<sup>10</sup> As above.

<sup>11</sup> Viljoen (n 3 above) 412.

<sup>12</sup> As above.

<sup>13</sup> OC Kafor & SC Agbakwa 'On legalism, popular agency and "voices of suffering": The Nigerian National Human Rights Commission in context' (2002) 24 *Human Rights Quarterly* 663.

<sup>14</sup> K Quashigah 'National human rights institutions in Africa: Functions, strengths, and weaknesses' quoted in HS Kanzira 'The independence of national human rights bodies in Africa: A comparative study of the CHRAJ, UHRC and SAHRC' (2002) 8 *East African Journal of Peace and Human Rights* 176.

## 2.1 Origins, nature and role of national human rights institutions

### 2.1.1 Defining national human rights institutions

While recognising the inherent difficulties with definitions, the UN has defined NHRIs as a ‘body which is established by a government under the constitution or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights’.<sup>15</sup> Carver’s report to the International Council on Human Rights Policy has defined them as a hybrid category that includes many different varieties within, such as human rights commissions, ombudsmen, *Defensores del Pueblo*, and procurators for human rights.<sup>16</sup> Accordingly, this ‘hybrid category’ excludes a government department, on the one hand, such as a human rights office in the foreign ministry, and obviously an NGO, on the other.<sup>17</sup>

Reif defines NHRIs as ombudsmen, human rights commissions or hybrid human rights ombudsmen.<sup>18</sup> Cardenas simply defines them as government agencies whose purported aim is to implement international norms domestically.<sup>19</sup> Suffice to point out that the definition of NHRIs seems to be contextual, and varies, depending to a large extent on the nature of the study and the purpose for which the study is being undertaken. That is why Hatchard defines them, in the context of the Commonwealth, as ‘bodies established by a national constitution or by statute and which promote and protect the fundamental political values of the Commonwealth that are enshrined in the Harare Commonwealth Declaration’.<sup>20</sup>

NHRIs have taken various forms in different countries, including, but not limited to, offices of ombudspersons, national human rights commissions, or a combination of the two,<sup>21</sup> anti-corruption commissions and equality and other specialist commissions.<sup>22</sup> At present, the majority of NHRIs fall into one of two broad categories: human rights

<sup>15</sup> Kafor & Agbakwa (n 13 above) 663.

<sup>16</sup> International Council on Human Rights Policy *Performance and legitimacy: National human rights institutions* (2004) 3; ESCR Committee General Comment 10, ‘The role of NHRIs in the protection of economic, social and cultural rights’ (1998) Doc E/1999/22.

<sup>17</sup> International Council on Human Rights Policy (n 16 above) 3.

<sup>18</sup> LC Reif ‘Building democratic institutions: The role of national human rights institutions in good governance and human rights protection’ (2000) 13 *Harvard Human Rights Journal* 2.

<sup>19</sup> S Cardenas ‘Emerging global actors: The United Nations and national human rights institutions’ (2003) 9 *Global Governance* 23.

<sup>20</sup> J Hatchard *Report on the inter-relationship between Commonwealth human rights commissions and other national human rights institutions* (2003) 7.

<sup>21</sup> Eg Ghana’s Commission on Human Rights and Administrative Justice (CHRAJ) fused a Human Rights Commission, an Ombudsman and an Anti-Corruption Agency.

<sup>22</sup> Hatchard (n 20 above) 7.

commissions or ombudsperson institutions.<sup>23</sup> The primary function of the latter institutions is to oversee fairness and legality in public administration. More specifically, the office of the ombudsperson exists to protect the rights of individuals who believe themselves to be victims of unjust acts on the part of public authorities.<sup>24</sup> Initially NHRIs were mainly concerned with the protection of persons against all forms of discrimination and with the protection of civil and political rights.<sup>25</sup> However, they are now encouraged to protect socio-economic rights,<sup>26</sup> with some institutions such as the South African Human Rights Commission (SAHRC) constitutionally mandated to promote and protect socio-economic rights.<sup>27</sup>

For the purposes of this article, NHRIs shall refer to permanent and independent bodies established by way of constitutional authority or through legislation and established for the specific purpose of promoting and protecting human rights.<sup>28</sup> Thus, the article takes a look at those NHRIs which have come to be widely known as national human rights commissions (NHRCs) established in accordance with the Paris Principles.<sup>29</sup>

### 2.1.2 The role of national human rights institutions at the domestic level

As mentioned before, the role of NHRIs is catalogued in several documents, namely, the Paris Principles, the Handbook on the Establishment and Strengthening of National Human Rights Institutions for the Promotion and Protection of Human Rights, the UN Fact Sheet 19: National Institutions for the Promotion and Protection of Human Rights, as well as the 1978 Guidelines on the Structure of National Institutions for the Protection and Promotion of Human Rights. The Best Practice Handbook is a guide to setting up NHRIs, staffing them, defining their mandates and practical roles as well as ensuring that they are accountable and accessible.<sup>30</sup>

In sum, these documents set out the role of NHRIs to include the competence to promote and protect universal human rights standards

<sup>23</sup> Kanzira (n 14 above) 174.

<sup>24</sup> Centre for Human Rights *National human rights Institutions: A handbook on the establishment and strengthening of national human rights institutions for the promotion and protection of human rights* (UN Handbook) UN Professional Training Series 4 (1995) 8.

<sup>25</sup> Centre for Human Rights (n 24 above) 7.

<sup>26</sup> ESCR Committee (n 16 above).

<sup>27</sup> Sec 184(3) South African Constitution (1996).

<sup>28</sup> AE Pohjolainen *The evolution of national human rights institutions – The role of the United Nations* (2006) 6.

<sup>29</sup> M Gomez 'Sri Lanka's new Human Rights Commission' (1998) 20 *Human Rights Quarterly* 281.

<sup>30</sup> Para 1 Paris Principles.

domestically.<sup>31</sup> They provide the minimum standards and guidelines for the establishment and evaluation of NHRIs.<sup>32</sup> Even though these instruments lay out the recommended framework for the establishment of NHRIs, much still depends upon the scope of constitutional rights and the size, structure and history of the state itself.<sup>33</sup> The Paris Principles set out some key paradigms which must be at the core of an NHRI.<sup>34</sup> The six key criteria in the Paris Principles are the following: independence of the institution guaranteed by statute or constitution; autonomy from government; pluralism; inclusivity in membership; a broad mandate based on universal human rights standards; adequate powers of investigation; and adequate resources.<sup>35</sup> As a result, most of these institutions have advisory, promotional and protective roles predominantly within the national sphere.

Most NHRIs carry out similar work, but the difference lies in the weight given to their particular functions. Hence, NHRIs differ in a number of significant respects, the main difference being the scope of their mandate.<sup>36</sup> The mandate of the Kenya National Commission of Human Rights, the SAHRC and the Ugandan Human Rights Commission allows them, *inter alia*, to investigate upon receiving complaints about the violation of human rights, to visit places of detention, to inform and educate the public about human rights and to act as the chief agent of the government in ensuring compliance with its obligations under international treaties and conventions on human rights.<sup>37</sup>

NHRIs are also vested with the responsibility to advise government on matters concerning the promotion and protection of human rights<sup>38</sup> and are mandated to offer advice on the conformity or otherwise of existing or proposed legislation with international human rights norms.<sup>39</sup> They are mandated to examine complaints alleging infringements of applicable international human rights instruments by

<sup>31</sup> As above.

<sup>32</sup> C Idike 'Deflectionism or activism? The Kenya National Commission on Human Rights in focus' (2004) 1 *Essex Human Rights Review* 43.

<sup>33</sup> J Hatchard *et al* *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern perspective* (2004) 211.

<sup>34</sup> International Council on Human Rights Policy (n 16 above) 1-2.

<sup>35</sup> Roundtable of national human rights institutions and national machineries for the advancement of women, Ouarzazate, Morocco, 15-19 November 2004 3-4.

<sup>36</sup> M Sekaggya 'Value of human rights institutions: Human rights commission processes' in CM Peter (ed) *The protectors: Human rights commissions and accountability in East Africa* (2008) 72.

<sup>37</sup> LM Mute 'Infusing human rights in policy and legislation: Experiences from Kenya National Commission on Human Rights' in CM Peter (n 36 above) 29; secs 16(1) (a)-(i) KNCHR Act.

<sup>38</sup> Para 2 Paris Principles; eg sec 16(1)(d) KNCHR Act.

<sup>39</sup> Paras 1(a)-(g) Paris Principles.

individuals, associations of trade unions and other representatives.<sup>40</sup> In fact, most of them enjoy wider remedial powers.<sup>41</sup> NHRIs are also supposed to ensure the effective implementation of national legislation and international instruments that impose human rights obligations on the government.<sup>42</sup> NHRIs are further responsible for encouraging states to ratify or accede to all the relevant international human rights instruments<sup>43</sup> and to take part in the state reporting process by way of the submission of shadow reports.<sup>44</sup> NHRIs are also supposed to assist in the formulation of educational and information programmes designed to enhance awareness and understanding of human rights principles through education and all press organs.<sup>45</sup> They are expected to co-operate with the relevant international bodies.<sup>46</sup>

The mandate of NHRIs also differs from one institution to one another, depending on the manner in which they are established. The SAHRC and the Ugandan Human Rights Commission both derive their mandate from the respective Constitutions.<sup>47</sup> Some NHRIs, such as the Benin Human Rights Commission and the Kenya National Commission of Human Rights, are established by acts of parliament,<sup>48</sup> whilst the Nigerian National Human Rights Commission was established by a military decree.<sup>49</sup>

Suffice to point out that, even though some successful NHRIs were established by an act of parliament or some other means, a constitutional foundation remains the foremost guarantee of legitimacy for national human rights institutions as constitutions are generally hard to tamper with.<sup>50</sup> Hence, it is advisable that a newly-established NHRI should derive its mandate from the state's constitution.<sup>51</sup>

<sup>40</sup> Part IV Paris Principles; UN Handbook (n 24 above) 34; Kafor & Agbakwa (n 13 above) 671; eg secs 16(1)(h)-(i) KNCHR Act.

<sup>41</sup> Eg secs 19(2)(a)-(c) KNCHR Act.

<sup>42</sup> Paras 3(b) & (c) Paris Principles; eg sec 16(1)(f) KNCHR Act.

<sup>43</sup> Para 3(c) Paris Principles.

<sup>44</sup> Para 3(d) Paris Principles; eg sec 16(1)(f) KNCHR Act.

<sup>45</sup> Para 3(g) Paris Principles; eg sec 16(1)(c) KNCHR Act.

<sup>46</sup> Para 3(e) Paris Principles.

<sup>47</sup> Sec 181(1)(b) Constitution of the Republic of South Africa; art 51(2) Constitution of Uganda; UHRC Act of 1995.

<sup>48</sup> B Lindsnaes *et al* *National human rights institutions; articles and working papers: Input to the discussions on the establishment and development of the functions of national human rights institutions* (2001) 14.

<sup>49</sup> National Human Rights Commission Decree of 1995.

<sup>50</sup> M Mohamedou 'The effectiveness of national human rights institutions' in Lindsnaes *et al* (n 48 above) 51.

<sup>51</sup> CM Fombad 'Limits of power to amend constitutions: Recent trends in Africa and their impact on constitutionalism' (2007) 6 *University of Botswana Law Journal* 27.

## 2.2 International and regional formal standing of national human rights institutions and the Paris Principles

It is well accepted that the Paris Principles provide guidelines as to the establishment, management, role and participation of NHRIs largely within the domestic arena. Their participation within the national — legal or otherwise — framework is not questionable, as they were initially and specifically crafted for that purpose. However, there is not sufficient literature situating the justification for their participation in the regional and international arena within the Paris Principles or any of the aforementioned documents on the nature and functions of NHRIs. The Paris Principles advocate the co-operation of NHRIs with the relevant international and regional human rights mechanisms. The extent of the co-operation remains to be clarified and is now a matter of interpretation, sparking a debate among international human rights scholars.

By formal standing of NHRIs in the context of the present paper I refer to the recognition of NHRIs as actors — and not as mere expedient partners — by any international or regional human rights mechanism. Such recognition will have to be express and may be in the form of resolutions — as is the case with the African Commission — or located in a treaty as is the case with the African Court of Justice, or may be located within the documents within which NHRIs derive their legitimacy. Such recognition will as a matter of course exclude the *de facto* recognition of NHRIs as actors. Therefore, by international or regional formal standing of NHRIs, I refer to the international or regional recognition of NHRIs — in one or more of the aforementioned ways — as actors at that level.

To a larger extent, the documents within which NHRIs derive their legitimacy do not envisage a NHRI that is actively and/or directly involved in the international *fora*. As it will be shown later, their participation at regional and international levels remains questionable. In fact, international human rights scholars have adopted what can be considered a liberal interpretation of these documents.<sup>52</sup> In particular, the Paris Principles have been interpreted to accommodate a larger participation of these institutions at international and regional levels. Through such interpretation, albeit inconsistent, NHRIs have been given the latitude to appear and participate at these forums.

NHRIs have been allowed to form networks with international and regional institutions and are beginning to acquire formal international standing. It appears, however, that the role that was envisaged for NHRIs, in particular by the Paris Principles, at international and regional levels was that of co-operation with the relevant international bodies. None of the instruments cited above specifically gives NHRIs a formal

<sup>52</sup> R Murray *The role of national human rights institutions at the international and regional levels: The experience of Africa* (2007) 7.



international standing, nor does any enabling legislation of these institutions perused during this study. In fact, NHRIs were initially established as liaison points for the UN, where the UN would be able to utilise their proximity to national authorities and populations to publicise human rights-related activities,<sup>53</sup> thus allowing easier implementation of international human rights principles and norms domestically.<sup>54</sup>

It is the metamorphosis of the 'purported aim' of the establishment of NHRIs, initially for forging the implementation of international human rights norms domestically, that is intriguing. It is apparent that the definitions highlighted above do not on the face of it perceive these institutions as international actors. They presuppose that NHRIs are by and large mandated to implement international norms domestically. The transformation of the role of these institutions exposes definitions of a NHRI, such as Cardenas's definition, as being a too simplistic view of the very nature and role of contemporary NHRIs.

### 3 Is the devil in the details? An analysis of the rise of national human rights institutions as new global actors

The mandate conferred upon NHRIs by the Paris Principles has been widely interpreted to accommodate them as actors at the international and regional levels. The issue of international formal standing aside, the main question remains: What is the main agenda of NHRIs at the international and regional levels? Espousing the rationale behind their emerging status as international actors, this section of the article highlights what appears, in the words of Cardenas, to be a double-edged phenomenon presenting both opportunities and challenges for the local protection of human rights norms.<sup>55</sup> It presents a discussion of their emerging status as global actors by examining their engagement with the African Commission.

Representatives of NHRIs are increasingly seen as actors in their own right at international human rights conferences and at times during convention negotiations.<sup>56</sup> It is not far-fetched to say that hardly any international conference or seminar takes place without their involvement.<sup>57</sup> Osogo is of the view that this is not accidental and it

<sup>53</sup> JO Ambani 'Oval slides in triangular spaces? Anchoring national human rights institutions in "tripartite" Commonwealth Africa' unpublished LLM dissertation, University of Pretoria, 2006 8.

<sup>54</sup> Ambani (n 53 above) 12.

<sup>55</sup> Cardenas (n 19 above) 23.

<sup>56</sup> J von Doussa 'The potential role of national human rights institutions in the Pacific' paper presented at the Australian Law Reform Agencies conference, Port Villa, Vanuatu, September 2008 [http://www.hreoc.gov.au/about/media/speeches/speeches\\_president/index.html](http://www.hreoc.gov.au/about/media/speeches/speeches_president/index.html) (accessed 9 October 2008).

<sup>57</sup> Ambani (n 53 above) 12.

is very well within their mandate.<sup>58</sup> However, as highlighted above, this participation is contentious. Certainly, it should not be taken for granted that they are well within their mandate by virtue of them participating at the international and regional levels. There is a need to interrogate the rationale behind their participation at those levels, with the aim of ascertaining whether they are indeed a necessary actor in the international arena.

### **3.1 The rationale behind the participation of national human rights institutions at the international and regional levels**

As already mentioned, the justification and role of NHRIs at the domestic level — either alone or in collaboration with other international or regional organisations — admits of no doubt. This is largely because NHRIs, as their name suggests, were crafted for the promotion and protection of human rights at the domestic level. It is the rationale for their participation at the international and regional levels that is more often than not questioned. Justifications for the participation of NHRIs at the international and regional levels evoke arguments akin to those of permitting NGOs to do the same.<sup>59</sup> In fact, the reasons are so similar that one might conclude that giving them any international formal standing will be tantamount to unnecessary duplication of international actors. Despite this possible objection, the following discussion pinpoints the reasons for allowing national institutions to have a greater performance at international or regional levels. The rationale for their participation at the international and regional levels could, arguably, be situated within the competence and responsibilities of NHRIs as espoused by the Paris Principles. For example, in the Paris Principles it is foreseen that NHRIs have a role to play in relation to reports that the state is supposed to submit to international and regional mechanisms.<sup>60</sup>

The involvement of NHRIs creates an important interface between the two levels of human rights protection. That is why one of the arguments advanced by proponents of clothing NHRIs with international formal standing is that their participation at these levels can better ensure states' compliance with international obligations.<sup>61</sup> In particular, Murray asserts, they can be seen as the national machinery designed for the implementation of the decisions and recommendations of international bodies.<sup>62</sup> Some observers have argued that NHRIs are the

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<sup>58</sup> As above.

<sup>59</sup> Murray (n 52 above) 11.

<sup>60</sup> Para A(3)(d) Paris Principles. The UN CERD Committee has in its General Recommendation 28 (2002) recommended that NHRIs assist their member states in complying with their reporting obligations.

<sup>61</sup> Murray (n 52 above) 11.

<sup>62</sup> Murray (n 52 above) 12.

only realistic means of addressing a vast majority of domestic issues.<sup>63</sup> Perhaps to say that they are the 'only' means is an exaggeration. It is, however, true to say that their mandate is all-encompassing and allows them to do more. The important role of NGOs, ombudspersons as well as other institutions with the mandate of protecting human rights should not be forgotten.<sup>64</sup>

NHRIs may also be counted on to assist with the submission of reports by states to international bodies. Even though there is controversy surrounding the participation of NHRIs in the state reporting process,<sup>65</sup> their involvement, whether directly or indirectly, will provide a reliable source of information.<sup>66</sup> The participation of NHRIs in international and regional mechanisms can also provide them with platforms to air their views and advance the quest for the protection of the citizenry and of human rights defenders.<sup>67</sup>

NHRIs can provide a level of expertise on human rights through their contribution at international and regional levels.<sup>68</sup> It is within that context that NHRIs are able to assist international or regional bodies in any fact-finding missions or prison facilities inspections as is normally the case and assist, if allowed by the relevant body's procedural rules of fact-finding missions, with their on-site observations.<sup>69</sup> Such assistance will also be relevant for special mechanisms, such as Special Rapporteurs.<sup>70</sup>

Another reason for NHRIs to participate at the international and regional levels is to influence the shaping of international policies, especially those with a bearing on the enjoyment of human rights by the citizens of a particular state. They may also become the focal point for submitting individual complaints to treaty bodies, such as the Afri-

<sup>63</sup> M Kjørsum *National human rights institutions implementing human rights* (2003) 19 [http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/n\\_h\\_r\\_i\\_h\\_fte\\_eng.pdf](http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/n_h_r_i_h_fte_eng.pdf) (accessed 20 August 2008).

<sup>64</sup> In the case of South Africa, this would be the other ch 9 institutions, namely, the Commission for Gender Equality, the Public Protector and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; sec 181 South African Constitution.

<sup>65</sup> Viljoen (n 3 above) 370; Murray (n 52 above) 16-18; Hatchard (n 33 above) 231; M Nassali 'Economic and social rights: drawing the threads together' in Peter (n 36 above) 98.

<sup>66</sup> M Evans *et al* 'The reporting mechanism of 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) 57.

<sup>67</sup> Murray (n 52 above) 21.

<sup>68</sup> Murray (n 52 above) 18; ML Schweitz 'NGO participation in international governance: The question of legitimacy' (1995) 89 *American Society of International Law Proceedings* 419.

<sup>69</sup> Centre for Human Rights *Opinion to the African Commission on Human and Peoples' Rights on the conduct and procedure of joint promotional and protective fact-finding missions with the United Nations and any other organisations* (2008) 5 (on file with author).

<sup>70</sup> Viljoen (n 3 above) 393.

can Court on Human and Peoples' Rights (African Court), the African Commission and the UN Committee on the Elimination of All Forms of Discrimination (CERD Committee).<sup>71</sup> There have been a few cases where NHRIs have themselves taken cases to international or regional bodies under the communication procedure.<sup>72</sup> This role, it could be argued, is well within their mandate.

Most NHRIs devote considerable energy and resources to human rights education programmes. Human rights education not only sensitises people about their rights, but it also makes the state aware of its obligations under international legal standards.<sup>73</sup> Information and education are the only ways in which the African Charter and other instruments can become a dynamic part of the democratic process.<sup>74</sup> In fact, some international and regional bodies have both protective and promotional mandates.<sup>75</sup> As a result, NHRIs can partner with international or regional bodies to carry out the dissemination of information and the promotion of human rights at the domestic level. It thus makes sense for NHRIs to participate at the international and regional levels, in order to better carry out human rights education programmes in close co-operation with the protective mechanisms.

The relationship between NHRIs and regional and international human rights mechanisms raises a number of other interesting issues. Like other institutions in a globalising world, NHRIs can have both beneficial and perverse consequences.<sup>76</sup> Having highlighted the advantages of the participation of NHRIs at the international or regional levels above, the following section looks at the other side of the coin. It considers what has come to be known as the 'perverse consequences' of affording NHRIs international or regional formal standing.

### 3.2 The latent danger of national human rights institutions as international or regional actors

One of the daunting challenges is the ambiguity of NHRIs: Are they state or non-state actors?<sup>77</sup> This ambiguity seems to stem from a narrow understanding of the true nature of NHRIs as state institutions or government machinery which have the responsibility to hold governments accountable. They are supposed to be independent from government, and yet they are set up by the government and acting

<sup>71</sup> Kjærum (n 63 above) 19.

<sup>72</sup> NHRIs lodge petitions with the Inter-American Commission on Human Rights after domestic remedies have been exhausted; Murray (n 52 above) 13.

<sup>73</sup> As above.

<sup>74</sup> Lindsnaes (n 48 above) 120.

<sup>75</sup> SA Yeshanew 'Utilising the promotional mandate of the African Commission on Human and Peoples' Rights to promote human rights education in Africa' (2007) 7 *African Human Rights Law Journal* 191.

<sup>76</sup> Cardenas (n 19 above) 36.

<sup>77</sup> Murray (n 52 above) 59.

as quasi-governmental organisations.<sup>78</sup> The question is whether they should be regarded as state actors or non-state actors, or whether they should be treated as *sui generis*. Coupled with this ambiguity is the issue of the accountability of NHRIs. Precisely who is accountable, between NHRIs themselves and the state, for actions of a NHRI at international and regional level?<sup>79</sup>

A full discussion of these issues is beyond the scope of this paper. Suffice to point out that these conceptual dilemmas are no doubt the most critical issues that need to be addressed in order to ensure that NHRIs have a significant and distinctive place at the international and regional arena.<sup>80</sup> This dilemma is, as Viljoen rightly points out, most apparent in matters of state reporting.<sup>81</sup> Their participation at the international and regional levels therefore needs to be scrutinised, lest they will be used by states to conceal violations of human rights by the state from an international body.<sup>82</sup>

Cardenas rightly argues that NHRIs could lead to the reassertion of state authority and a dampening of the role of civil society.<sup>83</sup> That of course is likely to arise where NHRIs are used by the government to improve its international image. The creation of the Nigerian National Human Rights Commission by the dictatorial Abacha regime is an oft-cited example of an institution created to keep up appearances.<sup>84</sup> The danger posed by similarly co-opted NHRIs to the human rights struggle is real. Through such institutions, states will move to displace non-state actors, particularly civil society. The use of NHRIs as the voice of the state usually happens when those leading the institution are appointed along political lines. This can easily be avoided by ensuring — among other things — that commissioners are properly remunerated so as to avoid cases of corruption,<sup>85</sup> have security of tenure, are answerable to the legislature, not the executive, and have financial autonomy to the extent that they will be able to determine their priorities and activities.<sup>86</sup>

Further, as NHRIs acquire more formal international powers, they may begin to compete with civil society actors and also help states control the human rights agenda by silencing calls for accountability

<sup>78</sup> P de Vos 'Experience of human rights in Africa: Challenges of implementing economic, social and cultural rights' in Peter (n 36 above) 27.

<sup>79</sup> C Scott 'Accountability in the regulatory state' (2000) 27 *Journal of Law and Society* 60; Murray (n 52 above) 69-88.

<sup>80</sup> RE Kapindu 'Book review: *The role of national human rights institutions at the international and regional levels: The experience of Africa* by Rachel Murray' (2008) 125 *South African Law Journal* 198.

<sup>81</sup> Viljoen (n 3 above) 393.

<sup>82</sup> International Council on Human Rights Policy (n 16 above) 100.

<sup>83</sup> Cardenas (n 19 above) 7.

<sup>84</sup> Kafor & Agbakwa (n 13 above) 665-666.

<sup>85</sup> International Council on Human Rights Policy (n 16 above) 12-13.

<sup>86</sup> As above.

at the international and regional levels.<sup>87</sup> It is possible that the roles of NHRIs and civil society actors could come into conflict, particularly in respect of dissent when it comes to the policies of the government and their implications for human rights.<sup>88</sup> The Paris Principles recognise that the relationship with civil society can help NHRCs to protect their independence and pluralism.<sup>89</sup> Thus, establishing close links or working relationships with NGOs and the larger network of civil society is important because civil society is most of the time involved directly with those in need of the services of a national Institution.<sup>90</sup> Through extensive and systematic co-operation with civil society, NHRCs can easily empower civil society participation and the advocacy on human rights protection and help fill human rights implementation gaps at the national level.

Finally, it has been argued that NHRIs are not necessarily experts necessitating their receiving formal international status on that basis.<sup>91</sup> In most states, they do not have the resources, unlike NGOs which are normally donor-funded, to obtain all the information relating to human rights violations in the respective country.<sup>92</sup> However, Kapindu argues to the contrary and asserts that ‘perhaps the problem is not inherent in the very concept of an NHRI, but rather in some of the people who have thus far been appointed to such organisations’.<sup>93</sup> He concludes by pointing out — rightly so — that the very nature of an NHRI requires that the people who are appointed should possess the necessary expertise in the area of human rights.<sup>94</sup>

#### 4 Participation of national human rights institutions in the workings of the African Commission

Consistent with international best practices, the African Charter encourages states to establish appropriate national institutions entrusted with the promotion and protection of rights and freedoms guaranteed

<sup>87</sup> Cardenas (n 19 above) 37.

<sup>88</sup> CR Kumar ‘National human rights institutions: Good governance perspectives on institutionalization of human rights’ (2003) 19 *American University International Law Review* 297; see also MA Olz ‘Non-governmental organisations in regional human rights systems’ (1997) 28 *Columbia Human Rights Law Review* 326-321.

<sup>89</sup> Para 1(a) Paris Principles, Composition and Guarantees of Independence and Pluralism.

<sup>90</sup> Training Series 12 *Economic, social and cultural rights: A handbook for national human rights institutions* (2005) 38.

<sup>91</sup> Murray (n 52 above).

<sup>92</sup> Kumar (n 88 above) 297; interview with Roselyn Karugonjo-Segawa, Director, Monitoring and Inspections, Uganda Human Rights Commission, Kampala, Uganda, 14 October 2008.

<sup>93</sup> Kapindu (n 80 above) 199.

<sup>94</sup> As above.

under the Charter.<sup>95</sup> Before NHRIs were given the opportunity to obtain affiliate status with the African Commission in 1998, a Co-ordinating Committee of African National Institutions (now renamed the Network of African National Human Rights Institutions) was formed in 1996 in Yaoundé, Cameroon, where the first African National Institutions Conference was held.<sup>96</sup> The Yaoundé Declaration was a decision by NHRIs present at the conference to, among other things, negotiate for a proper representative status at the African Commission.<sup>97</sup> The second conference of a similar nature was held in 1998 in Durban, South Africa, where another declaration was adopted.<sup>98</sup> The Durban Declaration urged the African Commission to adopt — at its next session — an appropriate resolution on the effective participation of national institutions in the work of the African Commission.<sup>99</sup>

NHRIs were offered the opportunity to apply for affiliate status with the African Commission through the 1998 Resolution on Affiliate Status. The Resolution did no more than endorse the Paris Principles as the criteria applicable for determining the status of affiliated institution and imposed a few obligations on these institutions.<sup>100</sup> The decision to grant NHRIs affiliate status by the African Commission was welcomed by the Organization of African Unity (OAU) in its Grand Bay (Mauritius) Declaration and Plan of Action.<sup>101</sup> It appears that NHRIs themselves pushed hard for recognition and eventual affiliate status with the African Commission. The relationship between NHRIs and the African Commission after the 1998 Resolution on Affiliate Status will be the focus of the next section of this article.

#### 4.1 Beyond the Resolution on Granting Observer [Affiliate] Status to National Human Rights Institutions in Africa (1998)

The term 'affiliate status' adopted by the 1998 Resolution does not clearly define the role of NHRIs and fails to sufficiently demarcate the nature of the role of NHRIs at the African Commission. The Resolution merely requires that these institutions assist the African Commission in the promotion and protection of human rights at the national level.<sup>102</sup> That notwithstanding, their affiliate status entitles NHRIs to be present at and to participate 'without voting rights' in African Commission

<sup>95</sup> Art 26 as read with art 25 African Charter.

<sup>96</sup> [http://www.newsite.co.ke/hr/index.php?option=com\\_content&task=view&id=8&Itemid=3](http://www.newsite.co.ke/hr/index.php?option=com_content&task=view&id=8&Itemid=3) (accessed 11 October 2008).

<sup>97</sup> Para 17 Yaoundé Declaration.

<sup>98</sup> Durban Declaration.

<sup>99</sup> Para 14 Durban Declaration.

<sup>100</sup> Para 4 Resolution on Affiliate Status.

<sup>101</sup> Para 24 Mauritius Declaration and Plan of Action.

<sup>102</sup> Para 4(d) Resolution on Affiliate Status to National Human Rights Institutions in Africa, adopted at the Commission's 24th session, Banjul, The Gambia, 22-31 October 1998; Viljoen (n 3 above) 413.



sessions.<sup>103</sup> The Activity Reports of the African Commission catalogue, albeit inconsistently, the relationship after the 1998 Resolution on Affiliate Status. NHRIs are afforded time to speak after states and before NGOs. They speak under the agenda item 'co-operation and relationship between Commission with NHRIs and NGOs' during the public sessions of the African Commission.<sup>104</sup> NHRIs are permitted to make any presentations on any issue that is of relevance to them and their presentations are usually preceded or followed by consideration by the African Commission of applications for affiliate status from NHRIs. NHRIs which care to attend the African Commission sessions take this opportunity to request a more involving relationship between the African Commission and NHRIs.<sup>105</sup> They have also been given the opportunity to give a statement, through a representative of NHRIs, at the opening ceremony of the Commission's sessions.<sup>106</sup>

The Interim Rules of the African Commission now make specific reference to NHRIs under Rule 72. Unfortunately, the Interim Rules restate the 1998 Resolution on Affiliate Status and do not marshal any new improvements. Unlike NGOs with observer status, it is not mentioned what will happen when a NHRI fails to submit its bi-annual report to the Commission. Further, it appears that NGOs with observer status can be invited to be present at private sessions of the Commission, whilst the same opportunity appears not to have been extended to NHRIs.

The participation of NHRIs in the sessions of the African Commission is as a result erratic. The Activity Reports indicate that a high water mark of attendance was reached at the African Commission's 39th ordinary session, when 19 NHRIs attended.<sup>107</sup> The number decreased sharply to five at the following session.<sup>108</sup> The 41st ordinary session was graced by 11 NHRIs.<sup>109</sup> Four institutions attended the 42nd session<sup>110</sup> and the 43rd ordinary session was attended by three NHRIs.<sup>111</sup> The 44th ordinary session was attended by nine NHRIs,<sup>112</sup> while the 45th ordinary session was attended by eight NHRIs.<sup>113</sup>

Apart from these sessions, the collaboration of NHRIs with the commissioners is usually in the form of promotional missions in respect of the duties that they have been assigned to do, mostly in their capacity

<sup>103</sup> Para 4 1998 Resolution on Affiliate Status; Viljoen (n 3 above) 413.

<sup>104</sup> Murray (n 52 above) 49.

<sup>105</sup> n 9 above.

<sup>106</sup> Murray (n 52 above) 51.

<sup>107</sup> Para 7 20th Activity Report, AU Doc EX.CL/279(IX).

<sup>108</sup> Para 7 21st Activity Report, AU Doc EX.CL/322(X).

<sup>109</sup> Para 9 22nd Activity Report, AU Doc EX.CL/364(XI).

<sup>110</sup> Para 12 23rd Activity Report, AU Doc EX.CL/466(XIII).

<sup>111</sup> Para 10 24th Activity Report.

<sup>112</sup> Para 8 25th Activity Report, AU Doc EX CL/490(XIII).

<sup>113</sup> Para 6 26th Activity Report.



as Special Rapporteurs.<sup>114</sup> Frankly, the commissioners are not doing much in terms of establishing a more formal link between the African Commission and NHRIs. These promotional activities are mostly in the form of workshops or panel discussions, relegating this affiliate status to nothing more than a 'talk shop'. Otherwise any working relationship between the African Commission and NHRIs in any other forum or form, if any, remains invisible.

There is simply no proper co-ordination and communication between the two. In the first instance, despite assertions by the African Commission that it values the relationship,<sup>115</sup> it has failed to follow up on the submission of reports by NHRIs as required by the 1998 Resolution on affiliate status.<sup>116</sup> This is despite the fact that once such a follow up is consistently done, NHRIs and the African Commission will be kept abreast of the workings of each other. It will further allow the African Commission to ensure that African NHRIs comply with the Paris Principles.

The African Commission is simply not pro-active, has left much to chance and to a large extent depends on the efforts of NHRIs. It does not even play a protective role in supporting NHRIs' commissioners that face government pressure or reprisal for their work. The African Commission has not reprimanded NHRIs that are weak or state-compliant.<sup>117</sup> This is despite a scathing report on NHRIs entitled 'Protectors or Pretenders; Government Human Rights Commissions in Africa' published by Human Rights Watch in March 2001.<sup>118</sup> Furthermore, several recommendations made by NHRIs to the African Commission remain unimplemented.<sup>119</sup> Despite this unfruitful relationship, the African Commission continues to confer affiliate status on those institutions which have applied and it continues to encourage states to establish such where none exists.<sup>120</sup>

How and in what form this operational gap can be closed is discussed in detail later in this article. Suffice to point out that the participation of NHRIs may 'be limited to their issuing of common positions on thematic issues as regards human rights implementation, including their

<sup>114</sup> Para 58 23rd Activity Report.

<sup>115</sup> Paras 47 & 49 African Commission's Mauritius Plan of Action 1996-2001.

<sup>116</sup> Murray (n 52 above) 87.

<sup>117</sup> Human Rights Watch 'Protectors or pretenders? Government human rights commissions in Africa' <http://www.hrw.org/reports/2001/africa> summary (accessed 10 May 2008).

<sup>118</sup> The report charges that many African NHRIs serve as apologists for government violations of human rights, lack independence and are generally, with a few exceptions, ineffective; Human Rights Watch (n 117 above) summary; MH Abdiwawa 'Empowering people on their rights in Tanzania' in Peter (n 36 above) 44.

<sup>119</sup> Second AU conference on NHRIs which was held to discuss the role of NHRIs in the African Commission resulted in recommendations which remain unimplemented; para 18 20th Activity Report; Viljoen (n 3 above) 413.

<sup>120</sup> Murray (n 52 above) 51.

own role and achievement of it'.<sup>121</sup> NHRIs can strengthen the national human rights institutions forum during the sessions of the African Commission at which strategies, resolutions as well as partnerships will be created. The national human rights institutions forum may only be strengthened by regular attendance of the sessions of the African Commission by NHRIs. Despite the possible involvement of a NHRI in the drafting of the state report, NHRIs should take an active part in assisting commissioners with questions that should be posed to the delegation of the reporting state. They should be more involved in the drafting of the African Commission's operating documents, such as its rules of procedure and its state reporting guidelines.

In the light of the non-existent efforts by the African Commission, efforts by NHRIs themselves cannot go unnoticed. NHRIs continue to hold conferences geared towards fostering a meaningful relationship. It is at these meetings that NHRIs could share their experiences, activities and difficulties with regard to the protection of human rights at the national level.<sup>122</sup> African NHRIs have also established the Network of African National Human Rights Institutions (NANHRI/Network), formerly known as the Co-ordinating Committee of the African National Human Rights Institutions.<sup>123</sup> The constitution of NANHRI governs, among other things, the Co-ordinating Committee of NANHRI.<sup>124</sup> Registered under Kenyan law as an independent legal entity, the Co-ordinating Committee co-ordinates the activities of the network through the Secretariat based in Kenya.<sup>125</sup>

NANHRI was conceived as a means of fostering relationships between NHRIs, regional and international human rights protection bodies as well as a way of strengthening NHRIs in Africa.<sup>126</sup> As Karugonjo-Segawa has pointed out, the network is willing and it is trying to improve relations between NHRIs in Africa and the African Commission.<sup>127</sup> The most unfortunate thing to happen would be for the network to concentrate on maintaining a good relationship with the International Co-ordinating Committee of National Human Rights Institutions (ICC) and other UN Charter-based mechanisms to the exclusion of the African Commission. Commissioner Bahame Nyanduga has already lamented the fact that the Constitution of NANHRI does not mention the African Charter, yet

<sup>121</sup> G de Beco 'Networks of European national human rights institutions' (2008) 14 *European Law Journal* 860-877 869.

<sup>122</sup> De Beco (n 121 above) 864.

<sup>123</sup> [http://www.newsite.co.ke/hr/index.php?option=com\\_content&task=view&id=8&Itemid=3](http://www.newsite.co.ke/hr/index.php?option=com_content&task=view&id=8&Itemid=3) (accessed 11 October 2008).

<sup>124</sup> As above.

<sup>125</sup> As above.

<sup>126</sup> Arts 2 & 3 Constitution of NANHRI.

<sup>127</sup> Interview (n 92 above).

member states draw reference from the Charter.<sup>128</sup> He further pointed out that there is a need for the modalities of co-operation between the African Commission and NANHRI to be looked into.<sup>129</sup>

#### 4.2 Post-mortem: Understanding the stillbirth of the relationship between the African Commission and national human rights institutions

One need not belabour the point with regard to this sad reality. As evidenced above, the lack of co-ordination between the African Commission and NHRIs is, to a larger extent, the cause of all the woes that have befallen the relationship between the two. Despite repeated calls for the establishment of one,<sup>130</sup> there is still no focal point for NHRIs within the Secretariat of the African Commission. This is despite the foregone conclusion that once such a co-ordination point is established, there will be an improved relationship. Such a focal point is likely to enhance their affiliate status as well as lead to the development of a clearer working relationship.<sup>131</sup> NHRIs do not attend the meetings of the African Commission because of the way the proceedings are being conducted and the lack of clarity on the agenda.<sup>132</sup> Hansungule questions the competence of NHRIs in assisting states' compliance with international obligations and points out that in certain cases they do not possess the relevant skills to play that role.<sup>133</sup> On the contrary, Karugonjo-Segawa posited that most NHRIs now have the capacity and indeed appreciate the workings of the African Commission.<sup>134</sup> Possibly, in certain cases, NHRIs are staffed with people who have no prior experience or training in human rights standards or work,<sup>135</sup> making it impossible for them to appreciate the work of the African Commission.

The poor relationship between the African Commission and NHRIs may be attributable to a lack of interest in the workings of the African Commission by NHRIs themselves, a lack of interest in the work done by NHRIs by the African Commission and, fatally, a lack of communication of the African Commission's activities to NHRIs.<sup>136</sup> Other problems

<sup>128</sup> Conference Report, Sixth Conference of African National Human Rights Institutions, 8-10 October 2007, Kigali, Rwanda, 34.

<sup>129</sup> As above.

<sup>130</sup> n 9 above; Report of the retreat of members of the African Commission on Human and Peoples' Rights facilitated by the Office of the High Commissioner for Human Rights (OHCHR), African Union Conference Centre, Addis-Ababa, Ethiopia, 24-26 September 2003 <http://www.nhri.net/pdf/ACHPR-Retreat-Report-Final.pdf> (accessed 22 February 2010).

<sup>131</sup> As above.

<sup>132</sup> Murray (n 52 above) 53.

<sup>133</sup> M Hansungule 'R Murray *The role of national human rights institutions at the international and regional levels*' (2007) 7 *African Human Rights Law Journal* 592.

<sup>134</sup> Interview (n 92 above).

<sup>135</sup> Human Rights Watch (n 115 above) summary.

<sup>136</sup> Interview (n 92 above).

that may be cited as hindrance include, in some cases, a lack of political space necessary for the NHRI to operate effectively or, where there is space, self-censorship by the NHRI. Some, like the Ugandan Human Rights Commission, do not take part in the workings of the African Commission due to financial difficulties. NHRIs may also be flawed at inception, hobbled by statute, or controlled through funding or staffing.<sup>137</sup> Additionally, this inaction may be due to an understanding of their (NHRIs') role as being limited to the domestic arena and not concerned with the international or regional human rights mechanisms.

The relationship between NHRIs and other human rights bodies in Africa is also important because it has the potential to ensure the more effective protection of human rights on the continent. Unfortunately, at the time of this study, there was no established relationship between NHRIs and other African human rights mechanisms. The Protocol to the African Charter Establishing the African Court on Human and Peoples' Rights (Court Protocol) does not explicitly refer to NHRIs. According to its Interim Rules of Procedure, only NGOs with observer status have access to the Court.<sup>138</sup> However, African NHRIs will only be able to submit communications to the African Court of Justice and Human Rights (African Court of Justice) once it becomes operational.<sup>139</sup>

## 5 Closing the gap: A dynamic approach to the relationship between the African Commission and national human rights institutions

As already highlighted, the basis for reforming the relationship between the African Commission and NHRIs is to address the issue of poor co-ordination and communication of their initiatives. That can only be addressed by establishing and strengthening links between the African Commission and NHRIs in Africa.

In so far as strengthening co-operational links is concerned, the African Commission could establish a focal unit within its Secretariat designed to co-ordinate all its relations with NHRIs. The establishment of such a focal point has been recommended as a way of strengthening the relationship between the African Commission and NHRIs.<sup>140</sup> As Hansungule points out — though in the context of the African Peer Review Mechanism (APRM) — a 'focal point is a critical link ... It is deci-

<sup>137</sup> Human Rights Watch (n 115 above) summary.

<sup>138</sup> Art 5(3) Court Protocol, as read with Rule 33 of the Interim Rules of Procedure of Court.

<sup>139</sup> Art 30 Protocol on the Statute of the African Court of Justice and Human Rights (2008).

<sup>140</sup> Report of the retreat of members of the African Commission on Human and Peoples' Rights (n 130 above); n 9 above.

sive to the success of the mechanism. An inaccessible focal point means stakeholders cannot communicate.<sup>141</sup>

A focal point within the Secretariat of the Commission is likely to ensure, among other things, proper dialogue between the African Commission and NHRIs. Through such a focal point, the African Commission can ensure that NHRIs comply with the Paris Principles and can therefore easily assess their effectiveness. Working with NHRIs, the focal point will support their work through a number of training and development activities and act as the point of contact between the African Commission and NHRIs. The NHRI unit may be tasked with ensuring that NHRIs submit their bi-annual activity reports as required by the 1998 Resolution on Affiliate Status. Such a body could also be used to implement the recommendations made to the African Commission pertaining to its relationship with NHRIs. A NHRI unit could also be mandated to consider applications for affiliate status. This will also grant the African Commission the opportunity to make the process of granting NHRIs affiliate status more thorough and less time-consuming. Karugonjo-Segawa points out that it took three applications to the African Commission for the Ugandan Human Rights Commission to be granted affiliate status.<sup>142</sup>

Additionally, such a unit could be a point where the African Commission and NHRIs convene to make decisions and implement resolutions that were adopted mainly by the African Commission. Such a body may, but does not necessarily need to, be the decision-making body of the partnership. Considering that this may have budgetary implications, it is advisable that in the interim a focal person be appointed to act as the link between the African Commission pending the establishment of such a focal point, obviously in the form of a permanent office within the Secretariat of the Commission.

Such a unit would also not be the first of its kind. The UN Office of the High Commissioner for Human Rights (UNOHCHR) has a similar unit. The UNOHCHR has also established a National Institutions Unit (NI Unit), tasked with co-ordinating activities between the UNOHCHR, the International Co-ordinating Committee of National Human Rights Institutions (ICC) and other UN treaty bodies.<sup>143</sup> The NI Unit is also the secretariat of the ICC<sup>144</sup> and provides advisory services relating to the

<sup>141</sup> M Hansungule 'Overview paper on the role of the APRM in strengthening governance in Africa: Opportunities and constraints in implementation' (undated) 15.

<sup>142</sup> Interview (n 92 above).

<sup>143</sup> Rule 2 International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Rules of Procedure.

<sup>144</sup> The ICC co-ordinates NHRIs at national level, organises ICC conferences and ensures regular contact with the OHCHR and other international organisations. The ICC is also responsible for accrediting NHRIs that are in compliance with the Paris Principles; R Murray (n 52 above) 31.

establishment and management of these institutions.<sup>145</sup> It also facilitates NHRIs' participation in the UN and UN Charter treaty bodies.<sup>146</sup>

Another route could be for the Network of African National Human Rights Institutions to take up this role and facilitate closer co-operation between the African Commission and its members. Having recognised the importance of such co-operation — particularly in relation to co-operation with UN bodies — NHRIs around the world have forged regional networks. Within Latin America, there is the Network of the Americas' National Institutions for the Promotion and Protection of Human Rights, which was created in 2000.<sup>147</sup> In the Asian region there is the Asia Pacific Forum of National Human Rights Institutions (APF).<sup>148</sup> Among other things, the APF provides practical support for the establishment and strengthening of NHRIs in the Asia Pacific region.<sup>149</sup> The APF also provides support to its members and assists them in their role of promoting, monitoring and protecting human rights.<sup>150</sup> The APF thus offers a wide range of services and support for its members. These services include, among other things, co-ordination of the participation of member institutions in the UN, ICC and other international and regional mechanisms. Just like NANHRI, its membership consists of NHRIs in the region and its activities are by far involved with human rights protection institutions in the region. Furthermore, just like NANHRI, full membership is limited to NHRIs which comply with international standards set out in the Paris Principles.

NHRIs can and should strive to establish a co-ordinated relationship. They can collaborate in many areas, including, but not limited to, capacity building through training,<sup>151</sup> co-operation through the exchange of information<sup>152</sup> as well as the organisation of regional workshops.<sup>153</sup> It is through networking that NHRIs can better participate in the formulation of policies and human rights protection initiatives in Africa.

<sup>145</sup> Effective functioning of human rights mechanisms: National institutions and regional arrangements. Paras 5-6 Report of the Secretary-General, 24 January 2006 E/CN.4/2006/101.

<sup>146</sup> Rule 4(a) Rules of Procedure of the ICC.

<sup>147</sup> <http://www.asiapacificforum.net/about/annual-meetings/8th-nepal-2004/downloads/other-human-rights-institutions/americas.pdf> (accessed 23 September 2008).

<sup>148</sup> Asia Pacific Brochure <http://www.asiapacificforum.net> (accessed 23 September 2008).

<sup>149</sup> As above.

<sup>150</sup> As above.

<sup>151</sup> The APF has a good exchange programme and has gone a long way to training the staff of member institutions.

<sup>152</sup> The APF has a website in place (<http://www.asiapacificforum.net>) that is used for the dissemination of information pertaining to the activities carried out by NHRIs. NANHRI, although still at the nascent stages, has a similar website (<http://www.nanhri.com>) which can be used effectively for the dissemination of information.

<sup>153</sup> Remarks of Mr Justice R Rajendra Babu, Chairperson, National Human Rights Commission of India, 12th Annual meeting of APF, 26 September 2007.

### 5.1 Establishing and strengthening co-operational links: The way forward

For there to be a meaningful and sustainable relationship, there is a need for clarity in the normative framework and at present the term 'affiliate status' does not adequately explain the role of NHRIs in the workings of the African Commission. The African Commission should therefore revisit the 1998 Resolution on Affiliate Status in order to clarify the position of NHRIs within its hierarchy, if any, of human rights actors. Further, the African Commission should introduce guidelines on the relationship between the African Commission and NHRIs just as it is the case with the Abuja Guidelines on the relationship between parliaments, parliamentarians and Commonwealth NHRIs.<sup>154</sup> The guidelines should explicitly spell out what the Commission can do to support the work of a NHRI and conversely what NHRIs can do to support the workings of the Commission. Equally, NHRIs should strengthen the Network of African National Human Rights Institutions, as earlier recommended.

The two should therefore identify areas of strategic interest and draw up a plan of action. Areas of possible support and collaboration include the submission of cases before the African Commission; collaboration in fact-finding missions; the inspection of prisons and detention facilities; and the organising of symposia, workshops, promotional visits, follow-up of decisions of the African Commission, preparation of state reports as well as shadow reporting. Collaboration on such activities should be organised through a focal point established within the African Commission Secretariat.

Thus, areas for collaboration between the African Commission and NHRIs can be either protective or promotional.

### 5.2 Protective-based co-operation

Under article 45(2) of the African Charter, the African Commission is mandated to protect human rights in Africa. This function has several aspects, which include individual communications,<sup>155</sup> inter-state communications and 'on-site' or 'fact-finding' missions by the African Commission.<sup>156</sup> NGOs have been regarded as partners of the African Commission as they have engaged critically with the African Commission on its working methods as well as in its working groups.<sup>157</sup> For example, NGOs have been instrumental in the submission of communications and the development of the communications procedure<sup>158</sup>

<sup>154</sup> Abuja Guidelines on the Relationship between Parliaments, Parliamentarians and Commonwealth NHRIs (2004).

<sup>155</sup> Arts 47- 59 African Charter.

<sup>156</sup> Art 46 African Charter.

<sup>157</sup> Viljoen (n 3 above) 407.

<sup>158</sup> As above.



and they have also facilitated fact-finding and promotional missions of the African Commission.<sup>159</sup>

The African Commission and NHRIs can certainly elevate their relationship to the same level as that of the African Commission and NGOs. In respect of communications, NHRIs could start by developing a culture of submitting communications to the African Commission. This has been done before<sup>160</sup> and needs only to be encouraged further, as the Rules of Procedure of the African Commission do not prevent NHRIs from submitting cases before the African Commission. In fact, NHRIs lodge petitions with the Inter-American Commission on Human Rights after domestic remedies have been exhausted.<sup>161</sup>

As regards 'on-site' or 'fact-finding' missions by the African Commission,<sup>162</sup> NHRIs could provide assistance to the missions sent by the African Commission, acting under article 46 of the African Charter, to investigate allegations of human rights violations.<sup>163</sup> They can partner with the Special Rapporteur on Prisons and Detention Facilities in Africa, for example, to inspect prisons and detention facilities.<sup>164</sup> This is ideal, especially as the mandate of most NHRIs involve the investigation of alleged human rights violations. Such inspections could also act as a vital pre-emptive measure which is important for vulnerable persons in the hands of state organs.<sup>165</sup> Furthermore, it could help the African Commission overcome some of the problems the delegates encounter during fact-finding missions, such as time constraints and the inability to collect enough evidence during their fact-finding missions.<sup>166</sup>

### 5.3 Promotion-based co-operation

Article 45 of the African Charter mandates the African Commission to promote human and peoples' rights on the continent.<sup>167</sup> In particular,

<sup>159</sup> As above.

<sup>160</sup> *Commission Nationale Des Droits de l'homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995); Murray (n 52 above) 13.

<sup>161</sup> L Reif *The Ombudsman, good governance and the international human rights system* (2004) ch 6.

<sup>162</sup> T Mutangi 'Fact-finding missions or omissions: A critical analysis of the African Commission on Human and Peoples' Rights and lessons to be learnt from the Inter-American Commission on Human Rights' (2006) 12 *East African Journal of Peace and Human Rights* 1, for a detailed discussion on fact-finding missions of the African Commission.

<sup>163</sup> Report of the retreat of members of the African Commission (n 130 above) 9.

<sup>164</sup> F Viljoen 'The Special Rapporteur on Prisons and Conditions in Africa: Achievements and possibilities' (2005) 27 *Human Rights Quarterly* 125-171.

<sup>165</sup> CM Peter 'The way forward for the East African Human Rights Institutions' in Peter (n 36 above) 324.

<sup>166</sup> Mutangi (n 162 above) 37.

<sup>167</sup> Art 45(1) African Charter; Yeshanew (n 75 above) 191.



the African Commission may collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, and disseminate information.<sup>168</sup> Accordingly, the African Commission is mandated to co-operate with African and other international institutions concerned with the promotion of human and peoples' rights.<sup>169</sup>

Over the years, the African Commission has made efforts aimed at realising the goals of its promotional mandate and appears to have properly organised itself for promotional activities.<sup>170</sup> The African Commission has thus been involved in the dissemination of information and the organisation of conferences, workshops, seminars and symposiums to discuss the relevant issues. In so far as the promotional mandate of the African Commission and co-operation between the Commission and NHRIs are concerned, there seems to be a movement in the right direction. The Activity Reports of the African Commission shows that commissioners do attend seminars and workshops organised by NHRIs to discuss issues relating to human rights as part of the promotional mandate of the African Commission.

Despite the controversy surrounding the extent of their participation in the state reporting process, NHRIs should be involved in one way or another in the state reporting process.<sup>171</sup> This is well within their monitoring mandate. They should, for example, be involved in the preparation of country reports and should send shadow reports to the African Commission so as to help bring to the fore facts that can only be obtained through investigative work at the national level.<sup>172</sup> Such reports are likely to better exhibit the reality of the human rights situation of the country. NHRIs can further 'provide constructive, well-informed criticism from within, which is frequently important in corroborating or balancing criticism from "foreigners"'.<sup>173</sup> In fact, that was the recommendation made at a retreat of the members of the African Commission where the role of NHRIs in the workings of the African Commission was discussed.<sup>174</sup> The African Commission should build the capacity of NHRIs on issues relating to state reporting.

Another area of collaboration between the African Commission and NHRIs could be in the area of follow-up of country-specific

<sup>168</sup> Art 45(1)(a) African Charter.

<sup>169</sup> Art 45(1)(c) African Charter.

<sup>170</sup> VOO Nmeihelle *The African human rights system: Its laws, practices and institutions* (2001) 176-179.

<sup>171</sup> Viljoen (n 3 above) 371; Report of the Brainstorming Meeting on the African Commission, 9-10 May 2006, Banjul, The Gambia, AU Doc ACHPR/BS/01/010, 9 May 2006 (20th Activity Report, Annex II).

<sup>172</sup> As above.

<sup>173</sup> G Alfredsson *et al* (eds) *International human rights monitoring mechanisms* (2001) 825.

<sup>174</sup> Report of the retreat of members of the African Commission (n 130 above) 3.

resolutions, decisions of the African Commission, and concluding observations on reports made to the African Commission by states.<sup>175</sup> Collaboration in this area can strengthen the African Commission's practice regarding the follow-up of recommendations and decisions of the African Commission. This is because of the pressure that NHRIs can exert at the national level as well as the fact that follow-up may be considered a form of investigation within the context of the communication procedure.

## 6 Conclusion

The participation of NHRIs in the workings of the African Commission, even though controversial, is not a hindrance to the establishment of any working relationship. Their participation is controversial because the Paris Principles and other documents outlining the nature and functions of the NHRI do not envisage an NHRI that is actively and/or directly involved at the international or regional level. At present there is no proper working relationship between the African Commission and NHRIs. This is largely attributable to two main factors. Firstly, there is no proper agenda, direction or framework as to what form the relationship should take. Secondly, there is absolutely no co-ordination or communication of events and initiatives of the two, making collaboration inconsistent, erratic and largely in the form of workshops, symposia and presentations by commissioners.

NHRIs can assist the African Commission through the submission of cases, collaboration in fact-finding missions, the inspection of prisons and detention facilities, organising of symposia, workshops, promotional visits, the follow-up of decisions of the African Commission, and the preparation of state reports as well as shadow reporting. In order to further strengthen its collaboration with NHRIs, the African Commission should establish a focal point within its Secretariat. The proposed unit should be tasked with co-ordinating activities between the African Commission and NHRIs. It can also be used for monitoring the effectiveness, independence and compliance with the Paris Principles by African NHRIs. It has been suggested that, pending the establishment of a focal point within the African Commission Secretariat, there be appointed a focal person responsible for co-ordinating activities between the African Commission and NHRIs. Equally, NHRIs should strengthen the Network of African National Human Rights Institutions in order to develop a functional and working relationship between the African Commission and NHRIs in Africa.

<sup>175</sup> F Seidensticker *Examination of state reporting by human rights treaty bodies: An example of follow-up at the national level by national human rights institutions* (2005).

Closer collaboration between the African Commission and NHRIs, although faced with many challenges, would bring about effective human rights protection in Africa. It would also ensure that the efforts of the African Commission trickle down to the citizenry. One cannot overemphasise the importance of overhauling the manner in which the African Commission and NHRIs relate. Ten years since NHRIs were afforded affiliate status, it is appropriate that the two take this relationship beyond mere rhetoric and paper-based affiliate status.

## Jurisdiction *ratione materiae* of the Uganda Human Rights Commission: Making sense of the ambiguity in the jurisprudence

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### Summary

*In the first decade of its existence (1998-2008), the Uganda Human Rights Commission has dealt with a significant number of complaints and, in doing so, has invariably had to bear in mind its competence in terms of – although this terminology has never been employed – its jurisdiction *ratione materiae*. The jurisdiction *ratione materiae* of the Commission as a tribunal is primarily to deal with complaints alleging violations of human rights. This should not have been contentious since the bulk of complaints lodged with the Commission since 1998 *prima facie* concern human rights. However, from 2006, the uncertainty regarding the Commission's jurisdiction *ratione materiae* has been manifested in several decisions, especially in respect of complaints alleging violations of the rights to life and property. The Commission's jurisdiction *ratione materiae* has been contested in such complaints through preliminary objections raised on the part of the state and, although rejected in the early decisions up to 2005, the Commission has since 2006 exhibited a willingness to uphold the objections. The discourse over the Commission's jurisdiction *ratione materiae* has had implications for other aspects of the Commission's mandate (including its jurisdiction *ratione personae* and the limitation period for presentation of complaints). Ultimately, the ambiguity over the Commission's jurisdiction *ratione materiae* is essentially a conceptual one pertaining to the nature (and content) of claims presented before the Commission and its quasi-judicial character.*

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## 1 Introduction

The Uganda Human Rights Commission (Commission) is established under article 51 of the 1995 Constitution of Uganda,<sup>1</sup> and its mandate and functions are spelt out under article 52(1) of the Constitution as including, *inter alia*, 'to investigate at its own initiative or on a complaint made by any person a group of persons against the violation of any human right'.<sup>2</sup> This is the primary function of the Commission as a tribunal and is essentially a protectionist one. This function is further reaffirmed in the Uganda Human Rights Commission Act<sup>3</sup> and under the Commission's Rules of Procedure<sup>4</sup> and operational guidelines.<sup>5</sup>

The Uganda Human Rights Commission came into existence in 1998 and although its first decisions were rendered in 1999-2000, the majority of its decisions have been handed down after 2004. During the first decade of its existence, the Commission has dealt with many complaints – totalling more than 350 – and, in doing so, it has invariably had to bear in mind its competence in terms of jurisdiction *ratione materiae*. With the exception of a number of cases during the period between 1998 and 2004, the Commission has been able easily to identify and render a determination that complaints involve 'human rights' claims. However, as from 2006, the decisions of the Commission have been underscored by contentions, raised as preliminary objections on the part of the state, to essentially – even if they were not so couched – the Commission's jurisdiction *ratione materiae*. The contentions have particularly been manifested with respect to claims alleging violations of the rights to life and property. The complaints alleging a violation of these rights have been regarded as *tortious* rather than human rights claims. Additionally, the contentions have been underpinned by objections regarding the

<sup>1</sup> Constitution of the Republic of Uganda, 1995, art 51(1). The Commission is the result of recommendations of two commissions set up in the early 1990s. A commission of inquiry established to inquire into the violations of human rights in Uganda from 1962 to 1986 presented as one of its key recommendations the need for the establishment of a permanent institution on human rights to act as a 'watchdog' over human rights in Uganda: *Report of the Commission of Inquiry into Violations of Human Rights in Uganda from 1962 to 1986*, UPPC, Entebbe, 1993, 582, recommendation 13.1(II). Subsequently, a constitutional commission recommended a permanent and independent human rights body to be enshrined in a prospective new constitution: *Report of the Uganda Constitutional Commission: Analysis and Recommendations*, UPPC, Entebbe, 1993, 185-188, paras 7.175-7.181, a recommendation that was acted upon by a Constituent Assembly debating the constitutional proposals in 1994, and a permanent Human Rights Commission was provided for under the 1995 Constitution.

<sup>2</sup> Art 52(1)(a).

<sup>3</sup> Cap 24 (Laws of Uganda 2000), sec 8(1)(a). The Act enacted in 1997 set out the legal framework for the formal establishment of the Commission in 1998.

<sup>4</sup> Uganda Human Rights Commission (Procedure) Rules, SI 16/1998, rule 4.

<sup>5</sup> Operational Guidelines of the Uganda Human Rights Commission, 1998, guidelines 3-4. The Rules and Guidelines are adopted in light of the powers conferred upon the Commission to 'establish its operational guidelines and rules of procedure'. 1995 Constitution, art 52(3)(a).

appropriate legal regime under which the complaints are to be presented as well as the question as to the period within which complaints should be presented before the Commission. Although the objections were rejected in the early decisions up to 2005, the Commission has since 2006 exhibited a willingness to uphold the objections, as underscored by the decisions of particular commissioners.

The article examines the ambiguity that has defined decisions of the Commission as regards its jurisdiction *ratione materiae*. It seeks to address the manner in which that jurisdiction has been conceptualised in the jurisprudence of the Commission, highlighting the ambiguities that have defined that jurisprudence and to appraise the implications the conceptualisation has borne upon other aspects of the Commission's mandate.

## 2 Construing the jurisdiction *ratione materiae* of the Uganda Human Rights Commission

The *ratione materiae* of the jurisdiction of a judicial or quasi-judicial body is concerned largely with the nature of the subject matter handled by the body in question. Under the Constitution, the Act, the Rules of Procedure and Guidelines, the Commission's protectionist function and, invariably, jurisdiction *ratione materiae* are primarily to deal with complaints alleging violations of human rights. The Guidelines detail the Commission's jurisdiction *ratione materiae* as dealing with 'complaints about violation[s] of *human rights*', with human rights as 'all rights guaranteed by [the] Constitution and [the] international human rights instruments to which Uganda is a signatory'.<sup>6</sup> The rights listed under the Guidelines are essentially those under the Bill of Rights in chapter IV of the 1995 Constitution. The Guidelines state:<sup>7</sup>

Examples of these rights are

- (i) the right to life and personal liberty and equality;
- (ii) freedom from slavery;
- (iii) freedom from discrimination on account of racial or ethnic origin, religion or sex, or disability or any other similar ground;
- (iv) freedom from arbitrary arrest and detention;
- (v) the right to a fair trial and speedy trial on arrest;
- (vi) the right to hold opinion and express one's views;
- (vii) freedom of thought, conscience and religion;
- (viii) freedom of association and peaceful assembly;
- (ix) the right to education;
- (x) the right to own property;
- (xi) economic, social and cultural rights;
- (xii) the rights of the family, children, women, workers, prisoners, etc.

<sup>6</sup> Operational Guidelines (n 5 above) Guideline 3(a).

<sup>7</sup> As above. The Commission also regards its jurisdiction *ratione materiae* to include 'a complaint about detention under emergency laws (art 48(1) of the Constitution)'. Operational Guidelines (n 5 above) Guideline 3(b).

The corollary is that complaints that do not involve human rights should be excluded. The Guidelines provide:<sup>8</sup>

Legal claims of a civil nature which do not directly touch on human rights may not be brought therefore the UHRC. Examples are matters relating to breach of contract, defamation, divorce, land disputes, claims based on the tort of negligence and any such ordinary civil disputes, between private individuals. Complaints based on or arising from crimes committed as a result of purely private disputes will not be accepted by the UHRC.

The jurisdiction *ratione materiae* of the Commission has been largely uncontentious, given that the bulk of the complaints lodged with the Commission since 1998 have *prima facie* concerned human rights. The majority of the complaints have involved allegations of violations of human rights guaranteed under the 1995 Constitution – from the right to life, the right to personal liberty, freedom from torture, the right to property, the right to education, to children's rights. Notably, in the instances where the question was whether a particular complaint constituted a 'human rights' claim, this was determined to be the case. The uncertainty that has stemmed from the Commission declining to entertain certain complaints (and which has been manifest since 2006) has essentially arisen in respect of specific complaints where the subject matter falls within other legal regimes (and causes of action).

### 3 Ambiguity in the jurisprudence of the Uganda Human Rights Commission as regards its jurisdiction *ratione materiae*

#### 3.1 Deciphering the subject matter: Human rights versus claim of a civil nature

The subject matter jurisdiction of the Commission are violations of human rights. As has been noted, this has not been problematic in the majority of complaints during the first decade of the Commission's existence. In fact, in a number of instances where the question was raised as to whether a claim in a complaint concerned human rights, this was resolved in favour of a finding of a human rights issue. Thus, in *Kalyango Mutesasira and Another (on behalf of 15 Others) v Kunsu Kiwanuka and 3 Others*,<sup>9</sup> where the complainants alleged a failure to pay their pensions and sought the enforcement of its payment, Commissioner Aliro-Omara felt it necessary to consider whether the facts as presented in the complaint – that is, the 'failure or refusal to pay due pension' – did 'constitute a violation of the human rights of the beneficiaries'.<sup>10</sup> In the end, the commissioner held that there had been

<sup>8</sup> Operational Guidelines (n 5 above) Guidelines 4(e)-(f).

<sup>9</sup> Complaint UHRC 501/ 2001 (decision of 21 September 2001).

<sup>10</sup> n 9 above, 3 8-9.

a violation of the complainants' rights to property and social security.<sup>11</sup> In *Martha Aluku and 10 Others v Attorney-General*,<sup>12</sup> on whether the 'failure to pay wages constituted a violation of human rights', the commissioner regarded such wages 'earned income' at each month's end, and therefore an enforceable claim as a 'right to property'.<sup>13</sup> It is to be noted that, as long as the Commission has determined that a complaint *prima facie* evidences a violation of a human right, it is immaterial that the complaint does not mention the elements of the right nor refer to specific constitutional provisions guaranteeing the right.<sup>14</sup>

The major controversy over the Commission's jurisdiction *ratione materiae* has arisen, especially from 2006, with respect to complaints filed before the Commission alleging a violation of specific rights. There are two strands to the discourse as regards the Commission's jurisdiction. Firstly, there is the contention that the subject matter of the complaints is tortious (rather than a violation of human rights) and, secondly, in light of the nature of the subject matter, the claims should be presented as civil suits under the appropriate legal regime. The specific rights affected by the controversy over the Commission's jurisdiction *ratione materiae* are two-fold. On the one hand, the right to life in the context of unlawful death at the hands of agents of government and, on the other hand, the right to property in the context of the entry upon and occupation of lands on the part of the army (particularly in conflict-afflicted Northern Uganda). As regards the complaints founded on unlawful death resulting at the hands of agents of government, the early approach until 2005 was to treat the claims as violations of the right to life guaranteed under article 22(1) of the Constitution.<sup>15</sup> However, in subsequent decisions (from 2006),

<sup>11</sup> n 9 above, 4-9.

<sup>12</sup> Complaint UHRC G/263/ 2000 (decision of 24 February 2004).

<sup>13</sup> n 12 above, 4-5.

<sup>14</sup> See eg *Stephen Okwalinga v Attorney-General*, Complaint UHRC 24/2004 (decision of 26 August 2006). Commissioner Wangadya held that a complaint founded on discrimination 'need not mention the grounds under article 21 of the [1995] Constitution'.

<sup>15</sup> See eg *Lydia Nabuwembo v ACP Bakesiima & 2 Others*, Complaint UHRC 219/1998 (decision of 23 January 2001); *Edward Kamana Wesonga (Legal Representative of late Patrick Pongo) v Attorney-General*, Complaint UHRC 197/1998 (decision in 2002); *Mariam Rajab Tugume v Attorney-General*, Complaint UHRC 776/1998 (decision of 23 November 2003); *Hajji Ali Mutumba v Attorney-General*, Complaint UHRC 225/1998 (decision of 12 December 2003); *Sgt Eriya Keisire v Attorney-General*, Complaint UHRC FP57/2003 (decision in January 2004); *Omong Juk v Attorney-General*, Complaint UHRC G167/1998 (decision of 23 February 2004); *Juma Abukoji v Attorney-General*, Complaint UHRC G/326/1999 (decision of 24 February 2004); *Margaret Atoo v Attorney-General*, Complaint UHRC G/88/2002 (decision of 28 July 2004); *John Baptist Oryem v Attorney-General*, Complaint UHRC G/32/1999 (decision of 27 July 2004); *James Bwango v Attorney-General & Another*, Complaint UHRC FP75/2003 (decision of 1 September 2004); *Leo Rusoke v Attorney-General*, Complaint UHRC FP/44/2003 (decision in 2005); *Peace Nshemereirwe v Attorney-General*, Complaint UHRC 249/2002 (decision of 30 August 2005).



the Commission has had to deal with contentions to consider claims in this regard as claims under the law of torts and, in effect, not within its competence. In *Joseph Oryem v Attorney-General*,<sup>16</sup> this contention, which was raised indirectly, was rejected by Commissioner Waliggo, who noted that the complaint filed by Joseph Oryem was 'about the violation of Thomas Kilama's right to life' and was therefore within the Commission's mandate to 'investigate violations of human rights'.<sup>17</sup> Similarly, in *Saverio Oola v Attorney-General*,<sup>18</sup> where the complainant was seeking compensation for a violation of his son's right to life, and in which the state raised several objections to the complaint, including the character of the claim as a 'tort' (and the manner of (and legal regime for) its presentation), the Commissioner stated:<sup>19</sup>

[C]omplaints brought before the Commission are not based on the *law of tort* but on alleged *violation of human rights*. The suits based under the Law Reform (Miscellaneous Provisions) Act are based on *tort* whereas complaints anticipated under Article 52 of the Constitution of the Republic of Uganda 1995 and Uganda Human Rights Commission Act 1997 ... are based on violations of *human rights*.

The commissioner further noted that a claim founded on loss of life was, in the wake of the 1995 Constitution, capable of being brought *either* as a 'tort' or a 'human rights' violation and, in effect, took cognisance of the hybrid character of the claim.<sup>20</sup> However, in *Collins Oribi v Attorney-General*,<sup>21</sup> the preliminary objection to a complaint alleging a violation of the right to life was upheld, with Commissioner Wangadya criticising what she considered an attempt by the complainant to baptise a tort (in a claim initially filed before the courts) as a human rights violation (in the complaint subsequently filed before the Commission):<sup>22</sup>

[W]hat was originally a *tort of negligence* resulting in death for purposes of the High Court is conveniently renamed 'violation of the deceased's constitutional right to life' to bring it within the jurisdiction of the Commission. I believe the complaint in issue is a *tort* for which the actual culprit was convicted of man-slaughter. If it was a deliberate killing he would have been convicted of murder ... This complaint should therefore have been filed in [the] High Court as a *tort*.

As regards the complaints founded on entry upon and occupation of lands on the part of the army, the early approach until 2005 was to regard the claims as violations of the right to property guaranteed

<sup>16</sup> Complaint UHRC G/144/2003 (decision of 1 December 2004).

<sup>17</sup> n 16 above, 4.

<sup>18</sup> Complaint UHRC G/206/2000 (decision in 2005).

<sup>19</sup> n 18 above, 4 (my emphasis).

<sup>20</sup> As above.

<sup>21</sup> Complaint UHRC 1163/2000 (decision of 12 September 2007).

<sup>22</sup> n 21 above, 5 14 (my emphasis).

under article 26 of the Constitution.<sup>23</sup> However, in the wake of preliminary objections to treat such claims as ‘land disputes’ or as ‘torts for trespass’, in decisions rendered from 2006, the Commission gradually gave in to the objections and determined that cases of occupation of lands on part of the army were not properly claims of human rights violations within its jurisdictional competence. In *Julius Caesar Okot Gwara v Attorney-General*,<sup>24</sup> Commissioner Wangadya held as follows:<sup>25</sup>

It is ... my considered view that this is a *land dispute* which the complainant has conveniently baptised a *human rights complaint*. It is a civil case of *trespass to land* and *trespass to property* – pure and simple. The complainant is aggrieved by the alleged invasion and illegal occupation of his land by the army and seeks a declaration to that effect. He also seeks an order for vacant possession which he refers to as ‘any relief deemed appropriate’. He further seeks compensation. The nature of the first two remedies sought leaves me in no doubt that this is a *land case* and not a *human rights complaint*.

The ambiguity over the Commission’s jurisdiction *ratione materiae* is further manifested in the additional contention as regards the manner in which claims are presented before the Commission. The contention is essentially a facet of the problem of conceptualising the nature of claims filed before the Commission as tortious rather than human rights in character. To that end, firstly, the contention has been that the claims should be presented by way of a *plaint*. Secondly, by virtue of their tortious nature, claims in respect of the loss of life (and deaths) at the hands of agents of the government should have been presented under the law on loss of dependency (that is, the Law Reform (Miscellaneous Provisions) Act).<sup>26</sup> Notably, this objection raised in several of the early complaints had been largely rejected by the Commission which at the time reiterated that claims regarding human rights violations are brought before the Commission by a *complaint* rather than by *plaint* in light of the legal framework establishing the Commission and noted that claims by *plaint* were only presentable in civil matters in *tort* before *courts of law*. In the *Joseph Oryem* case, Commissioner Waliggo stated:<sup>27</sup>

<sup>23</sup> See eg *Thomas Ocheing v Attorney-General*, Complaint UHRC G/26/1999 (decision of 12 May 2004); *Yusuf B Mayu v Bumbo Sub-County*, Complaint UHRC S/46/2002 (decision of 20 June 2004); *Peter Amone v Attorney-General & Another*, Complaint UHRC 227/1997 (decision in 2006); *Julius Peter Okot v Attorney-General*, Complaint UHRC G/149/2000 (date of decision not indicated).

<sup>24</sup> Complaint UHRC G/144/2000 (decision in 2006).

<sup>25</sup> n 24 above, 2-3 (my emphasis). In subsequent decisions involving similar claims of occupation of land by the armed forces, the Commissioner took the same stance. See eg *John Olong & 7 Others v Attorney-General*, Complaint UHRC G/176/2003 (decision of 23 October 2006) 4-5; *Nyero Santo Akoli v Attorney-General*, Complaint UHRC G/268/2003 (decision of 24 October 2006) 3. See also *John Kilara & 2 Others v Attorney-General*, Complaint UHRC G/74/2003 (decision of 23 October 2006).

<sup>26</sup> Cap 79 (Laws of Uganda 2000).

<sup>27</sup> n 16, 4 (my emphasis).

[T]he Uganda Human Rights Commission (Procedure) Rules ... provide for the mode of lodging complaints. It is by way of filling a *complaint* form under Rule 31 and not by filing a *plaint*. This has been a system since the inception of the Commission. The Law Reform (Miscellaneous Provision) Act is only applicable in the *ordinary courts* but not in matters before the Uganda Human Rights Commission Tribunal.

In the *Saverio Oola* case, the commissioner reiterated this legal position in depth as follows:<sup>28</sup>

In this complaint, based on alleged loss of life the complainant has options – since the promulgation of the Uganda Constitution 1995 and the Human Rights Commission Act 1997, a claim based on *loss of life* can either be brought in the *courts of law* under the *Law Reform (Miscellaneous Provisions Act)* or an aggrieved party may base a claim on the violation of the *right to life* under Article 52 of the *Constitution* [and] Section 7(1) of the *UHRC Act*. Where one chooses to go to court under the *Law Reform (Miscellaneous Provisions Act)*, one would have to proceed by way of *plaint* as required by the *Civil Procedure Rules*. On the other hand, where one chooses to file a complaint before the Commission based on a violation of the right to life, the procedure is by way of *complaint* as stipulated in Rule 4 of the Uganda Human Rights Commission (Procedure) Rules 1998. In this instant case the complainant chose to lodge his complaint under the UHRC Act and the procedures are well laid out in the Uganda Human Rights Commission (Procedure) Rules 1998.

However, in construing later complaints regarding occupation of land as primarily civil in nature, Commissioner Wangadya has felt that such claims ‘ought to have been filed in a court of law under the tort of trespass to property’.<sup>29</sup>

Ultimately, the ambiguity in the jurisprudence of the Commission with regard to its jurisdiction *ratione materiae* reflects the differences with which the commissioners regard the nature of the claims (and manner in which they are to be) presented *vis-à-vis* their jurisdictional mandate. More critically, the differences and the attendant ambiguity demonstrate several aspects of a conceptual problem. Firstly, it emanates from a failure to distinguish between ‘human rights’ and the ‘causes of action’ in other spheres of the law. The ambiguity has been defined by a dichotomy between human rights and torts, and has underscored much of the Commission’s jurisprudence after 2006 – for although the dichotomy has been resisted by Commissioners Waliggo and Aliro-Omara, it has shaped the decisions of Commissioner Wangadya. Notably, in one of her early decisions – in *Faddy Mutenderwa*

<sup>28</sup> n 18, 4 (my emphasis). See also the *Kamana Wesonga* case (n 15 above) 13. Commissioner Aliro-Omara remarked: ‘In this complaint [the State Attorney] is under the impression that this complaint is brought under the Law Reform (Miscellaneous Provisions) Act. That however is not the case. Complaints about human rights violations are brought before the Commission under article 52(1)(a) of the Constitution and under the Human Rights Commission Act 1998 and regulations made under it. It would therefore be wrong to [contend] ... that the complaint as filed does not conform to section 10 of the Law Reform (Miscellaneous Provisions) Act.’

<sup>29</sup> See the *John Olong* case (n 25 above) 5.

*v Attorney-General*,<sup>30</sup> where the complainant alleged a violation of his rights to personal liberty and property under articles 23 and 26 of the Constitution (and in which the state contended that these claims were tortious in nature) – Commissioner Wangadya endeavoured to distinguish between a ‘human right’ and a ‘tort’ as follows:<sup>31</sup>

A tort is ... a civil wrong independent of contract ... [L]iability in tort arises from breach of a duty primarily fixed by law which is towards others generally, breach of which is redressable by an action for unliquidated damages, affording some measure of compensation. Human rights are ... those rights and freedoms to which every human being is entitled. On the basis of the above two definitions it is clear that although both disciplines of ‘human rights’ and ‘torts’ create rights that confer an entitlement, human rights are possessed by human beings simply by virtue of their being human whereas the entitlements under the law of tort only arise where there has been a breach of a duty or obligation. Hence, human rights violations cannot be equated to torts. The present matter is an alleged violation of human rights and not a tort.

However, in a subsequent decision, in the *Collins Oribi* case, the commissioner discounted any distinction between human rights and torts, observing:<sup>32</sup>

The argument that human rights complaints at the Commission are not bound by the [Civil Procedure and Limitation (Miscellaneous Provisions) Act and the Law Reform (Miscellaneous Provisions) Act] because they are not ‘torts’ is not acceptable to me. There is no practical difference between torts in the courts of judicature and human rights complaints before the Commission. They are the same save that they are named differently depending on the forum where they are placed.

Nonetheless, Commissioner Wangadya’s viewpoint does not settle the conceptual issue or, in fact, resolve the human rights-torts dichotomy. By taking a human rights claim to be essentially a tortious claim – more so in the context of the law on loss of dependency (Law Reform (Miscellaneous Provisions) Act) – this fails to draw a distinction between a human right that inheres in the victim and the question of loss of dependency as a legal construct for the provision for the deceased’s surviving members as beneficiaries. The corollary in that respect is that compensation should be payable for the violation of the right as distinct from that payable to the dependants. It is only in this regard that the human rights claim (in respect of the right to life) is distinguishable from the tortious claim under the law on loss of dependency. This distinction has in fact been sounded out in a number of decisions by Commissioner Aliro-Omara. In the *Juma Abukoji* case, while reflecting on compensation payable for unlawful death in the context of a violation of the right to life, he observed:<sup>33</sup>

<sup>30</sup> Complaint UHRC 222/2003 (decision in 2005).

<sup>31</sup> n 30 above, 3.

<sup>32</sup> n 21 above, 4.

<sup>33</sup> n 15 above, 9 (my emphasis).

The ... compensation payable is *not primarily for the loss of dependency* but for the *violation of the right to life*. Any proof of loss of dependency would be additional consideration. It is clear from article 53(2) of the Constitution that compensation should be paid for infringement of a human right. Such compensation would be for the benefit of the estates of the deceased persons as represented by the complainant in this case. I want to emphasise this because there is ... a difference in *claiming for dependency* and pursuing compensation for the violation of the right to life.

Secondly, the ambiguity underscores the failure to recognise that a set of facts or instances can give rise to claims in 'human rights' as well as in 'tort' – in effect, there is a hybrid character to claims presentable as human rights violations. For, as Commissioner Waliggo has pointed out, a complainant has, in the wake of the 1995 Constitution, the option to file a claim with regard to loss of life either as a 'tort' before the courts of law under the Law Reform (Miscellaneous Provisions) Act, or as a 'human right' before the Commission under the Uganda Human Rights Commission Act.<sup>34</sup> Therefore, although the state may be correct in raising objections regarding the tortious nature of the complaints before the Commission, the fact is that complaints for violations of the right to personal liberty, freedom from torture or the right to property easily translate as claims for torts in respect of trespass against the person, trespass to goods, trespass to land, negligence, and so on. To that end, the claims in the *Kalyango Mutesasira*, *Martha Aluku* and *Stephen Okwalinga* cases would also obtain as claims in pension law, employment law and administrative law respectively.<sup>35</sup>

There is therefore a need to de-link a human rights claim from any underlying tortious elements. This is more pertinent in a situation where the victim of unlawful deprivation of life has no surviving dependants – in such a situation, the right to life is manifestly detached from the tortious elements that belie the loss of dependency.<sup>36</sup> The de-linking is in fact envisaged in the Commission's Guidelines. The irreceivable nature of a 'legal claim of a civil nature' is qualified where such claim does not directly touch on human rights. In that regard, a claim for loss of life is in a particular context inherently a claim for a violation of the right to life. Similarly, an occupation of land may raise tortious elements of trespass on land but is manifestly a violation of the right to property. Thus, a claim that manifests other civil elements should nonetheless be receivable if it similarly manifests human rights issues. The de-linking of a human rights claim from its tortious elements can be achieved as follows: The Commission should ascertain that the facts of the complaint present *prima facie* a violation of human rights. It

<sup>34</sup> See n 28 above and accompanying text.

<sup>35</sup> See nn 9, 12 & 14 above and accompanying text.

<sup>36</sup> See in this regard the decisions of Commissioner Aliro-Omara in cases where the victims had no surviving dependants (and in which he underscored the distinction between a claim for the violation of the right to life and a claim for dependency): *John Baptist Oryem* case (n 15 above) 21-22; *Omong Juk* case (n 15 above) 11-3.

should then regard as irrelevant that it also inures as a claim in other spheres of law. In effect, the Commission should regard the complainant as the *dominus litis*.

Additionally, a complainant should have a right to choose whether to present a claim before the courts of law or the Commission. In effect, a complainant has autonomy of choice as to the forum to which to present his or her claim. The Commission therefore ought to recognise and uphold that autonomy in dealing with complaints that are, in respect of the majority of the rights guaranteed under the Constitution, also capable of being presented as claims in tort. In that regard, autonomy of choice ought to have been upheld in the *Charles Oribi* case. With his claim in tort before the High Court time-barred, the complainant had the option to file a complaint in respect of the victim's human rights before the Commission, where such a complaint was still well in time. The decision of Commissioner Wangadya was a constraint on the complainant's autonomy of choice as to forum.

### 3.2 Defining the character of the Uganda Human Rights Commission as a quasi-judicial body

The Constitution provides that, in the exercise of its functions as a tribunal, the Commission is enjoined with the powers of a court.<sup>37</sup> However, although it has remarked that, in its quasi-judicial capacity, it is 'enjoined to follow the ... procedures of the High Court in instances where there are no specific statutory provisions',<sup>38</sup> the Commission has been hesitant to overextend this capacity. In fact, it does not regard itself as a court, and rightly so. The Commission's conceptualisation of its quasi-judicial character as a tribunal has, however, occasioned certain perceptions regarding its jurisdiction *ratione materiae*. The Commission has considered its quasi-judicial character in a number of decisions, especially as regards the extent of its capacity and powers to act as a 'court'. The Commission considered the question of its jurisdictional mandate in the case of *In the Matter of The Free Movement*,<sup>39</sup> where the complainant alleged that the monopolisation of political space by the Movement political system infringed 'upon the rights and freedoms of individuals and groups' and created a 'situation of increased political repression'.<sup>40</sup> The Commission questioned whether

<sup>37</sup> n 2 above, art 53(1). This is reaffirmed under the Uganda Human Rights Commission Act (n 3 above) sec 7(2).

<sup>38</sup> *Betty Nakiyingi v Major Kakooza Mutale & 2 Others*, Complaint UHRC 337/1998 (decision in 2000).

<sup>39</sup> Complaint UHRC 671/1998 (decided in 1999).

<sup>40</sup> For an overview of the controversy over the 'movement' political system under the 1995 Constitution, see eg N Kasfir 'No-party democracy in Uganda' (1998) 9 *Journal of Democracy* 49; J Mugajuj & J Oloka-Onyango (eds) *No-party democracy in Uganda* (2000).

it was 'seized with the jurisdiction to entertain [the complaint]'.<sup>41</sup> The complaint was deemed to raise questions of interpretation of certain provisions of the Constitution (and the competence of the Commission, as a tribunal, to refer a matter requiring the interpretation of the Constitution to the Constitutional Court). The Commission examined the provisions of articles 53, 129 and 137 of the Constitution, and concluded that although, as a tribunal, it was clothed with the powers of a court, it was not a 'court of judicature' with the powers to refer matters of constitutional interpretation to the Constitutional Court.<sup>42</sup>

[The Commission] as a tribunal cannot in any way be described as a Court of Judicature [in terms of the provisions of article 129(1) of the Constitution]. This means that the Commission cannot refer any matter to the Constitutional Court nor can it exercise any original jurisdiction in interpreting the Constitution. *The Commission has powers of a court for purposes of what is contained in article 53 of the Constitution only.*

In spelling out its mandate as specific to the enforcement of human rights and not the interpretation of the Constitution, the Commission further stated:<sup>43</sup>

[T]he contention by the Petitioners' counsel [is] that the provisions of articles 70, 71, 73, 269 and 273(1) of the Constitution have given rise to contradictions which ultimately violate the rights and freedoms of the petitioners and other groups of persons in Uganda ... The main issue here is whether the aforementioned articles of the Constitution imply that they are violating the rights of the people of Uganda. From our considered view, the grounds as set out in the petition show that the petitioners are seeking the *interpretation of the Constitution* but not a *redress for the violation of their human rights and freedoms*.

The more emphatic resolution of the Commission's status as not being that of a court has been made in respect of the competence of the Commission to entertain claims regarding certain rights. Thus, in several decisions rendered from 2006, Commissioner Wangadya has held that, even if 'land disputes' were to be treated as violations of 'right to property', the proper fora for the enforcement of those rights were 'courts of law' rather than the Commission. In the *John Olong* case, she remarked:<sup>44</sup>

It is my considered view that this nature of complaint ought to be handled by courts of judicature and not the Uganda Human Rights Commission. I recognise that the right to property is one of those rights falling under the Bill of Rights, ie, Chapter 4 of the Constitution and therefore generally within the brief of the UHRC. But it appears to me that the lawmakers intended that property-related disputes be specifically dealt with by courts of law. Indeed,

<sup>41</sup> n 39 above, 6 (my emphasis).

<sup>42</sup> n 39 above, 7-8. Under arts 137(1) and (5) of the 1995 Constitution, a court to which a matter had been presented was required to refer the matter to the Constitutional Court as the court competent to interpret the Constitution.

<sup>43</sup> n 39 above, 9.

<sup>44</sup> n 25 above, 4.



article 26(2)(b)(ii) of the Constitution provides for the aggrieved person to have 'a right of access to a court of law'.

As the Commission had done in the *Free Movement* case, the commissioner deferred to the provisions of article 129 of the 1995 Constitution as to what constitutes a 'court', and went on to hold that 'the [Commission] is not a court of law'.<sup>45</sup> Notably, in the *Stephen Okwalinga* case, the Commissioner adopted a similar position with regards to the complainant's claim regarding unfair and discriminatory dismissal from the police force. Although she determined that as the complaint was in respect of the right to non-discrimination and that the Commission 'would have been competent' to hear it, the commissioner held that the Commission had no jurisdiction given the fact that the complainant was, in her view, seeking a 'review of administrative decision of the police authority'.<sup>46</sup> She held that a right to such a review, as stipulated under article 42 of the Constitution, could only be handled by the 'courts' as the proper forum and, in that regard, given that the Tribunal was 'not a court of law', it was by 'implication not legally competent to handle complaints arising from decisions taken by administrative bodies'.<sup>47</sup>

Although it is empowered to adopt procedures of a court in the performance of its function (including the *protectionist* one), the Commission is right to qualify that its quasi-judicial character does not equate it to a court. The reluctance of the Commission to address the complaint in the *Free Movement* case can be understood in that context.<sup>48</sup> However, the Commission's conceptualisation of its jurisdiction *ratione materiae* with regard to complaints on a violation of the right to property on the basis of its quasi-judicial character as a 'court' is grounded on an erroneous interpretation. Therefore, although correct that the quasi-judicial character of the Commission is not that of a 'court', the decisions of Commissioner Wangadya on the enforceability of property rights before the Commission are premised on an erroneous interpretation of the provisions of the Constitution. The commissioner's rejection of the

<sup>45</sup> As above. See also the *John Kilara* case (n 25 above) 10-11; *Nyero Santo Akoli* case (n 25 above) 5-7.

<sup>46</sup> n 14 above, 6 (my emphasis).

<sup>47</sup> n 14 above, 8. See also the *John Olong* case, where the Commissioner, reflecting on the limits of the Commission to deal with the rights guaranteed under art 26 (property) and art 42 (administrative justice), stated: 'Although article 52(1)(a) enjoins the Commission to investigate any human right, where certain specific rights are infringed upon, redress, for example compensation, can only be sought from the courts of law. Such rights include (but are not limited to) the right to property under article 26 and the right to just and fair treatment under article 42 of the Constitution. Both articles provide for petitioning courts of law by the aggrieved persons' (n 25 above) 5.

<sup>48</sup> For a critique of the Commission's conceptualisation of its quasi-judicial character in the case, see, however, R Sengendo & J Katalikawe 'Revisiting the question of application or interpretation of the 1995 Constitution: A critical examination' (2001) 7 *East African Journal of Peace and Human Rights* 307.



Commission's jurisdiction over property claims under article 26 of the Constitution<sup>49</sup> is in fact the result of the failure to distinguish between the question of 'access to a court' as an aspect of the *content* of the right to property and the status of the Commission, in its quasi-judicial capacity, as a court. The 'access to a court of law' in article 26(2) of the Constitution is not a reference to the forum for the enforcement of the right; rather it is a condition *sine qua non* in a law for the compulsory acquisition of property. In effect, the absence of a law making provision for compensation and right of access to a court of law makes any compulsory acquisition of property unlawful<sup>50</sup> and, as has indeed been the position in a number of complaints, such an acquisition of property is enforceable before the Commission.<sup>51</sup> On the other hand, the right to apply to a court of law with regard to an unfair treatment claim under article 42 of the Constitution is in respect of the courts as the forum for addressing grievances arising from administrative decisions. The decision to decline jurisdiction in the *Stephen Okwalinga* case was therefore correct.<sup>52</sup>

#### 4 Implications of ambiguity upon other aspects of the Uganda Human Rights Commission's jurisdictional competence

The ambiguity over the Commission's *ratione materiae* jurisdiction has had implications with regard to the other aspects of the Commission's jurisdiction. This has particularly been the case as regards the legal capacity of persons to present complaints on human rights violations and the limitation period within which complaints are to be presented.

##### 4.1 *Ratione personae* jurisdiction – the issue of *locus standi*

The contentions as regards the manner of (and legal regime for) presentation of complaints has had a direct bearing to the Commission's jurisdiction *ratione personae*, that is, as regards who can present claims before the Commission and, in effect, the question of *locus standi*. To that end, with the preliminary objections founded on the nature of the claim as *tortious* and the manner of (and legal regime for) its

<sup>49</sup> See nn 24 & 25 and accompanying text.

<sup>50</sup> Art 26(2)(b)(ii) of the Constitution states: 'No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied: ... (b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for – .... (ii) a right of access to a court of law by any person who has an interest or right over the property.'

<sup>51</sup> See the *Thomas Ochieng* case (n 23 above) 5.

<sup>52</sup> See nn 46 & 47 and accompanying text.

presentation as a *plaint* in light of the provisions of the law on loss of dependency (Law Reform (Miscellaneous Provisions) Act), it has been the contention that, in the context of claims for unlawful death or loss of life, the *authors* of such claims should have obtained (and be holders of) letters of administration. The objections in this regard, raised in respect of claims for a violation of the right to life, were rejected and dismissed by the Commission in its early decisions right up to 2005. In both the *Saverio Oola*<sup>53</sup> and *Joseph Oryem*<sup>54</sup> cases, Commissioner Waliggo deferred to article 50(2) of the Constitution to uphold the *locus standi* of the complainants. In reality, the decisions from 1998-2005 are underscored by the liberal 'open-door' principle to *locus standi* in so far as the presentation and lodging of human rights complaints before the Commission are concerned. The Commission deferred to the principle as embodied under the Constitution and its legal framework (in particular its guidelines). In *Jervasio Atunya Onek v UPDF 4th Division Gulu*,<sup>55</sup> in which the complainant filed a complaint on behalf of his son-in-law, Thomas Orach Otim, who had been arrested by the armed forces, Commissioner Aliro-Omara acknowledged the propriety of the complainant's action:<sup>56</sup>

This was appropriate by virtue of the Uganda Human Rights Commission Operational Guidelines made under article 52(3) of the which allows *any person* to complain to the Commission about a human right violation notwithstanding the fact that the *complainant is not directly a victim* of the violation complained of.

In subsequent cases, apart from deferring to the 'open-door' principle, the Commission has also underscored the 'sufficient interest' of the complainant in the complaint filed, in light of the close relationship to the victim of the human rights violation. In the *Hajji Ali Mutumba* case, Commissioner Aliro-Omara deferred not only to the fact that '[a]rticle 50(2) of the Constitution entitles anybody to file a human rights claim seeking for redress', but also to the fact that 'Mutumba [had] sufficient interest in this case', in light of the fact that he claimed to be the father of the victim, Muhammad Busulwa, who had died in late 1996 while in custody at a government prison.<sup>57</sup> In fact, over the years, the commissioners have deferred to article 50(2) of the Constitution or simply taken for granted the close relation principle to uphold the *locus*

<sup>53</sup> n 18 above, 2 (complainant as the father of deceased son, Robert Okullo).

<sup>54</sup> n 16 above, 2-3.

<sup>55</sup> Complaint UHRC G/172/2001 (decision of 23 February 2004).

<sup>56</sup> n 55 above, 1.

<sup>57</sup> n 15 above, 11.

*standi* of complainants.<sup>58</sup> Notably, in all the cases, the commissioners were cognisant of the fact that the claims were in respect of violations of human rights.<sup>59</sup>

However, in the *Collins Oribi* case, Commissioner Wangadya upheld the objection raised regarding the *locus standi* of the complainant, a brother to the deceased, to present the complaint. Approaching the issue from the premise that the claim was essentially a 'tort' of negligence,<sup>60</sup> she rejected the reliance on article 50(2) of the Constitution and held that *locus standi* under that provision was nonetheless still subject to other laws (including the laws on succession and loss of dependency).

These provisions (article 50(2) of the Constitution) are operationalised by other laws which provide for specific rights and freedoms, specific remedies available in the event of violation, the manner or procedure for seeking such remedies, where to seek them, the powers to enforce them, etc. Such are so many, for instance the Uganda Human Rights Commission Act Cap 24, the Law Reform (Misc Provisions) Act Cap 79, the Succession Act Cap 162, the Civil Procedure Act Cap 71, the Civil Procedure and Limitation (Miscellaneous Provisions) Act Cap 72, the Limitation Act Cap 80, and such.<sup>61</sup>

As regards the necessity to obtain letters of administration to present claims for loss of life, she explained:<sup>62</sup>

I also want to emphasise that the legal requirement for acquisition of Letters of Administration before anyone can bring a death cause was well-intentioned – to safeguard the interests and rights of the beneficiaries. Letters of administration, apart from identifying the deceased's legal representative, provide the names, and other particulars eg ages of the beneficiaries and guide court/tribunal on how to distribute the estate or part thereof. They also provide information on the status of the beneficiaries, ie their relationship with the deceased. Particulars of the administrator and his relationship with the deceased are also made known early enough. Letters of administration too are evidence that the beneficiaries approve of and have confidence in their holder as administrator of their dead relative's estate. This way we can avoid situations where damages are awarded to a wrong party who in the end appropriates them to his own personal advantage to the exclusion of the rightful beneficiaries.

<sup>58</sup> See eg the *Margaret Atoo* case (n 15 above) (wife to Philip Odong); the *Peace Nshemereirwe* case (n 15 above) (sister to Patrick Mamenero); the *Lydia Nabuwembo* case (n 15 above) (sister to John Lubega); the *James Bwango* case (n 15 above) (husband to Margaret Barungi); the *Leo Rusoke* case (n 15 above) (son to Gabriel Byaruhanga); the *John Baptist Oryem* case (n 15 above) (father to Walter Ocen).

<sup>59</sup> See eg the *Joseph Oryem* case (n 15 above). Commissioner Waliggo alludes to the allegation in the complaint in respect of 'Thomas Kilama's right to life' as 'violated by the respondent's security agents'.

<sup>60</sup> n 21 above, 4 15.

<sup>61</sup> n 21 above, 16.

<sup>62</sup> n 21 above, 17-18.

In subsequent decisions involving death (and, in effect, the right to life), Commissioner Wangadya has at the outset underscored the fact that the complainants were close relations and administrators of the estates of the deceased family members.<sup>63</sup>

Invariably, the de-linking of human rights from related tortious elements is pertinent to addressing the implications the ambiguity over the Commission's jurisdiction *ratione materiae* has had upon its jurisdiction *ratione personae*. When the right (to life) is de-linked from the question of loss of dependency, it follows that the *locus standi* of a complainant should not be tied to the holding of letters of administration. In any event, the *locus standi* should be premised solely on the 'open-door' principle that underpins the Constitution and the Commission's legal framework. The underlying premise for *locus standi* is that a complainant exercises the right to petition on behalf of a victim of a human rights violation on account of either inability or legal incapacity, with the former manifest where the victim is dead or is in custody<sup>64</sup> and the latter where the victim is, for instance, a minor.<sup>65</sup> The practice of the Commission in situations of inability, particularly where the victim of the human rights violation is in custody, underscores the fact that *locus standi* in a complaint is in fact exercisable only in respect of what is fundamentally the rights of the victim. In the instances where the victim is released prior to the hearing of the complaint, the Commission has, in light of its rules,<sup>66</sup> substituted the victim as complainant in place of the author of the complaint.<sup>67</sup>

In any event, the disagreement over whether holding of letters of administration is a crucial *locus standi* requirement with regard to loss of life complaints misses an important point. A loss of life situation

<sup>63</sup> See eg *Leonard Mugerwa v Attorney-General*, Complaint UHRC 41/2003 (decision of 8 December 2006); *Sulaiman Kakomo v Attorney-General*, Complaint UHRC 388/2002 (decision of 5 September 2007); *Sam Opio Etimu v Attorney-General*, Complaint UHRC S/438/2004 (decision of 1 November 2007); *Edison Oluka v Attorney-General*, Complaint UHRC S/61/2005 (decision of 2 November 2007).

<sup>64</sup> See eg the *Jervasio Atunya Onok* case (n 55 above) 1-2 (son-in-law Thomas Orach Otim was arrested and detained by armed forces). See also n 84 below and accompanying text.

<sup>65</sup> See eg *Daudi Kauta (as a friend of George Kauta) v Ishaka Magameso & Others*, Complaint UHRC 180/1998 (decision of 19 April 1999).

<sup>66</sup> UHRC Rules (n 4 above), Rule 11(2).

<sup>67</sup> In the *Jervasio Atunya Onok* case, Commissioner Aliro-Omara observed, in substituting the author of the complaint with his son-in-law: 'Procedurally the tribunal felt it appropriate to replace Onok Atunya with Orach Otim Thomas as the complainant as in the case of success of the complaint any remedies applicable would go to Mr Orach Otim. Such substitution is allowed by Rule 11(2) of the Uganda Human Rights Commission (Procedure) Rules 1998' (n 55 above) 46 1-2 (my emphasis). Although in that case the complaint remained in the names of Jervasio Atunya Onok (the father-in-law), in other cases the Commission has in fact replaced the name of the author of the complaint with that of the victim. See eg *Sgt Jackson Cherop v Attorney-General*, Complaint UHRC G/288/2000 (decision of 14 April 2004) (complaint originally filed by Jimmy Kipsiwa on behalf of his brother, Jackson Cherop);

engenders interests in respect of the violation of the right to life as well as the loss of dependency. The interests in both instances – the right and loss of dependency – co-exist (in the overall hybrid nature of claims as human rights and torts) and enjoin different capacities for the enforcement of those interests. The capacities for enforcement – that is, *locus standi* – are premised upon the legal framework that defines those interests. The Constitution and Commission's legal framework provide for the *locus standi* for the enforcement of interests arising from a violation of the right to life, by which any person is entitled to present a complaint in respect of the violation. On the other hand, the laws on loss of dependency and succession provide for the *locus standi* for the enforcement of interests of the beneficiaries of the deceased's estate and require a claimant to have been granted letters of administration. In effect, the crucial distinction is that, as regards human rights, *locus standi* under article 50 of the Constitution and the Commission's legal framework is one of entitlement, while as regards a loss of dependency claim in tort, the *locus standi* is one of legal authorisation. In essence, any person is entitled to present a human rights complaint while only the holder of letters of administration is authorised to lodge a claim for loss of dependency (and the overall administration of a deceased's estate). However, given the hybrid nature of claims as human rights and torts, it is necessary to de-link *locus standi* in respect of the human right from that in respect of the tortious elements underlying loss of dependency. Although not sufficiently set out or elaborated upon, the elements of this de-linking are evident by Commissioner Aliro-Omara's decision in the *Hajji Ali Mutumba* case, in which he noted:<sup>68</sup>

Article 50(1) of the Constitution entitles anybody to file a human rights claim seeking for redress. I find that Mutumba could have sufficient interest in this case but so does the general estate of the late Busulwa. In the circumstances my order is that the estate of the late Busulwa is entitled to compensation. Those with interest in the estate can have access to the amount awarded in the complaint upon presentation of valid letters of administration.

The fallacy of requiring letters of administration as the basis of *locus standi* to present a complaint on the violation of the right to life before

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*Peter Isabirye Kiwule v Attorney-General*, Complaint UHRC J/35/2003 (decision of 3 December 2004) (complaint originally filed by Rev Grace Kayiso on behalf of his brother, Peter Isabirye Kiwule); *Paul Waiswa v Kamuli District Local Administration*, Complaint UHRC J/34/2002 (decision of 21 April 2006) (complaint originally filed by Jackson Muganza on behalf of his son, Paul Waiswa). All these cases were handled by Commissioner Aliro-Omara.

<sup>68</sup> n 15 above, 11-12. In the *Kamana Wesonga* case, the Commissioner similarly endeavoured to de-link the complainant's presentation of the complaint from the question of proof of dependency, in stating that: '[I]t is necessary to adduce evidence before the Commission proving the existence and status of the dependants of Pongo. This in my view may be at any stage of resolving the complaint because there is no strict legal requirement that they must be produced at the time a complainant testifies.'

the Commission is evident in *Charles Odong v Attorney-General*.<sup>69</sup> In a rare deferment to human rights in her decisions after 2006, Commissioner Wangadya expressed doubt of the necessity for letters of administration as the basis for *locus standi* in respect of a complaint for a violation of the right to life of a 17 year-old, remarking that requiring letters of administration in respect of 'a possibly non-existence estate' would 'defeat the purpose of the provisions of article 50 ... [of the Constitution]'.<sup>70</sup>

In essence, any person has an entitlement to present a complaint regarding human rights violations. The existence, as is the situation in most of the complaints, of a legal relation – although this is not essential – simply bestows upon the author of the complaint sufficient legal interest in the subject matter. Otherwise, the complainant in a human rights claim could be a disinterested bystander. On the contrary, in a tortious claim for the loss of dependency, a sufficient legal interest in the deceased's affairs is pertinent, and any claimant should obtain letters of administration. In treating letters of administration as merely a legal authorisation to the holder to lodge claims in the interests of the deceased's estate, the letters would be no different from a representative action, in which certain claimants are authorised to claim on behalf of a multitude of the other claimants. Notably, the Commission's guidelines enjoin a multi-faceted approach to *locus standi* as regards who can present a complaint.<sup>71</sup>

#### 4.2 Limitation periods for presentation of complaints

The conceptualisation of the nature (and manner of presentation of) complaints has had additional implications with regard to the period in which complaints are to be filed before the Commission. The human rights-torts dichotomy has underpinned the manner in which the commissioners have addressed the question of the period of limitation for complaints to be filed before the Commission. Ordinarily, torts that are presented against the state must be filed within two years of the act or omission resulting in the tort.<sup>72</sup> On the other hand, the Uganda Human

<sup>69</sup> Complaint UHRC G/283/2003 (decision in 2007).

<sup>70</sup> n 69 above, 3.

<sup>71</sup> n 5 above, Guideline 4, 'Who can make a complaint?' provides: '(a) the victim of an alleged human rights violation; (b) a relative, friend, legal representative, any organisation or person may make a complaint on behalf of the alleged victim. This should particularly be so if, for some reason, the victim cannot personally make the complaint; (c) an individual or organisation alleging with facts a series of massive violation of human rights or peoples' rights; (d) any person may complain before the UHRC not only on his/her own behalf, but also on behalf of others who are also similarly affected by the act he/she is complaining about. This will be known as "representative complaint".' As of 2008, the only instance of a 'representative complaint' is the complaint presented in the *Kalyango Mutesasira* case (n 9 above).

<sup>72</sup> Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72 (Laws of Uganda 2000), sec 3.

Rights Commission Act stipulates a limitation period of five years from the act or omission constituting a violation of human rights.<sup>73</sup>

In the early decisions, the Commission adhered to the five-year limitation period as provided under the 1997 Act.<sup>74</sup> In the *Faddy Mutenderwa* case, after pointing out that the complaint was ‘founded not on tort but on a violation of human rights’ and that ‘the Commission has jurisdiction to entertain this matter’, Commissioner Wangadya rejected the state’s attempt to subject the complaint to the limitation period under the Civil Procedure and Limitation (Miscellaneous Provisions) Act.<sup>75</sup> Similarly, in the *Saverio Oola* case, Commissioner Waliggo rejected attempts to subject the complaints on human rights violations (brought against the government) to the limitation period under the Civil Procedure and Limitation (Miscellaneous Provisions) Act, explaining in depth as follows:<sup>76</sup>

I do not agree with counsel for the respondent that the complaint before the tribunal is time-barred under the ... cited law. This law of civil procedure and limitation is formulated to prescribe time for suits against government based on torts. It envisages a situation where a tort cannot be brought against the Government after the expiration of [24] months from the date of which the cause of action arose – unless there are mitigating circumstances. The instant complaint is based on a claim of human rights violation. [The] limitation period for bringing complaints before the Commission is governed by section 25 of the Uganda Human Rights Commission Act, 1997 which allows the complainants to lodge before the Commission complaints for the violation of human right within five years from the date of the occurrence of the event complained of. The event complained of in this complaint occurred in 1997 and the complainant lodged his complaint with the Commission in 2000. The legislature, in passing section 25 of the UHRC Act clearly referred to human rights violations and prescribed the five-year limitation period. The UHRC Act itself is a special enactment dealing with human rights while the Civil Procedure and Limitation ... Act is a special Act dealing with suits filed in courts against the government.

As with the other aspects of the Commission’s jurisdiction *ratione materiae* and *personae* – and in light of the greater emphasis being placed on the tortious nature of claims – subsequent decisions, as from 2006, witness a gradual subjection of claims before the Commission to the period of limitation provided under the Civil Procedure and Limitation (Miscellaneous Provisions) Act, especially on the part of Commissioner

<sup>73</sup> n 3 above, sec 24.

<sup>74</sup> *Margaret Atoo* case (n 15 above) 1. Commissioner Aliro-Omara noted that the complaint filed on 7 April 2000 (almost four years after the human rights violation) was ‘within the limitation period of five years prescribed by the UHRC Act’. See also the *Peter Amone* case (n 23 above) 7-9 (although in this case, there was a ‘continuing violation’ in respect of occupation of land dating back to 1989).

<sup>75</sup> n 30 above, 4. In the end, the Commissioner held: ‘The alleged violation of the complainant’s rights occurred between June 17, 2002 and July 9, 2002. His complaint is therefore not time-barred.’

<sup>76</sup> n 18 above, 5 (my emphasis).



Wangadya. In *Titia Eratus v Attorney-General*,<sup>77</sup> the Commissioner reflected upon the apparent duality in the periods of limitation under the laws:<sup>78</sup>

It is unfortunate that the time limit allowed by the Uganda Human Rights Commission Act, ie five years, differs with that permitted by the Civil Procedure (Miscellaneous Provisions) Act, ie two years within which to sue the Attorney-General. The general policy of the Uganda Human Rights Commission is that this tribunal is bound by the five-year limit provided by the Uganda Human Rights Commission Act and not by the Civil Procedure (Miscellaneous Provisions) Act.

The Commissioner expressed her disagreement with what she regarded as a 'policy' of the Commission on the five-year limitation period,<sup>79</sup> and went on to uphold the objection raised by the state as to the time-barred nature of the complaint.<sup>80</sup> The commissioner further expressed a concern that the reliance on the provisions of the Uganda Human Rights Commission Act would create an injustice to the state in respect of a claim presented four years after the unlawful act or omission.<sup>81</sup> In the *Collins Oribi* case, the commissioner took the application of the limitation period under the Civil Procedure and Limitation (Miscellaneous Provisions) Act to complaints before the Commission a step further. In fact, she abandons the human rights-torts dichotomy altogether in observing that in respect of a limitation period for claims against the government, it was irrelevant if a claim is founded on tort or human rights.<sup>82</sup> In the end, she was very critical of the complainant's attempt to recast a claim he had originally presented before the High Court as 'a tort of negligence' as a violation of the deceased's 'right to life' so as to bring the claim 'within the jurisdiction of the Commission' and, in filing it four years after the death, 'defeat the law on limitation'.<sup>83</sup> More critically, the commissioner felt that the laws on limitation, including the Law Reform (Miscellaneous Provisions) Act, were binding upon the Commission.<sup>84</sup> She further considered the limitation provisions under the 1997 Act as general provisions subject to the more specific limitation provisions of the Civil Procedure and Limitation (Miscellaneous Provisions) Act and the Law Reform (Miscellaneous Provisions) Act.<sup>85</sup>

<sup>77</sup> Complaint UHRC G/205/2001 (decision in 2006).

<sup>78</sup> n 77 above, 1.

<sup>79</sup> As above.

<sup>80</sup> n 77 above, 14.

<sup>81</sup> n 77 above, 3.

<sup>82</sup> n 21 above, 4. The Commissioner stated: '[E]ven if the instant complaint involved any human rights violation other than death, it would still be statute-barred as against the Attorney-General.'

<sup>83</sup> n 21 above, 4. The deceased, Tom Owenykeu, was shot dead by a member of the local defence forces, a paramilitary force, on 7 December 1996 and the complaint was filed before the Commission on 4 December 2000.

<sup>84</sup> n 21 above, 3.

<sup>85</sup> As above.



Finally, she has regarded the Civil Procedure and Limitation (Miscellaneous Provisions) Act as providing a 'special privilege or immunity enjoyed by the Attorney-General' with regard to the claims filed against the government and that this was a privilege or immunity that could not be taken away simply by the 1997 Commission Act.<sup>86</sup> Notably, in the *Titia Eratus* case, the commissioner had already stated her view of the 'special privilege' accorded to the government under limitation law *vis-à-vis* the 1997 Act, as:<sup>87</sup>

[M]y interpretation thereof is that the five-year period provided under [section] 24 of the Uganda Human Rights Commission Act is a general provision which applies to all manner of respondents. But the Civil Procedure (Miscellaneous Provisions) Act is specific in its application. It specifically singles out the Attorney-General as a special respondent whose liability can only be raised within a special period of time, ie two years. Beyond that the suit/complaint is no more. The Uganda Human Rights Commission cannot invoke human rights to defeat such a law. The two-year period is kind of special privilege enjoyed by government and which privilege can only be taken away by legislation expressly stating so. It cannot be taken away by the Uganda Human Rights Commission.

Ultimately, the commissioner felt that the Commission was bound by the limitation period stipulated under the Civil Procedure and Limitation (Miscellaneous Provisions) Act in respect of the complaints presented before it alleging violations of human rights.<sup>88</sup>

The discourse on the timeline for presentation of complaints before the Commission is partly a result of the conceptual ambiguities that have shaped the jurisprudence on the Commission's jurisdiction *ratione materiae*. It was inevitable that the conceptualisation of claims as tortious that has engendered the subjection of complaints to the limitation periods prescribed under the laws on the loss of dependency and generally with regard to claims brought against the government. As with all the other facets of the discourse that has defined the confusion over the Commission's jurisdiction *ratione materiae*, the stances adapted with respect to limitation is faulty on a conceptual footing. Firstly, the two-year limitation period is, as Commissioner Waliggo in the *Saverio Oola* case said, in respect of suits filed before the courts against the government, whilst the five-year limitation period is unique to complaints presented before the Commission.<sup>89</sup> In any event, although the Commission is enjoined to adopt procedures of the High Court, this is only the case in instances where there are no specific statutory provisions. The Commission's legal instruments provide express provisions on limitation of complaints and, therefore, since it is not a 'court' *par excellence*, the Commission does not need to bother itself with rules

<sup>86</sup> n 21 above, 13.

<sup>87</sup> n 77 above, 2.

<sup>88</sup> *Collins Oribi* case (n 21 above) 6-13.

<sup>89</sup> See n 76 above and accompanying text.

or provisions of laws on suits before the traditional courts. Secondly, the view that the two-year limitation period under the laws is a special privilege granted to the government as a defendant (and is not displaceable except by express statutory enactment) does not offer insight into judicial inroads over the years with respect to statutory immunities to the government. The five-year limitation period as regards complaints presented before the Commission is not unique or peculiar to human rights protection in Uganda. Although the limitation period is one that is statutorily stipulated under statute law, in other aspects of the law, the judicial bodies (in this case, the courts) have been at the forefront of fostering human rights protection against the so-called privileges or immunities granted to the government. A good example is the 45-day statutory notice accorded to the government with respect of intended civil suits under the Civil Procedure and Limitation (Miscellaneous Provisions) Act.<sup>90</sup> The courts have held that such notice is not required or necessary in causes filed alleging violations of human rights.<sup>91</sup> In effect, the statutory notice the complainant in the *Collins Oribi* case served upon the Attorney-General was only relevant in that the intended suit before the High Court was in tort;<sup>92</sup> for had the claim before the court been for a violation of human rights, it would have been unnecessary and inconsequential.

Finally, the legislature cannot have been unaware of the Civil Procedure and Limitation (Miscellaneous Provisions) Act when it debated and enacted the 1997 Act. In fact, the five-year limitation period was a recognition of the peculiar character (and often circumstances) of human rights claims, especially with regard to complaints presented before the Commission. Given a history of depravity in so far as violations of human rights are concerned, the limitation period under the 1997 Act is a reflection of the attendant difficulties (owing to, for instance, illiteracy, ignorance, intimidation or lack of awareness of a violation) that might bedevil the presentation of complaints before the Commission.

## 5 Some concluding observations

The ambiguity and controversy in the jurisprudence of the Commission as regards its jurisdiction *ratione materiae* have largely been conceptual, premised in recent years on whether, in light of the Commission's

<sup>90</sup> n 72 above, sec 2.

<sup>91</sup> See eg *Dr James Rwanyarare & Others v Attorney-General*, Miscellaneous Application 85/1993; *Oketcho v Attorney-General*, Miscellaneous Application 124/1999; *The Environmental Action Network Ltd v Attorney-General & Another*, Miscellaneous Application 39/2001; *Greenwatch v Attorney-General*, Miscellaneous Application 92/2004. All the applications were filed and presented before the High Court.

<sup>92</sup> n 21 above, 4-5.

Guidelines, a complaint is concerned with the violation of human rights or a legal claim of a civil nature. It is the human rights-torts dichotomy that has underpinned the ambiguity and divergence in the Commission's conceptualisation of its subject matter jurisdiction with regard to loss of life and occupation of land complaints filed before it. The Commission must de-link or detach the human rights aspects in a complaint from any underlying tortious (or other civil) obligations given the oft inevitability of a wrongful act on the part of the state (or a non-state actor) presenting obligations in both human rights and civil claims. In fact, in such situations, the Commission should entertain the claims as a means of encouraging litigants to lodge complaints before the Commission. There are advantages of presenting claims before the Commission, including the ease in proving a human rights claim (as opposed to a tort-based claim) as well as the timely procedures and inexpensiveness of litigating complaints before the Commission. The simplicity in terms of form and manner of presenting complaints before the Commission is, given the prevailing jurisprudence, likely to be jeopardised by time-consuming processes of complainants seeking, in the case of loss of life complaints, the grant of letters of administration. The processing of such letters would likely foster delays in getting complaints before the Commission in a timely manner.

The ambiguity in the conceptualisation of the Commission's jurisdiction *ratione materiae* has invariably had implications in the approaches adapted by commissioners in respect of *locus standi* and the period of limitation for presentation of complaints before the Commission. The Commission must likewise de-link *locus standi* requirements in respect of human rights (as underscored by the 'open-door' policy in the provisions of the Constitution and the Commission's guidelines) from those requirements with regard to civil suits before courts. It should similarly regard the limitation periods under its legal framework as concerned with complaints regarding human rights presented to the Commission and disregard the periods under other civil procedure rules. Ultimately, the provisions of the Constitution and legal instruments establishing the Commission should be interpreted and applied in favour of affirming and enlarging (rather than constraining) the Commission's jurisdiction *ratione materiae*. Additionally, given that the Commission is not a 'court', it should not (and it is not required to) apply the rules or provisions of laws with respect to civil suits before the traditional courts.

Finally, ambiguity and divergence in the views of commissioners have resulted in an inconsistent jurisprudence on the Commission's jurisdiction *ratione materiae* (and other aspects of its competence). Although the effect on confidence of the end users of the Commission's complaint system cannot be ascertained, inconsistent decisions may not augur well for future confidence in the Commission if the problem continues unaddressed. Notably, given that the divergence has in part not been helped by the position adopted by the Commission after its

first teething years to have complaints heard before single commissioners, abandoning the early attempts at having a *coram* of at least three commissioners,<sup>93</sup> it may be necessary for the Commission to evolve standards, as in, say, practice directions, to clarify on the issues of its jurisdictional competence. Further, the Directorate of Complaints, Investigation and Legal Services that oversees the execution of the Commission's protectionist mandate (in the receipt and investigation of complaints alleging human rights violations) should give guidance and advice to the complainants on the presentation of complaints.

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<sup>93</sup> A good number of the early complaints were heard before two or more commissioners. See eg the *Free Movement* case (n 39 above); the *Betty Nakiyingi* case (n 38 above); *Emmanuel Mpondi v Chairman, Board of Governors, Nganwa High School & 2 Others*, Complaint UHRC 210/1998; *James Hafasha v D/SP John Bwango*, Complaint UHRC 335/1998.

# Marriage under African customary law in the face of the Bill of Rights and international human rights standards in Malawi

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## Summary

*Contracting a marriage under African customary law in Malawi poses difficulties and challenges in the light of the Bill of Rights and international human rights standards. There are bound to be conflicts which, seen from a human rights perspective, amount to violations of women's human rights. The article explores the nature of the conflict between human rights and a plethora of principles, rules and practices pertaining to marriage under African customary law in Malawi. The article also shows strong support from both men and women for cultural practices that conflict with women's human rights. It is therefore argued that efforts to eradicate these cultural practices, however well-intended, must be undertaken with a very high level of cultural sensitivity. It is suggested that, instead of a formal approach to the realisation of human rights, a substantive approach which is inclusive of the reasons behind the support for cultural beliefs and values, be adopted in order to address those aspects of a particular cultural practice that violate human rights.*

## 1 Introduction

The article examines the way in which the Bill of Rights and international human rights standards conflict with a plethora of principles, rules and practices of African customary family law that govern customary

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marriage in Malawi. The article also shows how strong cultural support can pose a threat to any effort aimed at addressing human rights violations in African customary law. It is therefore suggested that a substantive approach be adopted.

The words 'formal approach' and 'substantive approach' are borrowed from formal equality and substantive equality paradigms.<sup>1</sup> A formal approach means using law in its strict sense to address human rights violations. A substantive approach entails the use of law, while taking into account the reasons behind views in support of cultural values when implementing human rights. The position therefore is that the formal approach is not sufficient to address human rights violations under African customary law.

The article is divided into five sections. The next section examines the position of international human rights law in the Malawian Constitution (Constitution). The section also briefly discusses the international human rights position on cultural practices that conflict with human rights. The aim is to highlight the relevance of international human rights standards in Malawi. The third section looks at the position of customary law under the Constitution and discusses the implications of the status that the Constitution gives to customary laws. The fourth section discusses principles and practices governing a customary marriage in Malawi. Both matrilineal<sup>2</sup> and patrilineal<sup>3</sup> marriages are examined with a view to revealing the traditional values that are incompatible with the Bill of Rights and international human rights standards. The last section concludes the discussion.

## 2 Position of international human rights law in terms of the Constitution

The position of international human rights law in terms of the Constitution may be looked at in different ways. Firstly, some international human rights norms have been elevated to constitutional status in the

<sup>1</sup> J de Waal *et al* *The Bill of Rights handbook* (2005) 232 have defined formal equality as 'sameness of treatment'. The law must treat individuals in the same manner regardless of their circumstances. In other words, formal equality supports the view that a person's individual physical or personal characteristics should be viewed as irrelevant in determining whether they have a right to some social benefit or gain. On the other hand, substantive equality requires the law to ensure that there is equality of outcome. It is partially based on a redistributive justice model which suggests that measures have to be taken to rectify past discrimination, because to fail to do so would leave people and groups at different starting points.

<sup>2</sup> Matrilineal customary marriage refers to all customary marriages that trace their descent line through female relatives.

<sup>3</sup> Patrilineal customary marriage refers to all customary marriages that trace their descent line through male relatives.

Constitution, which renders them justiciable in Malawian courts.<sup>4</sup> This is through a direct incorporation of certain international law standards in the Constitution. For example, the non-discrimination clause, a key principle of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>5</sup> and other international instruments, has been enshrined in the Malawian Constitution.<sup>6</sup> In addition, international law has been granted an elevated status in the Malawian Constitution, not only in relation to the interpretation of constitutional provisions, but also as a factor relevant in the development of customary law and in the interpretation of municipal statutes by the judiciary.<sup>7</sup> Consequently, international law assumes a position of importance in relation to two aspects of legal development in this sphere; namely, in respect of the drafting of legislation, and in respect of law reform via judicial interpretation.

The second angle derives from the legal status of international law in Malawian municipal law. According to section 211(2) of the Constitution, certain international agreements form part of the laws of Malawi.<sup>8</sup> This position is relevant with respect to the International Covenant on Civil and Political Rights (ICCPR),<sup>9</sup> the Convention on the Rights of the Child (CRC),<sup>10</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>11</sup> CEDAW,<sup>12</sup> and the African Charter on Human and Peoples' Rights (African Charter).<sup>13</sup> As can be seen from their date of ratification, all these international agreements became part of domestic law in Malawi by virtue of section 211(2) of the Constitution and are, therefore, enforceable as part of domestic law.

<sup>4</sup> Sec 4 provides that '[t]he Constitution shall bind all executive, legislative and judicial organs of the state at all levels of government and all the peoples of Malawi are entitled to equal protection of this Constitution, and laws made under it'.

<sup>5</sup> CEDAW was adopted on 18 December 1979 and entered into force on 3 September 1981.

<sup>6</sup> An example would be sec 20 of the Malawian Constitution on the right to equality.

<sup>7</sup> Sec 11(2)(c) of the Malawian Constitution provides that '[i]n interpreting the provisions of this Constitution a court of law shall ...where applicable, have regard to current norms of public international law and comparable foreign case law'.

<sup>8</sup> Section 211(2) of the Constitution provides that '[i]nternational agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapses'.

<sup>9</sup> Ratified by Malawi in 1993; GA Resolution 2200A(XXI) 21UNGAOR Suppl (No 16) 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force on 23 March 1976.

<sup>10</sup> Ratified by Malawi in 1991.

<sup>11</sup> Ratified by Malawi in 1993; GA Resolution 2200A(XXI) 21UNGAOR Suppl (No 16) 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force on 3 January 1976.

<sup>12</sup> Ratified by Malawi in 1987.

<sup>13</sup> Ratified by Malawi in 1989. The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986.

## 2.1 Position of international human rights law regarding cultural practices that conflict with human rights

At the international level, it is important to note that many instruments recognise the application and relevance of African customary law. Article 22 of the Universal Declaration of Human Rights (Universal Declaration)<sup>14</sup> states that '[e]veryone, as a member of society ... is entitled to the realisation of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'. Further, article 27(1) provides: 'Everyone has the right to freely participate in a cultural life of the *community*, to enjoy the arts and to share in scientific advancement and its benefits' (my emphasis).

As a declaration, the Universal Declaration is a non-binding instrument that merely states the aspirations of nation states. However, it is submitted that it has become part of binding international law in Malawi. Reasons that can be advanced to substantiate this point are twofold. First, the standards laid down in the Universal Declaration were re-enacted in two conventions that are binding on states. These are ICCPR and ICESCR. Articles 15(1)(a)<sup>15</sup> and 27<sup>16</sup> of ICESCR and ICCPR, respectively, provide for the protection of cultural rights.

Secondly, the Malawi Supreme Court of Appeal (SCA) has held that the Universal Declaration applies and is enforceable in Malawi.<sup>17</sup> In the *Chihana* case, the SCA held that the Universal Declaration is part of Malawi's law and that the freedoms that it guarantees must be respected and can be enforced in the courts of Malawi.<sup>18</sup> Following the *Chihana* case, it has been noted that the cases of *Chisiza v Ministry of Education and Culture*<sup>19</sup> and *S v Nkhata*<sup>20</sup> have made reference to provisions of the Universal Declaration.<sup>21</sup> At the regional level, rights to culture are declared in the African Charter.<sup>22</sup>

<sup>14</sup> The Universal Declaration was adopted by UN General Assembly Resolution on 10 December 1948.

<sup>15</sup> Art 15(1)(a) of ICESCR provides: 'The State Parties to the present Covenant recognise the right of everyone (a) to take part in a cultural life.'

<sup>16</sup> Art 27 of ICCPR provides: 'In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

<sup>17</sup> See the case of *R v Chakufwa Chihana* SCA Criminal Appeal 9 of 1993, as cited by S White *et al* *Dispossessing the widow: Gender-based violence in Malawi* (2002) 32. See also TT Hansen 'Implementation of international human rights standards through the national courts in Malawi' (2002) 46 *Journal of African Law* 31-37, who noted that the SCA considered the Universal Declaration as part of the law of Malawi.

<sup>18</sup> As above.

<sup>19</sup> Miscellaneous Civil Case 10 of 1993 (unreported).

<sup>20</sup> Miscellaneous Civil Case 6 of 1993 (unreported).

<sup>21</sup> Hansen (n 17 above) 37-38.

<sup>22</sup> See eg art 17 of the African Charter.



Of particular importance in this article, however, is whether the protection of cultural rights at the international level constitutes a justifiable reason for violating human rights.

The position at international level is that no international human rights document cites culture as a basis on which protections may be abridged.<sup>23</sup> Rather than protecting culture at the expense of human rights, international documents reveal that culture necessarily must cede to universal standards.<sup>24</sup> Indeed, as the above mandate suggests, cultures are protected so that they may enhance human rights and not lead to their derogation.<sup>25</sup> Such an interpretation finds support in article 1(3) of the United Nations (UN) Charter,<sup>26</sup> which seeks

to achieve international co-operation in solving international problems of an economic, social, cultural, humanitarian character and in promoting respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

The language of the above provision makes clear two things: Human rights are not dependent on a specific culture, and human rights are to be respected without distinction as to the basic markers that influence different manifestations of cultural life: sex and religion, among others.<sup>27</sup>

Furthermore, numerous treaties that followed the UN Charter serve as examples of the approach that places the preservation of human rights as a fundamental universal principle, even when human rights protections challenge cultural practices. CEDAW confronts the possibility of misuse of culture as a pretext to violate women's rights in the following way. Article 5 of CEDAW requires state parties to take all appropriate measures to

modify the social and cultural patterns of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles for men and women.

Article 2(f) of CEDAW provides:

State parties ... by all appropriate means and without delay ... undertake:  
... (f) To take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

<sup>23</sup> JR Levesque *Culture and family violence: Fostering change through human rights law* (2001) 95-96.

<sup>24</sup> R Cook 'State accountability under the Convention on the Elimination of all Forms of Discrimination Against Women' in R Cook (ed) *Human rights of women: National and international perspectives* (1994) 234-235.

<sup>25</sup> Levesque (n 23 above) 96.

<sup>26</sup> The UN Charter was adopted on 26 June 1945.

<sup>27</sup> Levesque (n 23 above) 96.

With particular reference to discriminatory customary family practices at the point of contracting a marriage, articles 16(1)(a) and (b) of CEDAW<sup>28</sup> provide:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) the same right to enter into marriage;
- (b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent.

Apart from CEDAW, CRC also deals with discriminatory customary family law practices that affect women, especially young girls.<sup>29</sup> In addition, the Declaration on the Elimination of Violence Against Women of 1994<sup>30</sup> makes an important statement. Article 4 firmly rejects cultural relativism<sup>31</sup> as it prohibits states from invoking 'any custom, tradition or religious consideration to avoid their obligations' in pursuit of a policy of eliminating gender discrimination by all appropriate means and without delay.

At the regional level, the African Charter on the Rights and Welfare of the Child (African Children's Charter) deals with discriminatory practices that affect young girls.<sup>32</sup> Furthermore, the regional protection is extended by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's

<sup>28</sup> Commenting on arts 16(1)(a) and (b), the CEDAW Committee (established under art 17 of CEDAW to oversee the implementation of its provisions) in its General Recommendation 21 said this: 'While most countries report that national constitutions and laws comply with the Convention, custom, tradition and failure to enforce these laws in reality contravenes the Convention. A woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of states parties' reports discloses that there are countries which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages. Other countries allow a woman's marriage to be arranged for payment or preferment and in others women's poverty forces them to marry foreign nationals for financial security. Subject to reasonable restrictions based for example on a woman's youth or consanguinity with her partner, a woman's right to choose when, if, and whom she will marry must be protected and enforced at law.'

<sup>29</sup> See art 24(3) of CRC which provides: 'State parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.'

<sup>30</sup> UN General Assembly, 48th session, Official Records, GA Resolution 4, Agenda item 11, A/RES/48/104 1994.

<sup>31</sup> Cultural relativism promotes the belief that human rights vary from one culture to another.

<sup>32</sup> Art 21 of the African Children's Charter provides: 'State parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or other status.' The Children's Charter was adopted on 11 July 1990 and entered into force on 29 November 1999. Malawi ratified the Charter on 10 September 1999.

Protocol).<sup>33</sup> The Protocol was promulgated out of the African Union (AU)'s concern that, despite the ratification of the African Charter and other international human rights instruments by member states, women in Africa continue to be victims of discrimination and harmful cultural practices.<sup>34</sup> The Protocol contains provisions relating to the elimination of harmful practices, including the prohibition, through legislative measures backed by sanctions, of all forms of harmful practices that negatively affect the human rights of women and which are contrary to recognised international standards.<sup>35</sup>

To sum up, we see that international human rights standards call for state intervention with regard to cultural practices that violate human rights.

### 3 Position of customary law in the Bill of Rights

The Constitution has many provisions that directly or indirectly recognise the application and relevance of African customary laws in Malawi. Section 12 provides that the Constitution is founded upon the following underlying principles:

[A]ll legal and political authority of the state derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests; the inherent dignity and worth of each human requires that the state and all persons shall recognise and protect fundamental human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote.

Thus, Nyirenda, Hansen and Kaunda<sup>36</sup> have argued, based on this provision, that the Malawian Constitution attaches great importance to African customary law and traditional values.

Several provisions in a bill of rights itself can support the above position. For example, section 22(5) of the Constitution provides for the recognition of marriages by custom. This provision makes it obvious that marriages contracted according to customary laws are valid. Section 26 of the Constitution provides that '[e]very person shall have the right to use the language and to participate in the cultural life of his or her choice'. Although this section does not make any explicit reference to customary law, it expressly recognises the significance of customary or cultural values to human development, wellbeing and identity.<sup>37</sup> In

<sup>33</sup> The Protocol was adopted on 11 July 2003 and entered into force on 25 November 2005. Malawi ratified it on 20 May 2005.

<sup>34</sup> See Preamble to the Protocol.

<sup>35</sup> Art 5 of the Protocol.

<sup>36</sup> J Nyirenda *et al* *A comparative analysis of the human rights chapter under the Malawi Constitution in an international perspective* (undated) xxiii.

<sup>37</sup> See C Himonga 'Implementing the rights of child in African legal systems: The Mthembu journey in search of justice' (2001) 9 *International Children's Journal* 89.

essence, it guarantees the right of everyone to live according to the legal system applicable to the particular cultural group to which he or she (chooses to) belong.<sup>38</sup>

Section 26 of the Malawian Constitution must be contrasted with section 30 of the South African Constitution. The latter provides that '[e]veryone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights'. It has been argued that this provision means that when the right to culture clashes with the right to equality, the latter must take priority since this provision expressly subordinates the right to culture to all other rights in the South African Bill of Rights.<sup>39</sup> By contrast, section 26 of the Constitution does not have any express internal limitation. This may be interpreted to mean that the right to culture enjoys the same status as all other rights in the Malawian Bill of Rights.<sup>40</sup>

However, section 20(1) of the Constitution prohibits discrimination on certain specified grounds, including sex. Section 20(2) of the Constitution specifically states that '[l]egislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the courts'. The right to protection against discrimination is buttressed in section 24 of the Constitution, which includes gender as a ground of discrimination. Furthermore, section 24(2) of the Constitution expressly states that '[a]ny law that discriminates against women on the basis of gender or marital status shall be invalid'. It also obligates the government to take legislative measures that eliminate customs and practices that discriminate against women, including practices such as sexual abuse, harassment and violence, and the deprivation of property, including property obtained by inheritance.

Reading sections 20(2) and 24(2) of the Constitution together one gets the impression that the right to culture does not enjoy the same status as the right to equality. Furthermore, customary law, just like any other law in force in Malawi, is arguably limited by section 5 of the Constitution.<sup>41</sup> The principle of the supremacy of the national

<sup>38</sup> Himonga (n 37 above) 94.

<sup>39</sup> See, eg, F Kaganas & C Murray 'The contest between culture and gender equality under South Africa's interim Constitution' (1994) 21 *Journal of Law and Society* 427-428; L Fishbayn 'Litigating the right to culture: Family law in the new South Africa' cited in E Grant 'Human rights, cultural diversity and customary law in South Africa' (2006) 50 *Journal of African Law* 2; TR Nhlapo 'The African family and women's rights: Friends or foes? (1991) *Acta Juridica* 135; V Broinstein 'Reconceptualising customary law debate in South Africa' (1998) 14 *South African Journal on Human Rights* 388.

<sup>40</sup> L Mwambene 'Reconciling African customary law with women's rights in Malawi: The proposed Marriage, Divorce and Family Relations Bill' (2007) 1 *Malawi Law Journal* 113.

<sup>41</sup> Sec 5 of the Malawian Constitution provides that 'any act of government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid'.

Constitution ensures that, in legal interpretation, human rights guarantees take precedence over any other laws or customary rules.<sup>42</sup> The wording of section 5 of the Malawian Constitution seems to suggest that if customary law is inconsistent with the Constitution, it is invalid.<sup>43</sup> A further limitation on the application of customary laws is seen in section 10(2) of the Malawian Constitution which provides that '... in the application and development of customary law, the relevant organs of the state shall have due regard to the principles and provisions of the Constitution'.

In addition, section 44(1) of the Malawian Constitution places the right to culture among the rights in respect of which a limitation is permitted. As rightly argued by Chirwa,<sup>44</sup> the limitation clause, as provided by section 44(1), has application to all rights in a bill of rights. Therefore, even though section 26 does not contain an internal limiting clause, the general limitation clause applied under section 44(1) of the Malawian Constitution would be applicable.

Having said that, it is, however, important to note that in terms of sections 44(1) and (2) of the Constitution, limitations on a constitutional right, including the right to culture, may be permitted only where they are 'prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society'.<sup>45</sup> Section 44(2) sets a number of tests which courts have to meet if it is to be constitutional, notwithstanding its restriction of a right or rights contained in chapter IV of the Malawian Constitution. The first hurdle that must be met in terms of section 44(2) is that the rights contained may be limited by prescription of law. While this may be interpreted in a number of ways, a court will at least have to determine that the 'prescribed law' is certain and not vague, or

<sup>42</sup> B Ibhawoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *Human Rights Quarterly* 838 847. Similar provisions of constitutional supremacy exist in the constitutions of other African countries. See eg sec 26(1) of the Constitution of Ghana; sec 37 of the Ugandan Constitution.

<sup>43</sup> This position is similar to that in South Africa. Sec 2 of the Constitution of the Republic of South Africa, 1996 provides: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and obligations imposed by it must be fulfilled.' Commenting on sec 2 of the South African Constitution, as read with sec 39, C Rautenbach 'Some comments on the status of customary law in relation to the Bill of Rights' (2003) 1 *Stellenbosch Law Review* 107 observed that 'the wording of these provisions is to the effect that the application of customary law is subjected to the provisions of the Bill of Rights and the Constitution'.

<sup>44</sup> DM Chirwa 'Upholding the sanctity of rights: A principled approach to limitations and derogations under the Malawian Constitution' (2007) 1 *Malawi Law Journal* 11.

<sup>45</sup> Sec 44(2) of the Malawian Constitution provides: 'Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.'

lacking in precision.<sup>46</sup> Those affected by the law must be able to know what is expected of them. Should they be unable to do so, then the law would fall foul of this test.<sup>47</sup> The question that can be asked is: If a limitation is effected by a constitutional right and not law, would this provision apply? Obviously, such are some of the difficult questions that courts are likely to be faced with in Malawi.

Furthermore, section 44(2) demands that a law, when it impinges on a right, must meet the test of being 'reasonable' and 'recognised by international human rights standards and necessary in an open and democratic society'. The terms 'reasonable' and 'necessary' in an open and democratic society are vague and will need to be interpreted within the Malawian context.<sup>48</sup> Such interpretation will obviously play a significant role as far as discriminatory African customary laws against women are concerned, where one of the questions will be whether enjoying one's right to culture can be justified as a limitation on the right to equality.

While this will probably be answered in the affirmative, the real dilemma for a court will be to determine how far this limitation should be permitted to provide for the enjoyment of the right to culture. The meaning of terms such as 'open', 'democratic', 'necessary' and 'reasonable' will obviously have a bearing on courts. On the other hand, the trend internationally in determining the meaning of these terms will also have a bearing on the interpretive endeavours of Malawian courts. Sieghardt<sup>49</sup> states, in a European context, that to evaluate a democratic society one must consider

the needs or objectives of a democratic society in relation to the right or freedom concerned; without a notion of such needs, the limitations essential to support them cannot be evaluated. The aim is to have a pluralist, open, tolerant society. This necessarily involves a delicate balance between the wishes of the individual and the utilitarian 'greater good of the majority'. But democratic societies approach this problem from the standpoint of the importance of the individual, and the undesirability of restricting his or her freedom.

In addition to the above, section 44(3) of the Malawian Constitution provides that laws providing for the limitation should not negate the essential content of the right or freedom in question and should be of general application. As a result of the above discussion, the substantive approach becomes inevitable.

<sup>46</sup> Chirwa (n 44 above) 18.

<sup>47</sup> P Sieghardt *The international law of human rights* (1983) 92.

<sup>48</sup> In *Friday A Jumbe & Humphrey C Mvula v Attorney-General* Constitutional Case 1 & 2 of 2005 (unreported), as observed by Chirwa (n 44 above) 19, '[i]t was held that it was not enough for the state to argue in general that the reverse onus created by the Corrupt Practices Act was reasonable and necessary in an open and democratic society. The state was under the obligation to demonstrate with empirical evidence that such provision would lead to a reduction or curbing of corruption.'

<sup>49</sup> Sieghardt (n 47 above) 93.

It is, however, important to note that courts will not lightly declare African customary laws to be unconstitutional for being inconsistent with any other right, including the right of women to equality, for example. This is so because any legislation that varies, alters or abrogates any rule of African customary law<sup>50</sup> must not constitute an unjustifiable infringement on the right to culture. This also means that parliament does not have a free hand to overrule African customary law. It can do so only to the extent that it does not unjustifiably limit the right to culture. Essentially, this means that any legislation that seeks to advance and protect women's rights must strike an appropriate balance between many interests and rights, especially the right of women to equality and the right of individuals and groups of people to culture.<sup>51</sup>

In summary, we see that the interpretation of the limitation section will also play a large part in constitutional adjudication. The manner in which it restricts rights will probably be used to justify human rights violations.

#### 4 Rules governing customary marriages and the Bill of Rights

In this section, we examine how rules and practices governing customary marriage conflict with the Bill of Rights and international human rights standards. However, we start by giving an overview of forms of customary marriages so that the rules and practices that will be discussed are put into perspective.

In Malawi, there are two forms of customary marriages, namely, patrilineal and matrilineal marriages.<sup>52</sup> As a general rule, all customary marriages, whether matrilineal or patrilineal, are contracted according to the customary law of the parties.<sup>53</sup> All customary marriage laws recognise as essential to the validity of the marriage compliance with the following: The parties must have attained the age of puberty; consent of the woman's parents to the marriage; in patrilineal societies *lobola* must be paid by a man to the woman's parents or other relatives

<sup>50</sup> According to sec 48(2) of the Constitution, an 'Act of Parliament shall have primacy over other forms of law but shall be subject to the Constitution'.

<sup>51</sup> Mwambene (n 40 above) 114.

<sup>52</sup> M Chigawa *Customary law and social development: De jure marriages vis-à-vis de facto marriages at customary law in Malawi* (1987).

<sup>53</sup> Generally, customary law requires that the intending spouses must be of marriageable age and that they should be in a good state of mind. For a detailed discussion, see C Himonga *Family and succession laws in Zambia* (1995) 75. The same issues are equally important in Malawi. It should be noted that Malawi is not a homogeneous country. It consists of different tribes whose origins go back to a historical ancestor or ancestress. Generally, for purposes of customary family laws, these tribes are divided into two categories: matrilineal and patrilineal. The matrilineal tribes are



who are her guardians; in matrilineal systems there must have been a *chinkhoswe*; and the woman must be unmarried. There is, however, no precise age when one attains puberty and may marry under the customary marriage laws in Malawi.<sup>54</sup>

A discussion of the formation and dissolution of these customary marriages has already received considerable attention in the literature.<sup>55</sup> It is, therefore, not necessary to provide details, but only a summary of the main ideas relating to the two forms of customary marriages, starting with matrilineal marriages.

Matrilineal customary marriages can be grouped into *chikamwini* and *chitengwa*.<sup>56</sup> In *chikamwini* marriages, the man moves to the wife's village and has only a few rights there.<sup>57</sup> Lineage is traced through the woman.<sup>58</sup> Inheritance of property passes through the female line.<sup>59</sup> In addition, women under the matrilineal system have custodial ownership of land.<sup>60</sup> It should also be noted that in matrilineal systems, children 'belong'<sup>61</sup> to the woman and remain under the guardianship of the wife's eldest brother.<sup>62</sup> A woman's child inherits from her brother's property. Upon the death of a man, the wife and children continue to live at the place of their abode and continue to use the land. When a woman dies, the husband returns to his home. Compared to patrilineal

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mostly found in 20 districts of the central and southern regions, namely, Dedza, Dowa, Kasungu, Lilongwe, Mchinji, Nkhosakota, Ntheu, Ntchisi, Salima, Blantyre, Chiradzulu, Machinga, Mangochi, Mulanje, Mwanza, Thyolo, Zomba, Balaka and Phalombe. The patrilineal tribes are mostly to be found in all of the six districts that are in the northern region and Chikwawa and Nsanje districts in the southern region.

<sup>54</sup> This position has to be contrasted to civil law where they have a fixed age as to when one can marry.

<sup>55</sup> See, eg, JO Ibbik *Restatement of African law: Malawi Vol 1, The law of marriage and divorce* (1970); Chigawa (n 52 above); DS Koyana *et al Customary marriage systems in Malawi and South Africa* (2007); JC Bekker *Seymour's customary law in Southern Africa* (1989); White (n 17 above) 56.

<sup>56</sup> N Ngwira *Women's property and inheritance rights and the land reform process in Malawi* (2003) 6. See also P Ntata & C Sinoya *Customary law and the UN conventions on women and children* (unpublished) (1999) 14.

<sup>57</sup> F von Benda-Beckmann *Legal pluralism in Malawi: Historical developments 1858-1970 and emerging issues* (2007) 89.

<sup>58</sup> KM Phiri 'Some changes in the matrilineal family system among the Chewa of Malawi since the nineteenth century' (1983) 24 *Journal of African History* 257-258.

<sup>59</sup> Similarly, in Tanzania's matrilineal societies, as noted by F Butegwa 'Using the African Charter on Human and Peoples' Rights to secure women's access to land in Africa' in Cook (n 24 above) 497, property is inherited through the wife's lineage.

<sup>60</sup> This position is contrasted to Tanzania's matrilineal societies where, as noted by Butegwa (n 59 above), women do not have effective control or ownership of the family land.

<sup>61</sup> The word 'belong' is used to mean that rights and obligations toward the children in a matrilineal society accrue to the woman.

<sup>62</sup> E Mandala 'Capitalism, kinship and gender in the lower Tchiri (Shire) Valley of Malawi, 1860-1960: An alternative theoretical framework' (1984) 13 *African Economic History* 137-139. See also Phiri (n 58 above) 258-259.



tribes, Von Benda-Beckmann notes that the woman has a much stronger position *vis-à-vis* her husband.<sup>63</sup>

In *chitengwa* marriages, the above rules also apply. There are, however, points of difference. In *chitengwa* (matrilineal) marriages, the woman goes to live in the man's village, but the children belong to the woman's lineage.<sup>64</sup> Upon the death of the husband, the widow and children return to the widow's village of origin. Therefore, although matrilineal to a large extent, it is similar to the patrilineal *lobola* system in other respects.<sup>65</sup>

On the other hand, in patrilineal marriage systems the matrimonial residence is in the man's village. The wife leaves her village and resides in her husband's village. The man pays *lobola* to the wife's father or guardian. The payment of *lobola* establishes his right to take his wife and children to his own village, and signifies that the man owns all the property, and makes the children of the marriage legitimate.<sup>66</sup> It should also be noted that, whilst in matrilineal tribes descent is from the oldest brother of the wife, in a patrilineal system descent is also through males but from the husband's side.<sup>67</sup> Daughters are expected to get married and live in their husbands' villages. Therefore, they cannot inherit property.<sup>68</sup> Thus, some commentators have argued that the patrilocal nature of the marriage and the payment of *lobola* in patrilineal tribes place the man in a position to enjoy a superior status without any qualification.<sup>69</sup> It should also be noted that, unlike in the matrilineal system where children belong to the wife and her kin, in the patrilineal system children of the family belong to the man and his kinsmen.

Having briefly looked at the two forms of customary marriages, in the following subsections I examine rules and practices governing these marriages.

#### 4.1 Consent

Articles 16(1)(a) and (b) of CEDAW concern the goal of equality at the point of entering marriage. One of the key issues of this provision is consent: Do women have the same degree of freedom to give consent to a marriage as men?

Under customary family law, consent to a customary marriage by the parents of a woman is strictly adhered to whether the marriage is

<sup>63</sup> Von Benda-Beckman (n 57 above).

<sup>64</sup> Ngwira (n 56 above) 6; Phiri (n 58 above) 262.

<sup>65</sup> This will be discussed later when examining how it conflicts with the Bill of Rights.

<sup>66</sup> Ngwira (n 56 above) 6. See also A Armstrong *et al* 'Towards a cultural understanding of the interplay between children's and women's rights: An Eastern and Southern African perspective' (1995) *The International Journal of Children's Rights* 345.

<sup>67</sup> Ibik (n 55 above) 79. See also Armstrong *et al* (n 66 above) 355.

<sup>68</sup> Ngwira (n 56 above) 7.

<sup>69</sup> White (n 17 above) 56.

taking place between minors or not.<sup>70</sup> Traditionally, the consent of the father in patrilineal tribes or the maternal uncle in matrilineal tribes was not a decision of a guardian as an individual. The whole family considered the matter since the issue of marriage concerned the whole family. In some instances it concerned the whole village.<sup>71</sup> This position, it could be argued, robs a woman of the opportunity for her to enter into marriage autonomously.

Furthermore, where women, particularly young girls, are forced by their families to marry men who have chosen them, autonomy is not exercised. In addition to the above, in some cultures, the question arises as to whether the widow is free to refuse to be inherited by a brother of her deceased husband. Polygamy also raises significant questions about equality and choice.<sup>72</sup>

It should, however, be noted that the requirement of consent in respect of customary law marriages has to be contrasted with that for civil marriages where the consent of parents or guardians is only required when one is marrying below the age of 21.<sup>73</sup> Commenting on this difference, Bennett<sup>74</sup> states:

[W]hile a civil or Christian union is exclusively the concern of the spouses and depends for its validity on their consent, a customary marriage is an alliance of two families, for which the co-operation of the spouses is desirable, but not essential.

To understand this customary family rule, the definition of customary marriage by Bekker<sup>75</sup> is instructive. A customary marriage is defined as a 'relationship that concerns not only the husband and wife, but also the family groups to which they belonged before the marriage'. Thus, the consummation of a customary marriage brings into being reciprocal rights and obligations between the spouses for which their respective *family groups are collectively responsible* (my emphasis).

On the other hand, section 22(3) of the Malawian Constitution guarantees all men and women the right to marry and found a family. A similar provision is also to be found in several international instruments and regional human rights instruments to which Malawi is a party.<sup>76</sup> It is, however, noted that sections 22(6) and 22(4) of the Malawian

<sup>70</sup> JO Ibik 'The law of marriage in Nyasaland' unpublished PhD thesis, University of London, 1966 524, as cited by Von Benda-Beckmann (n 57 above) 86. See also the discussion by Armstrong (n 66 above) 362.

<sup>71</sup> Ibik (n 70 above).

<sup>72</sup> See discussion below.

<sup>73</sup> See sec 11(b) of the Marriage Act, chr 25:01. See also sec 24 of the South African Marriage Act 25 of 1961.

<sup>74</sup> TW Bennett *Human rights and African customary law under the South African Constitution* (1995) 113.

<sup>75</sup> Bekker (n 55 above) 96.

<sup>76</sup> See, eg, art 16(1) of the Universal Declaration. It provides that 'men and women ... have a right to marry and found a family'; arts 17 & 23 of ICCPR; art 10 of ICESCR; art 16 of CEDAW; arts 18, 27 & 29 of the African Charter.

Constitution set restrictions for entry into marriage. It is, therefore, submitted that these sections provide limitations to section 22(3) of the Malawian Constitution.

Section 22(6) of the Malawian Constitution provides that 'no person over the age of eighteen years shall be prevented from entering into marriage'. This means that every person over 18 years is at liberty to marry. The opposite is also true of those who are below 18 years. They lack legal capacity to enter into marriage. On the other hand, section 22(4) is to the effect that for those who are 18 years and above, marriage shall take place only with their free and full consent.<sup>77</sup> It is, therefore, submitted that the legal requirement of consent by a guardian<sup>78</sup> to a customary marriage conflicts with a number of women's rights in the following ways:

First, if the guardian withholds his consent to a woman who is older than 18 years, this would be in conflict with section 22(3) of the Malawian Constitution which, as noted in the preceding paragraph, grants every person the right to marry. This customary law requirement, therefore, diminishes a woman's status since it effectively relegates her to a position of a legal minor rather than a mature adult. Furthermore, in view of section 22(4) of the Malawian Constitution, a marriage which requires the consent of the village or a marriage guardian conflicts with the right to enter into marriage with a woman's free and full consent.

Secondly, if the guardian gives his consent to a girl who is younger than 18 years, this would be in conflict with section 22(6) that sets the marrying age at 18. Thirdly, this would also be an infringement of her personal freedom.<sup>79</sup>

From the above, we see that the customary law rule that no marriage can be contracted without the consent of the guardian is at variance with the Bill of Rights and international human rights instruments aimed at protecting women's rights to equality and choice.

Interlinked with consent there is the question of choice of a spouse. In both the matrilineal and patrilineal customary marriage systems, the decision on whom to marry is made primarily by the man concerned or such a man in consultation with his kin. A woman, under customary law, is not expected to make a move and propose marriage. A woman who actively makes such a proposal is considered to have loose morals.<sup>80</sup> So her choice of whom to marry is squarely dependent on who gets interested in her and makes a proposal. With such a belief

<sup>77</sup> Sec 22(4) of the Malawian Constitution is similar to art 16(1)(b) of CEDAW that states that 'women should also enjoy the right to freely choose and enter into marriage only with their free and full consent'.

<sup>78</sup> It should be noted that 'guardian' is used interchangeably with the parents of the woman intending to marry under customary laws.

<sup>79</sup> See sec 19 of the Malawian Constitution.

<sup>80</sup> Ntata & Sinoya (n 56 above) 15.

system, arguably, the choice of a spouse is severely compromised for a woman.

Useful expressions, found in the vernacular languages of Malawi, can help shed light on the issue of choice.<sup>81</sup> In the vernacular it is only a man who can 'marry' a woman: *kukwatira*<sup>82</sup> or *kutola*.<sup>83</sup> A woman 'gets to be married': *kukwatiwa*<sup>84</sup> or *kutoleka*.<sup>85</sup> Thus, clues to the difficulties that women face in realising their right to choose whom to marry can be found in the above vernacular usage.<sup>86</sup> This position can be contrasted with the English position, for example, where both men and women 'get married' to each other.

The cultural practice that only men are expected to make a spousal choice, and not women, is a human rights issue on the basis that it is against women's rights and freedoms guaranteed by the Malawian Constitution, as well as against international standards. It does not rhyme well with section 22(3) of the Malawian Constitution, which provides that 'all men and women have the right to marry and found a family'. It should be noted that this provision does not mention the issue of choice. However, it can be argued that it grants all men and women the right to marry someone of their choice. Moreover, a woman's right to choose whom to marry is guaranteed by international instruments to which Malawi is a party. Article 16(1)(b) of CEDAW states that 'women should also enjoy the right to freely choose a spouse and enter into marriage only with their free and full consent'.<sup>87</sup>

Therefore, it is submitted that the customary law tradition which only gives the right to propose marriage to men, and not to women, is incompatible with the Bill of Rights and international standards for the protection of women's rights.

## 4.2 Polygamy

The debate whether polygamy constitutes a violation of women's rights or is in fact a 'good' system that protects them has been ongoing for a long time.<sup>88</sup> Those who are against polygamy point to the fact that the custom is degrading to women and violates their rights to equality with men. This view finds support within the human rights paradigm which does not condone polygamy.<sup>89</sup> Those who support the con-

<sup>81</sup> As above.

<sup>82</sup> This word is used in matrilineal systems.

<sup>83</sup> This word is used in patrilineal systems.

<sup>84</sup> This word is used in matrilineal systems.

<sup>85</sup> This word is used in patrilineal systems and literally means 'taken by'.

<sup>86</sup> Ntata & Sinoya (n 56 above) 14.

<sup>87</sup> See also art 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962, GA Res 1763A (XVIII) of 7 November 1962.

<sup>88</sup> F Banda *Women, law and human rights: An African perspective* (2005) 116.

<sup>89</sup> See, eg, CEDAW General Recommendation 21 para 21; art 6(c) of the African Women's Protocol.

tinuation of the practice of polygamy argue that rather than violate women's rights, polygamy may facilitate their enjoyment.<sup>90</sup> Banda<sup>91</sup> further notes that the intensity of the debate over polygamy has not lessened over time, pointing to the debates held during the drafting of the African Women's Protocol in which article 6(c) of the Protocol was a compromise.

As noted earlier, both matrilineal and patrilineal customary marriages in Malawi are potentially polygamous.<sup>92</sup> The husband is allowed to marry more than one wife.<sup>93</sup> On the other hand, a married woman is barred from contracting further marriages for as long as she remains legally married.<sup>94</sup> Concurring with Kamchedzera,<sup>95</sup> customary laws favour the husband with regard to sexuality.

In Malawi, the prevalence of this practice is demonstrated by a study conducted by the Malawi Human Rights Commission (MHRC),<sup>96</sup> which shows that polygamy is still a common practice in all areas.<sup>97</sup> The study shows that about 98 per cent of the respondents interviewed stated that polygamy is still practised in their areas. It has also been established that 17 per cent of all women in Malawi are in polygamous unions.<sup>98</sup> In other African countries, a 1995 survey of eight anglophone countries established the prevalence rates of married women in polygamous marriages as follows: in Ghana, approximately 28 per cent; in Kenya, 19,5 per cent; in Nigeria, 42,6 per cent; and in Zimbabwe, one in five married Zimbabwean women and the average union was found to consist of 2,3 wives per man.<sup>99</sup> In South Africa, a study by Govender<sup>100</sup> shows that only 6 per cent of the women interviewed were married to men who had more than one wife. Interesting to note

<sup>90</sup> T Nhlapo 'African family law under an undecided constitution: The challenge for law reform in South Africa' in J Eekelaar & T Nhlapo (eds) *The changing family: Family forms and family law* (1998) 629, as cited by Banda (n 88 above) 116.

<sup>91</sup> Nhlapo (n 90 above).

<sup>92</sup> See *Mphumeya v Republic*, as cited by GS Kamchedzera 'Malawi: Improving family welfare' (1993-1994) 32 *Journal of Family Law* 372. As noted by Bekker (n 54 above) 126, this is also similar to the patrilineal customary marriage in South Africa.

<sup>93</sup> Ibik (n 55 above) 191.

<sup>94</sup> See *Msowoya v Milanzi* Civil Appeal Case 99 of 1979, NTAC (unreported).

<sup>95</sup> Kamchedzera (n 92 above) 374.

<sup>96</sup> MHRC *Cultural practices and their impact on the enjoyment of human rights, particularly women and children* (2005) 18.

<sup>97</sup> The study covered 10 of the 27 administrative districts in Malawi.

<sup>98</sup> WLSA Malawi & SARD C WIDSAA *Beyond inequalities 2005: Women in Malawi* (2005) 19-20.

<sup>99</sup> The Centre for Reproductive Law and Policy and FIDA-(K) *Women of the world: Laws and policies affecting their reproductive lives — Anglophone Africa* as cited by EM Kisaakye 'Women, culture and human rights: Female genital mutilation, polygamy and bride price' in B Wolfgang et al (eds) *Human rights of women: International instruments and African experiences* (2002) 277.

<sup>100</sup> P Govender *The status of women married in terms of African customary law: A study of women's experiences in the Eastern Cape and Western Cape Provinces* (2000) 32.

is that the MHRC study also found strong support for the continuation of the practice from women respondents.<sup>101</sup> Similarly, Kisaakye<sup>102</sup> has also noted that some women have voiced support for the practice.

The above position, it could be argued, has a bearing on what impact the Bill of Rights and international human rights norms can have on human rights violations that come with polygamy. With women supporting the practice, it is doubtful that a formal approach of abolishing the institution of polygamy as proposed by the Malawi Law Commission<sup>103</sup> would be a solution in addressing human rights violations.

On the other hand, sections 20(1) and (2) of the Malawian Constitution provide as follows:

Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status. Legislation may be passed addressing inequality in society and prohibiting discriminatory practices and the propaganda of such practices and may render such practices criminally punishable by the courts (my emphasis).

The prohibition of discrimination on the ground of sex is, arguably, intended to protect women.<sup>104</sup> By including sex as a ground on which discrimination is not allowed, section 20 of the Malawian Constitution leaves no doubt that no discrimination based on sex will be tolerated. Moreover, at international law, several international conventions to which Malawi is a party proscribe discrimination on the basis of sex.<sup>105</sup>

In a polygamous marriage, especially in a patrilineal system, at the point of contracting a subsequent marriage a man unilaterally may introduce new wives to the family and has many opportunities to marry, while each wife may have only one shared husband.<sup>106</sup>

<sup>101</sup> This finding has to be contrasted with the Malawi Law Commission's *Report on the Review of Marriage and Divorce Laws in Malawi* (2005) 29 which found, during the regional consultations, that 95% of the respondents cited more disadvantages than advantages of polygamy and had voiced strong support for it to be abolished. The study by the Malawi Law Commission could be compared to the study by Govender (n 100 as above) in South Africa, which shows that the predominant view (75%), reflected by most interviews, was for the abolition of polygamy.

<sup>102</sup> Wolfgang *et al* (n 99 above) 279.

<sup>103</sup> Malawi Law Commission (n 101 above).

<sup>104</sup> This position is also similar to sec 9(3) of the South African Constitution, 1996. It should, however, be noted that other constitutional provisions, eg, sec 13(5) of the Constitution of Tanzania, as noted by Banda (n 88 above) 35, do not include sex as one of the grounds on which discrimination is prohibited in their non-discrimination clause.

<sup>105</sup> Eg, arts 2 & 7 of the Universal Declaration; arts 2, 2(1), 3 & 20 of ICCPR; arts 2, 2(2) and 3 of ICESCR; art 1 of CEDAW; and arts 2, 19 & 28 of the African Charter.

<sup>106</sup> See also CRM Dlamini *The ultimate recognition of the customary marriage in South Africa* (1999) 32.

With the coming of HIV/AIDS, polygamy puts women's rights to health in jeopardy.<sup>107</sup> Under article 12 of ICESCR, state parties recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Given the attendant problems associated with polygamy, including compromised rights to sex and to a relationship generally, women are denied their rights. In light of the prevalence of HIV/AIDS in Malawi, polygamy also affects women's rights to life. The conduct of a husband having multiple partners increases women's vulnerability to be infected with HIV. This position is supported by Malawi Law Commission's findings:<sup>108</sup>

Polygamy helps in the spread of HIV and AIDS as wives who may feel lonely and neglected may turn to other men for the satisfaction of their sexual needs. The implications of HIV and AIDS infection in a polygamous family were considered quite serious as large numbers of a family may be wiped out by the pandemic.

The practice of polygamy directly conflicts with section 20 of the Malawian Constitution and international instruments on the protection of women's rights to equality as it treats women differently to men. Arguably, in both matrilineal and patrilineal marriage systems, there is a *prima facie* case of unfair discrimination because women are treated differently to men. However, one can hardly suggest that the inequality would be addressed if women were given the same opportunity to accumulate men as spouses.<sup>109</sup> Concurring with Goody, the notion of one woman acting as a wife to more than one man would indeed suggest greater oppression, not liberation.<sup>110</sup> On the other hand, the fact that women support the practice speaks volumes of why a substantive approach should be preferred.

### 4.3 *Lobola*

In patrilineal systems, the payment of *lobola* by the bridegroom (represented by bridegroom/guardian family members) to the bride's family as represented by the bride's guardian is a prerequisite for a valid marriage under African customary law.<sup>111</sup> Mofokeng<sup>112</sup> defines *lobola* as

<sup>107</sup> Wolfgang *et al* (n 99 above) 279.

<sup>108</sup> Malawi Law Commission (n 101 above) 29: See also Wolfgang *et al* (n 99 above) 279.

<sup>109</sup> F Kaganas & C Murray 'Law, women and the family: The question of polygyny in a new South Africa' (1991) *Acta Juridica* 126.

<sup>110</sup> J Goody *The Oriental, the ancient and the primitive: Systems of marriage and the family in the pre-industrial societies of Eurasia* (1990) 140, as cited by Kaganas & Murray (n 109 above) 127.

<sup>111</sup> Chigawa (n 52 above) 5.

<sup>112</sup> LL Mofokeng 'The *lobola* agreement as the silent prerequisite for the validity of a customary marriage in terms of the Recognition of Customary Marriage Act' (2005) 68 *Journal of Contemporary Roman-Dutch Law* 278.



[a]n agreement between the family group of the prospective husband and the family group of the prospective wife that on or before the marriage ceremony, there would be the transfer of property from the family group of the husband, to the family group of the wife in respect of the marriage.

In Malawi, of the people interviewed by MHRC, about 62 per cent were in support of the institution. Similarly, in South Africa, a study by Govender<sup>113</sup> shows that 85 per cent of the women interviewed indicated whole-hearted support for the system of *lobola*. These findings point to the fact that women and society at large are supportive of *lobola*. In view of this fact, it is clear that a formal approach is not likely to succeed because communities do not see it as a violation of their human rights. What may be practical, as a suggestion, is to address the sting of violations of human rights pertaining to *lobola* itself.

It is important to note that under patrilineal marriage, the failure to institute *lobola* negotiations renders the marriage void. As Dlamini<sup>114</sup> has rightly observed, Africans in general

are unable to regard a relationship as a marriage even if there can be compliance with all legal requirements if *lobola* has not been delivered or an agreement for its delivery [has not been] concluded.

In view of the above, to an African woman, negotiating and the subsequent delivery of *lobola* means a valid marriage. The opposite is also true. A formal approach to addressing human rights violations that come with *lobola* would require legislating against the practice. Such an approach would likely face resistance because it strikes at the very significant requirement of an African marriage.

Furthermore, for African patrilineal societies, *lobola* has a deeper cultural symbolism than the commercial meaning ascribed to it by its detractors.<sup>115</sup> It underscores the fact that a customary marriage creates an alliance not only between husband and wife, but also between their respective families and kinships.<sup>116</sup> It is the bedrock on which the African family in patrilineal societies is based. From *lobola* arise reciprocal rights and duties amongst the family groups concerned.<sup>117</sup> For instance, the male guardian who receives *lobola* does not only act as a mediator in cases involving disputes between the parties to a marriage, but he is also expected to assist in stabilising the marriage by protecting the wife if she is mistreated, deserted or neglected. In highlighting its significance in the African family, Koyana, Mwambene and Bekker have rightly observed that *lobola* is the 'great invention of customary law'

<sup>113</sup> Govender (n 100 above) 29.

<sup>114</sup> CRM Dlamini 'The modern legal significance of *ilobolo* in Zulu society' (1984) *De Jure* 149, as cited in Mofokeng (n 112 above) 279.

<sup>115</sup> See the criticisms by White (n 17 above) 53.

<sup>116</sup> See Bekker (n 55 above) 151 and Banda (n 88 above) 108.

<sup>117</sup> Mofokeng (n 112 above) 282.



that adequately balances the interests of the parties in a marriage.<sup>118</sup> If it is established that a woman was persistently treated cruelly and she refuses to go back to her husband, customary law favours her. The *lobola* is forfeited.<sup>119</sup>

From the above discussion, we see that the institution of *lobola* is at the centre of negotiating and balancing all rights that come with a customary marriage in the patrilineal system. So, looking at the protective aspects that come with *lobola*, it is obvious that no woman would want to forfeit that in a marriage, and it may explain its support.

At the same time, *lobola* has often been criticised for being an institution of oppression.<sup>120</sup> Critics link women's subordination and lack of a strong voice within marriage with the payment of *lobola*, which makes both the women and their families of origin dependent on their abusive partners.<sup>121</sup> Some critics go so far as to say that *lobola* constructs women as property.<sup>122</sup> Ironically, it has been noted that this was also the view of colonial authorities who likened it to purchase.<sup>123</sup> People holding this view argue that to continue with the practice is to perpetuate and encourage the subjugation of women.<sup>124</sup>

For purposes of our discussion, however, it is important to note that the payment or non-payment of *lobola* has great legal significance for the rights of women. It determines the rights that a man has over his wife and children.<sup>125</sup> Custody over children depends on the fulfilment of the obligations under the *lobola* agreement.<sup>126</sup> A father and his family are entitled to the custody of any children born out of the marriage as long as *lobola* was paid or where the wife's people are satisfied with the instalments not to question the validity of the marriage. It is, however, to be noted that there is no similar customary law that applies to the woman. In this instance, the customary law works to the advantage of men. It has also been observed that, traditionally, children were regarded as the most important, and sometimes the only, reason for getting married.<sup>127</sup> The payment of *lobola* thus denies women all rights to their children, as well as control over their lives.

<sup>118</sup> Koyana *et al* (n 55 above) 32.

<sup>119</sup> As above.

<sup>120</sup> White (n 17 above) 53.

<sup>121</sup> Banda (n 88 above) 110.

<sup>122</sup> Southern African Research and Documentation Centre (SARDC) *Beyond Inequalities: Women in Zambia* (2005), as cited by Banda (n 88 above) 110.

<sup>123</sup> Wolfgang *et al* (n 99 above) 281.

<sup>124</sup> As above.

<sup>125</sup> See also *Aiya v Aiya* Divorce Cause 8 of 1973 (unreported) Ugandan case, as cited by Wolfgang *et al* (n 99 above) 281.

<sup>126</sup> See also Bekker (n 55 above) 234 and Armstrong *et al* (n 66 above) 348.

<sup>127</sup> A Shenje-Peyton 'Balancing gender, equality, and cultural identity: Marriage payments in post-colonial Zimbabwe' (1997) 9 *Harvard Human Rights Journal* 106.

In addition to the above, the privileged position of a husband that comes with the *lobola* institution is also evident in the married persons' property relationships.<sup>128</sup> Under patrilineal customary family laws, any property the wife brought into the marriage, and which was part of the common household, is accredited to the husband. A wife does not have property rights. In the lifetime of a husband, he has control. A wife cannot dispose of household goods without the consent of her husband.<sup>129</sup>

A striking similarity to the lack of property rights of married women in patrilineal marriages is what Fredman<sup>130</sup> draws our attention to. She notes that in the post-feudal legal system:

Coverture gave the husband near-absolute control over the wife's property as well as her person. Married women were perpetual minors, divested of the possibility of economic independence. Any property which a married woman had owned as a single woman became her husband's property on marriage: personal property vesting absolutely, real property during the lifetime of a husband. Similarly, he had absolute rights to all property which came into her hands during her marriage, including all her earned income.

It is, therefore, not surprising that section 24<sup>131</sup> of the Malawian Constitution guarantees an equal right to full and equal protection by law. Furthermore, section 22(1)<sup>132</sup> of the Constitution guarantees equality within the family. It should be noted that section 24 of the Constitution is a unique one and finds its parallels in articles 16(1)(c), (d) and (f) of CEDAW.

Arguably, this constitutional provision can be used to address the inequality that comes with *lobola*. Therefore, the legal significance of the cultural determination of the custody of children and of property rights depending on the institution of *lobola* clearly goes against women's rights and freedom. It violates not only international standards<sup>133</sup> to which Malawi is a party, but also the Malawian Constitution in sections 19, 20, 24 and 28.<sup>134</sup>

<sup>128</sup> Von Benda-Beckmann (n 57 above) 89.

<sup>129</sup> As above. See also White (n 17 above) 58.

<sup>130</sup> S Fredman *Women and law* (1997) 40, based on accounts by W Blackstone *Commentaries on the law of England* (1809); JH Baker *An introduction to English legal history* (1979), among others.

<sup>131</sup> Secs 24 (1)(a)(ii) & (iii) of the Malawian Constitution provide: '(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their marital status which includes the right ... (a) to be accorded the same rights as men in civil law, including equal capacity; ... (ii) to acquire and maintain rights in property, independently or in association with others, regardless of their marital status; (iii) to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing' (my emphasis).

<sup>132</sup> Sec 22(1) provides that '[e]ach member of the family shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty or exploitation'.

<sup>133</sup> See arts 16(1)(c), (d) & (f) of CEDAW.

<sup>134</sup> Sec 28 provides for the right to property. See also White (n 17 above) 59.

#### 4.4 Child marriage

Child marriage is particularly problematic. Writing on child marriage in Africa, Poulter states:<sup>135</sup>

Marriages of girls under the age of 16 are not uncommon in Africa. It is very unusual for African customary laws to specify a minimum age for marriage. Rather it is left to parents to decide when a girl is ready for marriage and the onset of puberty is often regarded as the key prerequisite.

As noted, in respect of both matrilineal and patrilineal marriages, there is no precise age as to when one attains adulthood and may be able to marry under the customary marriage laws of Malawi. The age of marriage is determined by the attainment of puberty.<sup>136</sup> The graduation to adulthood is, in most cases, attained when one has reached puberty and, in some cases, after completing an initiation ceremony.<sup>137</sup> Puberty and the completion of ceremonies are not directly connected to age.<sup>138</sup>

In addition to the above, some cultural practices encourage child marriages in Malawi. Some of these cultural practices are now discussed.

##### 4.4.1 *Chimeta masisi*

*Chimeta masisi* is the replacement of a deceased wife.<sup>139</sup> It is a practice by which a bereaved husband marries a younger sister or niece of his deceased wife.<sup>140</sup> In most parts where this practice is common, the MHRC found that it is usually encouraged by parents who let their young daughters marry a brother-in-law. In most cases, however, these young daughters try to run away, but always end up being taken back. This, obviously, points to the fact that they are forced into these marriages; otherwise there would not be attempts to run away.

Some parents, in areas where *lobola* is paid, do this because they are afraid that the husband will ask for his *lobola* back.<sup>141</sup> Others, it was established, do it because they think that the death of the daughter will prevent them from accessing the wealth of the son-in-law.<sup>142</sup> Yet other parents are said to do it because they would want to keep the

<sup>135</sup> S Poulter 'African customs in an English setting: Legal and policy aspects of recognition' (1988) 31 *Journal of African Law* 210.

<sup>136</sup> See also a discussion by TW Bennett *Customary law in South Africa* (2004) 304 for a similar position with respect to the patrilineal marriages of South Africa.

<sup>137</sup> Puberty for girls is reached when menstruation starts.

<sup>138</sup> Chigawa (n 52 above) 5 and Armstrong *et al* (n 66 above) 337-340.

<sup>139</sup> MHRC (n 96 above) 22.

<sup>140</sup> According to the MHRC study, 40% of the respondents reported that replacement of a deceased wife takes place in their areas. It was, however, found to be particularly common in patrilineal systems.

<sup>141</sup> Under patrilineal customary laws, however, there is no rule that upon the death of a wife *lobola* should be paid back.

<sup>142</sup> MHRC (n 96 above) 22.

son-in-law in their family since he is of good character. And some think that they would be protecting their grandchildren. More disturbing is the fact that these daughters could be as young as 15 and marry a man who might be 50 or older.<sup>143</sup> Clearly, this is a form of child marriage.

#### 4.4.2 *Mbirigha*

*Mbirigha* means 'bonus wife'. In this practice, the husband is given a younger sister or niece of his wife to take as his second wife. The girl is sometimes enticed by the sister to join her in her marriage, or encouraged by aunts and parents to enter the union.<sup>144</sup> Sometimes the husband initiates the process himself.

The purposes of *mbirigha* include the following: First, it is a sign of gratitude to the son-in-law who is regarded as very generous or as one who takes proper care of their daughter and the parents themselves. Secondly, *mbirigha* is offered to bear children for the husband if the elder sister is barren, or has stopped bearing children because of advanced age. Thirdly, if the husband is rich, the wife may want to protect the wealth by letting her younger sister join her so that the man does not marry elsewhere. At times, the older sister would invite her younger sister in order to have someone with whom to live in the event that the husband dies. So too, the older sister may want to consolidate her power at her new home.

This practice, although said to be in general decline, was found to have been common in many of the areas covered by the study conducted by the MHRC. The *mbirigha*, as in the case of *chimeta masisi* discussed above, can be as young as 15, if not younger, depending on the age at which she attained puberty. Here again, we see that similar violations occur to the *mbirigha*.

#### 4.4.3 *Kupawila*

*Kupawila* means paying off a debt by marrying a daughter.<sup>145</sup> The most common form of *kupawila* in the northern parts of the Chitipa district occurs when the daughter's parents get into debt and as payment for the debt offer their daughter in marriage to the creditor. The daughter could be as young as nine and the man could be 40 or older. The daughter in this situation ends up attaining puberty while staying with the husband. Such daughters, it was established, stick with this arrangement because they are threatened that some curse would befall them if they tried to run away.<sup>146</sup> The MHRC found that 15,4 per

<sup>143</sup> As above.

<sup>144</sup> The MHRC found that 45% of interviewees said that 'bonus wife' is a practice that takes place in their area.

<sup>145</sup> MHRC (n 96 above) 23-24.

<sup>146</sup> As above.

cent of the respondents in their survey said that *kupawila* still persisted in their communities.

A variation of *kupawila* in the Mzimba district takes place when parents eye a male tenant on an estate who is hard-working and shows good prospects for doing well financially. The parents could then ask the tenant to do some piecework for them at their house. When the work has been done, some parents claim that they cannot pay for the services rendered but can instead give the tenant their daughter. In such cases the tenant is not asked to pay *lobola*.

Another form of *kupawila* the study came across is when parents send daughters as young as nine to stay with a rich man. The parents and the rich man would already have agreed, and money or cattle would already have changed hands. The daughter would be oblivious of the arrangement that her stay with the rich man is going to materialise into a marriage.

In both the Chitipa and the Mzimba districts, a variation of the practice of *kupawila* involves an arrangement by which the parents of a boy and those of a girl become very close and, in an attempt to strengthen their relationship, arrange that their children should marry each other. In the end they force their children into marriage.<sup>147</sup>

Having said that, it is observed that at the international level there have been several attempts to tackle the problem of child marriages, including the 1956 Slavery Convention,<sup>148</sup> the UN Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages 1962 and CEDAW.<sup>149</sup> On the African continent, the African Children's Charter prohibits early marriage and specifies 18 as the legal age of marriage.<sup>150</sup> The African Women's Protocol has also specified a minimum age of marriage of 18 years.<sup>151</sup>

As noted earlier in this article, sections 22(6), (7) and (8) of the Malawian Constitution regulate the age for entering into marriage. Subsection (6) provides that: '[n]o person over the age of eighteen years shall be prevented from entering into marriage'. This provision, as noted earlier, sets the marrying age at 18 years.<sup>152</sup> It is clear that this constitutional provision is intended to protect young girls against child marriages. However, subsection (7) requires that those who are aged between 15 and 18 need parental consent. By allowing persons

<sup>147</sup> MHRC (n 96 above) 24.

<sup>148</sup> Art 2 of the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956.

<sup>149</sup> Art 16(2) of CEDAW. See also CEDAW General Recommendation 21 paras 36, 38 & 39.

<sup>150</sup> Art 21(2) African Children's Charter.

<sup>151</sup> Art 6(b) African Women's Protocol.

<sup>152</sup> See also DM Chirwa 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49 *Journal of African Law* 215.

of between 15 and 18 to enter into marriage with the consent of their parents, the Malawian Constitution fails to categorically prohibit child marriages.<sup>153</sup> Subsection (8) discourages marriages between persons where either of them is under the age of 15 years.<sup>154</sup> This provision suggests that marriage with a person younger than 15 years of age may be permitted since the state is obliged only to discourage such a marriage and not prohibit it. The cumulative effect of section 22(8), as read with section 23 of the Malawian Constitution that provides for the rights of children against exploitation, however, is that children under 18 years of age should rather not marry. Such an interpretation would be in accordance with the age of majority as required by the international standards to which Malawi is a party.

The MHRC findings on the cultural practices that encourage child marriages clearly show that some parents are indirectly or directly behind these marriages. For that reason, it is doubtful that a categorical prohibition of child marriages, which would be the formal approach, would yield the desired result of addressing human rights violations that come with child marriages. It is therefore suggested that a substantive approach, which would include addressing the socio-economic circumstances behind the support, in some instances becomes inevitable.

## 5 Conclusion

This paper has highlighted some of the major rules and practices pertaining to contracting a customary marriage under African customary laws that potentially offend against the Bill of Rights and international human rights standards aimed at protecting women's rights. What has been evident from the analysis undertaken is that some features of African customary law governing a marriage effectively discriminate against women on the basis of their sex and, accordingly, are in direct conflict with the Bill of Rights and international human rights law. Moreover, this discrimination not only deprives women of the capacity to exercise their constitutional rights, but weakens their overall status in society by not treating them with the human dignity afforded to men.

Malawi has an obligation under the Constitution and those international instruments that it has ratified to do all within its powers to stop discriminatory cultural practices against women. The question therefore should be how this should be done. By recognising the

<sup>153</sup> Similar sentiments were also expressed in Malawi Law Commission Constitutional Review Programme: Consultative Paper (undated) 21. See also Ntata & Sinoya (n 56 above) 13.

<sup>154</sup> Sec 22(8) of the Malawian Constitution provides that '[t]he state shall actually discourage marriage between persons where either of them is under the age of fifteen years'.

power of cultural influence on the acts of both men and women, I intended to show that any efforts to eradicate these practices, however well-meaning, must be undertaken with a very high level of cultural sensitivity and hence I am advocating a substantive approach. The straightforward formal approach of addressing human rights violations is not satisfactory. Moreover, the conflict between human rights and African customary law needs to be analysed from many angles, including the reasons for the support by both men and women for some of the cultural beliefs which may seem to violate their human rights.

## The right to health care in the specific context of access to HIV/AIDS medicines: What can South Africa and Uganda learn from each other?

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### Summary

*Unlike many other African countries, which either exclude socio-economic rights from their constitutions or include them in the Preamble or the section on Directive Principles of State Policy, the South African Constitution is well known for its inclusion of this category of rights in its Bill of Rights. For example, while the right to health care services is specifically provided for in the South African Constitution, the Ugandan Constitution merely requires the state to 'take all practical measures to ensure the provision of basic medical services to the population'. In the specific context of access to HIV/AIDS medicines, it is interesting to note that, in spite of the disparity in the measure to which the right to health care is constitutionally protected, Uganda is renowned for having taken the lead in the roll-out of anti-retroviral treatment. South Africa has been widely criticised for its initial disastrous approach towards HIV/AIDS treatment, an approach that led to the loss of millions of lives that could have been saved*

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*with the early roll-out of anti-retroviral treatment. The article looks at the different approaches adopted by the two countries in terms of access to HIV/AIDS medicines and the implications for the right to health care. Apart from identifying the lessons Uganda and South Africa can learn from each other, the article explores the important question of accountability for the violation of the right to health care occasioned by inadequate access to HIV/AIDS medicines.*

## 1 Introduction

Although the first cases of AIDS were recorded in Uganda and South Africa around the same time (1982), the early spread of the disease was much more rapid and severe in Uganda than in South Africa. By 1987, Uganda was the epicentre of the disease with prevalence rates of up to 29 per cent in urban areas.<sup>1</sup> South Africa, on the other hand, had a lower initial rate of infection, with prevalence rates among pregnant women at 12,2 per cent in 1996, but rising to 24,8 per cent in 2001 and 30,2 per cent in 2005.<sup>2</sup> By that time, HIV prevalence in Uganda had fallen dramatically from an estimated 30 per cent among pregnant women in 1991 to around 5 per cent in 2001.<sup>3</sup>

Today, while South Africa is seen as one of the countries most severely affected by HIV/AIDS, Uganda is held up as a model in the fight against the epidemic. According to the 2008 UNAIDS Report on the Global AIDS Epidemic, an estimated 5,7 million South Africans are living with HIV, making it the largest HIV epidemic in the world.<sup>4</sup> The prevalence of HIV/AIDS in the adult population is about 18,8 per cent.<sup>5</sup> In Uganda, on the other hand, adult HIV prevalence has stabilised at 5,4 per cent, representing less than one million Ugandans.<sup>6</sup>

Although there are fears of a possible resurgence of the AIDS epidemic, there are a number of reasons why Uganda is hailed as a rare success story in spite of being one of the first countries on the African continent to experience the devastating impact of the disease. These reasons revolve around strong government leadership which, at the time, showed high-level political commitment to HIV prevention and care. This was coupled with broad-based partnerships and extensive

<sup>1</sup> See 'HIV and AIDS in Uganda' <http://www.avert.org/aidsuganda.htm> (accessed 14 July 2009).

<sup>2</sup> See 'HIV and AIDS in South Africa' <http://www.avert.org/aidssouthafrica.htm> (accessed 14 July 2009).

<sup>3</sup> As above.

<sup>4</sup> See UNAIDS 2008 *Report on the Global Aids Epidemic* [http://www.unaids.org/en/KnowledgeCentre/HIVData/GlobalReport/2008/2008\\_Global\\_report.asp](http://www.unaids.org/en/KnowledgeCentre/HIVData/GlobalReport/2008/2008_Global_report.asp) (accessed 14 July 2009).

<sup>5</sup> As above.

<sup>6</sup> As above.

public education campaigns involving all sectors of society.<sup>7</sup> On the other hand, a number of factors have been blamed for the severity and devastation of the HIV/AIDS epidemic in South Africa; a situation, many argue, that could have been avoided or at least minimised. Although some have argued that the severity of the AIDS epidemic in South Africa has its genesis in the pre-1994 apartheid policies and the subsequent major political changes which distracted the country from the disease, it is widely acknowledged that government's failure to act promptly and decisively was largely responsible for the HIV/AIDS devastation seen in the country at the turn of the century.<sup>8</sup> The government's attitude was reflected in the extremely unorthodox views held by the then President Thabo Mbeki and his Minister of Health, Manto Tshabalala-Msimang, who in 2006 led the United Nations (UN) Special Envoy for HIV/AIDS in Africa to refer to South Africa as 'the only country in Africa whose government continues to propound theories more worthy of a lunatic fringe than of a concerned and compassionate state'.<sup>9</sup> The current state of the HIV/AIDS epidemic in both Uganda and South Africa will be discussed in more detail below. Suffice here to say that HIV medicines, also known as anti-retroviral drugs (ARVs), have played a significant role in the varying trends and impacts of the disease as experienced by the two countries.

The introduction of life-saving ARVs in 1996 gave people living with HIV worldwide new hope as the virus no longer was a death sentence. Although ARVs were very expensive at the time, by the turn of the century, living with HIV had been transformed, particularly for people in Europe and the United States. Because of ARVs people with HIV could now live longer and lead productive lives. For such people, HIV/AIDS suddenly became a manageable medical condition rather than a fatal certainty.

Anti-retroviral drugs were introduced in Uganda in clinical trials as early as 1998. In 2004, Uganda began to offer free ARV medication to people living with HIV as part of a pilot programme and by 2006, 56 per cent of all those in need were receiving free HIV treatment.<sup>10</sup> In South Africa, only the small minority who could afford to pay for private health care had access to ARV treatment before 2004. It was

<sup>7</sup> See 'Uganda reverses the tide of HIV/AIDS' <http://www.who.int/inf-new/aids2.htm> (accessed 14 July 2009).

<sup>8</sup> The latter argument is the thrust of a recent Harvard study in P Chigwedere *et al* 'Estimating the cost benefits of anti-retroviral drug use in South Africa' (2008) 49 *Journal of Acquired Immune Deficiency Syndrome* 410, while the former argument is contained in *AIDS in South Africa: Treatment, transmission and the government* <http://avert.org/aids-south-africa.htm> (accessed 15 July 2009).

<sup>9</sup> See Kaiser Network 'Remarks by Stephen Lewis, UN Special Envoy for HIV/AIDS in Africa, to the closing session of the XVI International AIDS Conference, Toronto, Canada' quoted in *AIDS in South Africa: Treatment, transmission and the government* <http://avert.org/aids-south-africa.htm> (accessed 15 July 2009).

<sup>10</sup> 'HIV and AIDS in Uganda' (n 1 above). See also Uganda: Summary Country Profile for HIV/AIDS Treatment Scale-Up [http://www.who.int/3by5/june2005\\_uga.pdf](http://www.who.int/3by5/june2005_uga.pdf) (accessed 21 November 2009).

only after enormous pressure, legal challenges and an unprecedented public outcry that the government reluctantly started to supply the drugs in 2004. By the end of 2007, only about 28 per cent of the people who needed treatment were receiving it.<sup>11</sup>

The different approaches adopted by Uganda and South Africa in terms of access to HIV/AIDS medicines form the basis of the discussion in this article. The concept of 'access' is critical to the discussion, for it is not just about the existence of medicines, but the ability to access them. It has been held that accessibility means physically available and financially affordable.<sup>12</sup> In other words, 'access to medicines can only be assured if a sustainable supply of affordable medicines can be guaranteed – that is, a regular ongoing supply of affordable medicines'.<sup>13</sup> It has further been pointed out that, from a public health perspective, 'access to essential drugs depends on (1) rational selection and use of medicines; (2) sustainable adequate financing; (3) affordable prices; and (4) reliable health and supply systems'.<sup>14</sup> And as with other health care facilities and services, access to medicines has to be realised on a non-discriminatory basis, taking into account the most vulnerable and marginalised sections of the population.<sup>15</sup> It is against this background that the progress in the realisation of the right of access to HIV/AIDS medicines has to be seen. It also has to be seen not only in a general human rights context, but also in the specific context of the right to health care. Accordingly, apart from the lessons Uganda and South Africa can learn from each other, there is the important question of accountability for the violation of the right to health care occasioned by inadequate access to HIV/AIDS medicines. It is to this specific aspect of the right to health care that we first turn our attention.

## 2 The right to health care

### 2.1 The nature of the right

The World Health Organisation (WHO) broadly defines 'health' as 'a state of complete physical, mental and social well-being'.<sup>16</sup> It is in that context that the UN Committee on Economic, Social and Cultural

<sup>11</sup> See L Garbus & E Marseille 'HIV/AIDS in Uganda' <http://hivinsite.ucsf.edu/doc/ari-ug.doc> (accessed 21 November 2009).

<sup>12</sup> See A Hassim *et al* *Health and democracy: A guide to human rights, health law and policy in post-apartheid South Africa* (2007) 438.

<sup>13</sup> As above.

<sup>14</sup> AE Yamin 'Not just a tragedy: Access to medications as a right under international law' (2003) 21 *Boston University International Law Journal* 325 327.

<sup>15</sup> See para 12 of General Comment 14 *The Right to the highest attainable standard of health* (UN DocE/C 12/2000/4) [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En) (accessed 18 July 2009).

<sup>16</sup> See the Constitution of the World Health Organisation *Basic documents* (2007) 1.

Rights (ESCR Committee) has interpreted the right to health, as defined in article 12(1) of the International Covenant on Economic, social and Cultural Rights (ICESCR), as<sup>17</sup>

an inclusive right extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.

The 'right to health care' can specifically be defined as 'the prevention, treatment and management of illness and the preservation of mental and physical well-being through the services offered by the medical and allied health professions'.<sup>18</sup> There is no necessary conflict in the use of the terms 'right to health' and 'right to health care', as long as we understand that the 'right to health' is not possibly intended to guarantee a person's good health, but rather as 'a more convenient shorthand to cover the detailed language and references that are found in international treaties'.<sup>19</sup> There is no doubt, however, that the right to health care, however defined, includes the right of access to medical treatment, including HIV/AIDS medicines.

Like all rights concerning health, the right to health care belongs to the category of human rights known as socio-economic rights. By their nature, these rights have important social and economic dimensions as most of them reflect specific areas of basic needs or delivery of particular goods and services.<sup>20</sup> They also tend to create entitlements to material conditions for human welfare and, as such, a duty is placed on the state to actively implement them. It is in that context that the right to health care, which includes the right of access to HIV/AIDS medicines, has to be understood. It is also against that background that the international context of the right to health care in the context of HIV/AIDS medicines has to be discussed – an aspect to which we now turn our attention.

## 2.2 The international context

There is no shortage of international human rights instruments and documents dealing with the right to health care. Most of these instruments are not choosy in their terminology and generally refer to the right to health as defined by the WHO.<sup>21</sup> It is that prevailing interna-

<sup>17</sup> General Comment 14 (n 15 above) para 11.

<sup>18</sup> See 'Definition of health care' <http://www.answers.com/topic/health-care> (accessed 18 July 2009).

<sup>19</sup> See C Ngwenya & R Cook 'Rights concerning health' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 107.

<sup>20</sup> See JC Mubangizi *The protection of human rights in South Africa: A legal and practical guide* (2004) 118.

<sup>21</sup> See n 16 above.

tional terminological usage that will be adopted in this section. The discussion will also be divided into global instruments, on the one hand, and regional and sub-regional instruments on the other.

### 2.2.1 Global instruments

In the global context, the point of departure is perhaps the Universal Declaration of Human Rights (Universal Declaration), article 11 of which proclaims that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family including ... medical care and necessary social services'.<sup>22</sup>

Furthermore, article 12(1) of ICESCR recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Article 12(2) also lays down broad guidelines regarding the necessary steps to be taken by the member states in order to achieve the full realisation of this right.

Other UN treaties that directly address the right to health include the Convention on the Rights of the Child (CRC),<sup>23</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>24</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>25</sup> In addition to these, there are other instruments whose provisions indirectly or implicitly impact on the right to health. A good example is the International Covenant on Civil and Political Rights (ICCPR), article 6(1) of which guarantees the right to life and article 7 of which prohibits medical or scientific experimentation on anyone without his free consent. It is important to note that Uganda has either ratified or acceded to all the above-mentioned international human rights instruments and although South Africa is yet to ratify ICESCR, its Constitution includes an extensive catalogue of socio-economic rights that are contained in ICESCR.

In the specific context of the right of access to HIV/AIDS medicines, a number of UN declarations and similar documents are relevant. Perhaps the most pertinent of these is the United Nations General Assembly Declaration of Commitment on HIV/AIDS (2001) which recognises that<sup>26</sup>

access to medication in the context of pandemics such as HIV/AIDS is one of the fundamental elements to achieve progressively the full realisation of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

<sup>22</sup> Art 11 Universal Declaration.

<sup>23</sup> Art 24.

<sup>24</sup> Art 12.

<sup>25</sup> Art 5(e)(iv).

<sup>26</sup> See art 15 of the United Nations General Assembly Declaration of Commitment on HIV/AIDS (2001).

The Declaration also urges member states to have developed, by 2003, national strategies 'to strengthen health care systems and address factors affecting the provision of HIV-related drugs, including anti-retroviral drugs.'<sup>27</sup> Member states were also urged to make every effort 'to provide progressively and in a sustainable manner, the highest attainable standard of treatment for HIV/AIDS, including the prevention and treatment of opportunistic infection, and effective use of quality-controlled anti-retroviral therapy'.<sup>28</sup>

In 1996, the Office of the UN High Commissioner for Human Rights (UNHCHR) and the Joint UN Programme on HIV/AIDS prepared guidelines for UN member states on the application of international human rights law in the context of HIV/AIDS. The International Guidelines on HIV/AIDS and Human Rights, as they are officially known, were first published in 1998, revised in 2002 and consolidated in 2006. The 2002 revision and 2006 consolidation of the Guidelines was intended to ensure that they reflect new standards and developments in HIV-related treatment and evolving international law norms on the right to health generally, and the right of access to HIV-related prevention, treatment, care and support specifically.

Subsequent to the initial adoption of the International Guidelines on HIV/AIDS and Human Rights, a series of UNHCHR resolutions have been adopted to promote and monitor the guidelines. These include the Resolution on the Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) (1997, 1999 and 2001)<sup>29</sup> and the Resolution on Access to Medication in the Context of Pandemics such as HIV/AIDS.<sup>30</sup> The latter Resolution, *inter alia*, calls upon member states 'to address factors affecting the provision of drugs related to the treatment of pandemics such as HIV/AIDS ... in order to provide treatment and monitor the use of medications, diagnostics and related technologies'.<sup>31</sup>

One of the recent relevant UN instruments is the Political Declaration on HIV/AIDS (2006). Adopted by the General Assembly after a review of the progress achieved in realising the targets set out in the 2001 Declaration of Commitment on HIV/AIDS, the Political Declaration on HIV/AIDS, *inter alia*, reaffirms that prevention, treatment, care and support for those infected and affected by HIV/AIDS are mutually reinforcing elements of an effective response.<sup>32</sup> It also commits member states to overcoming legal, regulatory or other barriers that block access to

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<sup>27</sup> Art 55.

<sup>28</sup> As above.

<sup>29</sup> UN Commission on Human Rights Resolutions 1997/33, 1999/49 & 2001/51.

<sup>30</sup> UN Commission on Human Rights Resolution 2002/32.

<sup>31</sup> Art 4.

<sup>32</sup> Art 23 of the UN Political Declaration on HIV/AIDS (2006).

effective HIV prevention, treatment, care and support, medicines, commodities and services.<sup>33</sup>

The length and depth of this paper do not lend themselves to a detailed discussion of all global human rights instruments and documents that have a bearing on the right to health care generally and access to HIV/AIDS medicines specifically. Suffice to say that there are numerous other instruments, such as WHO Resolutions, ESCR Committee General Comments, ILO instruments and WTO documents, all of which urge, call upon or oblige member states to ensure access to health care and HIV/AIDS medicines or recognise and set standards for the access thereto.

### 2.2.2 Regional and sub-regional instruments

The African Charter on Human and Peoples' Rights (African Charter) is the founding African regional human rights instrument. Article 16 of the African Charter provides that state parties 'shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'. Another African regional treaty that has a bearing on health care is the Constitutive Act of the African Union (AU) (2000) which states as one of its objectives 'to work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent'.<sup>34</sup> Furthermore, both the Protocol to the African Charter on the Rights of Women in Africa (2003) (African Women's Protocol) and the African Charter on the Rights and Welfare of the Child (1990) (African Children's Charter) oblige state parties to provide adequate, affordable and accessible health services and to ensure the provision of necessary medical assistance and health care to women and children.<sup>35</sup>

In addition to the above regional treaties, there are a number of AU declarations and similar documents dealing specifically with HIV/AIDS. The Abuja Declaration and Plan of Action on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases (2001) acknowledged HIV/AIDS as an emergency on the continent and urged African leaders to place the response to HIV at the forefront and as the highest priority in their respective national development plans. Two years later, African leaders adopted the Maputo Declaration,<sup>36</sup> which reaffirmed the commitment enshrined in the Abuja Declaration.

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<sup>33</sup> Art 24.

<sup>34</sup> Art 3(n).

<sup>35</sup> See art 14(2)(a) of the African Women's Protocol and art 14(2)(b) of the African Children's Charter.

<sup>36</sup> See the Maputo Declaration on HIV/AIDS, Tuberculosis, Malaria and Other Related Infectious Diseases (2003).



More recently, and in the specific context of access to HIV/AIDS medicines, several declarations and other instruments have been adopted by the AU. These include the Gaborone Declaration on a Roadmap Towards Universal Access to Prevention, Treatment and Care (2005); the Brazzaville Commitment on Scaling Up Towards Universal Access to HIV and AIDS Prevention, Treatment, Care and Support in Africa by 2010 (2006) and the Abuja Call for Accelerated Action Towards Universal Access to HIV and AIDS, Tuberculosis and Malaria Services in Africa (2006). All these instruments either set specific timeframes or commit African leaders to the realisation of universal access to HIV/AIDS treatment, among other things. Mention should also be made of the African Commission on Human and Peoples' Rights (African Commission) Resolution on the HIV/AIDS Pandemic,<sup>37</sup> which declares HIV/AIDS a human rights issue and a threat against humanity. The Resolution calls upon African governments to allocate national resources in a way that reflects a determination to fight the spread of HIV/AIDS.

On the sub-regional front, there are a number of instruments and documents adopted by the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern Africa Development Community (SADC) that deal with access to health care generally and HIV/AIDS treatment specifically. Besides the treaties establishing these regional formations, relevant instruments include the SADC Protocol on Health (2003). The latter Declaration, for example, reaffirms the commitment of SADC countries to the combating of AIDS as a matter of urgency by, *inter alia*,<sup>38</sup>

increasing access to affordable essential medicines, including ARVs and related technologies, through regional initiatives for joint purchasing of drugs, with the view of ensuring the availability of drugs through sustainable mechanisms, using funds from national budgets.

It is quite clear from the foregoing discussion that there is a vast array of international human rights instruments and documents dealing with health care and HIV/AIDS. What is not clear is the efficacy of such instruments and the international human rights framework in protecting health care rights generally and the right of access to HIV/AIDS medicines specifically. This is compounded by the fact that most international instruments dealing with health care and access to HIV/AIDS medicines are in the form of declarations and resolutions which, unlike treaties, are not formally binding on states. It has been argued, however, that despite not being formally binding, such instruments have become a persuasive source of guidance to states on the most appro-

<sup>37</sup> Resolution on the HIV/AIDS Pandemic – Threat Against Human Rights and Humanity (2001).

<sup>38</sup> Art 2(g) of the Maseru Declaration on the Fight Against HIV/AIDS in the SADC Region (2003).



priate approach to HIV and AIDS.<sup>39</sup> And because access to medicine is a human right, it entails not only moral or humanitarian responsibilities, but also legal obligations.<sup>40</sup> These obligations have been clarified by the ESCR Committee's General Comment 14, according to which the right to health, like all human rights, imposes three types of obligations on state parties: the obligations to respect, to protect and to fulfil.<sup>41</sup> In turn, the obligation to fulfil entails obligations to facilitate, to provide and to promote.<sup>42</sup> The African Commission has explicitly adopted this same approach by establishing four levels of duties generated by the obligations of states under the African Charter to include the duties to respect, protect, promote and fulfil all the rights in the Charter.<sup>43</sup> It is in that context that we argue that South Africa and Uganda are both bound under international law to ensure the realisation of the right of access to HIV/AIDS medicines for those who require them. This is because the obligations of both countries under international law extend to ensuring sustained and equal access to comprehensive treatment and care, including HIV/AIDS medicines.<sup>44</sup> This has to be in the context of General Comment 14 which developed the minimum core content of the right to health.

In the case of South Africa, where the right of access to HIV/AIDS medicines has been violated even more extensively, international human rights instruments, binding or not, do play an important role in domestic law by virtue of sections 232, 231(4) and 39(1)(b) of the Constitution.<sup>45</sup> Moreover, the right to health care services is specifically protected under the national legal framework, as explained below.

<sup>39</sup> D Mushayavanhu 'The realization of access to HIV and AIDS-related medicines in Southern African countries: Possibilities and actual realisation of international law obligations' in F Viljoen & S Precious (eds) *Human rights under threat: Four perspectives on HIV, AIDS and the law in Southern Africa* (2007) 134.

<sup>40</sup> n 39 above, 135.

<sup>41</sup> General Comment 14 (n 15 above) paras 33–35.

<sup>42</sup> As above.

<sup>43</sup> *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 43–47.

<sup>44</sup> See eg General Comment 3: 'HIV/AIDS and the rights of the child' [http://www.uniteforchildren.org/files/UNHCHR\\_HIV\\_and\\_childrens\\_rights\\_2003.pdf](http://www.uniteforchildren.org/files/UNHCHR_HIV_and_childrens_rights_2003.pdf) (accessed 1 December 2009).

<sup>45</sup> The Constitution of South Africa, 1996. Sec 232 provides that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. Sec 231(4) provides that '[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation' and sec 39(1)(b) obliges any court, tribunal or forum to consider international law when interpreting the Bill of Rights.

### 3 Access to HIV/AIDS medicines in South Africa

#### 3.1 The constitutional framework

The right of access to health care is one of the socio-economic rights so ambitiously provided for in the 1996 South African Constitution. Section 27 provides as follows:

- (1) Everyone has the right to have access to -
  - (a) health care services, including reproductive health care;
  - (b) sufficient food and water; and
  - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The states must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

Other constitutional provisions that directly or indirectly impact on health include section 10, dealing with human dignity; section 11, dealing with the right to life; section 28(1)(c), guaranteeing children the right to basic health care services; and section 35(2)(e), providing for the right of detainees and sentenced prisoners to conditions of detention that are consistent with human dignity, including 'the provisions, at state expense of ... medical treatment'.

In so far as access to HIV/AIDS medicines is concerned, however, our focus should be on section 27, as it is within the ambit of 'health care services' that HIV/AIDS treatment falls. In that regard, although the Constitution does not define 'health care services', it has been suggested that such services should include proper medical care, prevention and diagnosis of diseases and vaccination.<sup>46</sup> The definition of health care services could also be seen in the context of CRC, which defines such services to include 'facilities for the treatment of illness and rehabilitation of health'.<sup>47</sup>

The constitutional right of access to health care services in South Africa has to be seen in the context of the legacy of the gross inequality that characterised South African society before 1994. By conferring on everyone a right of access to health care services, section 27(1) of the Constitution attempts to provide a legal foundation for an egalitarian and equitable health care system.<sup>48</sup> The section therefore not only obliges the state to provide access to health care services, but it also places a duty on the state and on private health care providers not to interfere with a person's access to existing services.<sup>49</sup> The constitutional duty placed on the state to respect and protect the right of access to

<sup>46</sup> See J de Waal *et al* *A Bill of Rights handbook* (2001) 448.

<sup>47</sup> Art 24(1) CRC.

<sup>48</sup> Ngwenya & Cook (n 19 above) 131.

<sup>49</sup> See S Khoza (ed) *Socio-economic rights in South Africa* (2007) 280.

health care services has been articulated and interpreted through various Constitutional Court judgments, the most important of which is *Minister of Health and Others v Treatment Action Campaign and Others*,<sup>50</sup> in which the Court not only demonstrated a willingness to impugn executive policy making, but also showed a commitment to enforcing the right of access to HIV/AIDS medicines and health care services specifically, and socio-economic rights generally.

### 3.2 The legislative and policy framework

As mentioned earlier, there is no doubt that the introduction of anti-retroviral drugs and other HIV/AIDS medicines have enabled HIV-positive people in many parts of the world to live productive lives for many years. In some countries (like South Africa), however, a lack of access to these life-saving and sustaining medicines has led to an extensive loss of life and caused untold pain and devastation.

While many countries in the world (particularly the Western world) began to use ARVs to treat HIV as far back as 1996, in South Africa such treatment was only available to people who had access to private medical care. It was not until 2003 that the South African government began to provide anti-retroviral therapy through the public health sector. A study by the Harvard School of Public Health estimated that about 330 000 people died of AIDS in South Africa between 2000 and 2005 because of the government's failure to implement an effective HIV/AIDS treatment programme.<sup>51</sup> The study concluded as follows:<sup>52</sup>

Access to appropriate public health practice is often determined by a small number of political leaders. In the case of South Africa, many lives were lost because of a failure to accept the use of available ARVs to prevent and treat HIV/AIDS in a timely manner.

This lack of political will explains the slow pace at which the legislative and policy framework for dealing with HIV/AIDS has been developed in South Africa. The genesis of the legislative framework is to be found in the Medicines and Related Substances Control Act.<sup>53</sup> Originally enacted in 1965, the Act has been amended several times, leading to the Medicines and Related Substances Control Amendment Act<sup>54</sup> that is most significant in dealing with access to essential medicines. A further amendment resulted in the Medicines and Related Substances

<sup>50</sup> 2002 10 BCLR 1030 (CC). Other cases in which the constitutional right of access to health care was given content include *Republic of South Africa v Grootboom* 2001 1 SA 46(CC); *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) and *EN & Others v Government of the Republic of South Africa & Others* 2007 1 BCLR 84 (D).

<sup>51</sup> See Chigwedere *et al* (n 8 above) 410.

<sup>52</sup> Chigwedere *et al* (n 8 above) 414.

<sup>53</sup> Act 101 of 1965.

<sup>54</sup> Act 90 of 1997.

Amendment Act<sup>55</sup> and the full reform package (inclusive of all the amendments) finally came into force in May 2004, almost seven years after the 1997 Amendment was signed into law.

Constraints of space do not allow for a detailed discussion of the Medicines and Related Substances Control Act and all its amendments. Suffice to say here that the 1997 amendment included a set of regulations<sup>56</sup> and both the amendment and regulations deal with a number of issues relating to access to medicines, including measures to ensure the supply of cheaper medicines, a transparent pricing system, the introduction of a fee-for-service system, promoting the use of generic medicines and fast-tracking procedures for the registration of essential medicines.

Mention should also be made of the National Health Act.<sup>57</sup> This legislation, which replaced the Health Act of 1977, is regarded as the single, most important piece of legislation for the health sector. The Act<sup>58</sup>

provides a framework for a structured uniform health system in order to unite the various elements of the national health system in a common goal to improve universal access to quality health services, taking into account the obligations imposed by the Constitution.

As such, its importance lies mainly in the fact that it places emphasis on aligning the national health care services to the imperatives of the Constitution and the Bill of Rights, an aspect that is significant to the right of access to medicines for HIV/AIDS and other diseases.

In so far as the policy framework is concerned, several policies and guidelines purporting to support the implementation of HIV/AIDS strategies in South Africa have been developed since 1994. In the context of HIV/AIDS treatment, these include the National Drug Policy for South Africa (1996) and the Guidelines on the Adequate Treatment of Opportunistic Infections (2002), among others. However, it was not until 2003 that the government came up with a comprehensive plan in the form of the National Operational Plan for Comprehensive HIV and AIDS Management, Treatment, Care and Support (2003), supplemented by the National Anti-retroviral Treatment Guidelines (2004).

The Operational Plan committed the government to providing ARV treatment to all those who needed it (believed to be about 1 650 000 people) by March 2008.<sup>59</sup> However, due to denialist and obstructionist attitudes at national and provincial leadership levels, the roll-out was so slow that by the end of 2008, fewer than 600 000 people were

<sup>55</sup> Act 59 of 2002.

<sup>56</sup> Sec 35 of the Act.

<sup>57</sup> Act 61 of 2003.

<sup>58</sup> See 'National Health Act proclaimed by the President' <http://www.info.gov.za/speeches/2005/05042013451004.htm> (accessed 7 December 2009).

<sup>59</sup> See 'HIV/AIDS in South Africa' <http://www.aids.org.za/hiv.htm> (accessed 10 August 2009).

being treated.<sup>60</sup> This in spite of the approval in 2007 of a new HIV/AIDS and STI Strategic Plan which was seen as a major breakthrough in the response to HIV/AIDS.

The 2008/2009 changes in government that saw the end of the Thabo Mbeki era, however, seem to have brought renewed hope for a turnaround in the government's commitment to dealing effectively with the HIV/AIDS epidemic. At the 5th International Aids Society (IAS) Conference on HIV Pathogenesis, Treatment and Prevention held in Cape Town in July 2009, the IAS applauded the South African government for moving quickly to dramatically scale up the provision of anti-retroviral therapy for people with HIV/AIDS across the country.<sup>61</sup> This is all very well, but for the turnaround to be sustainable, a new approach towards the implementation of the National Strategic Plan and the Operational Plan will be required as there are still many issues to be resolved regarding access to HIV/AIDS treatment, including the availability of ARVs, the high cost of the drugs and limited access to generic medicines.<sup>62</sup>

### 3.3 The role of the courts and civil society

Any discussion on the current situation regarding access to HIV/AIDS medicines in South Africa would be incomplete without reference to the role played by the courts and that of certain sectors of civil society. In so far as the courts' role is concerned, the Constitutional Court has not only been innovative in interpreting and giving content to the right of access to health care contained in the Constitution,<sup>63</sup> but it has also been assertive in reminding the state of its obligation to take reasonable steps to create and implement a legal framework that facilitates access to health care services, including HIV/AIDS medicines. In the specific context of HIV/AIDS medication, the earliest case to come before the South African courts was *Van Biljon and Others v Minister of Correctional Services and Others*,<sup>64</sup> in which the Court held that the state had a constitutional duty to provide anti-retroviral therapy to two prisoners for whom it had been medically prescribed.

The most relevant and prominent case, however, is undoubtedly *Minister of Health and Others v Treatment Action Campaign and Others*,<sup>65</sup> in which the Constitutional Court upheld the decision that the state had violated the constitutional rights of expectant HIV-positive mothers by not supplying them with Nevirapine – a drug that could reduce by half the rate of HIV transmission from mothers to babies. The Court further

<sup>60</sup> As above.

<sup>61</sup> See 'IAS applauds SA commitment to treatment scale up' <http://www.ias2009.org/> (accessed 10 August 2009).

<sup>62</sup> HIV/AIDS in South Africa (n 59 above).

<sup>63</sup> See eg *Grootboom & Soobramoney* (n 50 above); *Minister of Health & Others v Treatment Action Campaign & Others* 2002 5 SA 721(CC).

<sup>64</sup> 1997 4 SA 441 (C).

<sup>65</sup> 2002 5 SA 721 (CC).

held that the government's policy fell short of compliance with sections 27(1) and (2) of the Constitution and that the government had not reasonably addressed the need to reduce mother-to-child transmission of HIV. The government was ordered to permit and facilitate the use of Nevirapine and to remove the restrictions that prevented the drug from being made available at public hospitals and clinics that were not research or training sites. In making this order, the Court took into account, among other things, the implications of the roll-out on limited resources and the associated budgetary implications, but pointed out that it was constitutionally bound to require the state to take reasonable measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. 'Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets,' the Court said.<sup>66</sup>

The above so-called Nevirapine case is particularly important, not only in demonstrating the role of the courts, but also the importance of advocacy in realising the right of access to HIV/AIDS medicines. The case was brought by the Treatment Action Campaign (TAC), a non-governmental organisation (NGO) whose main function is to campaign for affordable treatment for people living with HIV and AIDS. Although the TAC has been the most prominent and effective civil society organisation (CSO) in advocating and campaigning for HIV/AIDS treatment, there are several other NGOs that have played and continue to play an important role. These include the AIDS Foundation of South Africa, the AIDS Consortium, Wits University AIDS Law Project, the AIDS Legal Network of South Africa, the Centre for HIV/AIDS Networking (HIVAN), Lovelife and the Health Systems Trust. While the work of these NGOs has been unco-ordinated and often strongly resisted by government, they have nevertheless played a critical role in improving access to HIV/AIDS medicines in South Africa. It is too early to predict the new government's approach towards the role of NGOs in the fight against HIV/AIDS, but it is submitted that nothing short of a broad-based partnership between the state and civil society will achieve the universal access to HIV/AIDS medicines envisaged in the 2003 Operational Plan and the 2007 Strategic Plan mentioned earlier.

## 4 Access to HIV/AIDS medicines in Uganda

### 4.1 The constitutional framework

Unlike South Africa, Uganda pays minimal attention to socio-economic rights in its Constitution.<sup>67</sup> Except for the right to education,<sup>68</sup> the rights

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<sup>66</sup> Para 38.

<sup>67</sup> The Constitution of the Republic of Uganda (1995).

<sup>68</sup> Art 30.

of women,<sup>69</sup> the rights of children,<sup>70</sup> the right to a clean and healthy environment<sup>71</sup> and economic rights,<sup>72</sup> which are explicitly recognised in the Bill of Rights, other socio-economic rights are laid down in a preliminary section entitled National Objectives and Directive Principles of State Policy. This section contains a set of objectives and principles intended to guide all organs of the state (including the judiciary) and non-state actors 'in applying or interpreting the constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society'.<sup>73</sup> There is therefore no explicit provision for the right of access to health care in the substantive Bill of Rights section of the Ugandan Constitution. Because of this, skeptics may ask: Legally, is there a right to health care in Uganda? As pointed out above, Uganda is party to international and regional human rights instruments that spell out the right to health care. The Constitution provides that the rights and freedoms, which are specifically mentioned in the Bill of Rights 'shall not be regarded as excluding others not specifically mentioned [such as the right to health care]'.<sup>74</sup> It can thus be argued that the right to health care, though not specifically mentioned, is legally recognised and can be enforced in a competent court.<sup>75</sup> The right can also be protected through a creative interpretation of other constitutionally-recognised rights such as the right to life. Though the right to life can be taken away in cases of

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<sup>69</sup> Art 33.

<sup>70</sup> Art 34.

<sup>71</sup> Art 39.

<sup>72</sup> Art 40.

<sup>73</sup> NODPSP I(i).

<sup>74</sup> Art 45.

<sup>75</sup> On the enforcement of rights and freedoms by the courts in Uganda, see art 50 of the Constitution. It should be noted that there has been a debate as to whether the Constitutional Court of Uganda is a 'competent court' for the purpose of handling the enforcement of human rights. In *James Rwanyarare & Another v Attorney-General* (Constitutional Petition 11/1997), the Constitutional Court held that it lacked jurisdiction to entertain a petition alleging a violation of human rights under art 50. However, in *Attorney-General v Tinyefuza* (Constitutional Appeal 1/1997), the Supreme Court held that arts 50 and 137 (on the interpretation powers of the Constitutional Court) must be read together since the Constitutional Court is bound to hear cases involving the enforcement of human rights and freedoms in the course of interpreting the Constitution. In *Serugo v Kampala City Council & Another* (Constitutional Appeal 2/1998), it was held that the jurisdiction of the Constitutional Court is exclusively derived from art 137, but the court can, if it deems it appropriate, deal with matters of redress and compensation, which are matters of enforcement of human rights under art 50 of the Constitution. In *Alenyo George William v Attorney-General & Others* (Constitutional Petition 5/2000), the Constitutional Court also held that it can handle cases of enforcement of human rights in the course of interpretation of the Constitution. It is therefore now settled that if a matter does not involve the interpretation of the Constitution as stipulated under art 137, any other court is a 'competent court' for the purpose of redressing violations of human rights.



capital punishment,<sup>76</sup> the state has a duty to take positive measures to protect and ensure the right through the prevention of death. Indeed, some judges have creatively interpreted the right to life. For example, in *Salvatori Abuki and Another v Attorney-General*,<sup>77</sup> the petitioner challenged the constitutionality of an exclusion order that was made under section 7 of the Witchcraft Act. He argued that the order deprived him of his property and the right to a livelihood. The court held that the exclusion order was unconstitutional since it threatened the right to life through deprivation of shelter, food and essential sustenance. Courts in Uganda can also learn from other jurisdictions where it has been observed that the right to life should not be understood in a restrictive manner and should be interpreted broadly to include other dimensions, such as health care.<sup>78</sup>

The relative success with which Uganda has been able to create the necessary framework for providing access to HIV/AIDS treatment, in comparison to South Africa's dismal record, may therefore not only be sought in the constitutional protection or lack thereof. Various other factors and role players have been significant in the progress towards the current situation regarding access to HIV/AIDS medicines in both countries, as explained below.

## 4.2 Policy framework: An overview

International human rights law accentuates the adoption of legislative, executive/administrative and judicial measures for the realisation of the right to health.<sup>79</sup> The ESCR Committee recognises that each state has a margin of discretion in assessing the apposite feasible measures for implementing the right to health generally, and the right to health care in particular.<sup>80</sup> In Uganda, there is no legislation that specifically deals with the right to health and its components, such as the right to health

<sup>76</sup> Art 22(1). In *Susan Kigula & 416 Others v Attorney-General* (Constitutional Petition 2/1997), 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 punishment. The Court held that the death penalty is an exception to the right to life under the Constitution and therefore constitutional. However, it was held that a prolonged stay on death row subjected the prisoners to cruel, inhuman and degrading punishment.

<sup>77</sup> Constitutional Petition 2/1997.

<sup>78</sup> See, eg, the Indian case of *Paschim Banga Khet Mazdoor Sanity & Others v State of West Bengal & Another* (1996) 4 SCC 37 and the Venezuelan case of *Cruz Bermudez & Others v Ministerio de Sanidad y Asistencia Social* (1999) Case 15789.

<sup>79</sup> See eg art 2(2) of ICESCR.

<sup>80</sup> General Comment 14 (n 15 above) para 53.



care of persons living with HIV/AIDS.<sup>81</sup> None of the international and regional human rights instruments that recognise the right to health care have been directly incorporated into the domestic legal system. However, most of the issues concerning the promotion and protection of the right to health care of persons living with HIV/AIDS are covered under policies, which are important because they dictate what level of health care provision is guaranteed, and what kinds of goods and services will be offered. The policy framework also helps in explaining how priorities may be established between competing claims and where to concentrate resources. Uganda has an elaborate policy framework, critical for the promotion of the right to health care of persons living with HIV/AIDS. The policy framework, developed in collaboration with civil society and donors, recognises the impact of poverty on the ability to access health care facilities, goods and services. For example, the Poverty Eradication Action Plan (PEAP)<sup>82</sup> — which is the overarching framework to guide public action to eradicate poverty — notes that poor people, who do not have the capacity to utilise private health care, should have access to the public health care system. The PEAP identifies HIV/AIDS as one of the priority areas to be tackled through a number of actions, including the provision of ARVs.<sup>83</sup>

As the lead government agency for health, the Ministry of Health has developed various policies, including a Health Sector Strategic Plan,<sup>84</sup> which identify specific targets for the prevention and control of HIV/AIDS. These targets include the scale up of voluntary counselling and testing and the prevention of mother-to-child transmission (PMTCT) services at Health Centre III by 2010. The targets also include increasing the population of Health Centre IV offering comprehensive HIV/AIDS care with anti-retroviral therapy to 75 per cent by 2010.<sup>85</sup> The health sector has a multi-sectoral and participatory approach, which encourages the involvement of civil society and other non-state actors in planning,

<sup>81</sup> However, there are proposed laws on HIV/AIDS, which are retrogressive; they promote dangerous and discredited approaches to the epidemic and, if passed in their present form, there would be a total violation of the rights of people living with HIV/AIDS. The HIV/AIDS Prevention and Control Bill requires mandatory testing for HIV and forced disclosure of HIV status and criminalises the wilful transmission of HIV. The Anti-Homosexuality Bill, which prohibits any form of sexual relations between persons of the same sex, provides for the death penalty for a homosexual who is HIV positive and has sex with a person below 18 years. The Bill also nullifies international treaties whose provisions (eg those prohibiting discrimination based on sexual orientation) are contrary to the spirit and provisions of the Bill. The laws are likely to roll back the success of Uganda in the area of HIV prevention and treatment. Their enforcement will increase stigma and discrimination against HIV-positive gays, lesbians and transgender people, who are among the marginalised and vulnerable people in the field of health care.

<sup>82</sup> Ministry of Finance, Planning and Economic Development *Poverty Eradication Action Plan* (2004).

<sup>83</sup> As above.

<sup>84</sup> Ministry of Health *Health Sector Strategic Plan* (2006).

<sup>85</sup> As above.

service delivery and monitoring. The HIV/AIDS strategy, for example, is based on government partnership with various stakeholders, including persons living with HIV/AIDS, faith-based organisations (FBOs), civil society organisations (CSOs), and parliament.<sup>86</sup>

The Ministry of Health has developed the Anti-retroviral Policy, which aims at universal access to anti-retroviral treatment to all that are clinically eligible for it. The Ministry has also developed a strategic plan on HIV/AIDS, which has a number of thematic areas, including care and treatment, the major goal of which is to improve the quality of life of persons living with HIV/AIDS by mitigating the health impacts of HIV/AIDS by 2012.<sup>87</sup> To this end, the strategic plan intends to increase equitable access to anti-retroviral treatment by those in need from 105 000 to 240 000 by 2012; to increase access to the prevention and treatment of opportunistic infections, including tuberculosis (TB); to scale up HIV counselling and testing to facilitate universal access to treatment by 2012; to integrate prevention into all care and treatment services by 2012; and to support and expand the provision of home-based care and strengthening referral systems to other health facilities and complementary services.<sup>88</sup> Another major thematic area is systems strengthening, the goal of which is to build an effective system that ensures quality, equitable and timely service delivery. The strategic plan also aims at reducing HIV transmission from mother to child by 50 per cent by 2012 through the administration and uptake of PMTCT services, including Nevirapine or other anti-retroviral treatment, combination prophylaxis and developing a home-based PMTCT programme.<sup>89</sup>

### 4.3 The policy framework: An appraisal

It is now recognised that HIV/AIDS interventions have a number of human rights implications. Thus, although the policies on HIV prevention, treatment, care and support sound noble on the surface, it is essential to subject them to human rights scrutiny. The question is: What is the potential of these policies and strategies to enhance or negate the promotion and protection of the right to health care of persons living with HIV/AIDS? What are the challenges and prospects of the implementation of the policy framework in Uganda?

It should be noted that universality is at the core of human rights. Given that the policy framework aims at providing universal access in respect of anti-retroviral treatment, it can be said to have the potential to promote and protect the right to health care of persons living with HIV/AIDS. The goals and targets of the policy framework are in line

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<sup>86</sup> As above.

<sup>87</sup> Uganda AIDS Commission *Moving towards universal access: National HIV/AIDS Strategic Plan* (2007).

<sup>88</sup> As above.

<sup>89</sup> As above.

with the concept of the progressive realisation to the maximum level of available resources, as provided for under ICESCR.<sup>90</sup> Indeed, the implementation of the National HIV/AIDS Strategic Plan has already registered some degree of success. There has been a rapid scale-up of anti-retroviral treatment whereby over 30 000 persons living with HIV/AIDS were initiated on anti-retroviral treatment in 2007, bringing the cumulative total on active treatment to 141 416 by June 2008, amounting to 59 per cent of the Strategic Plan's target of 240 000.<sup>91</sup> However, the gains made are likely to be reversed because of inadequate and irregular funding. Funding is not only critical for the provision of anti-retroviral treatment, but also physical and human infrastructure. According to the Strategic Plan, reversing the trend in the epidemic requires a massive increase in available resources, rising by over a year from about US \$263 million in 2007 to US \$513 million in 2012.<sup>92</sup> Anti-retroviral treatment accounts for 88 per cent of the resources required for care and treatment programmes.<sup>93</sup>

Although the Abuja Declaration recommends that states should allocate at least 15 per cent of their national budgets to health,<sup>94</sup> Uganda spends only 9 per cent on health, and certainly this has serious implications for the provision of anti-retroviral treatment.<sup>95</sup> The Ministry of Health relies largely on external funding for all its HIV/AIDS programmes.<sup>96</sup> In order to meet its targets under the policy framework, Uganda has received external support from various donors, such as the Global Fund to Fight HIV/AIDS, Malaria and Tuberculosis (Global Fund) and the United States President's Emergency Plan for AIDS Relief (PEPFAR).<sup>97</sup> It should be noted that donor funds are sometimes consumed by corruption, as evidenced by the Global Fund, where millions of dollars were swindled by state functionaries through 'fictitious' NGOs and community-based organisations (CBOs).<sup>98</sup> It should also be noted that external funding is not sustainable; the state must mobilise internal resources for the provision of critical components of the right to health care, such as anti-retroviral treatment.

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

<sup>91</sup> Uganda AIDS Commission *Report on Implementation of National HIV and AIDS Strategic Plan* (2008) 23. On the progress made, see also Ministry of Health *Ministerial Statement* (2008) 56.

<sup>92</sup> n 91 above, ix.

<sup>93</sup> As above.

<sup>94</sup> The Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases <http://www.info/popups/articleswindow.php?id=38> (accessed 17 November 2009) para 26.

<sup>95</sup> Uganda AIDS Commission (n 91 above).

<sup>96</sup> As above.

<sup>97</sup> As above.

<sup>98</sup> BK Twinomugisha 'Taking human rights seriously: Protection of the right of access to malaria treatment in Uganda' (2009) 2 *Journal of African and International Law* 161-200 170.

It is also important to point out that macro-economic institutions, such as the World Bank and the International Monetary Fund (IMF), which shape the socio-economic agenda in developing countries, argue that increasing public health spending undermines macro-economic stability.<sup>99</sup> The macro-economic model designed by these institutions sets rigid budget ceilings for each ministry, including the Ministry of Health. It is argued that spending on treatment measures such as anti-retroviral treatment is costly and may have inflationary tendencies.<sup>100</sup> In our view, economic policies that result in the underfunding of health care services are antithetical to the protection of human rights because they make access to health care dependent on the individual's capacity to pay. Health care provision is not looked at from a human rights perspective, but from the desire to increase economic growth and the maintenance of macro-economic stability.<sup>101</sup> But if we may ask: If growth is not for health, what is it for and who is expected to enjoy it? Thus, although the policy framework aims at universal access to anti-retroviral treatment for all who are clinically eligible for it, this may not be possible unless the funding constraints are concretely addressed. The policy framework does not concretely address issues of equity, especially the fact that, because of their poverty, some persons living with HIV/AIDS may not afford expensive CD4 count tests, which are a prerequisite for starting anti-retroviral treatment. Because of the absence of machines to carry out CD4 counts<sup>102</sup> in some rural areas, persons living with HIV/AIDS have to incur transport costs to travel to urban centres. It should also be noted that some of the machines are sophisticated and consequently there is a limited number of personnel able to perform the relevant tests. Even laboratories to carry out simple HIV tests may not be readily available in hard-to-reach areas.<sup>103</sup>

To its credit, the policy framework recognises the gender dimensions of the epidemic. It notes that women (60 per cent) are infected more than men (40 per cent) across the age spectrum from birth to 45 to 49

<sup>99</sup> Z Gariyo *Participatory poverty reduction strategy papers: The PRSP process in Uganda* (2002).

<sup>100</sup> As above.

<sup>101</sup> See L Trillo Diaz 'Protection of access to essential treatment for people living with HIV/AIDS in Uganda from a human rights perspective' unpublished LLM dissertation, University of Pretoria, 2005 33. On this argument, also see BK Twinomugisha 'Barriers to the protection of rural women's rights to maternal health care in Uganda' (2005) 11 *East African Journal of Peace and Human Rights* 1 67-92.

<sup>102</sup> A CD4 count is a diagnostic system used primarily to test for HIV. It analyses blood by counting residual white blood cells and testing immunity. The CD4 count enables health workers to know those in need of ARVs by determining exact immunity levels.

<sup>103</sup> BK Twinomugisha 'Protection of the right to health care of women living with HIV/AIDS (WLA) in Uganda: The case of Mbarara Hospital' *HURIPEC Working Paper 5* (2007).

years and the gender impact of the disease is significant.<sup>104</sup> However, the policy framework does not seriously analyse why vulnerable individuals and groups, such as women, may not adhere to the treatment regime. Women living with HIV/AIDS may not adhere to anti-retroviral treatment because of inequitable gender relations exacerbated by negative cultural practices. A gender analysis of the socio-economic and cultural causes of why women living with HIV/AIDS may not access and effectively utilise anti-retroviral treatment is necessary in order to achieve a more comprehensive picture of the magnitude of the problem. In a study of access to anti-retroviral treatment by women living with HIV/AIDS, one of us found that, because of their multiple gender roles, rural women hardly get enough time to effectively utilise anti-retroviral treatment in accordance with doctors' prescriptions.<sup>105</sup> Women seek care discreetly. Because of the associated stigma of HIV/AIDS and the fear of violence from their husbands, women do not want their husbands, in-laws and the wider community to know that they are receiving care.<sup>106</sup>

It is also important to note that most women are socialised to believe that the health of their children and families takes precedence over their own health. A pregnant woman readily accepts anti-retroviral treatment for reduction of MTCT even if she has not received care. The HIV/AIDS Strategic Plan correctly highlights this paradox: Most mothers who are eligible for anti-retroviral treatment only receive drugs to prevent infections in their infants and do not get treatment for their own infection.<sup>107</sup> HIV-positive mothers need to access anti-retroviral treatment in order to enhance their health and be able to ensure quality survival for their children.

Before concluding this section, it may be important to briefly comment on the extent to which the policy framework takes into account the interconnectedness and indivisibility of human rights. The right to food, for example, which is closely linked with the right of access to anti-retroviral treatment, is not considered seriously by the policy framework.<sup>108</sup> Like most patients on care, persons living with HIV/AIDS need adequate food in order to adhere to the treatment regime. Adherence throughout the entire course of anti-retroviral treatment is an essential part of any successful treatment programme. Patients have

<sup>104</sup> n 85 above, 7. See also UAC *The Uganda HIV/AIDS Status Report* (2006).

<sup>105</sup> Twinomugisha (n 98 above).

<sup>106</sup> As above.

<sup>107</sup> n 91 above, 23.

<sup>108</sup> The right to food is guaranteed under art 25 of the Universal Declaration, which couches the right within the broader context of an adequate standard of living that includes health, food, medical care, social services and economic security. See also art 11 of ICESCR; General Comment 12, *The Right to Adequate Food*, UN Doc E/C 12/199/5 (1999). For a discussion of the right to food, see BK Twinomugisha 'Challenges to the progressive realisation of the right to food in Uganda' (2005) 11 *East African Journal of Peace and Human Rights* 2 241-264.

to take at least 95 per cent of their pills in order to respond well.<sup>109</sup> When persons living with HIV/AIDS are not well fed, they may abandon the treatment for fear of serious adverse effects. Hunger reduces the efficacy of medication among persons living with HIV/AIDS and often affects drug adherence, especially to anti-retrovirals, hence a poor response to treatment.

## 4.2 Role of courts and civil society

While the judiciary in South Africa has been fairly innovative in the area of the right of access to health care by persons living with HIV/AIDS, courts in Uganda have not yet pronounced themselves on this issue. This could be due to the fact that, unlike their counterparts in South Africa, CSOs in Uganda have not yet struggled for enhanced access to medicines through the courts. However, CSOs which are focused on HIV/AIDS have played a fundamental role in providing care and support for those who are ill, the infected and affected through information, education and communication strategies. CSOs are most effective at reaching marginalised populations due to their flexibility and location in remote areas.<sup>110</sup> CSOs, including faith-based organisations (FBOs), have provided critical support to the national response to HIV/AIDS in Uganda. CSOs such as the AIDS Support Organisation (TASO) have greatly contributed to the well-being of persons living with HIV/AIDS through the provision of integrated services for care and prevention. Their efforts have contributed to the reduction of stigmatisation of and discrimination against persons living with HIV/AIDS.<sup>111</sup>

As is the case in South Africa, CSOs have engaged in advocacy work to improve access to medicines in Uganda. For example, the Action Group for Health Rights in Uganda (AGHA) has, alongside other organisations, been involved in advocacy against proposed legislation that would have limited access to generic medicines. AGHA has also been engaged in efforts to increase the budget for health generally and the provision of HIV/AIDS-related goods and services.<sup>112</sup>

<sup>109</sup> National ART Guidelines.

<sup>110</sup> On the role of civil society in HIV/AIDS interventions, see, eg, AJ Horvoka & EE Kiley 'Civil society organisations and the national HIV/AIDS response in Botswana' (2006) 5 *African Journal of AIDS Research* 2 167-178.

<sup>111</sup> P Mutabwire 'Participatory health service delivery: The fight against HIV/AIDS in Uganda' <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan023881.pdf> (accessed 18 November 2009).

<sup>112</sup> AGHA Strategic Plan 2009/10.

## 5 Accountability for the implementation of the right to health care

### 5.1 Accountability in the human rights context

Accountability has various meanings.<sup>113</sup> *Black's law dictionary* defines accountability as the 'state of being responsible or answerable'.<sup>114</sup> Cook<sup>115</sup> cautions that accountability is a wider concept than responsibility, which simply denotes liability for a breach of the law. She argues that accountability 'requires a state to explain an apparent violation and to offer an exculpatory explanation if it can'.<sup>116</sup> In the context of this paper, accountability involves states being answerable for their acts or omissions regarding their right to health obligations. If accountability mechanisms are lacking, the right to health care will be meaningless or ineffective for rights holders. As Yamin<sup>117</sup> has observed, accountability is a central concept of any rights-based approach to health because it converts passive beneficiaries into claims holders, and identifies the state and other actors as duty bearers, who may be held to account for their policies, programmes and strategies to provide universal access to health care. Yamin has also noted that accountability from a human rights perspective requires<sup>118</sup>

monitoring and oversight by both government officials and those who are affected; such accountability demands transparency, access to information and active popular participation. It is not enough to have access to reliable information and indicators; true accountability requires processes that empower and mobilise ordinary people to become engaged in political and social action ... accountability in a human rights framework also requires effective and accessible mechanisms for redress in the event of violations.

Viewed through a human rights lens, the concept of accountability is thus important in determining which health policies and institutions are working and which are not and why. In any case, as Langford has pointed out, the *raison d'être* of the rights-based approach is accountability.<sup>119</sup> It assists in identifying who should take credit for what has

<sup>113</sup> On the many meanings of accountability, see eg H Potts *Accountability and the highest attainable standard of health* (2008). Meanings include social accountability, professional accountability, political accountability and legal accountability. See also A Schedler et al *The self-restraining state: Power and accountability in new democracies* (1999).

<sup>114</sup> HC Black *Black's law dictionary* (1990) 19.

<sup>115</sup> RJ Cook 'State accountability under the Convention on the Elimination of All Forms of Discrimination Against Women' in RJ Cook (ed) *Human rights of women: National and international perspectives* (1994) 222-228.

<sup>116</sup> As above.

<sup>117</sup> AE Yamin 'Beyond compassion: The central role of accountability in applying a human rights framework to health' (2008) 10 *Health and Human Rights* 1-20.

<sup>118</sup> n 117 above, 1-2.

<sup>119</sup> M Langford *Claiming the Millennium Development Goals: A human rights approach* (2008) 15.



been performed well, and who has the responsibility to carry out certain tasks in the context of health care. Accountability helps in determining the extent to which the state has fulfilled its obligations and, if not, why not, and explores whether any redress needs to be made. Although non-state actors also have obligations in respect of the right to health, space constraints do not permit us to delve into how they can be held accountable for failure to fulfill their obligations in the field of health care.

## 5.2 How to hold the state accountable

Egregious and pervasive violations of the rights of persons living with HIV/AIDS, including the right to health care, often go unrecognised and, when they are recognised, they may not attract any punishment or remedy. Although states make promises for meeting the right to health care of persons living with HIV/AIDS in the policy framework, they may renege on such promises. The question therefore is how the states in question can be held accountable for violations of the right to health generally and the right to health care of persons living with HIV/AIDS in particular. It has been argued that, in determining whether the state is complying with its obligations in the field of health care, it may be necessary to focus more on violations than only on progressive realisation. For example, in respect of women's right to health care, Chapman<sup>120</sup> argues that there are three types of violations, namely, violations resulting from government actions and policies; violations related to patterns of discrimination; and violations related to a failure to fulfil the minimum core obligations. According to the ECSR Committee, violations may occur through acts of commission (through the direct actions of states or other entities insufficiently regulated by states)<sup>121</sup> and of omission (such as failure to take steps).<sup>122</sup> Violations may also occur when the state does not prevent, regulate or control infringements of the right to health by third parties.<sup>123</sup> In the next section we explore mechanisms of accountability for violations of the right to health care.

### 5.2.1 Legislative mechanisms

It may be argued that Uganda has a fairly more elaborate policy framework than South Africa in the specific context of HIV/AIDS. However, policies are not legally binding: They simply contain political obligations. Consequently, Uganda should, like South Africa, explicitly recognise the right to health care in the Constitution, which would

<sup>120</sup> AR Chapman 'A violations approach to monitoring economic, social and cultural rights' (1996) 18 *Human Rights Quarterly* 23-66.

<sup>121</sup> General Comment 14 (n 15 above) para 48.

<sup>122</sup> Para 49.

<sup>123</sup> Para 51.



clear any misgivings about the justiciability of the right.<sup>124</sup> It should be noted, however, that it is not sufficient to merely recognise the right in the Constitution. The ESCR Committee enjoins states to consider adopting a national framework law to give effect to the right.<sup>125</sup> To this end, there is an urgent need for health legislation that unequivocally obliges the state to provide adequate, affordable and accessible health care, including anti-retroviral treatment to its people with special attention to the poor and vulnerable. The legislation should contain provisions that permit the Minister of Health to formulate regulations relevant to the health sector. Such regulations would contain measurable benchmarks and targets against which performance may be measured.<sup>126</sup> The regulations should also include provisions on periodic review, monitoring and evaluation of performance of relevant health sectors. They should also prescribe offences and penalties against officers who may misappropriate essential drugs, or negligently fail to address stock-outs of anti-retroviral drugs and other medicines for opportunistic infections in hospitals or health centres, or negligently fail to distribute the drugs on time.<sup>127</sup> The regulations should also address access to medicines provided by private providers, by including fees structures or guidelines in order to minimise the exploitation of patients. As is the case in South Africa, the Ugandan legislation should promote the use of generic medicines. Both countries should take legislative steps to ensure that they benefit from the international trade regime, which permits public health exceptions to intellectual property rights and allows the manufacture, exportation and importation of cheaper generic versions of anti-retroviral drugs.<sup>128</sup>

<sup>124</sup> There is a need for South Africa to ratify ICESCR. It may also be necessary for both countries to domesticate ICECR, since domestic legal systems may guarantee more protection and promotion of human rights than international law, which may experience enforcement problems. On the need for domestication of international treaties, see C Heyns & F Viljoen 'The impact of the United Nations treaties on the domestic level' (2001) 23 *Human Rights Quarterly* 483; MA Torres 'The human right to health, national courts and access to HIV/AIDS treatment: A case study from Venezuela' (2002) 3 *Chicago Journal of International Law* 107-108.

<sup>125</sup> General Comment 14 (n 15 above) para 53.

<sup>126</sup> This method has been successfully utilised by the National Environment Act, a framework legislation which lays down major principles and concepts on the protection of the environment, but leaves details to lead agencies and the sector ministry.

<sup>127</sup> Trillo Diaz (n 101 above).

<sup>128</sup> There have been calls for Uganda to domesticate the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement flexibilities, such as parallel importation and compulsory licensing, which may enhance access to generic medicines in the country. On the problems and prospects of utilising such flexibilities, see BK Twinomugisha 'Implications of the TRIPS Agreement for the protection of the right of access to medicines in Uganda' (2008) 2 *Malawi Law Journal* 253-278.

### 5.2.2 Accountability through national courts

It is true that international accountability mechanisms through, for example, the reporting system, or even communications by the African Commission may be helpful in ensuring that states meet their obligations under international human rights law. However, in order for the right to health care to be meaningful for vulnerable persons such as persons living with HIV/AIDS, there must be adequate legal and other remedies provided at the domestic level. These remedies should be open to any right holder who claims that his or her right has been violated.

National courts can play a crucial role in addressing issues of social justice such as health care. Judges can be creative in their interpretation of relevant constitutional provisions to compel the state to meet its obligations under international human rights law. Even where there is no explicit recognition of the right to health care (as in Uganda), court action may succeed, either by inferring this right from other rights, such as the right to life, or by relying on human rights instruments which the state has ratified.<sup>129</sup> Ugandan courts may also boldly apply the Directive Principles of State Policy to hold the state accountable.<sup>130</sup> In many jurisdictions, litigation has been used as a mechanism to advance the right to health by holding states accountable to human rights norms in the specific context of HIV/AIDS.<sup>131</sup> Litigation may serve to hold states accountable to their laws and policies and also to empower individuals and groups to enforce the laws more directly.<sup>132</sup>

Unlike Uganda, there has been increased litigation and activism in the area of socio-economic rights in South Africa. For example, in the

<sup>129</sup> Courts in Uganda have increasingly referred to the jurisprudence of treaty bodies and case law from other jurisdictions. See eg *Charles Onyango Obbo & Another v Attorney-General* (Constitutional Appeal 2/2002); *Col (Rtd) Dr Besigye Kiiza v Museveni Yoweri Kaguta and the Electoral Commission* (Electoral Petition 1/2001).

<sup>130</sup> On this view, see eg BO Okere 'Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution' (1983) 32 *International and Comparative Law Quarterly* 214-215. Experiences from other jurisdictions, especially India, also show that a creative court can effectively apply Directive Principles to issues of human rights. Eg, in *Keshanavanda Bharati v State of Kerala* (1963) 4 SCC 225, the Supreme Court stated that, although the Indian Constitution expressly provides that the Directive Principles are not enforceable by any court, they should enjoy the same status as traditional fundamental rights.

<sup>131</sup> On cases concerning human rights of people living with HIV/AIDS, see eg UNAIDS *Courting rights: Case studies in litigating the human rights of people living with HIV* (2006).

<sup>132</sup> On litigation as a mechanism to enhance protection of the right to health, see S Gloppen 'Litigation as a strategy to hold governments accountable for implementing the right to health' (2008) 10 *Health and Human Rights* 23-24; S Gloppen 'Social rights litigation as transformation: South African perspectives' in P Jones & K Stokke (eds) *Democratising development: The politics of socio-economic rights in South Africa* (2005) 153-180; HV Hogerzeil *et al* 'Is access to essential medicines as part of the fulfilment of the right to health enforceable through the courts?' (2006) 368 *Lancet* 305-311.

*Treatment Action Campaign* case,<sup>133</sup> the Constitutional Court relied on General Comments of the ESCR Committee to determine that the health policy must be reasonable in development and implementation. The Court noted that for a policy to be 'reasonable', it had to be comprehensive, co-ordinated between the various levels of government and focused on those in greatest need. However, courts may be reluctant to interfere with policy decisions except where the court finds that there is no other lawful alternative but for it to adjudicate.<sup>134</sup> Courts may also be cautious about decisions involving the allocation of money, for example, in *Soobramoney v Minister of Health (KwaZulu-Natal)*,<sup>135</sup> where the court stated:<sup>136</sup>

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

Litigation, of course, cannot function as a mechanism to hold states accountable for the right to health care unless cases are brought to court by public-spirited individuals or civil society. Civil society organisations in Uganda should, like their counterparts in South Africa, engage in public interest litigation on behalf of the indigent and other disadvantaged members of society such as persons living with HIV/AIDS. Public interest litigation is particularly important given the poverty levels where potential litigants may not be aware of their rights, let alone being able to meet litigation costs. Civil society organisations can challenge the state in court to demonstrate that it has employed the available resources maximally towards the realisation of the right in question.<sup>137</sup> Given that legislative or juridical action may not necessarily change social behaviour unless supported by other plans or strategies, we now explore other accountability mechanisms.

<sup>133</sup> On how courts in Uganda can use the approach taken by the Constitutional Court in South Africa to protect socio-economic human rights, see BK Twinomugisha 'Exploring judicial strategies to protect the right of access to emergency obstetric care in Uganda' (2007) 7 *African Human Rights Law Journal* 283 300-301.

<sup>134</sup> See eg *Grootboom & Others v Government of the Republic of South Africa & Others* (2000) ICHRL 72.

<sup>135</sup> 1998 1 SA 765.

<sup>136</sup> Para 29.

<sup>137</sup> Trillo Diaz (n 101 above) 45. Art 50(2) of the Constitution permits PIL, which has been utilised by public-spirited individuals and organisations to challenge violations of human rights or the constitutionality of certain laws or other acts or omissions by government officials or agencies. Eg, in *Environmental Action Network (TEAN) v Attorney-General and the National Environment Management Authority* (Misc Appl 39/2001), the court relaxed the rules of standing and permitted the applicants, who did not have a direct interest in the infringing act, to bring an action on behalf of the non-smoking public. For a discussion of this and other cases, 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.

### 5.2.3 Democratic participation in the policy framework

One of the cardinal requirements of accountability is participation of all relevant stakeholders in the design, implementation, monitoring and evaluation of the policy framework. The concept of democratic participation is recognised in various legal and policy documents. For example, the Ugandan Constitution provides that ‘the state shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance’.<sup>138</sup> The cornerstone of the health policy framework in both South Africa and Uganda is Primary Health Care, which calls for the provision of health care to individuals and families through their full participation. According to WHO and UNAIDS, the people have the right and duty to participate individually and collectively in the planning and implementation of strategies for their treatment and care.<sup>139</sup> However, the major problem is that some of the policies and programmes are top-down and undemocratic. They are envisaged, planned and implemented by bureaucrats, planners and other outsiders without any direct involvement of vulnerable groups, such as prisoners, women, children and the poor. Although the policy framework in both countries encourages participation of the poor, vulnerable groups and civil society in its formulation, such participation is simply cosmetic. For example, in Uganda, civil society organisations were invited to provide input into the development of the PEAP. However, no input was sought from these organisations on the nature of the policies necessary to tackle poverty issues such as health care.<sup>140</sup>

Although civil society organisations may have their own interests and may not necessarily represent or be accountable to the poor, they can play a critical role in the promotion and protection of the right to health care of persons living with HIV/AIDS, by monitoring the delivery of anti-retroviral drugs and other HIV/AIDS-related goods and services. Civil society organisations may also conduct public hearings about various issues concerning access to health care by persons living with HIV/AIDS, such as the misappropriation of HIV/AIDS-related funds and expose such issues in the media. Civil society organisations can also actively follow up the national budgeting process to ensure that governments allocate adequate funds to the health sector generally and the provision of anti-retroviral drugs in particular. Civil society organisations may also form partnerships with Health Unit Management Committees (HUMCs) to ensure health protection generally and HIV/AIDS-related care in particular. These committees are mainly charged with mobilising communities

<sup>138</sup> Objective XXVI (ii) of the 1995 Constitution.

<sup>139</sup> WHO/UNAIDS *Ensuring equitable access to anti-retroviral treatment for women* (2004).

<sup>140</sup> BK Twinomugisha ‘A critique of Uganda’s poverty eradication action plan’ in K Matlosa *et al* (eds) *The state, democracy and poverty eradication in Africa* (2008) 298-312.

for health messages or resource support to the health unit. They are supposed to aid the state in promoting the active involvement of the communities in setting up and maintaining health infrastructure.

## 6 Conclusion

Uganda and South Africa have adopted different approaches towards the protection of the right to health care generally and the right of access to HIV/AIDS medicines in particular. Although these approaches have resulted in varying and disparate consequences, both countries should be held accountable for the violation of those health care rights, albeit in varying degrees. More importantly, however, it is clear that Uganda and South Africa have a lot to learn from each other.

Like South Africa, Uganda needs to give greater recognition to the right to health care in its Constitution. Moreover, there is also a dire need for a legislative framework for the protection of health care rights (and specifically the right to HIV/AIDS medicines) as the existing policy framework alone is not enough. A higher level of constitutional protection and an elaborate legislative framework will enable Ugandan courts to play a more meaningful role in addressing issues of access to health care through interpretation and litigation.

Both countries need to make better use of civil society organisations in a collaborative rather than an antagonistic relationship. A broad-based partnership between the state and civil society formations should target vulnerable groups, including prisoners, women, children and the poor. Moreover, the public health care system should be pro-poor and accessible.

As mentioned earlier, the lack of political will and commitment is largely responsible for the current state of the HIV/AIDS epidemic in South Africa. There is no better lesson that South Africa can learn from Uganda than the need for high-level political intervention, commitment and resoluteness. The new political era and recent change of government in South Africa will hopefully usher in the necessary political will that will scale up the provision of, and access to, HIV/AIDS medicines. It is still too early to tell whether the new political leadership will live up to what it has promised. But what is clear is that such commitment should enable the government to ratify and/or domesticate relevant international and regional human rights instruments, all of which play an important role in the realisation of the right of access to health care and other rights. It is, for example, inexplicable that South Africa has so far failed (or refused) to ratify ICESCR. Such refusal will continue to cast doubt on South Africa's commitment to the protection of socio-economic rights, in spite of its record.

## The African Union and the responsibility to protect

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### Summary

*This article discusses how the African Union, as a major contributor to peace and security, has embraced and further entrenched the concept of the responsibility to protect. It traces the concept from the time when the former Secretary-General of the United Nations, Kofi Annan, challenged the international community to agree on the basic principles and processes of when intervention should occur in order to protect humanity against gross violations of human rights. It further discusses how the government of Canada responded to this challenge through the establishment of the International Commission on Intervention and State Sovereignty, which undertook extensive work in an attempt to unpack the meaning of the concept. The article makes reference to the 2005 World Summit where the Heads of State and Government of the United Nations unanimously affirmed the concept of the responsibility to protect, as well as to the 2005 Common African Position on the Proposed Reform of the United Nations (Ezulwini Consensus) wherein the Executive Council of the African Union affirmed this concept. The article further makes linkages between the concept of the responsibility to protect and the notions of human rights, human security and international security. Focusing on the African Union, the article discusses how the concept has over the years evolved in the African context. Devoting particular attention to article 4(h) of the Constitutive Act of the African Union, the article gives an understanding on how this article gives effect to the responsibility to protect. It elaborates on the notions of collective intervention and universal jurisdiction, among other things. The article also considers the processes to be undertaken by the*

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*African Union, as a means of giving effect to the responsibility to protect, following requests for intervention by its member states and occurrences of undesirable unconstitutional changes of government.*

[T]here are moments when I feel that we are trapped in a mammoth factory known as the African continent, where all the machinery appears to have gone out of control all at once. No sooner do you fix the levers than the pistons turn hyperactive in another part of the factory, then the conveyor belt snaps and knocks out the foreman, the boiler erupts and next the whirling blades of the cooling fans lose one of their members which flies off and decapitates the leader of the team of would-be investors — the last hope of resuscitating the works. That, alas, is the story of our human factory on this continent.<sup>1</sup>

## 1 Introduction

Upholding human rights is one of the most effective ways of contributing to international security. A respect for human rights arguably prevents conflicts, both intra-state and interstate. Where conflicts take place, the application of human rights principles best addresses violations of human rights and fundamental freedoms. Achieving international security requires states to fulfil their responsibility to protect their citizens against human rights violations. Within the African context, the responsibility to protect is articulated in article 4(h) of the Constitutive Act of the African Union (Constitutive Act),<sup>2</sup> which provides for ‘the right of the [African] Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity’.<sup>3</sup>

The responsibility to protect ensures that human rights are respected, protected, promoted and fulfilled.<sup>4</sup> The responsibility to protect goes beyond these so-called grave circumstances, as human rights must be respected, protected, promoted and fulfilled at all times. In post-conflict situations, for instance, human rights take centre stage in addressing post-conflict challenges such as development or the lack thereof. Thus,

<sup>1</sup> W Soyinka ‘Constitution and continuity’ *Tempo* 16 March 2000 <http://www.nigerianlaws.com/> as quoted in NJ Udombana ‘The unfinished business: Conflicts, the African Union and the New Partnership for Africa’s Development’ (2003) 35 *George Washington International Law Review* 55.

<sup>2</sup> Adopted on 11 July 2000 and entered into force on 26 May 2001.

<sup>3</sup> See generally AA Girmachew ‘A study of the African Union’s rights of intervention against genocide, crimes against humanity and war crimes’ unpublished PhD thesis, University of Oslo, 2008.

<sup>4</sup> On the levels of state obligation to respect, protect, promote and fulfil human rights, see *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (SERAC case). In particular, see paras 44–47 of the SERAC case.



in post-conflict reconstruction and development,<sup>5</sup> the consideration of human rights is one of the most important indicative elements for addressing past experiences and thereby informing a peaceful future and stable environment. Essentially, human rights as an indicative element encompasses the promotion, protection and respect for human rights and human dignity. International security, therefore, cannot be achieved without respect for human rights. Hence, one cannot talk about international security without addressing human rights, the so-called 'idea of our time'.<sup>6</sup>

That Africa faces multi-faceted challenges is not in dispute. Violations of human rights and general insecurity have now become the norm in Africa. One of the most profound challenges on the continent is the responsibility of African states to protect their citizens and to ensure their right to peace, security and stability within the continent. Amongst other things, this results from the fact that Africa generally remains a continent wracked by armed conflicts and what Furley and May refer to as "'hopeless cases" where peace, if it does break out, can be tenuous, full of unresolved rivalries and tension, liable to be temporary and viewed as unsatisfactory by many of the participants'.<sup>7</sup> The International Commission on Intervention and State Sovereignty (ICISS) could not have put it better when stating that '[m]illions of human beings remain at the mercy of civil wars, insurgencies, state repression and state collapse'.<sup>8</sup>

The African continent presents interesting case studies due to a wide array of challenges: undemocratic governments; *coups d'état*; mercenarism; blood/conflict diamonds; bad governance and poor leadership, unfree and unfair elections; corruption and money laundering; underdevelopment; abuse of human rights; genocide; poverty; drought and famine; human trafficking; and HIV/AIDS.<sup>9</sup> These problem areas have a bearing on the responsibility to protect and speak to the need for African states to ensure human security on the continent.

<sup>5</sup> Post-Conflict Reconstruction and Development (PCRD) is one of the tools of the AU designed to curb the severity and repeated nature of conflicts in Africa as well as to bring about sustained development. See eg Decision on Post-Conflict Reconstruction and Development (EXCL/Dec 302 (IX) 25 June — 2 July 2006, Banjul, The Gambia) and Report on Post Conflict Reconstruction and Development (DOC EXCL/274 (IX) 25 June — 2 July 2006, Banjul, The Gambia) <http://www.africa-union.org/root/AU/AUC/Departments/PSC/PCRD/PCRD%20Main%20Web%20Source/Main%20Folder/documents.html> (accessed 23 January 2010).

<sup>6</sup> See C Heyns & F Viljoen 'The regional protection of human rights in Africa: An overview and evaluation' in PT Zeleza & PJ McConaughay *Human rights, the rule of law, and development in Africa* (2004) 129.

<sup>7</sup> O Furley & R May (eds) *Ending Africa's wars: Progressing to peace* (2006) 1.

<sup>8</sup> Report of the International Commission on Intervention and State Sovereignty *The responsibility to protect* (2001) 11.

<sup>9</sup> See S Gumedze 'Meaning of human security revisited' *ISS Today* 29 June 2007 [http://www.iss.co.za/static/templates/tmpl\\_html.php?node\\_id=2436&slink\\_id=4660&slink\\_type=12&link\\_id=21](http://www.iss.co.za/static/templates/tmpl_html.php?node_id=2436&slink_id=4660&slink_type=12&link_id=21) (accessed 29 February 2010).



Africa as such cannot be said to be a continent where human rights and security flourish.

As a result of the many problem areas enumerated above, the responsibility of ensuring that African states protect their citizens becomes even more profound. My understanding of the notion of the responsibility to protect is nothing but the duty entrusted upon states to ensure that the fundamental human rights of their citizens are zealously guarded and protected against violations of any kind. Within the African context, the responsibility to protect is unfortunately challenged by various factors, one of which is African states' poor overall human rights record. This is despite the fact that individual African states are parties to a plethora of human rights treaties at the international and regional levels. Notwithstanding these challenges, as it shall become clear, positive prospects exist for ensuring that African states fulfil their responsibility to protect their citizens against human rights abuses, especially in view of article 4(h) of the Constitutive Act.

The article discusses the African Union (AU) and the responsibility to protect, which is entrenched in article 4(h) of the Constitutive Act. First, the paper discusses the responsibility to protect and how it has evolved within the African context. Second, it considers the responsibility to protect under the AU with specific focus on collective intervention by the AU, the principle of universal jurisdiction, the request for intervention by AU member states, and unconstitutional changes of government. Finally, conclusions are drawn.

## 2 The responsibility to protect

The responsibility to protect is a very broad concept which covers a variety of issues. As stated above, the article seeks to confine the concept to states' obligation to ensure the respect for human rights within the African context. It cannot be denied that the concept finds greater emphasis in the case where there is a serious violation of human rights. In his report to the 1999 General Assembly, the former Secretary-General of the United Nations (UN), Kofi Annan, challenged the international community to agree on the basic principles and processes involved in respect of when an intervention should occur, under whose authority and how this was to be achieved.<sup>10</sup> As a result of this challenge, the government of Canada responded by establishing the independent International Commission on Intervention and State Sov-

<sup>10</sup> See the Annual Report of the Secretary-General to the 54th session of the UN General Assembly in September 1999 [http://www.un.org/News/press/docs/1999/statements\\_search\\_full.asp?statID=28](http://www.un.org/News/press/docs/1999/statements_search_full.asp?statID=28) (accessed 11 April 2010).

ereignty (ICISS) in September 2000.<sup>11</sup> The ICISS published a report titled 'The Responsibility to Protect' in December 2001.<sup>12</sup>

Parallel to the work of the ICISS, the AU took the lead in entrenching the responsibility of protecting in its founding legal document, the Constitutive Act. As already mentioned, the responsibility to protect is found in article 4(h) of the Constitutive Act. This became one of the core principles in accordance to which the AU was to function.<sup>13</sup> It could be argued that the Rwanda genocide (which could have been avoided had the UN intervened) was one of the most important considerations for entrenching the responsibility to protect in the Constitutive Act as this affected African states directly. After all, the AU remains Africa's premier institution and principal organisation for the promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (African Charter) and other relevant human rights instruments.<sup>14</sup>

As a concept the responsibility to protect is a fluid one. This presupposes that the concept is one that can be employed at various levels in order to ensure the protection of citizens. The responsibility to protect is a notion which seeks to challenge the traditional understanding of state sovereignty by allowing regional organisations to intervene in cases where serious human rights violations are taking place. Thus, the concept is viewed as the legal and ethical commitment of the international community, acting through organisations such as the UN and Africa's regional organisations, to protect citizens from genocide, war crimes, crimes against humanity, or ethnic cleansing.<sup>15</sup> In a recent report on the Wilton Park Conference 922,<sup>16</sup> it was stated that the concept of responsibility to protect rests on three pillars, namely, the obligation of states to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and from incitement; a commitment to assist states to meet these obligations; and a responsibility to protect populations from these crimes and violations.

The international community deems the crime of genocide, crimes against humanity and war crimes to be the most serious crimes of international concern and elaborated upon in the Rome Statute of

<sup>11</sup> See the website of the International Commission on Intervention and State Sovereignty <http://www.iciss.ca> (accessed 10 January 2010).

<sup>12</sup> The *Report of the International Commission on Intervention and State Sovereignty* is available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (accessed 10 January 2010).

<sup>13</sup> On the other core principles, see generally art 4 of the Constitutive Act.

<sup>14</sup> Art 3(h) Constitutive Act.

<sup>15</sup> Centre for Conflict Resolution *Africa's responsibility to protect* Policy Advisory Group Seminar Report (2007) 6.

<sup>16</sup> See *Report on Wilton Park Conference 922: Implementing the responsibility to protect: The role of regional and sub-regional partners* (Friday 11 – Sunday 13 July 2008) <http://www.wiltonpark.org.uk/documents/conferences/WP922/pdfs/WP922.pdf> (accessed 12 February 2010).

the International Criminal Court (Rome Statute).<sup>17</sup> The Rome Statute has proved to be an invaluable tool in the struggle against impunity, especially in conflict-ridden places. Worth noting is the fact that those individuals who are alleged to have committed serious crimes are predominantly from the African continent,<sup>18</sup> namely, Darfur, Sudan,<sup>19</sup> the Democratic Republic of the Congo,<sup>20</sup> Central African Republic<sup>21</sup> and Uganda.<sup>22</sup>

The above-mentioned serious crimes of international concern involve grave violations of human rights. Over and above the entrenchment of the responsibility to protect in article 4(h) of the Constitutive Act, African leaders have acknowledged the concept as an essential tool in preventing and halting war crimes, ethnic crimes, crimes against humanity and genocide. Africa's classic example of the expression of the responsibility to protect is found in an address by the Rwandan President, Paul Kagame, during a 2005 World Summit:<sup>23</sup>

Never again should the international community's response be left wanting. Let us resolve to take collective action in a timely and decisive manner. Let us also commit to put in place early warning mechanisms and ensure that preventive interventions are the rule rather than the exception.

After the 1994 Rwanda genocide, African states grappled with the question of whether the UN was still the body of choice to bring about peace and security on the continent. In the most general sense, as Evans puts it, the international community has conspicuously failed to maintain the peace since the end of the Cold War.<sup>24</sup> Evans and Sah-

<sup>17</sup> The text of the Rome Statute was circulated as document A/CONF 183/9 of 17 July 1998 and corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. On the international crimes, see arts 5-8 of the Rome Statute. Although the crime of aggression is listed in art 5(1)(d), art 5(2) provides that the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with arts 121 and 123, defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. The article further provides that such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

<sup>18</sup> See situations and cases at <http://www.icc-cpi.int/cases.html> (accessed 22 February 2010).

<sup>19</sup> *The Prosecutor v Ahmad Muhammad Harun ('Ahmad Harun') Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')* ICC-02/05-01/07.

<sup>20</sup> *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06; *The Prosecutor v Bosco Ntaganda* ICC-01/04-02/06; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07.

<sup>21</sup> *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

<sup>22</sup> *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05.

<sup>23</sup> See 'The responsibility to protect: Towards a collective African response to genocide, war crimes and crimes against humanity' <http://www.responsibilitytoprotect.org/index.php?module=uploads&func=download&fileId=421> (accessed 10 January 2010).

<sup>24</sup> See generally G Evans *Co-operative security and interstate conflict* (1994) 1-8.

noun have clearly pointed out that '[i]n this new century, there must be no more Rwandas'.<sup>25</sup> This statement highlights the AU's approach in addressing human rights and international security within the African continent.

In March 2005, during the 7th extraordinary session of the AU's Executive Council, the AU affirmed the acceptance of the responsibility to protect in a document titled 'The Common African Position on the Proposed Reform of the United Nations', otherwise known as the Ezulwini Consensus. According to the Ezulwini Consensus, it was noted that the General Assembly and the Security Council of the UN are situated far away from the reality of the African conflict scenes, and may not be in a position to undertake effectively a proper appreciation of the nature and development of African conflict situations. In addressing this challenge, it was critical for regional organisations in areas of proximity to conflicts to be empowered to intervene with the approval of the UN Security Council. What also came out of the Ezulwini Consensus was the realisation that in certain circumstances, which require urgent attention, the approval of the UN Security Council could be granted *ex-post facto*.<sup>26</sup>

In January 2009, the Heads of State and Government unanimously affirmed at the 2005 UN World Summit that 'each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.<sup>27</sup> The Heads of State and Government at the Summit outlined a three-pillar strategy in implementing the responsibility to protect: pillar one, the protection of the state, comprising of the enduring responsibility of the state to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement; pillar two, international assistance and capacity building, comprising of the commitment of the international community to assist states in meeting those obligations; and pillar three, timely and decisive response, comprising of the responsibility of member states to respond collectively in a timely and decisive manner when a state is manifestly failing to provide such protection.<sup>28</sup>

It must be noted that this three-pillar strategy complements the ICISS-proposed three-dimensional definition of the responsibility as follows:<sup>29</sup>

<sup>25</sup> G Evans & M Sahnoun 'The responsibility to protect' (2002) 81 *Foreign Affairs* 6.

<sup>26</sup> AU Executive Council 'The common African position on the proposed reform of the United Nations: The Ezulwini Consensus' [http://www.africa-union.org/News\\_Events/Calendar\\_of\\_%20Events/7th%20extra%20ordinary%20session%20ECL/Ext%20EXCL2%20VII%20Report.doc](http://www.africa-union.org/News_Events/Calendar_of_%20Events/7th%20extra%20ordinary%20session%20ECL/Ext%20EXCL2%20VII%20Report.doc) (accessed 29 March 2010).

<sup>27</sup> See the Report of the UN Secretary-General on implementing the responsibility to protect, 12 January 2009, A/63/677.

<sup>28</sup> As above.

<sup>29</sup> Report of the International Commission on Intervention and State Sovereignty (n 8 above) 17.

First, the responsibility to protect implies an evaluation of the issues from the point of view of those seeking or needing support, rather than those who may be considering intervention. This preferred terminology refocuses the international searchlight back where it should always be, that is, on the duty to protect communities from mass killing, women from systematic rape and children from starvation.

Secondly, the responsibility to protect acknowledges that the primary responsibility in this regard rests with the state concerned, and that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place. In many cases, the state will seek to acquit its responsibility in full and active partnership with representatives of the international community. Thus the 'responsibility to protect' is more of a linking concept that bridges the divide between intervention and sovereignty; the language of the 'right or duty to intervene' is intrinsically more confrontational.

Thirdly, the responsibility to protect means not just the 'responsibility to react,' but the 'responsibility to prevent' and the 'responsibility to rebuild' as well. It directs our attention to the costs and results of action versus no action, and provides conceptual, normative and operational linkages between assistance, intervention and reconstruction.

The definition of the first proposed dimension is very important in the sense that those seeking or needing support, that is, human beings, are the focal point for human security. The responsibility to protect should be most concentrated on the human needs of those seeking protection and support.<sup>30</sup> After all, the Universal Declaration of Human Rights (Universal Declaration) provides that '[a]ll human beings are born free and equal in dignity and rights'.<sup>31</sup> By virtue of this fact, anything that threatens such freedom, equal dignity and fundamental rights should be guarded against. Hence the need for states' responsibility to protect human beings, regardless of any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>32</sup> This proposed dimension also points to the more serious forms of threats to human security, namely, mass killings, the systematic rape of women and the starvation of children. The responsibility for states to intervene in these situations cannot be gainsaid. It is also for this reason that specific international treaties have been adopted both at the international and regional levels with the main objective of addressing such challenges, which are rife within the African continent.

The definition of the second dimension proposed gives an indication that the primary responsibility to protect rests with none other than the state concerned. The international community, therefore, assumes the secondary responsibility, in the event that the state concerned fails or is unwilling to protect its citizens. The principle of sovereignty in this

<sup>30</sup> n 8 above, 15.

<sup>31</sup> Art 1 Universal Declaration.

<sup>32</sup> Art 2 Universal Declaration.

situation cannot inhibit the operationalisation of the responsibility to protect at the international level. According to the ICISS, the UN is an organisation dedicated to the maintenance of international peace and security on the basis of protecting the territorial integrity, political independence and national sovereignty of its member states.<sup>33</sup> The ICISS further states that the fact that the overwhelming majority of today's armed conflicts are internal has, among other things, presented the UN with the major difficulty of reconciling the principle of sovereignty and its mandate to maintain international peace and security, coupled with its compelling mission to promote the interests and welfare of people within those states experiencing armed conflicts.<sup>34</sup>

This dilemma is equally true with the AU, whose objective is, among others, to defend the sovereignty, territorial integrity and independence of its member states.<sup>35</sup> Yet, it is also entrusted with the responsibility of promoting peace, security and stability on the continent,<sup>36</sup> which may arguably entail a violation of the principle of sovereignty. Since member states of international organisations such as the UN and AU voluntarily accept international obligations as responsible members of the community of states upon signing treaties, they accept the responsibilities of memberships flowing from their membership of such organizations. This is because treaties of international organisations are binding once ratified, accepted, approved or acceded to. The Vienna Convention on the Law of Treaties of 1969 provides that the terms 'ratification', 'acceptance', 'approval' and 'accession' mean the international act so named, whereby a state establishes on the international plane its consent to be bound by a treaty.<sup>37</sup> According to the ICISS Report, '[t]here is no transfer or dilution of state sovereignty. But there is a necessary re-characterisation involved: from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties.'<sup>38</sup>

In dissecting the notion of sovereignty as responsibility, the ICISS Report states that it has a threefold significance,<sup>39</sup> namely, one, that it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and the promotion of their welfare; two, that it suggests that national political authorities are responsible to the citizens internally and to the international community through the UN; and three, that it means that the agents of the state are responsible for their actions, that is, they are accountable for their acts of commissions and omissions. It is through this way of thinking that international human rights norms are strengthened. The principle

<sup>33</sup> ICISS Report 13.

<sup>34</sup> As above.

<sup>35</sup> Art 3(b) Constitutive Act.

<sup>36</sup> Art 3(f) Constitutive Act.

<sup>37</sup> Art 2(1)(b) Vienna Convention on the Law of Treaties of 1969.

<sup>38</sup> ICISS Report 13.

<sup>39</sup> As above.

of accountability, especially on the part of state agents, is important as any acts of commission or omission, which seriously violate human rights, automatically attract international criminal responsibility. In this way, sovereignty cannot be a justification for non-observance of human rights norms and standards.

The third and last proposed dimension of the responsibility to protect emphasises the 'responsibility to prevent' and the 'responsibility to rebuild' over and above the 'responsibility to react'. One of the most important aspects of the responsibility to protect is that of undertaking measures to prevent the occurrence of serious violations of human rights. In the event that such violations occur, it is also critical that once the protection aspect of the responsibility is undertaken, the state has the responsibility to rebuild in collaboration with other states and through international organisations. It is for this reason that the AU designed a policy on Post-Conflict Reconstruction and Development (PCRD) as one of its tools intended to curb the severity and repeated nature of conflicts in Africa as well as to bring about sustained development.<sup>40</sup> The policy on PCRD comprises six indicative elements, namely, security, humanitarian/emergency assistance, political governance and transition, socio-economic reconstruction and development, human rights, justice and reconciliation, and women and gender.

The responsibility to protect finds fertile ground within the concept of human security, as understood in contemporary times, human security being a concept that focuses on the security of the individual – his or her physical safety, economic and social well-being, respect for his or her dignity and worth as a human being, and the protection of human rights and fundamental freedoms.<sup>41</sup> In bringing a new dimension to the concept of human security, Kofi Annan, the former Secretary-General of the UN, stated that<sup>42</sup>

[h]uman security in its broadest sense embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfil his or her own potential. Every step in this direction is also a step towards reducing poverty, achieving economic growth and preventing conflict. Freedom from want, freedom from fear and the freedom of future generations to inherit a healthy natural environment – these are the interrelated building blocks of human, and therefore national, security.

<sup>40</sup> See Policy on Post-Conflict Reconstruction and Development <http://www.africa-union.org/root/AU/AUC/Departments/PSC/PCRD/PCRD%20Main%20Web%20Source/index.html> (accessed 30 January 2010).

<sup>41</sup> Report of the International Commission on Intervention and State Sovereignty (n 8 above) 15.

<sup>42</sup> K Annan 'Secretary-General salutes international workshop on human security in Mongolia' Press Release SG/SM/7382 <http://www.un.org/News/Press/docs/2000/20000508.sgsm7382.doc.html> (accessed 29 March 2010).



The responsibility to protect, therefore, is also a concept that seeks to ensure the continuity of human security. That is to say that there is no way that human rights, good governance, access to education and health care, for instance, can be enjoyed without a state protecting human rights. It is for this reason, therefore, that in the event that human security is threatened, the responsibility to protect takes precedence in the sense that the international community has to step in, in order to protect those seeking protection or assistance. Thus, the ICISS notes that<sup>43</sup>

[t]he emerging principle in question is that intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.

According to the African Union Non-Aggression and Common Defence Pact (not yet in force), 'human security' means<sup>44</sup>

the security of the individual in terms of satisfaction of his/her basic needs. It also includes the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee for each individual of opportunities and choices for his/her full development.

From this definition, it is very clear that human security goes beyond the state-centric approach to security. Human security, therefore, centres on the human being. Human security can only be achieved once the basic needs of a human being are satisfied. Again, this requires states to ensure that human rights and fundamental freedoms are respected and protected for the benefit of the human being. The definition also underscores the importance of enabling the creation of social, economic, political, environmental and cultural conditions that are essential for the survival and dignity of the human being.

Human security guarantees that each individual is afforded opportunities and choices for their full development. To this end states, being the primary duty-bearers, have an enormous responsibility of ensuring that human security is achieved. In terms of the AU Non-Aggression and Common Defence Pact:<sup>45</sup>

State parties undertake to promote such sustainable development policies as are appropriate to enhance the well-being of the African people, including the dignity and fundamental rights of every human being in the context of a democratic society.

<sup>43</sup> Report of the International Commission on Intervention and State Sovereignty (n 8 above) 16.

<sup>44</sup> Adopted by the 4th ordinary session of the Assembly held in Abuja, Nigeria, on 31 January 2005.

<sup>45</sup> Art 3(c) of the AU Non-Aggression and Common Defence Pact.

This provision underscores the importance of the promotion of sustainable development, pursued by the AU on the African continent. This ties in well with Africa's contemporary development blueprint, the New Partnership for Africa's Development (NEPAD).<sup>46</sup> NEPAD's main objective is to place African countries individually and collectively on a path of sustainable growth and development and by so doing to put a stop to the escalating marginalisation of the continent.<sup>47</sup> Thus, NEPAD's role in the promotion of human rights in Africa cannot be overemphasised as it addresses the issue of development, which is essential for the survival and well-being of the individual.<sup>48</sup>

### 3 Responsibility to protect under the African Union

That the maintenance of international security is the primary responsibility of the UN, particularly the UN Security Council, is now settled.<sup>49</sup> Within the African context, it may be argued that the maintenance of security, which is regional in nature, is the primary responsibility of the AU, particularly the Peace and Security Council of the AU (PSCAU). Thus, the AU's work on peace and security contributes towards international security. According to Sutterlin:<sup>50</sup>

Now, as the definition of international security has broadened to encompass not only peace between states but also the security of populations within states, economic and social progress are increasingly seen as essential to international security and peace.

The AU has in principle become the vanguard of an emerging regional African government aimed at fostering mechanisms for co-operation among African states and has as its main objective to promote peace, security and stability on the continent, thus contributing to international security.<sup>51</sup>

According to Evans:<sup>52</sup>

<sup>46</sup> NEPAD was launched at a special summit in Abuja, Nigeria, on 23 October 2001. See NEPAD [http://www.nepad.org/documents/nepad\\_english\\_version.pdf](http://www.nepad.org/documents/nepad_english_version.pdf) (accessed 12 January 2010). On the progress on NEPAD, see a report by Prof Wiseman L Nkuhlu *The New Partnership for Africa's Development: The journey so far* (June 2005) <http://www.nepad.org/2005/files/documents/journey.pdf> (accessed 12 January 2010). The NEPAD document is available at <http://www.nepad.org/AA0010101.pdf> (accessed 12 January 2010).

<sup>47</sup> Para 67 of the NEPAD document.

<sup>48</sup> See generally S Gumedze 'The New Partnership for Africa's Development (NEPAD) and human rights' (2006) 22 *South African Journal on Human Rights* 144.

<sup>49</sup> See art 24 of the UN Charter.

<sup>50</sup> JS Sutterlin *The United Nations and the maintenance of international security: A challenge to be met* (1995) 4.

<sup>51</sup> See generally art 4 of the Constitutive Act of the AU.

<sup>52</sup> G Evans *Co-operative security and interstate conflict* (1994) 1-8.

It is a central characteristic of the responsibility to protect norm, properly understood, that it should only involve the use of coercive military force as a last resort: when no other options are available, this is the right thing to do morally and practically, and it is lawful under the UN Charter.

In the event that governments are unable or unwilling to protect their citizens from genocide, war crimes, crimes against humanity and ethnic cleansing, the international community has a responsibility to protect those vulnerable populations. When the UN fails in its responsibility to protect, it is incumbent upon regional organisations, such as the AU, to fill in the gaps that the UN leaves as a result of its bureaucratic challenges in its attempt to protect citizens from serious violations of human rights. It is also for this reason that the AU has developed its own security architecture, which will ensure that the responsibility to protect, as we understand it, is effected at the regional level in order to complement this responsibility at the UN level. Below the paper focuses on the responsibility to protect as provided for in the Constitutive Act.

### **3.1 Article 4(h) of the Constitutive Act: Collective intervention by the African Union**

In establishing the AU, its member states were, among other things, determined to promote and protect human rights on the continent, thus operationalising the responsibility to protect at the regional level.<sup>53</sup> This responsibility is solidified and elaborated upon through the express objective of the AU of promoting and protecting human and peoples' rights.<sup>54</sup> This objective gives a clear and unambiguous directive that it shall be undertaken 'in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'. Among other things, the AU is also supposed to function in accordance with a respect for human rights.<sup>55</sup> This principle, therefore, informs the responsibility to protect at the AU level. The ICISS Report argues that, while sovereign states have the primary 'responsibility to protect' their own citizens, if they prove unwilling or unable to do this, then the international community must act regardless of political sensitivities.

The Constitutive Act recognises the contested principle of non-interference by any member state in the internal affairs of another.<sup>56</sup> This, however, does not preclude the AU (as opposed to the member states) to interfere in the internal affairs of its member states. Article 4(h) of the Constitutive Act provides for the right of the AU to intervene in a member state pursuant to a decision of the Assembly with respect to grave circumstances, namely, war crimes, genocide and crimes against

<sup>53</sup> See para 9 of the Preamble to the Constitutive Act.

<sup>54</sup> Art 3(h) Constitutive Act.

<sup>55</sup> Art 4(m) Constitutive Act.

<sup>56</sup> Art 4(g) Constitutive Act.

humanity. This principle, therefore, formalises and operationalises the responsibility to protect at the AU level. The Constitutive Act recognises war crimes, genocide and crimes against humanity as serious violations of human rights, which it describes as 'grave circumstances'. This principle, however, limits the responsibility to protect. It is argued here that Constitutive Act should have gone beyond so-called 'grave circumstances'.

Confirming the intervention principle, article 4(j) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSCAU Protocol)<sup>57</sup> provides that the PSCAU shall, in particular, be guided by

the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with article 4(h) of the Constitutive Act.

Article 4(h) of the Constitutive Act is yet to be amended so as to include in the listed international crimes a grave circumstance known as a 'serious threat to legitimate order'.<sup>58</sup> However, this crime is not defined. According to Baimu and Sturman,<sup>59</sup> this proposed amendment clause is inconsistent with the other grounds for intervention, which aim to protect African peoples from grave violations of human rights when their governments are unable or unwilling to do so. They argue that, rather than upholding human security, the amendment is aimed at upholding state security.<sup>60</sup>

Save for the proposed amendment, article 4(j) of the PSCAU Protocol is identical to article 4(h) of the Constitutive Act. The omission of the proposed amendment from the PSCAU Protocol does not seem to have any effect as article 4(j) of that Protocol makes reference to article 4(h) of the Constitutive Act, which in turn will include the proposed amendment. The confirmation of the principle of intervention in the PSCAU Protocol further gives the responsibility to protect the prominence it deserves.

<sup>57</sup> The PSCAU Protocol entered into force on 26 December 2003 and replaced the Declaration on the Establishment within the OAU of the Mechanisms for Conflict Prevention, Management and Resolution (Cairo Declaration), while superseding the resolutions and decisions of the OAU relating to the Mechanisms for Conflict Prevention, Management and Resolution in Africa, which are in conflict with the PSCAU Protocol. See art 22 of the PSCAU Protocol.

<sup>58</sup> See art 4(h) of the Protocol on Amendments to the Constitutive Act of the African Union, adopted by the 1st extraordinary session of the Assembly of the AU in Addis Ababa, Ethiopia, on 3 February 2003 and by the 2nd ordinary session of the Assembly of the AU in Maputo, Mozambique, on 11 July 2003. As of 3 February 2010, only 25 member states had ratified this Protocol.

<sup>59</sup> See E Baimu & K Sturman 'Amendment to the African Union's right to intervene: A shift from human security to regime security?' (2003) 12 *African Security Review* 37.

<sup>60</sup> As above.

According to article 4(h) of the Constitutive Act, circumstances warranting the AU's right to intervene in a member state should be considered to be 'grave'. The question of what constitutes 'grave circumstances' is likely to present a challenge, as the term 'grave' is relative. While the Constitutive Act does not precisely define what is to be considered 'grave circumstances', it nevertheless lists international crimes that qualify under such meaning, namely, war crimes, genocide and crimes against humanity. This is arguably a very simplistic approach in that confining 'grave circumstances' to only a few crimes narrows the scope of application of article 4(h) of the Constitutive Act.

The above-mentioned crimes, which constitute 'grave circumstances', have been defined in the 1998 Rome Statute of the International Criminal Court.<sup>61</sup> Over and above these, a somewhat ambiguous 'grave circumstance', namely, 'a serious threat to legitimate order' is to be added to the list through a proposed amendment, which is not yet in force. While this may be viewed as a classical example of international law in the making,<sup>62</sup> it remains to be seen what the meaning of 'a serious threat to legitimate order' will be interpreted to mean, especially given the somewhat rouse systems of governance in a number of African states which may use this proposed 'grave circumstance' as a justification for suppressing opposition within their territories. In fact, these autocratic systems of government may themselves be characterised as serious threats to legitimate order and the question then would be whether the AU should be bold enough to intervene in such circumstances.

In so far as the right to intervene is concerned, the AU will most definitely face a dilemma in making a decision of intervening in a member state. Be that as it may, before such decision is taken, a strong case has to be made to bring article 4(h) of the Constitutive Act into operation. Maluwa draws an analogy with terms such as 'threat to peace', 'breach of the peace' and 'acts of aggression', which are not defined in the UN Charter, but which the General Assembly and the Security Council of the UN have been able to determine precisely.<sup>63</sup> Based on this reasoning, Maluwa notes that the establishment of the PSCAU provides a clearly-defined mechanism which will be useful in determining which situations represent serious threats to legitimate order.<sup>64</sup>

The right to intervene in member states must be sanctioned by the Assembly, which takes its decisions by consensus or, failing which, by

<sup>61</sup> See <http://www.icc-cpi.int/> (accessed 19 March 2010). The Rome Statute entered into force on 1 July 2002. The definitions are found in art 8, for war crimes; art 6, for genocide; and art 7, for crimes against humanity.

<sup>62</sup> See generally T Maluwa 'The OAU/African Union and international law: Mapping new boundaries or revising old terrain?' (2004) 98 *American Society of International Law Proceedings* 232.

<sup>63</sup> Maluwa (n 62 above) 236-7.

<sup>64</sup> As above.

a two-thirds majority of the member states of the AU.<sup>65</sup> Regarding the decision-making powers of the AU in respect of this right to intervene in a member state, Packer and Rukare raise a critical point. They argue that the fact that the Assembly is the only organ responsible to decide to intervene raises the risk of inaction.<sup>66</sup> This scepticism is based upon the Organisation of African Unity (OAU)'s practice of inaction in conflict situations in Africa, which also had the effect of impairing the credibility of the organisation dearly, particularly during the 1994 Rwanda genocide.

On the question of article 4(h) of the Constitutive Act, Kindiki argues that, since the provision is couched in terms of a 'right', meaning that the Assembly has the discretion to decide whether or not to intervene, then the consent of the target state will not be required.<sup>67</sup> He further suggests that it would have been much better had the provision been couched as a 'duty' which in his opinion would have created a sense of obligation to intervene, which in turn is more likely to move the AU into action.<sup>68</sup> Whether the 'intervention' is couched as a 'right' or a 'duty', there seems to be no way in which the AU may be held accountable for not exercising such a 'right' or undertaking such a 'duty'. One way of making the AU accountable is to enable it to accede to the African Charter in the same way that Protocol 14 of the European Convention on Human Rights makes a provision for the European Union to accede to the European Convention.<sup>69</sup>

Acceding to a human rights instrument by the AU will also create a binding mechanism and give essence to the AU's functional principle of respect for democratic principles, human rights, the rule of law and good governance as provided for in the Constitutive Act. It is also in this way that the responsibility to protect by the AU can be enforceable through a judicial or quasi-judicial process. Of course, unless and until the African Commission and the African Court on Human and Peoples' Rights (which both provide for an implementation mechanism for the African Charter) are made organs of the AU, this recommendation would be futile. By transforming these organs to be part of the AU will ensure that there is an internal system of checks and balances. These organs will be given the authority to challenge the very institution, that is, the AU, which establishes them. Even though this may create tension between the AU and these mechanisms, the responsibility to protect,

<sup>65</sup> Art 7(1) Constitutive Act.

<sup>66</sup> CAA Packer & D Rukare 'The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 373.

<sup>67</sup> K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) 3 *African Human Rights Law Journal* 107.

<sup>68</sup> As above.

<sup>69</sup> See art 17 of Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Strasbourg, 13 May 2004.

however, requires effective mechanisms that will ensure that the AU is kept in constant check in order to ensure its effectiveness in protecting citizens of its member states from serious violation of human rights.

The question of the AU's right to intervene is simply left to the 'whims' of the Assembly. While the Rwanda genocide remains an indictment, it is hoped that history will not repeat itself during a time when the AU has an arguably forward-looking peace and security regime in place. If a situation necessitates the AU to exercise its right to intervene in a member state, then such a right must, without any delay, come into operation for the sake of restoring peace and security. The trend within the AU is, however, not positive and the AU is either very slow to intervene in cases requiring its intervention as a result of a violation of human rights by its own member states (as in the case of Zimbabwe), or unable to effectively address gross violations of human rights within the context of grave circumstances (as in the case of Darfur, Sudan).

In the case of the Darfur crisis in the Sudan, the AU applied the responsibility to protect, based on the principle of intervention under article 4(h) of the Constitutive Act, but not invoking the provision explicitly, by establishing the African Union Mission in Sudan (AMIS).<sup>70</sup> Originally founded in 2004, with a force of 150 troops, AMIS was a peacekeeping force operating primarily in Darfur. By mid-2005, its numbers were increased to about 7 000. Despite the AU's intervention in Darfur, the peacekeeping mission was not able to contain the violence in Darfur. The AU's intervention in Darfur is very significant in understanding the practical application of the responsibility to protect within the African context as championed by the AU. No doubt, many lessons were learned through the AU's experience in Darfur. One of the lessons is the need for a strong peace and security architecture in Africa that will be able to deal with grave circumstances such those in Darfur.

The responsibility to protect in Darfur by the AU was also complemented by the UN. For instance, through the UN Security Council Resolution 1706, the UN Security Council requested the Secretary-General 'to take the necessary steps to strengthen AMIS through the use of existing and additional United Nations operations in Darfur'.<sup>71</sup> Through the UN Security Council Resolution 1769, on 31 July 2007, the Security Council authorised and mandated 'the establishment, for an initial period of 12 months, of an AU/UN hybrid operation in Darfur (UNAMID)'. According to the UN Security Council Resolution 1769, the UNAMID<sup>72</sup>

shall incorporate AMIS personnel and the UN Heavy and Light Support Packages to AMIS, and shall consist of up to 19 555 military personnel,

<sup>70</sup> See website on the situation in the Darfur region of the Sudan <http://www.africa-union.org/DARFUR/homedar.htm> (accessed 30 March 2010).

<sup>71</sup> UN Security Council Resolution 1706 (2006) S/RES/1706 (2006) 31 August 2006.

<sup>72</sup> UN Security Council Resolution 1769 (2007) S/RES/1769 (2007) 31 July 2007.



including 360 military observers and liaison officers, and an appropriate civilian component including up to 3 772 police personnel and 19 formed police units comprising of up to 140 personnel each.

The mandate of UNAMID was subsequently extended for a further 12 months to 31 July 2009 through UN Security Council Resolution 1828 (2008),<sup>73</sup> and for a further 12 months to 31 July 2010, through UN Security Council Resolution 1881 (2009).<sup>74</sup>

### 3.2 The principle of universal jurisdiction

From article 4(h) of the Constitutive Act flows the principle of universal jurisdiction, which is defined as 'a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim'.<sup>75</sup> This principle has been resisted fiercely by the AU, which argues that it is being abused and misused when non-African courts indict African leaders for allegedly having committed international crimes. During its 11th ordinary session which was held between 30 June and 1 July 2008 in Sharm El-Sheikh, Egypt, the Assembly of the AU (Assembly) adopted a Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction.<sup>76</sup> This decision, *inter alia*, vociferously argues that the abuse of<sup>77</sup>

the political nature and abuse of the principle of universal jurisdiction by judges from some non-African states against African leaders, particularly Rwanda, [was] a clear violation of the sovereignty and territorial integrity of these states.

The Assembly also stated that the abuse of the principle of universal jurisdiction was a development that could endanger international law, order and security.<sup>78</sup> What is intriguing is the fact that the Assembly had within the same decision expressly recognised that<sup>79</sup>

universal jurisdiction is a principle of international law whose purpose is to ensure that individuals who commit grave offences such as war crimes and crimes against humanity do not do so with impunity and are brought to justice, which is in line with article 4(h) of the Constitutive Act of the African Union.

<sup>73</sup> UN Security Council Resolution 1828 (2008) S/RES/1828 (2008) 31 July 2008.

<sup>74</sup> UN Security Council Resolution 1881 (2009) S/RES/1881 (2009) 6 August 2009.

<sup>75</sup> See eg KC Randall 'Universal jurisdiction under international law' (1988) 66 *Texas Law Review* 785-788. See also International Law Association Committee on International Human Rights Law and Practice 'Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences' (2000) 2.

<sup>76</sup> Assembly/AU/Dec.199 (XI).

<sup>77</sup> See para 5(ii) of the Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction.

<sup>78</sup> n 77 above, para 5(i).

<sup>79</sup> n 77 above, para 3.

What could be observed from the Assembly's standpoint in this instance is the fact that there is a move within the AU to resist at all costs the testing of the responsibility to protect in courts of law. International human rights law and international criminal law, however, protect the right of an accused to be presumed innocent until proven otherwise by a competent court or tribunal. The fact that there are several indictments against African leaders does not necessarily mean that they are guilty, as they are still presumed innocent.

In fact, the decision by the Assembly does not challenge the question of whether or not such 'judges from some non-African states' are competent to hear matters against African leaders. Instead, the justification given includes the fact that the abuse of the principle of universal jurisdiction is a development that could endanger international law, order and security<sup>80</sup> and more specifically that<sup>81</sup>

[t]he abuse and misuse of indictments against African leaders have a destabilising effect that will negatively impact on the political, social and economic development of states and their ability to conduct international relations.

In reality, however, it is only a competent court that can pronounce on the question of whether or not an indictment against an individual (notwithstanding his or her social standing) has been abused and/or misused. My view is that the AU is not a competent organ to make such a ruling without laying a legal basis for it. More over, the AU's reaction borders on an abuse of power, which seriously impedes the AU's responsibility to protect. The AU's mandate is not to shield African leaders from prosecution but to ensure that human rights are promoted and protected.

Not only has the AU been protective of the Rwandan President, Paul Kagame, against prosecution by a non-African court, but such protection has also been extended to President Omar Hassan al-Bashir of Sudan. Following an application on 14 July 2008 by the prosecutor of the International Criminal Court (ICC) for a warrant of arrest under article 58 of the Rome Statute against the Sudanese President, the AU called on the UN Security Council to suspend the ICC's indictment of the Sudanese President for Darfur war crimes.<sup>82</sup> The AU contended that the indictment would not only destabilise the country, but also undermine efforts to resolve the ongoing humanitarian crisis in Darfur. Again, the AU's reaction to the prosecutor's application for a warrant of arrest is seen as going against the principle of universal jurisdiction and the responsibility to protect. This is despite the fact that the AU, while condemning the application, reiterated the<sup>83</sup>

<sup>80</sup> n above, para 5(i).

<sup>81</sup> n above, para 5(iii).

<sup>82</sup> See para 11(i) of the Communiqué of the Peace and Security Council of the AU, 142nd meeting, 21 July 2008, Addis Ababa, Ethiopia.

<sup>83</sup> n 82 above, para 2.

AU's unflinching commitment to combating impunity and promoting democracy, the rule of law and good governance throughout the entire continent, in conformity with its Constitutive Act, and in this respect, condemns once again the gross violations of human rights in Darfur.

Without arguing on the merits of the intended proceedings against the Sudanese President, it is critical that the ICC be allowed to exercise its independence and not be subject to any interference whatsoever from the AU in particular. The AU's interference in this matter is in violation of article 26 of the African Charter which provides that state parties to the Charter shall have the duty to guarantee the independence of the courts. The ICC is a competent court that is entrusted by the international community to dispense justice, whether or not the accused person is an African leader. Indeed, one of the principles of the AU is the respect for the rule of law and it may be argued that the AU's reaction to the Prosecutor's application is a sign of a discrepancy between what the AU believes on paper and what it practises. In such a situation, the responsibility to protect cannot thrive, at least not at the AU level.

### 3.3 Art 4(j) of the Constitutive Act: Request for intervention

The responsibility to protect can also be effected by an AU member state requesting the AU to intervene in order to restore peace and security in accordance with article 4(j) of the Constitutive Act. In such a case, the importance of the decision by the AU to intervene cannot be overemphasised. The advice of the PSCAU is also important in this regard, since it seeks to enable the Assembly to make informed decisions on whether or not to intervene in a particular member state. From the above, it can be observed that not only does the AU exercise its responsibility to protect on its own volition, but it is also prompted to act by member states. It is, however, not clear if the AU can be compelled to fulfil its responsibility to protect by the citizens in their individual capacity or through representations by civil society. Having observed that the AU is not in support of its own member states' leadership being subjected to international court proceedings, it is doubtful whether such intervention can be undertaken in the case where an African leader is perpetrating violations of human rights, including the right to peace and security.

In an attempt to clarify the need to transform the 'right to intervene' into a 'responsibility to protect', Evans and Sahnoun state the following:<sup>84</sup>

If the international community is to respond to this challenge, the whole debate must be turned on its head. The issue must be reframed as an argument not about the 'right to intervene' but about the 'responsibility to protect.' And it has to be accepted that although this responsibility is owed by all sovereign states to their own citizens in the first instance, it must be

<sup>84</sup> Evans & Sahnoun (n 25 above).

picked up by the international community if that first-tier responsibility is abdicated, or if it cannot be exercised.

An important point, which Evans and Sahnoun raise, is that if we were to use this alternative language, then the change in terminology (from 'intervention' to 'protection') avoids the language of 'humanitarian intervention'.<sup>85</sup>

According to Evans and Sahnoun, the application of 'the responsibility to protect' rather than 'the right to intervene' has three big spin-offs, namely, that it implies an evaluation of the issues from the point of view of those needing support as opposed to those who may be considering intervention; that it implies that the state concerned bears the primary responsibility to protect its citizens from violations of human rights; and that as an umbrella concept (ie the 'responsibility to protect') it embraces other responsibilities of 'reacting', 'preventing' and 'rebuilding'.<sup>86</sup> What is of paramount importance is the fact that the responsibility to protect at the international level is triggered by a state's inability or unwillingness to fulfil its primary responsibility to protect or is itself the perpetrator.

Evans and Sahnoun argue that 'even the strongest supporters of state sovereignty will admit today that no state holds unlimited power to do what it wants to its own people'.<sup>87</sup> They argue that it is now commonly acknowledged that sovereignty represents a two-pronged responsibility, namely, external responsibility, wherein states are responsible for respecting the sovereignty of other states, and internal responsibility, wherein states are responsible for respecting the dignity and basic rights of all the peoples within its territory.<sup>88</sup>

The dual responsibility which sovereignty implies is now understood within the contemporary human rights discourse. The culture of impunity and indifference is an antithesis of sovereignty. It is the absence of this dual responsibility that has brought about untold suffering to African people with certain African states constantly turning a blind eye to gross human rights violations within their territories.

At face value, the right of the AU to intervene in a member state seems to be in conflict with the principle of non-interference under article 4(g) of the Constitutive Act and article 4(f) of the PSCAU Protocol, thus possibly frustrating the responsibility to protect at the AU level. Article 4(f) of the PSCAU Protocol provides for the principle of non-interference by any member state (and not the AU) in the internal affairs of another, and the Constitutive Act provides for the same principle of guiding the workings of the PSCAU. What is worth noting is that neither the Constitutive Act nor the PSCAU Protocol precludes the

<sup>85</sup> As above.

<sup>86</sup> As above.

<sup>87</sup> Evans & Sahnoun (n 25 above) 3.

<sup>88</sup> As above.

AU from exercising the right to intervene as a continental body responsible for peace and security in Africa. A reading of these instruments suggests that no AU member state may interfere in the internal affairs of another member state but may intervene through the AU which has a right to do so in terms of the Constitutive Act. It is unfortunate, however, that these instruments do not define the terms 'interfere' and 'intervene' which, while generally having the same meaning, they may in fact mean different things, conceptually speaking.

Over and above the responsibility to protect, the AU's right to intervene in a member state also operationalises the right of all peoples to peace and security under article 23(1) of the African Charter and the right of member states to live in peace and security under article 4(1) of the Constitutive Act. What remains a problem with this right is its content and ambit. As rightly pointed out by Packer and Rukare, the Constitutive Act is not clear on whether the definition of intervention is to be limited to the use of force or viewed broadly as including mediation, peacekeeping missions, sanctions and any other non-forcible measures.<sup>89</sup> Based on the fact that article 13(2) of the PSCAU Protocol envisages the establishment of an African Standby Force, Baimu and Sturman prefer to confine such intervention to one by means of military force.<sup>90</sup> In support of this assertion, Kindiki is of the view that, considering the fact that the intervention under article 4(h) of the Constitutive Act will entail responding to 'grave circumstances', which include war crimes, genocide and crimes against humanity, the presumption is that the intervention will be by the use of armed force because only proportional use of armed force is likely to address these 'grave circumstances'.<sup>91</sup>

Packer and Rukare,<sup>92</sup> however, do concede that this right to intervene may also involve non-forcible measures such as mediation, peacekeeping missions, sanctions or any other measures. This viewpoint is informed by the AU's principles of peaceful resolution of conflicts between member states,<sup>93</sup> the prohibition of the use or threat of force among member states,<sup>94</sup> peaceful coexistence of member states and the right to live in peace and security,<sup>95</sup> and respect for the sanctity of human life and condemnation and rejection of impunity, political assassination, acts of terrorism, and subversive activities.<sup>96</sup> I therefore support the view that the right of the AU to 'intervene' in a member state encompasses both forcible and non-forcible measures, depending

<sup>89</sup> Packer & Rukare (n 66 above) 372.

<sup>90</sup> Baimu & Sturman (n 59 above).

<sup>91</sup> Kindiki (n 67 above) 107.

<sup>92</sup> Packer & Rukare (n 66 above) 372.

<sup>93</sup> Art 4(e) Constitutive Act.

<sup>94</sup> Art 4(f) Constitutive Act.

<sup>95</sup> Art 4(i) Constitutive Act.

<sup>96</sup> Art 4(o) Constitutive Act.

on the nature of the threat to peace and security. The question is about what is deemed to be 'the best cause of action' in the circumstances as recommended by the Chairperson of the AU under article 12(5) of the PSCAU Protocol. The circumstances prevailing in the member state would therefore inform the nature of the intervention strategy, whether forcible or otherwise. The main objective of such intervention, in whatever way it is shaped, is to ensure that the responsibility to protect is achieved in order to afford protection, especially to the most vulnerable groups who suffer in the hands of the AU's member states.

Another point, which is closely linked to the risk of inaction by the AU, is that a difference of opinion between the Assembly and the PSCAU is bound to occur, especially when a decision arises on whether or not the AU should intervene in a particular member state. However, the Assembly will have the final word on the matter. Assume the PSCAU determines a situation to be representing a 'threat to legitimate order' and duly reports to the Assembly with the backing of the institutions closely working with it, such as the African Commission. If the Assembly assesses such a situation differently, tension would be inevitable between these organs, resulting in the peace and security framework being jeopardised, and the responsibility to protect being compromised.

### 3.4 Unconstitutional changes of government

Unconstitutional changes of governments remain a threat to Africa's peace and security. Unconstitutional governments also breed violations of human rights. During its 164th and 165th meetings, the PSCAU condemned the *coup d'état* in the Republic of Guinea which took place on 24 December 2008.<sup>97</sup> The PSCAU stated in no uncertain terms that the *coup* was a flagrant violation of the Constitution of Guinea and other relevant AU instruments, as well as its demand to constitutional order. As a result of the *coup*, the PSCAU decided to suspend the participation of Guinea in the activities of the AU until the return to constitutional order in accordance with the relevant provisions of the AU Constitutive Act and the Lomé Declaration of July 2000 on unconstitutional changes of government.<sup>98</sup>

Despite receiving the negative reports of SADC, the AU and the Pan-African Parliament observers on the Zimbabwean President run-off elections held on 27 June 2008,<sup>99</sup> the AU recognised Mr Robert Mugabe as the President of Zimbabwe in contravention of the principle under article 4(p) of the Constitutive Act on the condemnation and

<sup>97</sup> See Communiqué, Peace and Security Council 165th meeting, 29 December 2008, Addis Ababa, Ethiopia, PSC/PR/Comm(CLV).

<sup>98</sup> As above.

<sup>99</sup> See, eg, the *Report of the Pan-African Parliament Election Observer Mission* PAP/S/RPT/76/08 <http://www.pan-africanparliament.org/Controls/Documents.aspx?DID=1029> (accessed 12 April 2010).

rejection of unconstitutional changes of governments. The AU, instead, supported the call for the creation of a government of national unity, by implication legitimising Mr Mugabe's illegal presidency.<sup>100</sup> The AU further issued a stern warning while appealing to states and parties concerned to refrain from any action that may negatively impact on the climate of dialogue. As regards states' 'interference' in Zimbabwean affairs, the AU's message was loud and clear: No AU member states had the right to interfere in the internal affairs of another member state. This approach is, with respect, counter-productive in effecting the responsibility to protect by the AU.

Article 4(p) of the Constitutive Act clearly condemns and rejects unconstitutional changes of governments. A punitive measure found in the Constitutive Act against unconstitutional governments is that they shall not be allowed to participate in the activities of the AU.<sup>101</sup> In terms of article 5(2)(g) of the PSCAU Protocol, one criterion used in electing members of the PSCAU is a respect for constitutional governance in accordance with the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration). Among other things, the PSCAU is empowered, under article 7(g) of the PSCAU Protocol, to institute sanctions whenever an unconstitutional change of government takes place in a member state, as provided for in the Lomé Declaration. The problem with sanctions (no matter what form they take) is that they tend to impact negatively upon civilian populations. Article 7(g) of the PSCAU Protocol empowers the PSCAU to institute sanctions and Rule 36(c) of the Rules of Procedure of the Executive Council of the AU empowers the Executive Council to apply sanctions imposed by the AU Assembly in respect of unconstitutional changes of government, as specified in Rules 35, 36 and 37 of the Rules of Procedure of the AU Assembly.

Unconstitutional changes of government remain a challenging issue facing the AU. Following the unconstitutional change of government that occurred in Madagascar on 17 March 2009, the PSCAU held several meetings,<sup>102</sup> wherein it strongly condemned the situation and decided to suspend the country from participating in the activities of the AU, in conformity with the Lomé Declaration of July 2000 and the AU Constitutive Act.<sup>103</sup> During its 216th meeting held on 19 February

<sup>100</sup> See Resolution on Zimbabwe (Assembly/AU/Res 1 (XI)).

<sup>101</sup> Art 30 Constitutive Act.

<sup>102</sup> The meetings took place as follows: 16 March 2009 (179th meeting); 17 March 2009 (180th meeting); 20 March 2009 (181st meeting); 21 August 2009 (200th meeting); 10 September 2009 (202nd meeting); 9 November 2009 (208th meeting); and 7 December 2009 (211th meeting).

<sup>103</sup> See the Report of the Chairperson of the Commission on the Situation in Madagascar, Peace and Security 216th Meeting of the Peace and Security Council, 19 February 2010, Addis Ababa, Ethiopia, PSC/PR/2(CCXVI).



2010, the PSCAU issued a Communiqué<sup>104</sup> condemning the seizure of power by force that took place in Niger on 18 February 2010. Among other things, the PSCAU decided to suspend the participation of Niger in all activities of the AU until the effective restoration of constitutional order in the country, as it existed before the referendum of 4 August 2009.

The question posed here is whether the AU has a right to intervene in the circumstances under article 4(h) of the Constitutive Act read together with article 4(j) of the PSCAU Protocol. The underlying principle behind the AU's right to intervene is to restore peace and security. Although the meaning of what is to constitute a 'serious threat to legitimate order', the term that is likely to feature in article 4(h) of the Constitutive Act remains a problem. As discussed above, it would generally seem that unconstitutional changes of governments are classical cases of serious threats to legitimate order. It must be noted, however, that not all unconstitutional changes of government present serious threats to legitimate order. Assuming a democratically-elected government becomes autocratic during its tenure and one way of remedying the situation is to stage a *coup d'état*, the question is whether the AU would be justified in intervening. The answer to this question would be that if such an unconstitutional change of government threatens peace and security, then the AU would be justified in intervening in the member state concerned.

While the Constitutive Act is concerned with unconstitutional changes of government, it is silent on the unconstitutional continuation of governments. The latter has unfortunately become a disturbing trend where African leaders have generally remained in power though elections that are deemed not free and fair.

## 4 Conclusion

The article has discussed the AU as a contributor to peace and security through exercising its responsibility to protect human rights on the African continent. The question is whether 'the sad story of our human factory' on the continent can be reversed through the various structural arrangements within the AU. While the principle of the responsibility to protect remains controversial, the AU has taken the lead by embedding it within article 4(h) of the Constitutive Act. This is very significant in addressing peace and security on the African continent, a continent that has been described as 'the most threatened of all the other continents'.<sup>105</sup>

<sup>104</sup> Communiqué of the 216th Meeting of the Peace and Security Council, 19 February 2010, Addis Ababa, Ethiopia, PSC/PR/COMM.2(CCXVI).

<sup>105</sup> AP Mutharika 'The role of the United Nations Security Council in African peace management: Some proposals' (1996) 17 *Michigan Journal of International Law* 561.

The new faces of international security in the twenty-first century require a greater emphasis on the notion of the responsibility to protect, especially in Africa. The already discussed three-dimensional definition of the responsibility to protect introduces a powerful tool for the AU in addressing the continent's challenges. The responsibility to protect builds a solid bridge between human rights, on the one hand, and international security on the other. This highlighted that the responsibility to protect also comprises the responsibility to prevent, the responsibility to rebuild and the responsibility to react. Whether this is practically feasible in Africa remains an open question. It would seem that in practice the AU has not as yet achieved enough considering the serious human rights violations and insecurity that generally engulf the continent. Conflicts and unconstitutional changes in government require that the responsibility to protect be enforced by the AU. The fact that article 4(h) of the Constitutive Act has already been applied in a number of African states points to the fact that the AU is at least embracing the responsibility to protect. Of course a more robust debate on the responsibility to protect *vis-à-vis* the principle of intervention is still required in Africa.

Summarising the African story, Jones sees the continent as having many challenges and much hope.<sup>106</sup> While the AU offers some hope in addressing some of Africa's many challenges, it is also faced with structural challenges, which include member states that are not prepared to ensure that human rights are respected, protected, promoted and fulfilled. This is a major challenge that not only frustrates sustainable development, but also undermines human security in Africa. Article 4(h) of the Constitutive Act offers some hope which AU member states should take advantage of.

That Africa generally remains a continent of perpetual suffering resulting from African states' inability to promote, protect and respect human rights is not in dispute. It was almost a decade ago that, in his most defining moment as the former British Prime Minister, Mr Tony Blair, declared that '[t]he state of Africa is a scar on the conscience of the world'.<sup>107</sup> Unfortunately, this remains a reality even today, especially in so far as implementing the responsibility to protect. Is there any hope that the scar on the conscience of Africa itself can begin to heal? The AU has what it takes to ensure that the principle of intervention is effectively implemented in grave circumstances, such as war crimes, genocide and crimes against humanity.

<sup>106</sup> See T Jones 'Africa: Many challenges, much hope' (1995) 89 *American Society of International Law Proceedings* 484.

<sup>107</sup> The speech was given to the Labour Party conference in October 2001.

## Who does the law seek to protect and from what? The application of international law on child labour in an African context

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### Summary

*Since time immemorial, African indigenous societies have viewed childhood in terms of intergenerational obligations of support and reciprocity, and deemed the period of childhood as that for acquiring the social and technical skills necessary to perform the future roles of adulthood. Children represent lineage continuity and, most importantly, the material survival of their families and the communities at large. International human rights instruments embody a contemporary approach to childhood which views it as a distinct and separate stage of innocence, physical weakness, mental immaturity and general vulnerability — a period ideologically excluded from the production of value. With these differences in the approaches to child development, the potential for discordance between African customary laws and practices on the one hand and the objectives of the international children's rights instruments, on the other hand, is real. Can a world of such social and cultural diversity possibly attain universal interpretation, application and acceptance of the international norms of children's rights? The article highlights the challenges involved in applying the international prohibition on child labour to traditional societies of Southern Africa and offers a few compromises for a relevant regime for the region.*

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## Introduction

'The term "child labour" is an emotive one.'<sup>1</sup> For some people it conjures up images of dirty, malnourished children shackled in chains, while for others, particularly those of the developing world, the term simply means the work done by children with no negative connotation attached to it. It is, however, the media images of suffering children that have prompted a global explosion of interest in the activities of children and fuelled the crusade against child labour.

Human rights activists and health and educational professionals describe child labour as abusive. They say it involves working for long hours under 'dangerous' and 'unhealthy' conditions, with a lack of physical and social security, and minimal remuneration. Labouring children are deprived of the freedom to play or rest, not to mention the time to devote to their education.<sup>2</sup> All these factors cause 'irreversible physical and psychological damage' to a child or even death.

Between 1919 and the early 1970s, the International Labour Organization (ILO) enacted numerous conventions regulating the minimum age of employment of children in various sectors.<sup>3</sup> In 1973, the international crusade against child labour reached an important milestone with the adoption of the Convention Concerning Minimum Age for Admission to Employment (Minimum Age Convention).<sup>4</sup> By applying its provisions to all areas of economic activity, the Convention expanded prior sectoral coverage to include 'all employment or work'. With this Convention, the ILO committed itself, for the first time, to achieving the total abolition of child labour, and thus urged member states to institute national policies in order, ultimately, to bring an end to children's involvement in employment. The ILO obliged states to

<sup>1</sup> J McKechnie & S Hobbs 'Child labour: A global phenomenon?' (1999) 8 *Child Abuse Review* 87.

<sup>2</sup> Human Rights watch 'Child labor' <http://hrw.org/children/labor.htm> (accessed 14 June 2007).

<sup>3</sup> Eg, the Convention Fixing the Minimum Age for Admission of Children to Industrial Employment (C 005) of 1919; the Convention Concerning the Night Work of Young Persons Employed in Industry (C 006) of 1919; the Convention Fixing the Minimum Age for Admission of Children to Employment at Sea (C 007) of 1920; the Convention Concerning the Age for Admission of Children to Employment in Agriculture (C 010) of 1921; the Convention Fixing the Minimum Age for the Admission of Young Persons to Employment as Trimmers or Stokers (C 015) of 1921; the Convention concerning the Age for Admission of Children to Non-Industrial Employment (C 033) of 1932; the Convention Concerning the Restriction of Night Work of Children and Young Persons in Non-Industrial Occupations (C 079) of 1946; the Convention Concerning the Minimum Age for Admission to Employment as Fishermen (C 112) of 1959; the Convention Concerning the Minimum Age for Admission to Employment Underground in Mines (C 123) of 1965.

<sup>4</sup> C 138 adopted on 26 June 1973 and entered into force on 19 June 1976. K Hanson & A Vandaele 'Working children and international labour law' (2003) 11 *International Journal of Children's Rights* 99.

progressively raise the minimum age for admission to work, 'consistent with the fullest physical and mental development of young persons'.<sup>5</sup>

The minimum age standards expressed an ideal of childhood as a 'privileged phase of life, properly dedicated only to play and schooling, and with an extended period of dependence during which economic activity is discouraged or actually denied'.<sup>6</sup> It would seem that the Minimum Age Convention was motivated by an assumption that, if the minimum age were raised, the physical and mental development of children would be enhanced since they would not be allowed to work until mid-adolescence. It set the minimum age at 15.<sup>7</sup> Countries with relatively undeveloped economies and educational facilities were allowed temporarily to adopt a lower standard of 14, as long as employers' and workers' organisations were in agreement.<sup>8</sup>

The Convention also applied different minimum ages to light and hazardous work. It set the minimum age for light work at 13,<sup>9</sup> but that could be lowered to 12 in developing countries on condition that it did not impede schooling.<sup>10</sup> For dangerous work, the Convention set a limit of 18, and allowed children aged 16 to undertake such work only if their safety and morals were fully protected and they received sufficient specific instruction or professional training.<sup>11</sup>

Standards set in this Convention, like those preceding it, were linked to schooling. The treaty expressed this tradition by stipulating that 'the minimum age shall not be less than the age of completion of compulsory schooling'.<sup>12</sup> Where the maximum age of compulsory schooling was above 15 years, the minimum age of employment was accordingly raised.<sup>13</sup>

From the early 1980s, international concerns about children's rights produced more instruments on children's issues which brought a new understanding of the phenomenon of child labour. In November 1989, the United Nations (UN) General Assembly adopted the Convention on the Rights of the Child (CRC), an instrument providing a wide range of entitlements for children.<sup>14</sup> By September 1990, the Convention had

<sup>5</sup> Art 1; J Boyden *et al* *What works for working children* (1998) 188.

<sup>6</sup> Boyden *et al* (n 5 above) 195.

<sup>7</sup> Art 2(3). The Convention was supplemented by Recommendation 146 which advocated the raising of the minimum age to 16 years. In general, the recommendation provides the broad framework and essential policy measures for both the prevention of child labour and its elimination. It, however, recommends that the 'minimum age' should be fixed at the same level for all sectors of economic activity.

<sup>8</sup> Art 2(4). Boyden *et al* (n 5 above) 195 188.

<sup>9</sup> Art 7(1).

<sup>10</sup> Art 7(4).

<sup>11</sup> Arts 3(1) & (3).

<sup>12</sup> Art 3. Hanson & Vandaele (n 4 above) 99.

<sup>13</sup> Art 2(3).

<sup>14</sup> GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989), entered into force 2 September 1990.

entered into force and, by the turn of the century, a record 191 states had ratified it.<sup>15</sup> With regard to child labour, the Convention specifically provided as follows:<sup>16</sup>

State parties [are to] recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

With this provision, CRC laid the foundation for a renewed understanding of the concept of child labour (although it did not define the term). Child labour could now be determined not according to the activity (as previous ILO Conventions provided), but according to the effect of the activity on the children concerned. Using the effects of the activity on the child as a point of departure altered numerous aspects of dealing with child labour. Firstly, any labour activity, regardless of whether it takes place at a work place or in the child's home, could be deemed unacceptable if it was detrimental to the development of the child. This meant that the millions of children (mainly girls) taken out of school to do housework were now classified as children engaging in child labour. Although CRC was not the first UN Convention to provide for child labour, it enlarged the scope of the prohibition of economic exploitation.<sup>17</sup>

In June 1999, the ILO adopted the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention).<sup>18</sup> By November 2000, the Convention had entered into force. To date, 171 of the 183 member states of the ILO have ratified it.<sup>19</sup>

The Worst Forms of Child Labour Convention reflects a global consensus that there should be an immediate end to offensive forms of child labour. It seeks to complement existing international instruments such as the Minimum Age Convention (which is aimed at the overall abolition of child labour).<sup>20</sup>

The Convention came up with two categories of unacceptable labour: the worst forms and work hazardous to the physical, emotional and moral wellbeing of the child. The worst forms include slavery, debt bondage, prostitution, pornography, forced recruitment of children for use in armed conflict, use of children in drug trafficking and other illicit

<sup>15</sup> United Nations treaty collection <http://www.treaties.un.org> (accessed 26 March 2010).

<sup>16</sup> Art 32(1).

<sup>17</sup> Art 10(3) of the International Covenant on Economic, Social and Cultural Rights prohibited the exploitation of children.

<sup>18</sup> ILO Convention 182.

<sup>19</sup> List of ratifications for ILO Convention 182 <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C182> (accessed 26 March 2010).

<sup>20</sup> It also stipulates the minimum age for admission to employment which must not be less than the age of completion of compulsory schooling.

activities, and all other work harmful or hazardous to the health, safety or morals of children.<sup>21</sup> Article 4(1) leaves it to state members to define hazardous forms of child labour in their national legislation. Such types of work are usually conducted in legitimate sectors of economic activity and are thus called 'worst forms by condition'. These forms may be improved if, for example, they are currently affecting the health and safety of the children who engage in them. A good example are adolescents above the minimum working age engaged in conditions of work which are inherently hazardous or too arduous for them. If a young person works in a factory using machinery without safety guards, then fitting a protection device to the machine may make it non-hazardous, and then this activity would cease to fall under the category of worst forms as defined by the Worst Forms of Child Labour Convention.

Meanwhile, Africa became the first continent to adopt a children's rights treaty specially adapted to the conditions of the region. In July 1990, the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) adopted the African Charter on the Rights and Welfare of the Child (African Children's Charter). It would take another nine years before the instrument entered into force.<sup>22</sup>

Scholars contend that the instrument was born out of the feeling by African member-states that CRC missed important socio-cultural and economic realities of the African experience. The African Children's Charter thus prides itself on its 'African' perspective of human rights, and takes into consideration the virtues of the African cultural heritage, and the values of African civilisation which are expected to inspire and characterise the African concept of the rights and welfare of the child.<sup>23</sup>

Nevertheless, it was inspired by the trends evident in the UN system. In line with CRC, the African Children's Charter provides that<sup>24</sup>

[e]very child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral or social development.

<sup>21</sup> Arts 3(a)-(c). This article will not dwell on the worst forms of child labour.

<sup>22</sup> To date, 45 countries out of the 53 members of the AU have ratified the Charter. <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (accessed 26 March 2010); A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) 10 *International Journal of Children's Rights* 179, DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157.

<sup>23</sup> Lloyd (n 22 above) 180-183.

<sup>24</sup> Art 15(2)(d) also encourages the dissemination of information on the dangers of child labour to all sectors of the community, having regard to the relevant ILO instruments relating to children.



It also provides for protection against sexual exploitation,<sup>25</sup> and the prevention of the sale, trafficking and abduction of children.<sup>26</sup> The African Children's Charter recognises the right of children to play and leisure<sup>27</sup> and, like CRC, it provides that, in all matters concerning the welfare of the child, the 'best interests of the child' are to be given paramount consideration.<sup>28</sup>

Notwithstanding this section on best interests, the African Children's Charter takes it cue from its predecessor, the African Charter on Human and Peoples' Rights (African Charter),<sup>29</sup> to impose certain 'responsibilities' on children towards their family, society, the state and other legally-recognised communities and the international community. Article 31 provides that

[t]he child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:

- (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
- (b) to serve his national community by placing his physical and intellectual abilities at its service;
- (c) to preserve and strengthen social and national solidarity;
- (d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
- (e) to preserve and strengthen the independence and the integrity of his country;
- (f) to contribute to the best of his abilities at all times and at all levels, to the promotion and achievement of African unity.

Children's rights activists declare that this provision of duties reinforces a conservative approach to human rights. They say that it represents the most elaborate limitation on children's rights, particularly those concerned with labour, and they fear that the emphasis on the duty of the individual, rather than that of the state, undermines the force of children's rights. Activists, therefore, argue that the preservation of African cultural norms may actually encourage child labour.<sup>30</sup> As such, the Charter's provision of duties is often viewed as 'little more than the formulation, entrenchment and legitimisation of adult and state rights and privileges against children'.<sup>31</sup>

<sup>25</sup> Art 27 African Children's Charter.

<sup>26</sup> Art 29 African Children's Charter.

<sup>27</sup> Art 12 African Children's Charter.

<sup>28</sup> Art 4(1) African Children's Charter.

<sup>29</sup> OAU Doc CAB/LEG/67/3 Rev 5, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2006) 23, adopted on 27 June 1981 and entered into force on 21 October 1986.

<sup>30</sup> M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 229.

<sup>31</sup> M Mutua 'The African human rights system: A critical evaluation' [http://hdr.undp.org/docs/publications/background\\_papers/MUTUA.PDF](http://hdr.undp.org/docs/publications/background_papers/MUTUA.PDF) (accessed 4 March 2004).

The excitement over this provision in the African Charter is, however, astounding, considering that article 29(1) of the Universal Declaration of Human Rights (Universal Declaration) provides that '[e]veryone has duties to the community in which alone the free and full development of his personality is possible'. The Preambles of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) also make reference to the individual's 'duties to other individuals and to the community to which he belongs'.<sup>32</sup> One would contend that the African Children's Charter only goes further in providing a 'more specific and detailed range of duties of the individual'. Moreover, those objecting to the provision on the duties of the child in the African Children's Charter seem not to have noticed that inherent in article 31 are two limitations: that the duties of the children are subject to their age and ability (thus paying credence to the evolving capacities of the child); and that these responsibilities of children are subject to 'such limitations as may be contained in the present Charter' (in this case those which guard against the various forms of abuse of the child).<sup>33</sup>

It is, however, the international community's apparently overwhelming support for CRC and the Worst Forms of Child Labour Convention that implies a high degree of international agreement on children's rights. This backing is based on an assumption that the institutionalisation of children's rights and the abolition of child labour at a global level will result in the improvement of the lives of all children. While states have displayed an obvious consensus of concern for children, there is nevertheless disagreement on the conception of childhood, the period of growth that should be protected, and the laws and policies needed to bring about an improvement in child welfare, particularly those designed to tackle child labour.

The following discussion seeks to explore the extent and complexities of the challenges involved in identifying an effective and comprehensive set of legal measures for dealing with child labour in African cultural settings. It must be borne in mind from the outset that this article focuses on the general forms of child labour which most children are engaged in, rather than the worst forms (covered by the ILO Worst Forms of Child Labour Convention on the Rights of the Child), the dangers of which are universally acknowledged and condemned.

Without intending to polarise the debate, the article generalises the ideologies underlying international instruments and those of African societies (found in rural areas, where the majority of the continent's population resides) and concedes from the onset that in as much as

<sup>32</sup> These provisions, however, seem to be at odds with the human rights regime's general emphasis on individuality. J Sloth-Nielsen & BD Mezmur 'A dutiful child: The implications of article 31 of the African Children's Charter' (2008) 52 *Journal of African Law* 159 160.

<sup>33</sup> Sloth-Nielsen & Mezmur (n 32 above) 170.

there are differences, there are also shared commonalities between them. As a matter of fact, both share the concern for the child, impose restraints on the abuse of children and assure human dignity in all material respects. Today, they place great value on the health, education and general welfare of the child even if in different ways. There are also some sections of Western society where children work.<sup>34</sup>

While this article essentially calls for the formulation, interpretation and implementation of all internationally-recognised human rights in their proper cultural context, it takes note of the limits of culture, and warns of the dangers of essentialising culture and acknowledges the changes that have been brought to African societies by urbanisation, globalisation and multi-culturalism.

## 2 Cultural influences

Culture is a major influence on a child's upbringing. It determines the context in which children work, the prevailing opinions about the value of that work and the attitudes to the raising of children.<sup>35</sup> In societies of the developed world, family life is based on a nuclear unit, often in isolation from other kin.<sup>36</sup> They value an underlying 'individualistic' culture in the developmental goals of childhood which promote the individual's acquisition of competence and independence.<sup>37</sup>

CRC and the ILO Conventions embody such contemporary ideals. These instruments emphasise individuality and professional interventions, and they de-emphasise the influence of wider social, economic and cultural circumstances.<sup>38</sup> These instruments also assume a model of childhood based on the notion that children everywhere have the same basic needs, and that these can be met with a standard set of responses.<sup>39</sup> International jurisprudence has added an interesting yet significant dimension to this conception of childhood: the agency of the child which stipulates a child's right to be heard and taken seriously, to be an active participant in issues that concerns it and recognition of

<sup>34</sup> In several parts of Europe and the United States, children work for pay, particularly in seasonal activities, street trades, small workshops and at home. B Creighton 'Combating child labour: The role of international labour standards' (1996-1997) 18 *Comparative Labour Law Journal* 362 364.

<sup>35</sup> Boyden *et al* (n 5 above) 140.

<sup>36</sup> Due to the labour migration and Western influences, African families who have moved to urban areas have adopted this kind of social structure, although they still maintain some links (even if limited) with their extended family remaining in the rural areas.

<sup>37</sup> S Wise & A Sanson 'Child care in cultural context: issues for new research' (2000) 22 *Australian Institute of Family Studies* 3.

<sup>38</sup> As above.

<sup>39</sup> V Pupavac 'The infantilisation of the south and the UN Convention on the Rights of the Child' (1998) 3 *Human Rights Law Review* 3.

a child's evolving capacities. CRC's provisions on respect for the views of the child, the child's right to freedom of expression, freedom of thought, conscience and religion, and freedom of association<sup>40</sup> underline children's status as individuals with fundamental human rights and views and feelings of their own.<sup>41</sup>

The social organisation of ethnic groups in Lesotho, Zimbabwe and South Africa from pre-colonial times to the present, however, tells of different social systems and ideas of child development. The African philosophy of existence can be summed up in Shona as *ndiri nokuti tiri, uye nekuti tiri, neniwo ndir*, meaning 'I am because we are and because we are, therefore I am'. African societies are thus characterised by collectivist or inter-dependent cultural scripts which stress the importance of kinship.<sup>42</sup>

At the heart of the African socio-political order lies the family, a unit which extends both vertically and horizontally.<sup>43</sup> Family members are linked in strong reciprocal aid relationships which entail complex rights and responsibilities. African societies value collective goals highly, such as learning to live in harmony with one another, competent participation in social events, obedience to authority, and a co-operative and altruistic orientation.<sup>44</sup>

The indigenous cultures of these countries, therefore, do not view the individual as an autonomous being possessed of rights above and prior to society. Whatever the specific social relations, such societies conceive of the individual as an integral part of a greater whole: the family within which each has a defined role and status.<sup>45</sup> Such a system tends to stress duties rather than rights.<sup>46</sup> Society would deem invoking one's rights as anti-social behaviour. Indeed, each person is expected to compromise personal interests for the good of the community. From infancy, this sense of sacrifice is instilled in everyone.<sup>47</sup>

These ideas of development define childhood and express beliefs about children's nature, what they are capable of doing and how they

<sup>40</sup> Arts 12, 13, 14 & 15.

<sup>41</sup> This illustrates the complexity of the child labour discourse whereby one has to balance protecting the child from abuse and exploitation while promoting and respecting the child's right to self-determination. R Hodgkin & P Newel *Implementation handbook for the Convention on the Rights of the Child* (2001) 149.

<sup>42</sup> JAM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 309-320.

<sup>43</sup> TW Bennett *Human rights and African customary law under the South African Constitution* (1995) 5.

<sup>44</sup> Wise & Sanson (n 37 above) 3; W Ncube *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 203.

<sup>45</sup> RT Nhlalo 'International protection of human rights and the family: African variations on a common theme' (1989) 3 *International Journal of Law and the Family* 14.

<sup>46</sup> AA An-Na'im & FM Deng (eds) *Human rights in Africa: Cross-cultural perspectives* (1990) 16.

<sup>47</sup> As above.

should be integrated into society.<sup>48</sup> African societies deem childhood as a time for learning, character building and acquiring the social and technical skills necessary to perform the future roles of adulthood. Children represent lineage continuity and, most importantly, the material survival of families and the community at large.

Colonial influences did little to alter traditional thinking. Even after the independence of African countries, the notion of the primacy of the group and the submission of the individual persisted.<sup>49</sup> Today, African children are still considered to have a responsibility to work for the cohesion and sustenance of their families, to put their physical and intellectual abilities at the service of their communities and to preserve cultural values in their relations with others.<sup>50</sup>

In this regard, an African girl child has the duty to clean the house, cook, fetch firewood, wash clothes and take care of younger siblings. All these burdens are meant to prepare her for motherhood. The boy child has the duty to work in the fields, to harvest and to herd livestock. These jobs are meant to groom the children to play appropriate roles when they become adults. In addition, however, both boys and girls work to contribute to the sustenance of the family. Although, today, some traditional ideals may have been lost or modified, particularly in urban areas, the duty to contribute to the survival of the family and community remains.<sup>51</sup>

At first glance one could say that CRC accepts this diversity of cultures, since it places a considerable emphasis on non-discrimination and the importance of children's cultural rights.<sup>52</sup> It also calls for respect for the responsibilities, rights and duties of parents or the members of

<sup>48</sup> Boyden *et al* (n 5 above) 32.

<sup>49</sup> This led to African support for collective rights and for restrictions on individual rights in the interest of the community, as well as for an emphasis on responsibilities. A Pollis & P Schwab *Human rights: Cultural and ideological perspectives* (1979) 8-9.

<sup>50</sup> Art 31 African Children's Charter.

<sup>51</sup> It may be noted at this point that practical experience also demonstrates the existence of an international divide between rich and poor societies, according to which the industrialised countries of Europe and North America (and often Western-educated elites in poorer countries) tend to conceive of childhood and raise their children differently than the less economically developed societies of Africa, Asia and elsewhere. Those in developing countries often reject Western-influenced international child labour standards because the views of children and childhood implicit in such standards do not adequately fit in with the realities of developing countries. WE Myers 'Considering child labour: Changing terms, issues and actors at the international level' (1999) 6 *Childhood* 13; see also T Nhenga 'International prohibition on child labour in an African perspective: Lesotho, Zimbabwe and South Africa' unpublished PhD thesis, University of Cape Town, 2008 156-180.

<sup>52</sup> Art 31: '(1) States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. (2) States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.'

the extended family or community, as provided for by local custom, to provide appropriate direction and guidance in a child's exercise of rights.<sup>53</sup>

On closer scrutiny, however, when describing the need for state members to 'take all effective measures with a view to abolishing traditional practices prejudicial to the health of the child', CRC acknowledges the potentially harmful effects of culture.<sup>54</sup> The instrument is thus ambivalent on the role of culture in the lives of children. It sends mixed signals, thus obscuring these cultural practices to be condemned or condoned.<sup>55</sup>

The differences between the ideologies that informed human rights treaties and those of African cultures raise serious concerns. Can international human rights instruments, given the preconceptions of their drafters, apply effectively to peoples from different cultures? Can the latter peoples identify with the notions of child labour contained in the international instruments? If some cultures do not possess the conception of children's rights as enshrined in international instruments, should their customs and norms on child development be dismissed as bad?<sup>56</sup>

The best way to answer these questions is to consider child labour within the context of both cultural perspectives. This involves a critical analysis of the following issues: the period of life protected by law, child development and the conceptualisation of child labour.

## 2.1 Childhood

To determine who the law seeks to protect, one first has to deal with the question of childhood. At what age does childhood begin: at conception, birth or infancy? What are its characteristics? Is its end marked by physical signs, individual accomplishments, rites of passage or the attainment of an arbitrarily fixed age?<sup>57</sup> Is it a universal condition, or is the concept understood differently in different cultures and contexts? If it is not universally understood, can there be universal child labour standards?<sup>58</sup>

Most people distinguish a child from an adult by referring to physical differences and a power relationship. This distinction, however, is

<sup>53</sup> Art 5.

<sup>54</sup> Art 24(3).

<sup>55</sup> E Verhellen (ed) *Understanding children's rights* (1996) 58.

<sup>56</sup> Cobbah (n 42 above) 309.

<sup>57</sup> The concept of child has sometimes been used to give information about certain relationships. Eg, regardless of how old we become, we will always be our parents' children. Those who are born last will always be the 'baby' of the family, regardless of age, accomplishments or physical attributes. J Gabarino *Children and families in the social environment* (1992) 99.

<sup>58</sup> KA Bentley 'Can there be any universal children's rights?' (2005) 9 *International Journal of Human Rights* 107.

complicated by a diversity of possible relationships within each cultural group.<sup>59</sup> Societies have always had a 'concept' of childhood, but various 'conceptions' of this phenomenon vary in three basic ways, namely, the boundaries, dimensions and divisions. The boundary of childhood is the point at which it is considered to begin and end. A society nearly always has a formal division of roles and responsibilities that amounts to the setting of a boundary between childhood and adulthood. Examples are rites of passage or initiation ceremonies which celebrate the end of childhood.<sup>60</sup>

The second way which conceptions of childhood may differ is in their dimensions. There are various vantage points from which to detect differences between children and adults. These include the moral or juridical angle from which persons may be deemed incapable, by virtue of age, of being held accountable for their actions; the physical viewpoint from which persons, by virtue of their immaturity, are seen as lacking in adult reason or knowledge; and a political angle from which young humans are thought unable to contribute towards and participate in the running of society.

Other dimensions in the childhood discourse also exist. Some societies deem childhood to end at puberty, when humans are able to procreate, or at a time when individuals are capable of independently sustaining themselves. A person who is, therefore, juridically a child, will not necessarily be so from the point of view of reproductive capacity or self-sufficiency.<sup>61</sup>

The third respect in which conceptions of childhood can differ is their divisions. The early life of a human being may be subdivided into a number of different periods and the category of childhood can bear different relations to these. Most cultures recognise a very early period of infancy, characterised as one of extreme vulnerability and dependence upon adult care. A great deal of significance is often attached to weaning, because this tends to occur during the next pregnancy of the mother, and thus marks a point at which the young infant is about to be replaced as the object of close maternal attention. The acquisition of speech may also be another key point of transition.<sup>62</sup>

The conception of childhood reflected in international child rights instruments derives from seventeenth and eighteenth century philosophers, notably John Locke and Jean-Jacques Rousseau. Locke perceived children as 'ignorant persons requiring literacy, education, reason, self-

<sup>59</sup> In African cultures, eg, the duration of child dependence and subordination is not fixed. The age roles for all individuals also vary; A Fletcher & S Hussey (eds) *Childhood in question: Children, parents and the state* (1999) 32.

<sup>60</sup> Hence, the various dimensions of childhood need not converge in defining one consistent and agreed-upon period of human life. D Archard *Children: Rights and childhood* (1993) 32-3.

<sup>61</sup> As above.

<sup>62</sup> As above.



control and shame before they could be transformed into a civilised adult'.<sup>63</sup> Locke said childhood was mainly something that had to be overcome, which offered opportunities, for a step-by-step conversion into maturity. Locke advocated the gradual hardening of children by subjecting them to cold baths, giving them leaky shoes, feeding them little meat and allowing them only adequate sleep.<sup>64</sup>

Rousseau, the French philosopher, proclaimed the necessity of the concept of childhood, but advocated a very different conception. To him, it was as a period of extreme weakness and vulnerability.<sup>65</sup> He believed in the 'spontaneity, purity, strength and joy of childhood', and saw these as capacities to be celebrated.<sup>66</sup> Rousseau regarded children as individuals in their own right, who deserved the freedom to express themselves. As far as he was concerned, strict supervision and structure were unnecessary for the successful development of a child.<sup>67</sup> Instead, he demanded that education recognises its identity and peculiar nature. Rousseau's romantic perception of the child was a major factor in paving the way for modern ideas of child development which are, reflected in international instruments on children's rights.<sup>68</sup>

Today, the significance of childhood is well pronounced in modern societies which perceive it as a period of extended economic dependence, protected innocence and weakness, and rapid learning which is achieved through universal schooling. During this period, the child is largely separated from economic and community life.<sup>69</sup> The term 'child' is based on the notion that young persons are vulnerable both in the physical and mental senses, and hence 'suffer' from immaturity, a weak intellect and the incapacity to make decisions that are in their interests.<sup>70</sup> Here children are depicted as helpless (or potential victims), dependent on adult protection.

This notion of childhood is historically and anthropologically unusual, not only for the radical division it draws between childhood and adulthood, but also for valuing children's helplessness rather than usefulness. It extends their dependency to an advanced age by deliberately delaying instruction in certain life skills, notably, the making of a living or the raising of a family. Such a view of childhood leaves

<sup>63</sup> He believed that children could not participate as full citizens as they did not have the requisite rationality to exercise their natural freedom and rights. S Lugtig 'A review of David Archard's *Children: Rights and childhood*' (1996) 41 *Mcgill Law Journal* 893.

<sup>64</sup> L Abernethie 'Child labour in contemporary society: Why do we care?' (1998) 6 *International Journal of Children's Rights* 81-87.

<sup>65</sup> 'Child psychology' University of Kansas [http://www.kuce.org/isc/previews/psyc/psyc333\\_lesson.html](http://www.kuce.org/isc/previews/psyc/psyc333_lesson.html) (accessed 16 October 2005).

<sup>66</sup> Abernethie (n 64 above) 87.

<sup>67</sup> Curator 'Centuries of childhood', Kent University Museum <http://dept.kent.edu/museum/exhibit/kids/kids.html> (accessed 16 October 2005).

<sup>68</sup> Abernethie (n 64 above) 87-88.

<sup>69</sup> Archard (n 60 above) 39.

<sup>70</sup> Boyden *et al* (n 5 above) 27; Archard (n 60 above) 37.

children largely free of responsibility.<sup>71</sup> In line with this conception, children must spend their time in school, with time for leisure and play. Although economically dependent, children are also considered capable of handling certain aspects of social and political autonomy, fostered by education and health systems that stress individual rights and responsibilities.

The modern conception of childhood has two key features. The first is a rigid hierarchy, which separates children from adults by special dress, games, language and behaviour. The second is the idea of childhood innocence, whereby a childhood must be both happy and separated from the corrupt world. This is expressed in the child-centred family which is determined materially, if in no other way, to make these the 'best years of life'.<sup>72</sup>

As a result of this paternalistic conception, adults monopolise the determination of what is in the best interests of the child under the supposition that childhood, by definition, makes children ill-suited to make rational, reasonable and wise decisions.<sup>73</sup> As a result of a supposed mental immaturity, children are denied legal capacity, and are placed under parental responsibility so that they may not execute juristic acts, administer their own affairs or enter into contracts without assistance.<sup>74</sup> It is from this conception of childhood that the view arises that children are to be protected against exhausting, unhealthy labour and that they have a right to care, education and, more generally, their own social environment.<sup>75</sup>

The ILO Conventions and CRC define a child as 'every human being below the age of 18 years'. CRC, however, goes on to provide that a child is a person under the age of 18 'unless under the law applicable to the child, majority is attained earlier'.<sup>76</sup> The African Children's Charter, on the other hand, simply states that a child is 'every human being below the age of 18 years'.<sup>77</sup> The ILO Worst Forms of Child Labour Convention also defines a child as one who is below the age of 18. The African Children's Charter and the ILO Convention therefore leave no allowance for variation.

<sup>71</sup> WE Myers 'Appreciating diverse approaches to child labour' presentation during the symposium 'Child Labour and the Globalising Economy: Lessons from Asia/Pacific Countries' 7-9 February 2001, Child Labour website <http://www.childlabor.org/symposium/myers.htm> (accessed 5 October 2006).

<sup>72</sup> A Fyfe *Child labour* (1989) 13.

<sup>73</sup> Ncube (n 44 above) 17.

<sup>74</sup> As above.

<sup>75</sup> It is clear that these prescriptions have been codified into international standards and domestic legislation. Eg, arts 19, 24, 28, 31, 32 & 36 of CRC; secs 28(e) & (f) of the Constitution of South Africa; sec 43 of the South African Basic Conditions of Employment Act 75 of 1997.

<sup>76</sup> Art 1 CRC.

<sup>77</sup> Art 2 African Children's Charter.

The arbitrary setting of the upper age limit for childhood at 18 by the African Children's Charter<sup>78</sup> and the Worst Forms of Child Labour Convention<sup>79</sup> is problematic when applied to African cultures where the determinants of adulthood are both biologically and socially constructed.<sup>80</sup> International agencies and industrialised countries use this yardstick of modernity as a tool to condemn those countries with a high incidence of child labour as 'backward' and 'undemocratic'.<sup>81</sup>

While international law marks the end of childhood at a certain age, in Africa the movement of individuals through childhood is not marked by arbitrary fixed ages, but by rites of passage that lack chronological specificity.<sup>82</sup> Thus, the African conception of childhood depends, to a very large extent, upon the social, economic and cultural dynamics of a given society. In pre-colonial Africa, '[childhood was] marked by factors that had more to do with the biology or physical development, ability, the purpose for which a definition of childhood or adulthood [was] sought and status, rather than with the number of years a person has lived'.<sup>83</sup>

African societies deemed childhood as a period of 'training', as evidenced by the persistent demands of adults on children to perform arduous tasks to 'toughen them', in preparation for their entry into the harsh world of adulthood.<sup>84</sup> It was also perceived in terms of intergenerational obligations of support and reciprocity.<sup>85</sup> A child in this sense was always a child, in relation to his or her parents, who expected, and were traditionally entitled to, all forms of support in times of need. For instance, a Shona child always had the duty to look after its parents if they were incapable of taking care of themselves.<sup>86</sup>

<sup>78</sup> Art 2 African Children's Charter.

<sup>79</sup> Art 2 Worst Forms of Child Labour Convention.

<sup>80</sup> Refer to the 'African conception' of child above.

<sup>81</sup> O Nieuwenhuys 'The paradox of child labour and anthropology' (1996) 25 *Annual Review of Anthropology* 237-246.

<sup>82</sup> Women and Law in Southern Africa 'Towards a cultural understanding of the interplay between children's rights and women's rights: An Eastern and Southern African perspective' Working Paper 11, February 1995 7.

<sup>83</sup> Age was treated as an approximate benchmark, not an exact record. Ncube (n 44 above) 100. The arbitrary fixing of the age of majority by a legal fiction is thus problematic in African countries where the conception of childhood differs radically from the Western notion embodied in international human rights instruments. Women and Law in Southern Africa (n 82 above) 7.

<sup>84</sup> Bhaca girls, eg, from an early age took an active part in the housework of the kraal and learned the essential feminine techniques of grinding, cooking and field-work. Young boys learned how to handle livestock, treat their diseases and assist them when giving birth. P Alston (ed) *The best interests of child: Reconciling culture and human rights* (1994) 90; WD Hammond-Tooke *Bhaca society: A people of the Transkeian Uplands South Africa* (1962) 77.

<sup>85</sup> Ncube (n 44 above) 12.

<sup>86</sup> This may be the same in some Western cultures, but it is not a practice socially expected. JF Holleman *Shona customary law with reference to kinship, marriage, the family and the estate* (1969) 62.

African childhood was also a period of internalised and rigorously-enforced obedience to authority. The Shona maintained strict discipline, and disobedience attracted corporal punishment.<sup>87</sup> This notion implied that the family not only managed the training and socialisation of children into adulthood, but that it also had the right to determine the tasks, traditions and customs which had to be complied with before 'childhood' in its narrower sense ended.

As in most societies, however, the African concept of 'child' is both biologically and socially constructed, depending largely on the purpose for which a definition of childhood is sought.<sup>88</sup> In the biological sense, a child is any person who is born to another.<sup>89</sup>

I am my father and mother's child ... regardless of my age and station in life. To my father and mother I am always their child and in some respects forever subject to their authority or advice or guidance for so long as they are alive.

In a social sense, a woman may remain a child all of her life. For instance, according to Sesotho culture, she may not be an autonomous individual without reference to her father, husband or other male extended family members.<sup>90</sup>

Some African societies tie the concept of a child to the physical ability to carry out specific tasks. These decisions are influenced by any of several factors, which may include economic status, level of education or location (rural or urban). Persons from families of meagre means and low educational status are deemed by their societies to reach adulthood earlier than those of economically affluent and educated ones.<sup>91</sup>

Most African societies mark the end of childhood when new economic responsibilities are acquired and entrance into the institution of marriage takes place.<sup>92</sup> Others use initiation. A Xhosa male child, for example, does not become an adult until he has gone through all the circumcision rituals, during which he has to spend several days in the bush fending for himself through hunting and gathering.<sup>93</sup> Any man who has not gone through this process will be derogatorily referred to as a 'child' and regarded for all intents and purposes as such.<sup>94</sup> Even after this, however, full adulthood is not attained until he has married

<sup>87</sup> As above.

<sup>88</sup> Ncube (n 44 above) 100.

<sup>89</sup> As above.

<sup>90</sup> As above.

<sup>91</sup> Ncube (n 44 above) 207.

<sup>92</sup> As above.

<sup>93</sup> Hammond-Tooke (n 84 above) 77.

<sup>94</sup> As above.

and established a family.<sup>95</sup> From this perspective, childhood is a state of being unmarried.<sup>96</sup>

The problem with the contemporary ideal of childhood is that it denies children's agency in work,<sup>97</sup> yet CRC itself and the African Children's Charter both recognise childhood not only as a period of protection, but also as one where the agency of the child is upheld.<sup>98</sup> Moreover, doubt may be thrown on the developmental and moral validity of a model of childhood, which excludes children from participation in matters that are social and economic. What is the value of isolating and institutionalising children in schools buffered from the important realities of life? The rationale of CRC, however, is that, irrespective of the level of development of a country, children must have a childhood of dependency during which they are empowered with rights, and social policy must be re-orientated to ensure that their best interests are the primary concern.<sup>99</sup>

One may argue that the 'protective view' of childhood evident in international instruments has resulted from a combination of circumstances in the first world that are not part of the experience of most developing countries. The construction of childhood reflected particularly in the ILO Conventions arose in the particular circumstances of the developed countries, late in their industrialisation, which consequently led to the removal of children from the labour market into education. International law thus unfairly requires developing countries to adopt this model of childhood, although without the industrialisation and development that prompted its evolution to what it is 'demanded' to be today – a period of dependency and protection.<sup>100</sup>

## 2.2 Child development

The whole discussion of childhood and child labour is centred on the 'development of the child'. Childhood is the first stage of development in the life of a human being, and labour is deemed to be detrimental to that stage of development. But what do we mean by 'development

<sup>95</sup> R Macmillan & R Copher 'Families in the life course: Interdependency of roles, role configurations, and pathways' (2005) 67 *Journal of Marriage and the Family* 858 868-75.

<sup>96</sup> In the same way that societies may consider a person over the age of 18 as a child, either socially or biologically, they may also deem a person below that age as an adult. Examples of such are a 'child chief', a 'child parent' or a 'child spouse'. They fall in the category of parent or adult by virtue of having the same name of an ancestral spirit, by procreation or by marital status. In all these instances, the society may accord the child the status of an adult in the position so appointed or attained. *Women and Law in Southern Africa* (n 82 above) 7.

<sup>97</sup> As above.

<sup>98</sup> Chirwa (n 22 above) 160.

<sup>99</sup> Art 3(1) CRC.

<sup>100</sup> HJ Steiner & P Alston *International human rights in context: Law, politics, morals* (2000) 517-518.

of the child'? Who determines the 'development of the child'? What criteria are to be used? When one talks about work that is 'detrimental to the development' of the child, what dimension of development is being referred to?

The theory of child development, as embodied in international law, is built on a belief that it is in the best interests of the child to be economically dependent, at least until a specified minimum age, school being a more appropriate context for growth and development than work.<sup>101</sup> Initially, this idea of a universal process of development may be appealing.<sup>102</sup> To embrace it blindly, however, would be to ignore the fact that different societies have their own ideas about children's capacities and vulnerabilities, the ways in which a child learns and develops, and what is good or bad for them.

As already illustrated above, different cultures place significance on differing stages of a child's growth, which may be marked by chronological age, by physical abilities, biological changes, and such. Each stage will have different implications for the child. Children thrive, and indeed flourish, in widely-contrasting conditions and circumstances, and they have different capacities and needs, to which the universal child development model is insensitive. Although this model draws on supposedly 'scientific' principles, we have no conclusive evidence that it suits children's interests better than other cultural models or as a matter of fact produces happier and better-adjusted children.<sup>103</sup>

### 2.3 Child labour

Having identified the various conceptions of child and childhood, and acknowledged that any such conception is both problematic and variable, we now turn to the concept of child labour and its application to African societies. One of the initial problems associated with the regulation of child labour is the difficulty in defining the scope of behaviour that requires regulation. Two distinct discourses in the historical literature use the term child labour in very different ways. One body of work defines a child as anyone under a certain age, and it applies 'child labour' to any work done by such people. The other deems child labour

<sup>101</sup> Boyden *et al* (n 5 above) 27.

<sup>102</sup> Eg, '[d]efining development in terms of progressive stages fits the empirical observation that children everywhere grow bigger and stronger with age and master new skills and new insights daily. It also seems to make feasible the measurement of developmental progress in individual children through the application of behavioural and developmental tests.' Boyden *et al* (n 5 above) 31.

<sup>103</sup> Boyden *et al* (n 5 above) 39; Hanson & Vandaele (n 4 above) 120; J Gallinetti 'Worst forms of child labour: A view from out of Africa' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 327.

on family establishments as a contribution by children of whatever age to that economy, and, as such, perfectly acceptable.<sup>104</sup>

It would not be surprising, therefore, if a group of people discussing the phenomenon were each to have different ideas of what the term meant. The various definitions are all products of political settlements, which are themselves the result of social, cultural, political and economic positions taken by states and the other actors that draft the provisions of international law.<sup>105</sup> Such diversity in the understanding of child labour leaves one in a quandary as to the precise evil the law seeks to abolish.

No single international instrument explicitly defines child labour. The ILO Conventions mainly approach child labour in terms of minimum ages of employment. CRC views it not according to the activity, but according to the effect of the activity on the child concerned. It deems any labour unacceptable, if it is detrimental to the development of the child, regardless of whether it takes place in a workplace or at home.<sup>106</sup> The African Children's Charter merely prohibits the economic exploitation of a child and any work which has the same elements as those prohibited under CRC.<sup>107</sup> This clear lack of consistency in the definition of child labour in international law thus complicates its application in traditional African societies.

These provisions of international law do not describe a single phenomenon. To the contrary, the definitions imply quite dissimilar notions about what is problematic about child labour, and, in consequence, lead to divergent policies for addressing the issue. The key phrases that seem to recur are: 'too much work', 'too young an age', 'hazardous to morality and health', 'harmful to development', 'exploitation' and 'interference with education'. These concepts themselves, however, are subject to different interpretations as will be illustrated below.

Due to a lack of a concise definition of child labour, international organisations (such as the ILO and the United Nations Children's Emergency Fund (UNICEF)), trade unions and other interest groups have attempted to fill in this *lacuna* by coming up with their own definitions. They have therefore defined child labour by juxtaposing it with child work, by using age boundaries, by the nature of the work, by its impact

<sup>104</sup> H Cunningham 'The decline of child labour: Labour markets and family economies in Europe and North America since 1830' (2000) 3 *Economic History Review* 409-410.

<sup>105</sup> H Cullen *Role of international law in the elimination of child labour* (2007) 22; C Breen 'The role of NGOs in the formulation of and compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict' (2003) 25 *Human Rights Quarterly* 453.

<sup>106</sup> Art 32 of CRC provides: 'States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.'

<sup>107</sup> Art 15 African Children's Charter.



on the health, development and morals of the child, by the hours spent, by the effect on education, and by the economic benefits accruing to the child or third persons. A closer scrutiny of some of these ways of defining child labour is therefore necessary.

### 2.3.1 Labour/work dichotomy

The view that not all work is unacceptable has received universal agreement. Human rights bodies have traditionally found child labour harmful and 'child work' acceptable.<sup>108</sup> UNICEF makes a distinction between 'dangerous and exploitative work' and 'beneficial work'.<sup>109</sup> Dangerous and exploitative work is that which is carried out full-time and at too early an age. The working day is too long; it is carried out in inadequate conditions; it is not sufficiently paid; it involves excessive responsibility; and it undermines the child's dignity and self-esteem. Such is child labour.<sup>110</sup> Beneficial work, on the other hand, is that which promotes or stimulates a child's physical, cognitive and social development without interfering with scholastic or recreational activity, or rest.<sup>111</sup>

According to the ILO, child work refers to adult-guided activities that focus on the child's growth and enculturation into the family and society. Child work is, therefore, developmental in nature.<sup>112</sup> The dichotomy between child work and child labour is, however, problematic in that many people use the terms interchangeably. Both are born of the ubiquitous human need to survive. They are interactions requiring physical and mental effort, and they are means of acquiring resources.<sup>113</sup> Much of the ambiguity centres on these common features.

The definition of work most often used in surveys and censuses is largely based on participation in the wage labour force, while most children's work occurs outside this sector. The ILO's estimate of the number of labouring children is in most cases based on wage labour

<sup>108</sup> 'The distinction between work and labour is to be found in a critical overview of the climate in which these processes operate and the quality of the relationships in operation.' SN Mishra & S Mishra *Tiny hands in unorganised sector: Towards elimination of child labour* (2004) 15.

<sup>109</sup> UNICEF is an organ of the UN mandated by the UN General Assembly to advocate the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential. UNICEF is guided by CRC and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children.

<sup>110</sup> E Ochaíta *et al* 'Child work and labour in Spain: A first approach' (2000) 8 *International Journal of Children's Rights* 15 19; 'Child protection from violence, exploitation and abuse' UNICEF website [http://www.unicef.org/protection/index\\_childlabour.html](http://www.unicef.org/protection/index_childlabour.html) (accessed 18 June 2008).

<sup>111</sup> Ochaíta (n 110 above) 19.

<sup>112</sup> National Research Council of the National Academies *Monitoring international labour standards: Techniques and sources of information* (2004) 169.

<sup>113</sup> Mishra & Mishra (n 108 above) 15.

statistics supplied by member countries. The criterion most frequently used to define unpaid activities as 'work' is whether or not the activity contributes to production. Measuring children's productive output, however, has proved to be difficult, since, in many cases, their contribution is indirect. For example, are boys who spend their days playing in the fields and scaring away birds working? Neither they nor their parents may perceive the activity as work, yet it may have a positive effect on farm productivity.<sup>114</sup> Definitions of work, particularly children's work, are highly variable and differ according to cultural and economic circumstances.

An emphasis on the distinction between work and labour may be useful if one is looking for a way to ban some forms of child labour and accept others.<sup>115</sup> The reality in some traditional African societies is that most child activities are a combination of work and labour, in varying degrees of each, depending upon the quality of relationships involved. For instance, a girl doing domestic chores in her own home or in a foster arrangement may fall into either the work or labour categories, depending on her relationship with the guardians she is living with. One thus cannot determine the point at which acceptable work shifts to child labour. It must also be noted that the criteria used to determine child work and child labour change across time, place and culture and vary according to different conceptions of childhood.<sup>116</sup>

The work-labour distinction also implies that all profit-motivated activity is harmful and all gratuitous activity benign. It does not consider children in family situations as exploited. This understanding of labour implies that it is paid employment, whereas a great deal of children's work is not remunerated and is not productive.<sup>117</sup>

Another problem with the distinction between labour and work is its focus on abstract definitions, which distracts from the activities of children in practice and from the situations in which these activities are performed. Once something is classified as child labour, it is identified as bad, and therefore to be abolished. It evokes an emotional reaction rather than a careful consideration of the actual situation of the child.<sup>118</sup>

Unless children are looked at within a proper context, however, there are bound to be misunderstandings in defining child labour.<sup>119</sup> Recent

<sup>114</sup> Eg, are boys who spend their day playing in the fields and scaring away birds working? They may not perceive their activity as work, nor may their parents, yet it may have a positive effect on productivity. G Rodgers & G Standing (eds) *Child work, poverty and underdevelopment* (1981) 91.

<sup>115</sup> JC Andvig 'Child labour in sub-Saharan Africa: An exploration' (1998) 2 *Forum for Development Studies* 327-328.

<sup>116</sup> Abernethie (n 64 above) 91-99.

<sup>117</sup> As above.

<sup>118</sup> MFC Bourdillon (ed) *Earning a life: Working children in Zimbabwe* (2000) 9.

<sup>119</sup> As above.

studies on child development suggest that children's ability to work, and to benefit or suffer from it, varies significantly from child to child. The new research also shows that child work has many effects, some good and some bad, not all of which can be separated from each other.<sup>120</sup> Even so, evidence about the impact of child work is fragmentary. There are few studies using case controls to show the long-term impact of early work or its relative severity. The studies that do exist rarely examine the psychological costs or benefits of work, and much of what is written focuses on the potential hazards rather than the actual harm that occurs.<sup>121</sup>

In general, international law's attempt to neatly separate child work from child labour is the basis of stereotyping and prejudice. If we find the criteria for deciding in advance whether a particular activity is to be classified as work or labour, we are considering whether the activity should be permitted or not, before examining the advantages and disadvantages for the children concerned.<sup>122</sup>

### 2.3.2 Minimum age of employment

The ILO approaches child labour according to minimum ages. The whole concept of establishing minimum age reflects the concern that children of too young an age should be specially protected. Prior to the 1860s, the Western world did not consider age as an important measure for the acceptability of child work, and, at that time, the employment of nine year-olds (and below) was legal and common place.<sup>123</sup> Rather than establishing age limits, however, nineteenth century child labour legislation reduced hours of work and provided some education for child labourers.<sup>124</sup>

With changes in the conception of childhood, the early twentieth century saw the ILO setting age limits for the employment of children in various sectors of the economy. The age limits in the Minimum Age Convention of 1973 still form the basis for international and national legislation. The Convention compels countries to fix a minimum age for employment that must not be less than the age for completing compulsory schooling.<sup>125</sup> The instrument sets the minimum age of

<sup>120</sup> SL Bachman 'A new economics of child labor: Searching for answer behind the headlines' (2000) 53 *Journal of International Affairs* 545 554.

<sup>121</sup> As above.

<sup>122</sup> Bourdillon (n 118 above) 10.

<sup>123</sup> VA Zelizer *Pricing the priceless child. The changing social value of children* (1985) 75.

<sup>124</sup> An example was the Health and Morals of Apprentices Act of 1802 in Great Britain, which outlawed night work and attempted to limit the working day in cotton mills. A subsequent Act of 1819 forbade the employment of children under the age of nine in cotton mills. Fyfe (n 72 above) 30; Zelizer (n 123 above) 75.

<sup>125</sup> For developed countries, it should not be less than 15 years (art 2 para 3). Developing countries may set the minimum age at 14 (art 2 para 4).

employment at 15.<sup>126</sup> Developing countries may set the minimum age at 14.<sup>127</sup> Domestic limitations on age vary according to the nature of the work, and the so-called 'development of the child' and educational obligations.<sup>128</sup>

The Minimum Age Convention also provides that national laws or regulations may permit the employment or work of persons between 13 to 15 years of age on 'light work', which is<sup>129</sup>

not likely to be harmful to their health and development; and such as not to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their capacity to benefit from the instruction received.

This competent authority must determine what light work is, and prescribe the number of hours and conditions in which such work may be undertaken. For dangerous work, the Convention sets a limit of 18 and allows children aged 16 to undertake such work only if their safety and morals were fully protected and they received sufficient specific instruction or professional training.<sup>130</sup>

In determining whether work is 'light' or 'likely to be harmful', the ILO takes into consideration, among other factors, the duration of work, the conditions under which the work is done and its effect on school attendance. The ILO, however, does not provide any operational guidance for assessing these factors and determining whether any given form of work would qualify as light or hazardous work. The type of work which falls under the rubric of light and hazardous is left to individual countries to determine. The comparison between light and hazardous work therefore remains unhelpful as it fails to provide any effective method of distinguishing between legitimate and illegitimate forms of work.<sup>131</sup>

<sup>126</sup> Art 2(3) Minimum Age Convention. Since the British Factory Acts of the 19th century, compulsory education has proved to be one of the most effective means of combating child labour. International law reflects an acknowledgment of that fact. The age of admission to employment is thus inextricably linked to the age limit for compulsory education. The logic is that if compulsory schooling ends at the same time as the minimum age for employment, it removes the risk of children engaging in employment before they are legally entitled to work and rules out an enforced period of idleness. ILO: Minimum Age, General Survey of the Reports Relating to Convention No 138 and Recommendation No 146 Concerning Minimum Age, Report of the Committee of Experts on the Application of the Conventions and Recommendations, Report III (Part 4(B)), ILC, 67th session, Geneva, 1981, para 140.

<sup>127</sup> Art 2(4) Minimum Age Convention.

<sup>128</sup> The Convention, however, provides flexibility for countries to establish a younger minimum age of 12 or 13 for children to partake in 'light work' (art 7). Hanson & Vandaele (n 4 above) 101.

<sup>129</sup> Art 7(1) Minimum Age Convention.

<sup>130</sup> Arts 3(1) & (3) Minimum Age Convention.

<sup>131</sup> J McKechnie & S Hobbs 'Child labour: A global phenomenon?' (1999) 8 *Child Abuse Review* 87 88.

By implication, a child who is below the minimum ages stipulated by the Convention would be engaging in child labour if they do the work prohibited for their age. These minimum age standards express an ideal of childhood as 'a privileged phase of life, properly dedicated only to play and schooling, and with an extended period of dependence during which economic activity is discouraged or actually denied'. It would seem that the Minimum Age Convention was motivated by an assumption that, if the minimum age were raised, the physical and mental development of children would be enhanced, since they would not be allowed to work until middle adolescence.

While it is generally conceded that minimum age laws have been effective in removing children from formal employment, an issue which has been well researched, it is, however, still unknown whether the laws have improved the development and the welfare of the children concerned. Minimum age regulations have not received a credible analysis that empirically weighs costs and benefits to determine their net impact on children and on society. This is astounding, considering that the minimum age policy has been in place for over 150 years, and the Minimum Age Convention for over 25 years.

An example of this oversight is in instances where children are orphaned due to HIV/AIDS or other reasons. Taking such children out of employment because they are under age would be counter-productive as they will be left with no means of survival.<sup>132</sup> Such a case of 'misguided good intentions' should be a warning about the costs of applying simplistic assumptions and solutions across the board without adequate attention to differences of social and economic context.

One could also argue that regulating child labour by minimum age limitations would be problematic in countries which lack the institutional wherewithal to register the birth of every child such as those of Africa. In such societies, age is thus difficult to prove. In any event, some child development experts believe that age is not always the best way to decide whether individual children are ready for work, or whether any particular kind of work is appropriate for a specific child.<sup>133</sup> Several factors should be considered, such as the health and nutrition of the child and its living environment.

<sup>132</sup> Authors argue that 'a universalised standard excluding children below a particular age from employment or work as set out in article 2 of the [Minimum Age] Convention is unjustified ... insufficient attempts have been made to determine the impact of setting a minimum age for admission to employment or work on children; and the effort of enforcing "blanket prohibitions" affecting all work (even safe work) diverts attention away from the need to intervene in forms and conditions of work that are harmful to children'. M Bourdillon *et al* cited in Sloth-Nielsen (n 103 above) 328.

<sup>133</sup> SL Bachman 'The political economy of child labour and its impacts on international business' [http://www.nabe.com/publib/be/000330.pdf#search=%22us%20Dept.%20of%20Labour%20\(1998\)%20definition%20of%20child%20labour%22](http://www.nabe.com/publib/be/000330.pdf#search=%22us%20Dept.%20of%20Labour%20(1998)%20definition%20of%20child%20labour%22) (accessed 19 September 2006).

Moreover, the ILO setting of specific age standards for children, the prescription of their participation in some spheres of activity whilst proscribing others, pathologises those child activities which take place outside the limits set for childhood. It is for this reason that activists and child development experts judge developing societies as having failed their children because the children's lives do not conform to the image prescribed by international law. Consequently, the discourse of children's rights suggests that the plight of children in the Third World 'is due to the moral failings of their societies'.<sup>134</sup>

### 2.3.3 Education

Child development experts and campaigners against child labour have thus often pointed out the negative correlation between child work and the right to education. The understanding of child labour as a practice harmful to a child's intellectual development is thus a well-established belief that has its origins in the mid-nineteenth century. Compulsory education is thus considered as an effective way of putting into effect the minimum age standards for admission to employment.<sup>135</sup>

It is submitted, however, that the incompatibility of education and work is overstated, and the benefits of abandoning work for schooling overrated. History has shown that condemning all child work and compelling children to go to school without first securing viable alternatives have made them even more vulnerable to poverty.<sup>136</sup> Moreover, a large number of children, particularly in Asia and Africa, manage to combine school and work effectively.<sup>137</sup>

Although full-time work (whether hazardous or not) is clearly incompatible with school attendance and performance, part-time child labour does not necessarily interfere with education when it occurs during vacations, or for a few hours a week during the academic year.<sup>138</sup> Furthermore, there is no authoritative data based on empirical and scientific research to support the rhetoric about the dangers of combining all forms of work with education. One therefore has to be careful about making automatic assumptions that all child work impairs education and intellectual development.

Defining child labour as work that keeps children from school also creates the risk of over-estimating the harm of work and neglecting

<sup>134</sup> As above.

<sup>135</sup> Art 28 CRC and art 2 of the Minimum Age Convention. Boyden *et al* (n 5 above) 249-250.

<sup>136</sup> As above.

<sup>137</sup> Sixty million African children combine schooling and work. A Admassie 'Explaining the high incidence of child labour in sub-Saharan Africa' (2002) 14 *African Development Review* 251-255.

<sup>138</sup> R Anker 'The economics for child labour: A framework for measurement' (2000) 139 *International Labour Review* 257-261.

the relevance of poor quality education in developing countries.<sup>139</sup> The definition neglects the fact that schools can sometimes drive children of poverty-stricken families to labour. They are left with no option but to go out to earn money to help pay for school costs.<sup>140</sup> Institutions, such as the missionary and farm schools of Southern Africa, have been known to actually perpetuate child labour rather than provide solutions for it. Hordes of children in rural Zimbabwe, for instance, have to wake up early to work on commercial farms and plantations or for missionary enterprises in exchange for education. This brings into question all the rhetoric of the human rights movement on the benefits of education.

Another important question that arises with defining child labour as work that hampers schooling is the nature of education. More than one form of education exists. There is, first, formal education, which involves going to school and equipping the child with the necessary skills for formal employment. The second is traditional education, which includes an engagement in customary livelihood at home, in fields and forests with parents and communities.<sup>141</sup>

The model of education in international law also seems to carry with it an arrogantly negative perception of African cultural ways without acknowledging their benefits and does not take into account the existence of these different forms of education in African societies. They assume that a formal school is the only acceptable form of education. Southern African societies, however, consider child work an important component of education, especially in the household-based production system and various apprenticeship arrangements.<sup>142</sup> Traditional education includes engaging in customary livelihoods at home, in fields and pastures with parents and communities.<sup>143</sup> The basic skills transmitted do indeed allow children to mature in a protective environment, at the same time preparing them for survival in an often harsh world.<sup>144</sup>

Admittedly, the global fruits of formal schooling have been considerable. Notwithstanding this, schooling should not be viewed uncritically, since it is eventually 'limited by technology of the classroom, formal instruction and uniform stages of progression, prescribed knowledge, a curriculum of self-contained bits and by the restricted amount of time

<sup>139</sup> C Heady 'What is the effect of child labour on learning achievement? Evidence from Ghana' *UNICEF Innocenti Working Papers* (2000) 79.

<sup>140</sup> Anker (n 138 above) 261.

<sup>141</sup> PB Larsen 'Indigenous and tribal children: Assessing child labour and education challenges' *Child labour and Education Working Paper*, International Programme on the Elimination of Child Labour (IPEC) [http://www.ilo.org/public/english/standards/ipecc/publ/download/edu\\_indigenous\\_2003\\_en.pdf](http://www.ilo.org/public/english/standards/ipecc/publ/download/edu_indigenous_2003_en.pdf) (accessed 21 September 2006).

<sup>142</sup> Rodgers & Standing (n 114 above) 33.

<sup>143</sup> Larsen (n 141 above).

<sup>144</sup> As above.



children actually spend at school'.<sup>145</sup> In other words, education has not been fine-tuned to suit local circumstances.

When considering schools as routes to education and development, two major issues need to be taken into account. Firstly, given the multiplicity of values and goals of development in the world today, it is not evident that school alone can satisfy children's many developmental capacities and needs. Secondly, it is questionable whether the kind of schooling on offer in many parts of the world is of much benefit to children. It may be that, in some cases, work has a more positive developmental effect, especially on the psychological well-being of the child.<sup>146</sup>

### 2.3.4 The health risks to child development

International law also approaches child labour with reference to the effects work may have on a child's health, on the assumption that labour is harmful to the health and life expectancy of children.<sup>147</sup> Historians acknowledge that during the industrial revolution in Europe, working children suffered permanent damage to their health as a direct consequence of their early experiences when they worked long hours without rest and were exposed to dangerous substances and machinery.<sup>148</sup>

However, it is quite apparent that the rhetoric relating work to child development deals superficially with physical health and safety, which include all the bodily senses required to survive in the journey to adulthood.<sup>149</sup> Little is known about the developmental and health effects of work and what makes work abuse for children and the cultural (and social and economic) forces that provoke and sustain that abuse. Scholars pay attention only to the hazards of work. There is little consideration of the possible benefits of work on child development. As a result, human rights activists and child development experts condemn the African way of raising children without understanding why child work in such societies continues to be an integral part of human development.

The drafters of international law, particularly ILO Conventions, seem to confuse hazards or risks with actual effects. While children should be protected from dangerous work and not be encouraged to endure hazards, merely because they are resilient, the mere presence of risk tells us very little about the precise outcome of work for children. Exposure to a hazard does not necessarily have damaging consequences. Much

<sup>145</sup> Boyden *et al* (n 5 above) 58.

<sup>146</sup> Boyden *et al* (n 5 above) 110.

<sup>147</sup> Art 32(1) CRC; arts 3 & 7 Minimum Age Convention; and art 3 Worst Forms of Child Labour Convention.

<sup>148</sup> Nhenga (n 51 above) 19.

<sup>149</sup> Boyden *et al* (n 5 above) 29-39.

depends on the social and normative context of work, the nature and severity of the hazard and how children respond individually.<sup>150</sup>

Questions also remain as to how to quantify the amount of time a child needs for rest, leisure and play, on who determines how much time a child may work and on which factors shall inform the decision as to the appropriate number of hours that may be allocated to child activities. Given differences in children's physical capabilities and adaptations, it is difficult to answer these questions. International and domestic instruments on children's rights do not provide any guidelines and thus the answers will inevitably be based on subjective deduction.<sup>151</sup>

The child development experts' assumption that most children's work is grim, distasteful and stultifying to their development has seriously distorted both national and international activities dealing with it. Experts have usually placed the emphasis on physical and safety issues, and on the adverse effects on schooling, while largely ignoring psychosocial effects which mitigate against detrimental outcomes, contribute to a child's resilience and facilitate development. It can actually bring important rewards, such as teaching children endurance, giving them a sense of pride and self-worth, and making self-sufficiency possible.<sup>152</sup>

The contemporary theory of development is thus restrictive in that it overlooks the existence of the social and moral dimensions of human development, which include concern for others, sharing, a sense of belonging, the ability to co-operate, the distinction between right and wrong, respect for laws and for the property and persons of others, resourcefulness and other capacities needed to live successfully within a social context.<sup>153</sup> Little attention is paid to emotional development, which relates to adequate self-esteem, family attachment, feelings of love, acceptance and the affection necessary to maintain family ties.<sup>154</sup> Such dimensions of development may be enhanced by child work, and are essential in African cultures. Moreover, there are so many kinds of work and working conditions, some facilitating and some hindering children's growth, that it is presumptuous to make blanket judgments about the morality of child work and the legal standards involved.

The limits of culture must, however, be noted. Just as culture should not be excluded from the human rights equation, so too must it not be used consistently to trump rights. Indeed, there are cultural practices, which, by today's standards, are difficult to justify, for instance, taking the girl child out of school because she is to be married.<sup>155</sup> Such limits on culture, however, seem to have driven the international campaign against child labour to seek the denial of all cultural practices and atti-

<sup>150</sup> Boyden *et al* (n 5 above) 79.

<sup>151</sup> As above.

<sup>152</sup> Boyden *et al* (n 5 above) 144 110.

<sup>153</sup> As above.

<sup>154</sup> As above.

<sup>155</sup> Alston (n 84 above) 20.

tudes. Notable amongst these are the expectation that children will contribute economically to their families, and the belief that children working is an appropriate preparation for adulthood. While such African attitudes can indeed significantly perpetuate child labour, they cannot, with their associated practices, be entirely condemned.<sup>156</sup>

African attitudes exist in a wide variety of forms, not all of which can necessarily be linked to exploitative types of child labour. Modifying the forms of those cultural attitudes and practices, therefore, should be a finely-nuanced, context-specific task. The ways and degree to which children are expected to contribute to their families, the best mix of formal education, paid employment and apprenticeship to prepare children for adulthood, and the appropriate way to handle biologically and culturally-gendered differences are intrinsically context-oriented decisions. Hence, any attempt to modify them should be sufficiently local to take account of the circumstances in which they occur and perhaps in consideration of the evolving capacities of the child.<sup>157</sup> Further, decisions about such matters would normally fall within the spheres of family privacy, religious liberty and cultural autonomy. Hence, attempts to modify those attitudes coercively or without sensitivity to local conditions are likely to be met with resistance.<sup>158</sup>

While the cultural differences in child rearing seem obvious at first glance, these differences are often not recognised by those charged with implementing the law, as they apply 'scientific' ways of approaching problems. The economic, social and political conditions for urban, middle class individuals who shape policy and programming, often differ dramatically from those on the receiving end: the rural folk. This expert knowledge is often derived from a conceptual basis that denigrates local knowledge and traditional wisdom. Local practices are frequently defined as harmful without appreciating the meaning of harm.<sup>159</sup>

### 2.3.5 African countries' ratification of international child labour instruments

Given the above discussion, the question at this point would be: How is it that African countries have ratified CRC and the ILO Conventions on child labour if the principles enshrined therein are so at odds with the cultures of their constituencies? Answering these questions would require one to look to the states' reasons for ratification and the nature

<sup>156</sup> DM Smolin 'Conflict and ideology in the international campaign against child labour' (1999) 16 *Hofstra Labour and Employment Law Journal* 401-402.

<sup>157</sup> The challenge, however, would be how to effectively and objectively assess the capacities of each child.

<sup>158</sup> As above.

<sup>159</sup> Verhellen (n 55 above) 59.

of the said countries' participation at the negotiation and drafting stages of the Conventions.

True as it may be that African countries have ratified the international laws on children's rights, it is well known that the motivation for the ratification is always a combination of various factors, with international diplomacy being a primary consideration. States always want to be seen as supporters of human rights. While some have ratified human rights treaties with the genuine intention to establish a universal normative framework and strengthen such a system worldwide, there is also evidence that developing countries simply succumbed to political pressure to ratify from other states and international non-governmental organisations (NGOs).<sup>160</sup>

Some countries have ratified human rights instruments to facilitate reintegration into the international community after a period of isolation, symbolising a break with an authoritarian past or to prevent a recurrence of wide-scale human rights abuses. An example of countries which have done so is South Africa at the demise of apartheid in 1994, and Zimbabwe and Namibia after their independence in 1980 and 1990 respectively.<sup>161</sup> It is also common knowledge that developing countries have often ratified a human rights instrument for the sole purpose of receiving international aid. Governments that have ratified treaties for such reasons often lack a moral motivation to improve the lives of their citizens as they are obliged under the instruments and hence reduce the ratification to a mere academic exercise. As a consequence, most countries never bother to incorporate the treaties into domestic law.

One could also argue that during the drafting and negotiation of all human rights treaties, just about all delegates in attendance are usually more concerned with protecting the official positions of their governments with expedient ambiguity, than with achieving conceptual clarity, let alone representing beliefs, attitudes and practices of their national constituencies.<sup>162</sup> Moreover, the few representatives of developing countries who do attend are usually late participants in a

<sup>160</sup> Eg, India ratified CEDAW and CRC in response to the increasing international scrutiny of its human rights record, after Pakistan tabled a resolution to the Commission of Human Rights on the state of human rights in Kashmir. Iran also acceded to CRC because it was under pressure at the time due to its human rights record. Brazil ratified CERD to show some participation in international human rights; the former USSR ratified CERD and CEDAW as part of the international trend to do so, not wanting to lag behind other states; the same applies to the Philippines with respect to CRC. Japan ratified CERD when it was the only liberal democracy left that had not done so. PE Veerman *The rights of the child and the changing image of childhood* (1992) 183.

<sup>161</sup> South Africa ratified five treaties shortly after the end of apartheid. Institute for Human Rights and Development in Africa (IHRDA) 'The African Charter on the Rights and Welfare of the Child' <http://212.60.76.30/modules/news/index.php?storytopic=16> (accessed 11 September 2007).

<sup>162</sup> Boyden *et al* (n 5 above) 68.

predetermined process.<sup>163</sup> Hence they have to work with concepts and mechanisms already called from sources other than their own.<sup>164</sup>

Often, delegates of developing countries have no alternative position to present, since their national constituencies did not have the chance to articulate different proposals based on their indigenous experiences and in response to the realities of their own countries.<sup>165</sup> At the negotiating sessions, they often lack a sense of familiarity and support from home. Such negotiators, particularly those from developing countries, are therefore ill-equipped to make a meaningful contribution to the proceedings.<sup>166</sup>

Moreover, many initiatives on child labour have generally been based on an assumption that the problem is confined to the poor countries. The societies and groups most determined to eliminate the practice have thus tended to come from the developed world. Industrialised countries have thus dominated the discussion on child labour and been the ones to define it and to stipulate its remedies in accordance with interests and ideologies of these countries of origin. A serious inequality in the negotiating positions therefore exists. It is for this reason that one has to look beyond formalistic participation in order to appreciate the realities of implementation. Countries that did not participate, or had little opportunity to contribute during the negotiating process, will most likely lack the motivation and wherewithal to implement the provisions of the instruments.<sup>167</sup>

The ILO has tried to remedy this inequality by providing different child labour standards for poor nations and their developed counterparts.<sup>168</sup> Such attempts have hardly been successful considering that international values and imperatives are still imposed on the latter without due consideration of the different methods of rearing children,

<sup>163</sup> CRC came about as a result of long-term advocacy by voluntary organisations such as Save the Children and, more specifically, in response to Poland's call for an international instrument on children's rights to mark the 1979 International Year of the Child. M Freeman *The moral status of children: Essays on the rights of the child* (1997) 53.

<sup>164</sup> As above.

<sup>165</sup> As above.

<sup>166</sup> Only four developing countries had representation at the CRC sessions of the Open-Ended Working Group, namely, Algeria, Morocco, Senegal and Egypt. Their participation, however, was sporadic. The rest of the African countries (including Lesotho, Zimbabwe and South Africa) never took part at all. Throughout the proceedings, NGOs representing the interests of children were involved only periodically and their participation was badly co-ordinated. Freeman (n 163 above) 53; Veerman (n 160 above); IHRDA (n 161 above).

<sup>167</sup> It would also seem that before the drafting and negotiation stage, little effort is put into researching the indigenous societies of non-Western countries, which are meant to benefit from those instruments. Moreover, there is little regard to whether or not the representatives of countries have done the necessary consultations with their national constituencies.

<sup>168</sup> The gradation of standards has thus historically been part of ILO Minimum Age Conventions.

and varying conceptions of childhood. Moreover, it is not clear how the degree of difference in child labour standards was determined between developed and developing nations (as exemplified by the terms of the 1973 Minimum Age Convention).<sup>169</sup>

### 3 Conclusion

It should be clear at this point that, while there is an international consensus on the concern for children, societies differ on the conception of childhood, how a child's welfare may best be secured and the acceptable forms of child activity. The discord between international law and African cultures on the laws and policies needed to deal with child labour represents fundamental differences on the social problem that should be eliminated. There is a growing consensus on the existence of a definitional problem, which appears to spring from two sources. The first is that developing countries which had tended to regard child labour as necessary are now being forced to view it as only harmful. The second is a recognition that the international law has a one-dimensional view of the problem which begs relevance in the societies of developing countries.<sup>170</sup>

Clearly, it is difficult to come to a common understanding of what is hazardous to a child, besides the more obvious dangers to health and social development of extreme forms of child labour such as sexual exploitation, mining and construction. Social and economic considerations will subjectively influence the determination. For instance, African societies do not consider the fetching of firewood and water as in anyway hazardous, but as an integral part of the socialisation process, while members of more modern societies would never send a child to a 'big bad forest' to fetch wood or to a well to fetch water 'where there is a risk of drowning'. To the latter, such work is of no value to a child's social development.

Given the questions that come up about the current and dominant perceptions of child labour, it is apparent that international law is based on assumptions which lack the substantiation of comprehensive research. 'We are confronted ... with the very weak state of knowledge and understanding of the causes of abuse, exploitation and harm in work situations ...'<sup>171</sup> There has, therefore, been a tendency to define work generally, and vaguely, as a problem for children, and to base inquiries on individual case studies, many of which focused on situations of serious peril. A consequence has been the formulation of blanket legal (and policy and programme) measures which were

<sup>169</sup> Smolin (n 156 above) 393.

<sup>170</sup> Myers (n 51 above) 22.

<sup>171</sup> B White 'Defining the intolerable: Child work, global standards and cultural relativism' (1999) 6 *Childhood* 133 135.

ill-suited to the children whose work was not particularly hazardous or exploitative, and could be combined successfully with school work. The specific circumstances and needs have not been understood.<sup>172</sup>

Many of the studies provide a fairly static picture of children's working lives, neglecting their work histories. These lead to misleading conclusions. The intensity of children's work and their schedules sometimes change over short periods of time. This general lack of theoretical and methodological rigour results in a poor conceptualisation of working children as victims, and their classification, often erroneously, into categories defined very loosely by their circumstances or situation.

CRC and the ILO instruments on child labour therefore attempt to achieve the impossible: imposing a set of general standards of right treatment for children in a world with vastly different understandings about childhood and child development.<sup>173</sup> The crusading moralism that characterises the child rights movement poses a problem for the practical and objective reconsideration of child labour (and other issues on child welfare). It leads to a rigidity of thought and action in an era when more flexibility is essential to the successful adaptation of child protection methods to the exigencies of a changing world.<sup>174</sup> The rights codified in international instruments leave little room for compromise or an allowance for competing cultural values and foreclose reflection on intricate issues that are not soluble by simplistic formulae.<sup>175</sup>

What is apparent is that the principles of human rights do not permit people, in particular cases, to make individual judgments about whether abolishing child labour is in fact reasonable in the circumstances. The laws on child labour are ill-adapted to what Africans expect: a careful discussion of trade-offs and competing concerns, thereby facing a potential backlash by those concerned with cultural, familial or personal autonomy.<sup>176</sup>

While it is vital to retain or recapture cherished traditional values, one must be cautious about relying on dying, lost and even mythical cultural norms.<sup>177</sup> The relativist critique of human rights should not support a general challenge to children's rights but rather 'create a contingent, partial warning about the appropriate content of rights

<sup>172</sup> See A Bekele & WE Myers *First things first in child labour: Eliminating work detrimental to children* (1995) 29.

<sup>173</sup> As above.

<sup>174</sup> Boyden *et al* (n 5 above) 324-326.

<sup>175</sup> C Sunstein 'Rights and their critics' (1995) 70 *Notre Dame Law Review* 727 730-2.

<sup>176</sup> In addition, the rules which the human rights movement seeks to impose would, if actually enforced, severely limit cultural, familial, religious and personal freedom. Smolin (n 156 above) 400.

<sup>177</sup> 'Leaders sing the praises of traditional communities – while they wield arbitrary power antithetical to traditional values, pursue development policies that systematically undermine traditional communities and replace traditional leaders with corrupt cronies and party hacks. Such cynical manipulation of tradition occurs everywhere.' J Donnelly *Universal human rights in theory and practice* (1989) 118.



and about the possibly harmful way in which certain social institutions safeguard rights'.<sup>178</sup>

In short, one must always bear in mind that the absence of individual 'rights' in the African cultural context does not mean that children are systematically abused or neglected as a matter of policy. Such treatment is not deliberate. The powerful ethic of generosity towards all kinfolk, apparent in African traditional societies, assured children of nurture and protection within families. The African social and legal system does in fact assure human dignity in all material respects.<sup>179</sup>

Child labour principles, as with other human rights principles, have thus not had full effect on African society because cultural practices persist. Human rights instruments have not sought to address the tensions between their provisions and local cultures. The lack of attention to the particularities of children's situations has led to generalised and one-dimensional legal remedies that are likely to be weak or counter-productive for the children involved.<sup>180</sup>

There is a need to move beyond the narrow education, health and safety concerns of the current international child labour laws and to place a greater emphasis on discovering other protective and promotional measures to enable children to grow and develop. These measures will look at children's work, principally in terms of its impact, both negative and positive, on their welfare and development.<sup>181</sup> Instead of having a blanket prohibition of child labour, there is a need for the retention of work that builds character, initiative, and qualities of organisation, discipline and love of knowledge.

Child labour must be approached from the perspective of all the controlling sectors of children's activities, namely, the children themselves, parents, extended family, community, educators and employers. Drafters must find a common ground between all these stakeholders so there is a unity of purpose reflected in the law.

Since it has proved to be impractical to impose a 'one-size-fits-all' approach to childhood and child labour on all societies, African countries must define and stipulate remedies for child labour in accordance with their own interests and ideologies. The laws governing child work must not stand in isolation, but should be conceived and implemented to fit their social context and should work harmoniously with other lines of action in a national policy. To avoid being counter-productive, this legislation must, therefore, uphold healthy child development

<sup>178</sup> Steiner & Alston (n 100 above) 336-337.

<sup>179</sup> Bennett (n 43 above) 5.

<sup>180</sup> Myers (n 51 above) 42.

<sup>181</sup> R Himes (ed) *Implementing the Convention on the Rights of the Child: Resource mobilisation in low-income countries* (1995) 190-191.

processes and be supported by social, economic, and educational measures.<sup>182</sup>

Unfortunately, the imposition of these international laws based on modern economic and social practice has so far created problems, due primarily to a failure to consider sufficiently the state of development of the communities upon which they imposed or the full social and economic implications.<sup>183</sup> It is thus imperative for the law to express the collective will of the people which is neither the 'idealistic opinion of the reformer, nor the opinion of a self-centred commercialism'.<sup>184</sup> The law must not act only as an external complex of rules to which reality is subjected, but should also seek to express reality itself.<sup>185</sup>

The success of child labour laws in Africa will depend on the level of cultural legitimacy accorded to the norms contained therein.<sup>186</sup> If the law is found to be lower than the plane of public opinion, then it would be wise to consider changing it in conformity with that opinion and with certain well-defined principles.<sup>187</sup> Without wide social support, child labour laws may in fact attract hostility from the communities and the very people they are intended to protect. Where belief in the legitimacy of child labour is strong in a society, the law may actually reinforce support for the outlawed custom.<sup>188</sup> The likelihood of a rejection of the law increases where a legal system is imported from another culture or for other reasons is not accepted as a source of authority to be obeyed out of duty. It is thus imperative for the law not to be imposed from the top or by external forces, but come from the societies themselves.<sup>189</sup>

In creating children's rights norms that are suitable for Southern African societies, it is vital that we do not reinforce much of the taken

<sup>182</sup> Eg, in Zimbabwe, the Labour Relations Regulations of Statutory Instrument 72 of 1997 and sec 10A of the Children's Act (Cap 5:06) of 2001 which regulate the work of children must be supported by policies from the Ministries of Education; Health and Child Welfare; Public Service, Labour and Social Welfare; and Youth Sports and Culture. Local government and traditional authorities must also be involved in conscientising and mobilising their respective communities in putting into effect such legal interventions.

<sup>183</sup> A St J Hannigan 'The imposition of Western law forms upon primitive societies' (1961) 4 *Comparative Studies in Society and History* 1-5.

<sup>184</sup> Hanson & Vandaele (n 4 above) 75.

<sup>185</sup> Legal systems do not float in a cultural void, free of space and time and social context, but ought to reflect what is happening in the societies they regulate. LM Friedman 'Borders: On the emerging sociology of transnational law' (1996) 32 *Stanford Journal of International Law* 65 72-75.

<sup>186</sup> T Kaime 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5 *African Human Rights Law Journal* 223.

<sup>187</sup> OR Lovejoy 'The test of effective child labor legislation' (1905) 25 *Annals of the American Academy of Political and Social Science* 45-52.

<sup>188</sup> SB Burman & BE Harrell-Bond *The imposition of law: Studies on law and social control* (1979) 16.

<sup>189</sup> As above.

for granted assumptions about our cultures.<sup>190</sup> The ways of reframing and reformulating the law on child labour in the sub-region must avoid falling into the trap of essentialising culture.<sup>191</sup> Rather, law makers must recognise its fluidity and diversity, and also recognise children as the agents of culture, not simply its victims and challengers of patriarchy.<sup>192</sup>

As the essentialism of culture all too often entails the preservation of social, political and economic power, it may, in fact, justify and perpetuate the abuse of the work of children.<sup>193</sup> Generalisations of a girl child's cultural role in the domestic arena can result in her being denied formal education in preference to her male counterpart.<sup>194</sup> Such essentialism plays into the hands of economists and political strategists, who depend on the labour of children.

The effect of essentialising culture is for one to become less mindful of its dynamism, and thus remain tied to norms that are obsolete in the present-day reality of urbanisation, globalisation and multiculturalism. South Africa, for instance, is a perfect example of a country which is *de facto* a state of racial, cultural and ethnic diversity, where the essentialism of any culture would be a distortion of reality. Essentialism rules out the possibility of belonging to multiple, hybrid and even shifting cultures.<sup>195</sup> We thus need to accept that cultures within the Southern African region are internally diverse so that the evaluation of any laws and policies that aims to recognise or accommodate a cultural minority must take into account its effects on different groups and the way in which that policy or law may affect the power relations within those groups.<sup>196</sup>

<sup>190</sup> V Sewpaul 'Challenging East-West value dichotomies and essentialising discourse on culture and social work' (2007) 16 *International Journal of Social Welfare* 398.

<sup>191</sup> Essentialism regards culture as separate, clearly bounded, internally uniform and static. S Laden & D Owen *Multiculturalism and political theory* (2007) 227.

<sup>192</sup> K Pakesa & S Roy-Chowdhury 'Examining the practice of cross-cultural family therapy' (2007) 29 *Journal of Family Therapy* 268.

<sup>193</sup> R Mahalingam 'Essentialism, culture and power: Rethinking social class' (2003) 59 *Journal of Social Issues* 733 735.

<sup>194</sup> U Narayan & S Harding (eds) *Decentering the center: Philosophy for a multicultural, post-colonial and feminist world* (2000) 80.

<sup>195</sup> Y Abu-Laban 'Liberalism, multiculturalism and the problem of essentialism' (2002) 6 *Citizenship Studies* 459 465.

<sup>196</sup> Laden & Owen (n 191 above) 227. Also see Sewpaul (n 190 above) 404 and ME Goodhart 'Origins and universality in the human rights debates: Cultural essentialism and the challenge of globalisation origins and universality in the human rights debates' (2003) 25 *Human Rights Quarterly* 935 941.

# Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities

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## Summary

*The article explores ways of overcoming challenges in the effective implementation of economic, social and cultural rights in Nigeria. It begins with a brief review of the legal architecture of economic, social and cultural rights. It examines challenges to implementing these rights, such as locus standi, justiciability and the doctrine of dualism. Finally, it identifies the opportunities provided by Nigeria's current constitutional review process; the debate on access to information legislation; legislative action; and citizens' education, empowerment and mobilisation.*

## 1 Introduction

Scholars are often quick to claim that economic, social and cultural rights are *programmatic*<sup>1</sup> and therefore incapable of immediate reali-

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<sup>1</sup> In the sense of having to be 'realised gradually', being of a 'more political nature' and 'not capable of judicial enforcement'. See A Eide 'Economic, social and cultural rights as human rights' in A Eide & A Rosas (eds) *Economic, social and cultural rights: A textbook* (2001) 3. See also 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.

sation.<sup>2</sup> This claim is reinforced by the language of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which gives considerable discretion to states in the standard and timing of recognised rights.<sup>3</sup>

The wide gap<sup>4</sup> between the reception and enforcement of economic, social and cultural rights, on the one hand, and civil and political rights, on the other, ensures that the former are treated less seriously than the latter. However, economic, social and cultural rights have far-reaching implications for the lives and livelihood of millions of poor and powerless Africans.

In Nigeria, economic, social and cultural rights are recognised under chapter II of the 1999 Constitution as Fundamental Objectives and Directive Principles of State Policy (DPSP). However, section 6(6)(c) seems to prohibit the courts from entertaining matters arising out of violations of chapter II. If one assumes that this is fatal to litigation on economic, social and cultural rights,<sup>5</sup> one needs to look for other opportunities to realise these rights.

The article explores such opportunities with a view to eliciting a discussion on the need to realise the *rights of the poor*. It reviews the legal architecture of economic, social and cultural rights as well as challenges to implementing this specie of rights, such as *locus standi*, justiciability and the doctrine of dualism. Finally, it explores the opportunities provided by Nigeria's current constitutional review process; the debate on access to information legislation; legislative action; and citizens' education, empowerment and mobilisation.

## 2 Legal architecture of economic, social and cultural rights

Economic, social and cultural rights exist on three different but interconnected levels — international, regional and national. At the international level, the Universal Declaration on Human Rights (Universal Declara-

<sup>2</sup> Indeed, art 2 of ICESCR urges states to 'progressively realise' these rights.

<sup>3</sup> Exceptions are the right to free and compulsory primary education and the principle of non-discrimination. See J Cottrell & Y Ghai 'The role of the courts in implementing economic, social and cultural rights' in Y Ghai & J Cottrell (eds) *Economic, social and cultural rights in practice – The role of judges in implementing economic, social and cultural rights* (2004) 61.

<sup>4</sup> For background on the factors responsible for the existing gap, see S Ibe 'Beyond the rhetoric: Transcending justiciability in the enforcement of socio-economic rights in Nigeria' unpublished LLM dissertation, Maastricht University, Netherlands, 2006 (on file with author); RKM Smith *Textbook on international human rights* (2003); Eide (n 1 above); HJ Steiner & P Alston *International human rights in context* (2000); MCR Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995).

<sup>5</sup> It is not. I provide the basis for this conclusion in sec 2 of the article.

tion) recognises a few economic, social and cultural rights.<sup>6</sup> ICESCR<sup>7</sup> is the framework for realising these rights. Until recently, ICESCR did not provide access to remedies at the international level for victims of violations of economic, social and cultural rights.<sup>8</sup> Therefore, such victims had to resort to domestic or regional systems.

Described as representing 'a significantly new and challenging normative framework for the implementation of economic, social and cultural rights',<sup>9</sup> the African Charter on Human and Peoples' Rights (African Charter) presents economic, social and cultural rights free of claw-back clauses.<sup>10</sup>

Unlike the case with ICESCR,<sup>11</sup> state parties to the African Charter assume obligations that have immediate effect. State parties must respect, protect and fulfil all the rights in the Charter, including economic, social and cultural rights.<sup>12</sup> The obligation to respect, like that arising under ICESCR, means that states must 'refrain from actions or conduct that contravene or are capable of impeding the enjoyment of economic, social and cultural rights'.<sup>13</sup> This obligation is neither

<sup>6</sup> Examples include the right to an adequate standard of living (art 25); the right to property (art 17); the right to work (art 23); and the right to social security (arts 22 & 25).

<sup>7</sup> By Resolution 543 (VI) of 5 February 1952, the Commission on Human Rights divided the rights contained in the Universal Declaration into what would become two separate covenants, ICESCR and the International Covenant on Civil and Political Rights (ICCPR), in part because economic, social and cultural rights were perceived as general principles for governments in the management of public affairs while civil and political rights were considered enforceable. See Ibe (n 4 above) 6.

<sup>8</sup> The Optional Protocol to ICESCR, adopted on 10 December 2008, rectified this. Unlike ICESCR, ICCPR was adopted with an Optional Protocol establishing the procedure for individual complaints in 1966. See L Chenwi 'Correcting the historical asymmetry between rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 9 *African Human Rights Law Journal* 23-51.

<sup>9</sup> CA Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights – The system in practice 1986-2000* (2002) 178-218 186.

<sup>10</sup> Civil and political rights are subject to claw-back clauses. See Ibe (n 4 above) 13.

<sup>11</sup> Art 2 of ICESCR enunciates the 'progressive realisation' principle, which the ESCR Committee has described as 'a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time'. See General Comment 3 on the Nature of State Parties' Obligations under ICESCR, para 9.

<sup>12</sup> Unfortunately, the Charter does not mention such ICESCR rights as the right to social security, an adequate standard of living (art 11(1)), freedom from hunger (art 11(2)) or the right to strike (art 8(1)(d)). Although the African Charter specifically provides for economic, social and cultural rights and recognises them as justiciable rights, state parties to the Charter have yet to realise these rights, either within domestic legal systems or at the regional level.

<sup>13</sup> F Morka 'Economic, social and cultural rights and democracy: Establishing causality and mutuality' in HURILAWS *Enforcing economic, social and cultural rights in Nigeria – Rhetoric or reality?* (2005) 85 88.

contingent on 'availability of resources', nor subject to the notion of 'progressive realisation'. The obligation to protect involves a duty to encourage third parties (including non-state parties) to respect these rights or refrain from violating them. The obligation to fulfil creates a duty that 'requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights'.<sup>14</sup> Significantly, article 45 of the African Charter makes all rights justiciable before the African Commission on Human and Peoples' Rights (African Commission).<sup>15</sup> Nigeria has ratified and domesticated the African Charter.<sup>16</sup>

In a recent decision,<sup>17</sup> the Economic Community of West African States (ECOWAS) Court of Justice confirmed that the 'rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before this court'.<sup>18</sup>

Nigeria's 1999 Constitution recognises economic, social and cultural rights in chapter II consisting of DPSP provisions.<sup>19</sup> Chapter II was devised to fulfil the promises made in the Preamble to the Constitution, *inter alia* to

provide for a constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of freedom, equality and justice and for the purpose of consolidating the unity of our people.

The Preamble and provisions of chapter II reflect the high ideals of a liberal democratic polity and thus serves as guidelines to action on major policy goals.<sup>20</sup> The rationale for the inclusion of chapter II in the 1999 Constitution, as in the 1979 Constitution, is that governments

<sup>14</sup> See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) 15 *Netherlands Quarterly of Human Rights* 244.

<sup>15</sup> See S Ibe 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 225-228.

<sup>16</sup> See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act ch A9, Laws of the Federation of Nigeria, 2004 which domesticates the Charter in accordance with sec 12 of the 1999 Constitution. Sec 1 of the Act provides that '[t]he provisions of the Charter shall have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria'. See also the decision in *Fawehinmi v Abacha* (2000) 6 NWLR Part 660, 228 confirming that the Charter is part of Nigerian law.

<sup>17</sup> *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission*, Suit ECW/CCJ/APP/08/08, ruling of 27 October 2009 (on file with author).

<sup>18</sup> n 17 above, para 19.

<sup>19</sup> The term was first used in the 1979 Constitution. Justice Mamman Nasir described fundamental objectives as identifying 'the ultimate objectives of the nation' and the Directive Principles as laying down the 'policies which are expected to be pursued in the efforts of the nation to realise the national ideals' (see *Archbishop Okogie v The Attorney-General of Lagos State* (1981) 2 NCLR 350).

<sup>20</sup> O Agbakoba & U Emelonye *Test of progressive realisation of economic, social and cultural rights in Nigeria (1990-1999 Budget Analysis)* (2001) 1-2.



in developing countries have tended to be pre-occupied with power and its material perquisites and have scant regard for political ideals as to how society can be organised and ruled to the best advantage of all.<sup>21</sup> The resultant effect of this pre-occupation is that existing social divisions in Nigeria's heterogeneous population are perpetuated.

The first section under chapter II recognises the duty and responsibility of 'all organs of government, and all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this chapter of this Constitution'.<sup>22</sup> Similarly, section 224 provides that the programmes and objectives of a political party must conform to the provisions of chapter II. Finally, item 60 of the Exclusive Legislative List gives the National Assembly the power to make laws with respect to the establishment and regulation of authorities to promote and enforce the observance of the DPSP contained in chapter II. However, section 6(6)(c) of the same Constitution seems to prohibit the courts from entertaining cases arising under or as a result of chapter II.<sup>23</sup> Although it seems that by virtue of section 6(6)(c) economic, social and cultural rights are non-justiciable, I argue that this is not necessarily true.

In *Archbishop Anthony Okogie and Others v The Attorney-General of Lagos State*,<sup>24</sup> Nigeria's Appeal Court was able to examine this interesting subject. By a circular dated 26 March 1980, the Lagos State government purported to abolish private primary education in the state. The plaintiffs challenged the circular as unconstitutional. Under the relevant provisions of the 1979 Constitution, the plaintiffs applied to refer the following question to the Court of Appeal:

Whether or not the provision of educational services by a private citizen or organisation comes under the classes of economic activities outside the major sectors of the economy in which every citizen of Nigeria is entitled to engage in and whose right so to do the state is enjoined to protect within the meaning of section 16(1)(c) of the Constitution.

In his decision on the merits of the case, Mamman Nasir J held that no court has 'jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles'. He also clarified the role of the judiciary as 'limited to interpreting the general provisions

<sup>21</sup> J Akande *Introduction to the Constitution of Nigeria* (2000) 52.

<sup>22</sup> Sec 13.

<sup>23</sup> Consequently, some have argued that economic, social and cultural rights are not justiciable. See E Durojaye 'Litigating the right to health in Nigeria: Challenges and prospects' paper presented at the Conference on International Law and Human Rights Litigation in Africa organised by the Centre for Human Rights, University of Pretoria, South Africa, and the Amsterdam Centre for International Law, University of Amsterdam, Netherlands, 14-15 August 2009, University of Lagos, Nigeria 11-12; F Falana *Fundamental rights enforcement* (2004) 9.

<sup>24</sup> (1981) 2 NCLR 350. The facts and key pronouncements are excerpted from Ibe (n 15 above) 241-242.

of the Constitution or any other statute in such a way that the provisions of the chapter are observed'. I disagree with the popular idea that this decision<sup>25</sup> and others like it<sup>26</sup> make economic, social and cultural rights non-justiciable. If nothing else, the fact that the court pronounced on this matter demonstrates that judicial action is possible on matters arising out of chapter II violations. Furthermore, the court correctly observed that its role should be to interpret the provisions of the Constitution in a way that ensures that the provisions of chapter II are observed. I would therefore argue that, although section 6(6)(c) provides the basis for arguing against the justiciability of economic, social and cultural rights, it does make an important exception, namely, 'except as otherwise provided by this Constitution'.<sup>27</sup> This means that a provision of the Constitution, such as item 60 of the Exclusive Legislative List, changes the equation to the extent that the legislature enacts any specific legislation seeking to implement chapter II.

The legislature has in fact done so in the case of Nigeria's anti-corruption crusade. In *Attorney-General of Ondo State v Attorney-General of the Federation*,<sup>28</sup> Uwaifo J made clear the relationship between item 60(a) and section 15(5)<sup>29</sup> of the Constitution in these words:<sup>30</sup>

It is quite tenable, in my view to consider item 60(a) in regard to section 15(5) of the Constitution as having placed directly as a subject in the exclusive legislative list, the abolition of all corrupt practices and abuse of office, in the terms that the item is stated. Under the circumstance, the National Assembly may, in the exercise of the substantive powers given by section 4 of the Constitution in relation to item 60(a), make all laws which are directed to the end of those powers and which are reasonably incidental to their absolute and entire fulfilment.

<sup>25</sup> Indeed, the decision liberalises access to primary education by providing the platform for establishing privately-owned primary schools in Lagos State.

<sup>26</sup> See also *Uzoukwu v Ezeonu II* (1991) 6 NWLR Part 200.

<sup>27</sup> In *Federal Republic of Nigeria v Alhaji Mika Anache & Others* (2004) 14 WRN 1-90 61, Justice Niki Tobi explained that 'the non-justiciability of section 6(6)(c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words "except as otherwise provided by this Constitution". This means that if the Constitution otherwise provides in another section, which makes a section or sections of Chapter II justiciable, it will be so interpreted by the courts.'

<sup>28</sup> (2002) 27 WRN 1-231.

<sup>29</sup> Sec 15(5) provides: 'The state shall abolish all corrupt practices and abuse of power.' It is embedded in ch II of the 1999 Constitution.

<sup>30</sup> n 28 above, 160 paras 40-48. In the *Anache* case (n 27 above), Tobi J emphasised that '... item 60(a) is one of the items that the National Assembly is vested with legislative power ... by item 60(a), the National Assembly is empowered to establish and regulate authorities to "promote and enforce the observance of the provisions of chapter 2 of the Constitution"' (63).

Further, Nigeria's chapter II owes its origin to India.<sup>31</sup> The Indian judiciary has set a precedent regarding DPSP, in an expansive model of interpretation for economic, social and cultural rights. The model identifies an undeniable link between justiciable civil and political rights and supposedly non-justiciable economic, social and cultural rights. In a plethora of cases, beginning with *Maneka Gandhi*,<sup>32</sup> the court expanded civil and political rights to include economic, social and cultural rights. Indeed, we can argue that this happens in a rather subtle form in Nigeria.

There are several cases in which the judiciary has granted bail to a criminal suspect on account of ill-health.<sup>33</sup> Clearly, the subject matter is a civil and political right, namely, the right to bail as an integral part of the right to personal liberty. However, a socio-economic right (the right to health) is relied upon for the purpose of claiming a civil and political right. This is a model firmly rooted in Indian jurisprudence, but also interesting for its positive contribution to improving rights. It is therefore important to consciously apply this principle in the dispensation of justice.

Strengthening institutions such as the Independent National Electoral Commission (INEC), the National Human Rights Commission (NHRC), the Economic and Financial Crimes Commission and the Independent Corrupt Practices and Other Related Offences Commission (ICPC) will ensure that citizens determine that their leaders and independent institutions guarantee responsible and accountable governance at all levels.

### 3 Challenges to implementing economic, social and cultural rights in Nigeria

In this section, I consider the challenges of *locus standi*, justiciability and dualism which impede the implementation of economic, social and cultural rights in Nigeria.

<sup>31</sup> It is crucial to observe that India's adoption of the DPSP was defined by its historical and social context as well as international developments at the time of its drafting, which predated the general trend towards decolonisation. Things have since changed. Eg, the Vienna Declaration of 1993 expressly affirms the current trend towards universality, indivisibility, interdependence and interrelatedness of all rights.

<sup>32</sup> See also *Francis Coralie Mullin v Union Territory of Delhi* (1981) 1 SCC 608, where the Supreme Court held that the right to life guaranteed under art 21 of the Indian Constitution includes the right to live with human dignity and all that goes along with it.

<sup>33</sup> Courts are enjoined to grant bail in special circumstances, including cases where refusal of the application will put the applicant's health in serious jeopardy. See eg the case of *Fawehinmi v The State* (1990) 1 NWLR Part 127 486. In *Mohammed Abacha v State* (2002) 5 NWLR Part 761 638 653 para E, Ayoola J confirmed that '[w]hatever the stage at which bail is sought by an accused person, ill-health of the accused is a consideration weighty enough to be reckoned as special circumstance'.

### 3.1 The challenge of *locus standi*

The challenge of *locus standi* or standing to sue is relevant within the context of justiciable economic, social and cultural rights. This is because only in this context would it be necessary to approach the courts as individuals or a collective for the purpose of seeking judicial interpretation or a resolution of problems arising from or attributable to violations of economic, social and cultural rights.

Onnoghen J has described *locus standi* as 'the legal capacity to institute proceedings in a court of law or tribunal'.<sup>34</sup> In the alternative, it is 'the right of a party to appear and be heard on the question for determination before the court or tribunal'.<sup>35</sup> To establish *locus standi*, a litigant must show sufficient interest in the suit or matter.

There are two criteria for showing sufficient interest. The first relates to the question whether the party could have been joined as a party to the suit. The second is whether the party seeking redress will suffer some injury or hardship arising from the litigation.<sup>36</sup> Consequently, only a party in imminent danger of any conduct of the adverse party has *locus standi* to commence an action.<sup>37</sup> In view of the strict requirements for establishing standing to sue, and the confusing decision in *Abraham Adesanya v President of the Federal Republic of Nigeria*,<sup>38</sup> it is often difficult or impossible for non-governmental organisations (NGOs) or other interested persons to sue on behalf of victims of rights violations. Regarded as the *locus classicus* on the subject in Nigeria, the *Adesanya* case sought a determination by the Supreme Court on three key issues, the most important of which concerns the correct interpretation of the provisions of section 6(6)(b). Section 6(6)(b) of the 1979/99 Constitutions provides as follows:

The judicial powers vested in accordance with the foregoing provisions of this section shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

<sup>34</sup> See *Berende v Usman* (2005) 14 NWLR Part 944 1 16 paras D-E, quoting the decision in *Alhaji Gombe v PW (Nigeria) Ltd* (1995) 6 NWLR Part 402 402. In *Thomas & Others v Olufosoye* (1986) 1 NWLR Part 18 669, Ademola JCA, referring to the *locus classicus* on the issue of *locus standi* in Nigeria, *Senator Abraham Adesanya v The President of Nigeria* (2002) WRN Vol 44 80, said: '[I]t is also the law ... that, to entitle a person to invoke judicial power, he must show that either his personal interest will immediately be or has been adversely affected by the action or that he has sustained or is in immediate danger of sustaining an injury to himself and which interest [sic] injury is over and above that of the general public.'

<sup>35</sup> As above. See also *Senator Abraham Adesanya v President of the Federal Republic of Nigeria* (n 34 above); *Fawehinmi v Col Akilu* (1987) 4 NWLR Part 67 797.

<sup>36</sup> Niki Tobi J in *Pam v Mohammed* (2008) 40 *Weekly Reports of Nigeria* 67 123.

<sup>37</sup> See *Olagunju v Yahaya* (1998) 3 NWLR Part 542 501.

<sup>38</sup> See n 34 above.

In a minority opinion often confused as the majority decision on the matter, Mohammed Bello J expressed the following sentiment:

It seems to me that upon the construction of the subsection, it is only when the civil rights and obligations of the person who invokes the jurisdiction of the court, are in issue for determination that the judicial powers of the court may be invoked. In other words, standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of.

A careful survey of the decision in *Adesanya's* case reveals that the Supreme Court was not unanimous on the real purport of section 6(6)(b) in relation to *locus standi* in Nigeria. While Nnamani and Idigbe JJ subscribed to Bello J's idea that section 6(6)(b) laid down a test for *locus standi*, Sowemimo and Obaseki JJ took the view expressed by Fatayi Williams CJ (then Chief Justice of Nigeria) to the contrary. Unfortunately, Uwais J, who had the casting vote, took a completely different view to the effect that the interpretation of section 6(6)(b) depended on the facts and circumstances of each case. This *lacuna* led to such confusion that a few subsequent cases<sup>39</sup> were decided on the basis that Bello J's opinion was the majority decision of the Supreme Court. The Court, however, clarified its position on the *Adesanya* case in *Owodunni v Registered Trustees of the Celestial Church and Others*.<sup>40</sup> In its lead judgment, Ogundare J confirmed that 'there was not a majority of the court in favour of Bello JSC's interpretation of section 6(6)(b) of the Constitution'. Instead, he pointed to the decision of Ayoola J of the Court of Appeal as correctly establishing the province of the section.

In the case referred to above, Ayoola J offered some illumination in the following words:

In most written Constitutions, there is a delimitation of the power of the three independent organs of government namely: the executive, the legislature and the judiciary. Section 6 of the Constitution which vests judicial powers of the Federation and the states in the courts and defines the nature and extent of such judicial powers does not directly deal with the right of access of the individual to the court. The main objective of section 6 is to leave no doubt as to the definition and delimitation of the boundaries of the separation of powers between the judiciary on the one hand and the other organs of government on the other, in order to obviate any claim of the other organs of government, or even attempt by them to share judicial powers with the courts. Section 6(6)(b) of the Constitution is primarily and basically designed to describe the nature and extent of judicial powers vested in the courts. It is not intended to be a catch-all, all-purpose provision to be pressed into service for determination of questions ranging from *locus standi* to the most uncontroversial questions of jurisdiction.

I think that Ayoola J's judgment correctly establishes the province of *locus standi* to the extent that it holds that section 6(6)(b) is not its

<sup>39</sup> See *Fawehinmi v President, Federal Republic of Nigeria* (2007) 14 NWLR Part 1054 275 and *Okechukwu v Etukokwu* (1998) 8 NWLR Part 562 513.

<sup>40</sup> (2000) 10 NWLR Part 675 315.

legal basis. However, to the extent that it does not carefully establish its legal basis, it is necessary to devise a more inclusive definition of *locus standi* in a way that ensures that litigants need not demonstrate personal interest 'over and above'<sup>41</sup> those of the general public.<sup>42</sup> For this purpose, I propose a revision of the law<sup>43</sup> to allow for the *actio popularis*<sup>44</sup> or public interest litigation, where a person or organisation may institute a case on behalf of a third person or persons with commonality of grievance.<sup>45</sup> Shortly after this article was submitted, the Chief Justice of Nigeria made new rules of court<sup>46</sup> to dispense with the strict requirements of *locus standi*.<sup>47</sup> According to section 3(e) of the Rules, no human rights case may be dismissed or struck out for want of *locus standi*.

### 3.2 The challenge of justiciability

Much has been written and said about the justiciability of economic, social and cultural rights.<sup>48</sup> In this article, I have referred to the opinion of some writers on the subject. For all the reasons advanced for the non-justiciability of economic, social and cultural rights – the implications for revenue allocation and separation of powers, the unavailability

<sup>41</sup> The Court of Appeal in *Fawehinmi v President, Federal Republic of Nigeria* (n 39 above) and Supreme Court in *Owodunni v Registered Trustees of the Celestial Church & Others* (n 40 above) applied the 'over and above' principle.

<sup>42</sup> See *Olufosoye* (n 34 above).

<sup>43</sup> Essentially the Rules of Court.

<sup>44</sup> Interestingly, the ECOWAS Court relied on this in the *SERAP* case to hold that 'in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable.' See the *SERAP* case (n 17 above) 16.

<sup>45</sup> Explaining the goal of public interest litigation, the Indian Supreme Court in *Peoples' Union for Democratic Rights (PUDR) v Union of India* (1983) 1 SCR 456 <http://www.scribd.com/doc/17037501/PUDR> (accessed 2 October 2009) held that it was to 'promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and un-redressed'.

<sup>46</sup> Fundamental Rights (Enforcement Procedure) Rules 2009 (on file with author), which took effect on 1 December 2009.

<sup>47</sup> Sec 3(e) lists the following as possible applicants in a human rights case: (i) anyone acting in his own interest; (ii) anyone acting on behalf of another person; (iii) anyone acting as a member of, or in the interest of, a group or a class of persons; (iv) anyone acting in the public interest; (v) associations acting in the interest of its members or other individual groups.

<sup>48</sup> Eg, Lester and An-Na'im restate the core arguments in the justiciability debate in Ghai & Cottrell (n 3 above). Lester believes that 'for reasons of democratic legitimacy, crucial resource allocation decisions are better left in the hands of the legislature and the executive, rather than being determined by an unelected judiciary' and that judicial intervention should take place only 'where there exists a clear and comprehensive dereliction of duty on the part of the two "democratic" branches of government'. For his part, An-Na'im thinks that 'if human rights are to be universal in a genu-

or inadequacy of resources and implementation difficulties – the one point which continues to resonate is that regarding the financial implications of judicial decisions on economic, social and cultural rights. Proponents argue that economic, social and cultural rights involve considerable financial investments over which the judiciary is ill-equipped to adjudicate. This is untenable considering the financial implications of ordering fresh elections in Nigeria over the last two years since the last general elections in April 2007. The fact that every fresh election conducted depletes the commonwealth does not invalidate the legal competence of courts to adjudicate over election petitions. By the same token, the prospect of a huge financial outlay to meet the basic needs of citizens should not deter any judge from hearing economic, social and cultural rights cases on their merits.<sup>49</sup>

Whilst one would not argue for exclusive and/or first-hand recourse to litigation in cases involving violations of economic, social and cultural rights, it is imperative that one resorts to the judiciary in a country like Nigeria where there exists a sufficiently gross failure to uphold basic economic, social and cultural rights. Where the other two branches have failed to fulfil their responsibilities, the judiciary has a duty to intervene. The independent bar and NGOs must start this process. The judiciary will need to articulate a minimum core obligation below which the state cannot fall. This is essential in view of the penchant for states to rely on the idea of the progressive realisation to evade obligations freely assumed under ICESCR. Although the progressive realisation benchmark assumes that valid expectations and concomitant obligations of state parties under ICESCR are neither uniform nor universal, but relative to levels of development and available resources,<sup>50</sup> the Committee on Economic, Social and Cultural Rights (ESCR Committee) has clarified that it imposes an obligation to ‘move as expeditiously and effectively as possible’ towards achieving a set goal, namely, the full realisation of economic, social and cultural rights.<sup>51</sup> Furthermore, the ESCR Committee establishes a minimum core obligation on the basis of which every state party owes an obligation to ‘ensure the satisfaction of minimum essential levels of each of the rights’.<sup>52</sup> State parties seeking

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in a more inclusive sense, they must include ESCR and that cannot be without judicial supervision of the performance of normal political and administrative process in this regard’. See L Lester of Herne Hill QC & C O’Cinneide ‘The effective protection of socio-economic rights’ in Ghai & Cottrell (n 3 above) 17-22 and AA An-Na’im ‘To affirm the full human rights standing of economic, social and cultural rights’ in Ghai & Cottrell (n 3 above) 7-16.

<sup>49</sup> See An-Na’im (n 48 above).

<sup>50</sup> A Chapman & S Russell (eds) *Core obligations: Building a framework for economic, social and cultural rights* (2002) 5.

<sup>51</sup> Para 9, General Comment 3 on ‘The Nature of States Parties’ Obligations’ (5th session, 1990). See [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument) (accessed 31 March 2010).

<sup>52</sup> General Comment 3 (n 51 above) para 10.



to rely on the unavailability of resources to escape the minimum core obligation must demonstrate that 'every effort has been made to use all resources that are at its (their) disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.<sup>53</sup> However, the South African Constitutional Court has rejected the 'minimum core' requirement on the ground that states may only be held to the standard of reasonability in the steps they take to guarantee economic, social and cultural rights. In a frequently-cited decision,<sup>54</sup> the Court declared:<sup>55</sup>

It is impossible to give everyone access even to a 'core service' immediately. All that is possible and all that can be expected of the state, is that it acts reasonably to provide access to the socio-economic rights ... on a progressive basis.

### 3.3 The challenge of dualism

Dualism is described as legislative *ad hoc* incorporation of international rules. Under dualist systems, international law becomes applicable within the state's legal system only if and when the legislature passes specific implementing legislation.<sup>56</sup>

Nigeria has a dualist system regarding international law. Specifically, section 12 of the 1999 Constitution provides that: '[n]o treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'. Interpreting this provision against Nigeria's obligations under the Convention of the International Labour Organisation, the Supreme Court insisted that section 12(1) was a condition precedent to applying international treaties ratified by her.<sup>57</sup> Specifically, the Court confirmed that '[i]n so far as the ILO Convention has not been enacted into law by the National Assembly, it has no force of

<sup>53</sup> As above.

<sup>54</sup> *Minister of Health & Others v Treatment Action Campaign & Others* 2002 5 SA 721 (CC) (TAC case). See [http://www.law-lib.utoronto.ca/Diana/TAC\\_case\\_study/MinisterofhealthvTACconst.court.pdf](http://www.law-lib.utoronto.ca/Diana/TAC_case_study/MinisterofhealthvTACconst.court.pdf) (accessed 2 April 2010).

<sup>55</sup> TAC case (n 54 above) 24.

<sup>56</sup> See M Dixon & R McCorquodale *Cases and materials on international law* (2003) 109, quoting A Cassese *International law* (2001) 168-171 180. See also ME Adjami 'African courts, international law and comparative case law: Chimera or emerging human rights jurisprudence?' (2002) 24 *Michigan Journal of International Law* 103. For Brownlie, dualism 'points to the essential difference of international law and municipal law, consisting primarily in the fact that the two systems regulate different subject matter'. See I Brownlie *Principles of public international law* (1998) 31-32.

<sup>57</sup> See *The Registered Trustees of National Association of Community Health Practitioners of Nigeria & Others v Medical and Health Workers Union of Nigeria* (2008) 37 WRN 1.

law in Nigeria and cannot possibly apply'.<sup>58</sup> Although this decision violates a fundamental principle of international law, '[a] state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law',<sup>59</sup> it nonetheless represents the true position of the law with respect to unincorporated treaties in Nigeria. For incorporated treaties, the position is different. In *Abacha v Fawehinmi*,<sup>60</sup> a full panel of Nigeria's Supreme Court examined the legal effect of incorporated treaties, specifically the African Charter. The Court declared that such treaties become 'binding and our courts must give effect to it like all other laws falling within the judicial power of the courts'.<sup>61</sup> However, the Court was careful to clarify that such treaties with international flavour did not, by virtue of incorporation into domestic law, assume a status higher than the Constitution. Interestingly, the Court unwittingly liberalised access to courts for violations of economic, social and cultural rights by agreeing that once incorporated into domestic law, an international treaty without specific procedural provisions could be enforced by recourse to the Fundamental Rights Enforcement Procedure Rules made pursuant to chapter IV of the 1999 Constitution.<sup>62</sup>

## 4 Opportunities for realising economic, social and cultural rights

In this section, we explore opportunities for realising economic, social and cultural rights in Nigeria. In this regard, we shall consider the current constitutional review process; the clamour for a freedom of information law; legislative action; and citizens' education, empowerment and mobilisation.

### 4.1 The constitutional review process

Nigeria's bi-cameral legislature, comprising the Senate and House of Representatives, has a constitutional mandate to amend the Constitu-

<sup>58</sup> Sylvester Onu J 53 lines 30-35. He also referred to the decision of Ogundare J in *Abacha v Fawehinmi* SC 45/1997 <http://www.nigeria-law.org/General%20Sanni%20Abacha%20&%20Ors%20%20V%20%20Chief%20Gani%20Fawehinmi.htm> (accessed 22 October 2009), wherein he echoed the provisions of sec 12 that 'an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly'.

<sup>59</sup> See art 27 of the Vienna Convention on the Law of Treaties, 1969, referring to justification for failure to perform a treaty.

<sup>60</sup> n 58 above.

<sup>61</sup> n 58 above, 4.

<sup>62</sup> See judgment of O Achike J in *Abacha v Fawehinmi* (n 58 above) 20. See also *Oshevire v British Caledonian Airways* (1990) 7 NWLR Part 163 489 and *Ibidapo v Lufthansa Airlines* (1997) 4 NWLR Part 498 124.

tion.<sup>63</sup> In furtherance of this mandate, both houses have attempted a review of the military-imposed Constitution of 1999 many times. Unfortunately, every attempt has failed. Its current attempt presents an opportunity for legislative proposals to place economic, social and cultural rights on a firm footing. To ensure equality of all categories of rights under the Constitution, it might be necessary to merge all rights under a single chapter in the Bill of Rights and to vest jurisdiction over a violation or threatened violation of these rights in the courts. This way the challenge of justiciability will be laid to rest. Concomitant to providing access to courts for violations of economic, social and cultural rights is gaining access to information necessary to evaluate government's performance in this critical area.

#### 4.2 The debate on access to information

The journey to an access to information regime in Nigeria began ten years ago with the submission of a bill on the subject to the National Assembly. Unfortunately, Nigerians are yet to enjoy freedom of information. Although this significantly violates the promises of past and current governments, it presents an opportunity to litigate existing legislation guaranteeing access to information, such as the Environmental Impact Assessment Act,<sup>64</sup> with a view to forcing the relevant institutions to open up the public debate. Specifically, it provides a latitude for citizens to interrogate government income and expenditure with a view to ensuring that needs are met in timely fashion.

#### 4.3 Legislative action

Item 60 of the Second Schedule to the Constitution empowers the National Assembly to establish and regulate authorities of the federation or any state 'to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution'. This presents an interesting opportunity for the legislature to hold the executive accountable for steps taken to progressively realise economic, social and cultural rights. The Bar Association should engage

<sup>63</sup> Sec 9 of the 1999 Constitution invests the National Assembly with this mandate.

<sup>64</sup> Cap E12, Laws of the Federation 2004. The Act sets out general principles, procedure and methods to enable the prior consideration of environmental impact assessment on certain public or private projects. Sec 2(1) provides: 'The public or private sector of the economy shall not undertake or embark on or authorise projects or activities without prior consideration, at an early stage, of their environmental effects.' The Act enjoins the relevant agency responsible for the environment to 'give an opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on the environmental impact assessment of the activity' before it gives a decision on any activity to which an EIA has been produced (sec 7). Furthermore, the Act mandates the agency to publish its decision in a manner that members of the public can be notified (sec 9(3)). These sections provide a veritable opportunity to challenge a denial of access to government-held information and should be explored to broaden existing interventions.

in legislative advocacy to ensure that the National Assembly takes the necessary steps, failing which it should invite the courts to compel the assembly to perform its lawful duties as a public institution.

#### 4.4 Education, empowerment and mobilisation of citizens

NGOs and the Bar Association owe a sacred duty to Nigerians, namely, the duty to educate, empower and mobilise them in order to take positive action towards realising their full potential. At the heart of the pervasive poverty and almost absolute disregard for the economic, social and cultural rights of citizens are ignorance and powerlessness. Public advocacy events directed at equipping the rural and urban poor with the requisite skills to interface with government and, more importantly, demand good governance, are crucial to sustaining Nigeria's fledgling democracy. To ensure success and sustainability, it is necessary to equip the lawyers themselves. Consequently, the teaching of human rights law should be made a compulsory course in the third or fourth year programme of law faculties across the country. For lawyers, the continuing legal education programme of the Nigerian Bar Association should aim to provide a minimum of four hours of human rights training per year.

### 5 Conclusion

Even the most advanced economies fail to place a high premium on economic, social and cultural rights for reasons previously discussed. Whilst this may be acceptable, to a very limited extent, in those countries because of their robust social welfare programmes,<sup>65</sup> it is absolutely unacceptable to accord economic, social and cultural rights less than equal status with civil and political rights in countries such as Nigeria. In this article, I have identified the challenges as well as opportunities for realising this specie of rights. However, it is important to note that only through the collaborative efforts of the three arms of government – executive, legislative and judicial – as well as civil society, including the Bar Association and other interest groups, will economic, social and cultural rights be realised and sustained. In the words of Bhagwati J:<sup>66</sup>

The task of restructuring the social and economic order so that the social and economic rights become a meaningful reality for the poor and lowly sections of the community is one which legitimately belongs to the legislature and the executive, but mere initiation of social and economic rescue programmes by the executive and the legislature would not be enough and it is only through multidimensional strategies including public interest litigation that these social and economic rescue programmes can be made effective.

<sup>65</sup> See SC Agbakwa 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Law Journal* 177.

<sup>66</sup> *Peoples' Union v Union of India* (n 45 above).

# Human rights developments in the African Union during 2009

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## Summary

*The year 2009 witnessed numerous human rights developments on the African continent. The African Union added a treaty on the protection of internally displaced persons to its already robust normative human rights framework. The African Commission reviewed and expanded its working groups, extended its reach to emerging issues, including climate change and the global financial crisis, and adopted reporting guidelines under the African Women's Protocol and a framework document on the abolition of the death penalty in Africa. For its part, the African Court handed down its first judgment, while the African Children's Committee further cemented its role in examining state reports under the African Children's Charter. This note provides an overview of these developments.*

## 1 Introduction

The African Union (AU) – Africa's continental intergovernmental body – has entrenched the promotion and protection of human rights as an integral part of its mandate and agenda.<sup>1</sup> In 2009, the AU added a treaty on the protection of internally displaced persons to its already

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<sup>1</sup> See E Baimu 'The African Union: Hope for better protection of human rights in Africa?' (2001) 1 *African Human Rights Law Journal* 299.

robust normative human rights framework.<sup>2</sup> Regional bodies operating under the auspices of the AU specifically charged with the functions of promoting and protecting human rights have also made significant strides in the discharge of their specific mandates. These bodies include the African Commission on Human and Peoples' Rights (African Commission), African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). The article reviews major developments within these bodies in the discharge of their specific mandates during 2009. It also briefly reviews developments within the AU's main organs which have relevance for human rights.

The developments highlighted in the article should not be seen in isolation from the human rights situation in Africa during 2009. In many parts of the continent, efforts to consolidate gains made over the years in the field of human rights and democratisation were enhanced. However, regression was recorded in several African countries where impunity and the resurgence of armed conflicts and unconstitutional regime changes prevailed.<sup>3</sup> The realisation of socio-economic rights on the continent was also stalled by the global economic recession. Thus, an overall picture of the continent in 2009 shows a chequered landscape of gains and losses in the promotion and protection of human rights.

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

The African Commission lies at the heart of the AU's institutional framework for the promotion and protection of human rights. It is charged with the mandate of monitoring state compliance with the African Charter on Human and Peoples' Rights (African Charter),<sup>4</sup> and its Protocol on the Rights of Women in Africa (African Women's Protocol).<sup>5</sup> The Commission customarily holds two ordinary sessions per year, during which it performs a number of tasks in the execution of its mandate. The African Commission may also hold extraordinary sessions if and when circumstances demand. The individual commissioners who constitute the Commission are also expected to execute their specific mandates during the inter-session period. In 2009, the African Commission held

<sup>2</sup> For the main AU human rights instruments, see C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007).

<sup>3</sup> See Resolution on the general human rights situation in Africa, ACHPR/Res157(XLVI)09.

<sup>4</sup> Art 45 African Charter.

<sup>5</sup> Arts 26(1) & 32 African Women's Protocol.

two ordinary sessions<sup>6</sup> and two extraordinary sessions.<sup>7</sup> The fact that extraordinary sessions were held is a reflection of the recent increase in funding for the Commission by the AU. These sessions were convened with the primary aim of reducing the number of communications that were yet to be finalised by the Commission and to conclude its position on the issues of complementarity with the African Court.<sup>8</sup>

## 2.1 Election of new members and bureau

In 2009, the Chairperson of the African Commission, Sanji Mmasenono Monageng (from Botswana), was elected as a judge of the International Criminal Court (ICC) with effect from March 2009. Her term as commissioner was to expire in July. The term of Commissioner Nyanduga (from Tanzania) also came to an end in July. Two new members of the Commission were thus elected at the 15th ordinary session of the AU Executive Council held in Sirte, Libya, in June 2009. Mohamed Fayek (from Egypt) and Mohamed Bechir Khalfallah (from Tunisia) were elected as new members.<sup>9</sup> The Executive Council also re-elected Zainabo Sylvie Kayitesi (from Rwanda) as a member of the Commission.<sup>10</sup> The trio were sworn in as commissioners during the 46th ordinary session of the Commission held in November 2009 in Banjul, The Gambia.<sup>11</sup>

With the election of Mr Fayek and Mr Khalfallah, both of whom have human rights non-governmental organisation (NGO) experience, the African Commission for the first time in a couple of years includes members from the North African region. The addition of Arab-speaking commissioners should be beneficial for the work of the Commission relating to the promotion and protection of human rights in this region of the continent.

The Commission now consists of six female and five male members; however, it seems that Commissioner Angela Melo (from Mozambique) has ceased to participate actively in the work of the Commission since

<sup>6</sup> In May and November 2009, the African Commission held its 45th and 46th ordinary sessions, respectively, in Banjul, The Gambia.

<sup>7</sup> In April and October 2009, the Commission held its 6th and 7th extraordinary sessions in Banjul, The Gambia, and Dakar, Senegal, respectively.

<sup>8</sup> See 26th Activity Report of the African Commission, para 150; 27th Activity Report of the African Commission, para 219.

<sup>9</sup> Decision on Election of Members of the African Commission on Human and Peoples' Rights, EX.CL/Dec.497(XV) Rev 1.

<sup>10</sup> As above.

<sup>11</sup> 27th Activity Report, para 23.



April 2009, although her mandate expires only in 2013.<sup>12</sup> Rule 8(1) of the African Commission's interim Rules of Procedure provides:<sup>13</sup>

If, in the unanimous opinion of the other members of the Commission, a member has stopped discharging his or her duties for any reason other than a temporary absence, the Chairperson of the Commission shall inform the Chairperson of the African Union Commission, who shall declare the seat vacant.

The African Commission thus has some discretion as to how long an absence from the sessions of the Commission should be tolerated. The Commission declared in November 2006 that Commissioner Babana had stopped discharging his duties, with the result that the AU Executive Council appointed a new member in July 2007 for the two years that remained of his term. Commissioner Babana had been appointed by the AU Assembly in July 2003 and participated in the work of the Commission until the 37th ordinary session in May 2005. Following this precedent, the Commission should request the Chairperson of the AU Commission to declare the seat of Commissioner Melo vacant at the session in May 2010 should she fail to attend this session.

At the November session, a new bureau of the Commission was elected. Commissioners Reine Alapini-Gansou and Mumba Malila were respectively elected Chairperson and Vice-Chairperson of the Commission for a term of two years.<sup>14</sup> Prior to the election of the new bureau, Commissioners Tom Nyanduga and Reine Alapini Gansou served as acting Chairperson and acting Vice-Chairperson as replacements for Commissioners Sanji Monageng and Angela Melo.

## 2.2 State reporting

The state reporting procedure is one of the two mechanisms (the other being the communications procedure) that the African Commission uses to monitor state compliance with the African Charter and the

<sup>12</sup> Commissioner Melo was re-elected to the Commission for a six-year period in July 2007. Her absence from the Commission is apparently linked to her appointment as Director of the Division of Philosophy and Human Rights of UNESCO in March 2009. She participated in the 6th extraordinary session of the Commission in Banjul, 30 March – 3 April 2009 but did not attend the 45th ordinary session in May, the 7th extraordinary session in October or the 46th ordinary session in November. She is not included in the list of members of the Commission published on the website of the Commission; see 'List and addresses of the commissioners of the African Commission on Human and Peoples' Rights' (updated January 2010), [http://www.achpr.org/english/\\_info/members\\_achpr\\_en.html](http://www.achpr.org/english/_info/members_achpr_en.html) (accessed 16 March 2010), though the Commission took note of her absence from the November 2009 session; see 27th Activity Report of the African Commission, para 6.

<sup>13</sup> This provision corresponds substantively with art 39(2) of the African Charter.

<sup>14</sup> 27th Activity Report, para 24.

African Women's Protocol.<sup>15</sup> The Commission's mandate to examine state reports draws from articles 62 and 26 of the African Charter and the African Women's Protocol respectively. It examines the reports in public during its ordinary sessions and issues concluding observations in respect of the reports it has examined. Since 1991, the Commission has examined a total of 77 reports, six of which were examined in 2009. During its 46th ordinary session, the Commission examined the reports of Mauritius, Uganda and Benin.<sup>16</sup> It examined the reports of Botswana, Congo, and Ethiopia during its 47th ordinary session.<sup>17</sup>

Notably, by submitting and presenting its report during the Commission's 47th ordinary session, Botswana reduced the number of states that had never submitted a report to the Commission by one. Thus, as at the end of 2009, 12 states had not submitted any report to the Commission,<sup>18</sup> while 26 other states were behind in the submission of reports.<sup>19</sup> Evidently, states' non-compliance with their reporting obligations remains a major challenge to the Commission's state reporting mechanism. However, compared to previously, recent years have seen increased reporting under the African Charter, which may be attributed to the 'sensitisation conducted by commissioners whenever undertaking missions and interacting with the respective state parties'.<sup>20</sup> For instance, in reference to Botswana's submission of its initial report, Commissioner Nyanduga observed during the 46th session that he could testify that his interaction with the government of Botswana during the last six years had contributed to the submission of the Botswana state report.<sup>21</sup>

Apart from the consideration of state reports, a significant development in 2009 regarding the state reporting procedure was the formulation and adoption of state reporting guidelines under the African Women's Protocol. Partly for lack of reporting guidelines, no state has ever submitted a report in terms of article 26 of the Protocol. Thus, in August 2009, the African Commission, in conjunction with the Centre for Human Rights at the University of Pretoria, organised the Gender Expert Meeting on State Reporting on the Protocol on

<sup>15</sup> See generally A Danielsen *The state reporting procedure under the African Charter* (1994); M Evans & R Murray 'The state reporting mechanism of the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 49.

<sup>16</sup> 26th Activity Report of the African Commission, para 133.

<sup>17</sup> 27th Activity Report, para 198.

<sup>18</sup> Comoros, Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Gabon, Guinea Bissau, Liberia, Malawi, São Tomé & Príncipe, Sierra Leone and Somalia. See 27th Activity Report, para 199.

<sup>19</sup> 27th Activity Report, para 199.

<sup>20</sup> Speech by The Honourable Bahame Tom Mukirya Nyanduga, the Acting Chairperson of the African Commission, at the opening ceremony of the 46th ordinary session of the African Commission (on file with the authors).

<sup>21</sup> As above.

the Rights of Women in Africa with the primary purpose of drafting reporting guidelines under the Protocol.<sup>22</sup> The Meeting formulated draft guidelines for presentation to the Commission for adoption.<sup>23</sup> According to the final Communiqué of the 46th ordinary session, the draft guidelines were adopted by the African Commission during that session.<sup>24</sup> However, in reflection of its traditional slow pace of dissemination and publication of its activities, the Commission has not yet published the guidelines. Indeed, the 27th Activity Report of the Commission is silent regarding the adoption of the guidelines as part of the Commission's activities during the 46th session.

If the final version of the guidelines adopted by the Commission were to mirror the draft guidelines, state parties to the African Charter and the African Women's Protocol would be required to submit their state reports in two parts: Part A, dealing with the rights in the African Charter, and Part B, dealing with the rights in the Protocol. In reporting on how they have given effect to each of the Protocol rights, states would be required to do so in terms of a list of measures of implementation covering ten areas: legislation; administrative measures; institutions; policies and programmes; public education; any other measures; remedies; challenges experienced; accessibility; and disaggregated statistics. Moreover, states would be required to report on the Protocol rights under thematic clusters rather than on an article-by-article basis. The guidelines identify eight thematic clusters: equality/non-discrimination; the protection of women from violence; rights relating to marriage; health and reproductive rights; economic, social and cultural rights; the right to peace; the protection of women in armed conflicts; and the rights of especially protected women's groups. By and large, the draft guidelines are a great improvement in comparison with the Commission's reporting guidelines under the African Charter, which have been harshly criticised.<sup>25</sup>

In 2009, the African Commission also published, for purposes of seeking comments from stakeholders, the Draft Principles and Guidelines on Economic, Social and Cultural Rights. Once adopted, the Principles and Guidelines will serve as 'additional guidelines for the submission

<sup>22</sup> See J Biegón 'Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of the Pretoria Gender Expert Meeting, 6-7 August 2009' (2009) 9 *African Human Rights Law Journal* 615.

<sup>23</sup> The draft guidelines have been annexed to Biegón (n 22 above) 639-643.

<sup>24</sup> Final Communiqué of the 46th ordinary session of the African Commission, para 41.

<sup>25</sup> See G Mugwanya 'Examination of state reports by the African Commission: A critical appraisal' (2001) 1 *African Human Rights Law Journal* 110-111 (describing the 1989 Guidelines for National Periodic Reports as 'too detailed, lengthy and in some areas repetitive and unnecessarily complex'). See also K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 261; F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the South' (2000) 44 *Journal of African Law* 110-111.

of state party reports to the Commission'. The Draft Principles and Guidelines are detailed and bulky, running to a total of 74 pages. They easily fall prey to the criticism that has been levelled against previous guidelines of the African Commission which have been 'very elaborate, but also too lengthy and complicated, making compliance a matter of impossibility'.<sup>26</sup> It would have helped to minimise the existing confusion inherent in the African Commission's reporting guidelines under the African Charter, if guidelines akin to general comments available under the United Nations (UN) system were gradually adopted for each socio-economic right. If adopted in their present form, the Draft Guidelines and Principles will most likely add more confusion to the already complex maze of state reporting guidelines under the African Charter.

### 2.3 Resolutions

Resolutions adopted during the sessions of the African Commission are important instruments by which the Commission executes its mandate. It uses the resolutions in a number of ways: to elaborate Charter rights; to comment on the human rights situation on the continent and in individual countries; to define its relationship with external actors; and to regulate its internal operations. The Commission adopted a total of 21 resolutions in 2009.<sup>27</sup> Most of these resolutions were administrative in nature; mainly dealing with the appointment of special rapporteurs and members of working groups. Two resolutions addressed contemporary issues that impact on the enjoyment of human rights on the continent: climate change and the global financial crisis.<sup>28</sup> In the Resolution on Climate Change, the African Commission decided to carry out a study on the impact of climate change on human rights in Africa, while in the Resolution on the Impact of the Global Financial Crisis, it urged African states to, *inter alia*, continuously monitor the impact of the global financial crisis on vulnerable groups. In addition to resolutions, special rapporteurs issued press releases on specific incidents in member states.

The Resolution on the Deteriorating Human Rights Situation in the Republic of The Gambia, adopted during the Commission's 7th extraordinary session in October 2009, warrants specific discussion here. The Resolution was adopted following media reports that the Gambian President had threatened to 'kill anyone, especially human rights defenders and their supporters, whom he considered to be sabotaging

<sup>26</sup> F Viljoen *International human rights law in Africa* (2007) 372. See also Mugwanya (n 25 above) 279; Quashigah (n 25 above) 261.

<sup>27</sup> The Commission adopted three resolutions during its 45th ordinary session, three during its 7th extraordinary session and 15 during its 46th ordinary session.

<sup>28</sup> Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, ACHPR/Res153(XLVI)09; Resolution on the Impact of the Ongoing Global Financial Crisis on the Enjoyment of Social and Economic Rights in Africa, ACHPR/Res159(XLVI)09.

or destabilising his government'. As a consequence, NGOs threatened to boycott the 46th session of the Commission which was due to be held in The Gambia in November 2009. In its Resolution, the Commission called on the AU to ensure that the Gambian President withdrew the threat and that if he could not, to provide the Commission with extra-budgetary resources to enable it to hold its 46th session either in Ethiopia or in any other member state of the AU. The Resolution also requested that the AU consider relocating the Secretariat of the Commission in the event that the human rights situation in The Gambia deteriorated.

The Resolution elicited strong but mixed reactions from the Gambian government. On the one hand, it reiterated its commitment to human rights and its willingness to host the African Commission and its sessions.<sup>29</sup> On the other hand, it made scathing attacks against the Commission and the African Centre for Democracy and Human Rights Studies, an NGO based in The Gambia, which was perceived to have been behind the adoption of the Resolution.<sup>30</sup> The Gambian government threatened to 'review its relationship with the African Centre' if the Resolution was maintained.<sup>31</sup> It described the Resolution as 'obnoxious and based on ulterior motives' and questioned the reasons for its adoption 'in a meeting held outside The Gambia'.<sup>32</sup> The stalemate, particularly as to where the 46th session would be held, was broken when high-level consultations between a delegation of the Gambian government, the Chairperson of the AU Commission and the Acting Chairperson of the African Commission were held in Kampala, Uganda, on 20 and 21 October 2009.<sup>33</sup> Following these consultations, the Gambian government affirmed its commitment to the African Charter, and the hosting of the 46th session of the Commission. It guaranteed the safe passage, free expression and participation of all participants who would attend the session.

## 2.4 Special mechanisms

The African Commission has, over the years, established special mechanisms in the form of special rapporteurs and working groups to deal with specific thematic human rights issues on the continent. There

<sup>29</sup> Letter from the Gambian Attorney-General and Minister of Justice to the African Commission, AG/C/144/Part 5/(44), 15 October 2009 (on file with the authors).

<sup>30</sup> Letter from the Gambian Office of the Secretary-General, President's Office, 28 October 2009, OP 209/400/01/Temp A/(22) (on file with the authors).

<sup>31</sup> As above.

<sup>32</sup> As above.

<sup>33</sup> See press release by Commissioner Tom Nyanduga, Acting Chairperson of the African Commission [http://www.achpr.org/english/Press%20Release/pressrelease\\_gambia\\_46\\_session.pdf](http://www.achpr.org/english/Press%20Release/pressrelease_gambia_46_session.pdf) (accessed 27 February 2010).

are currently five special rapporteurs of the African Commission:<sup>34</sup> on prisons and conditions of detention; on the rights of women; on human rights defenders; on refugees, asylum seekers and internally displaced persons; and on freedom of expression. Save for the appointment, and in some cases reappointment, of individual members of the Commission as special rapporteurs on the above-mentioned five themes,<sup>35</sup> no substantive changes were made to the mechanism of special rapporteurs in 2009.

As of the end of 2008, the African Commission had established five working groups:<sup>36</sup> on indigenous populations and communities; on the Robben Island Guidelines; on the death penalty; on economic, social and cultural rights; and on specific issues relevant to the work of the Commission (mainly focusing on the revision of the Commission's Rules of Procedure). In addition to changes in the membership of these working groups,<sup>37</sup> there were four substantive developments in respect to working groups in 2009.

Firstly, during its 45th ordinary session, the African Commission transformed the Focal Point on the Rights of Older Persons to a Working Group on the Rights of Older Persons and People with Disabilities in Africa.<sup>38</sup> It is expected, *inter alia*, to draft a concept paper for consideration by the African Commission that will serve as the basis for the adoption of a Draft Protocol on Ageing and People with Disabilities.

<sup>34</sup> See generally R Murray 'The Special Rapporteurs in the African system' in Evans & Murray (n 15 above) 344.

<sup>35</sup> See Resolution on the Appointment of the Special Rapporteur on Prisons and Conditions of Detention in Africa, ACHPR/Res156(XLVI)09 (appointing Commissioner Catherine Dupe Atoki as the new Special Rapporteur on Prisons); Resolution on the Appointment of the Special Rapporteur on the Rights of Women in Africa, ACHPR/Res154(XLVI)09 (renewing the mandate of Commissioner Soyata Maiga as Special Rapporteur on the Rights of Women); Resolution on the Appointment of the Special Rapporteur on Human Rights Defenders in Africa, ACHPR/Res149(XLVI)09 (appointing Commissioner Mohamed Bechir Khalfallah as the new Special Rapporteur on Human Rights Defenders); Resolution on the Appointment of the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa, ACHPR/Res160(XLVI)09 (appointing Commissioner Mohamed Fayek as the new Special Rapporteur on Refugees); Resolution on the Reappointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, ACHPR/Res161(XLVI)09 (renewing the mandate of Commissioner Pansy Tlakula as the Special Rapporteur on Freedom of Expression).

<sup>36</sup> See generally BTM Nyanduga 'Working groups of the African Commission and their role in the development of the African Charter on Human and Peoples' Rights' in Evans & Murray (n 15 above) 379.

<sup>37</sup> See Resolution on the Renewal of the Mandate of the Working Group on Indigenous Populations/Communities in Africa, ACHPR/Res155(XLVI); Resolution on the Renewal of the Mandate of the Chairperson and the Members of the Working Group on the Death Penalty, ACHPR/Res152(XLVI)09; Resolution on the Appointment and Composition of the Working Group on Specific Issues Relevant to the Work of the Commission.

<sup>38</sup> Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa, ACHPR/Res143(XXXV)09.

To treat the aged and the disabled together might seem arbitrary, but appears to be based on article 18(4) of the African Charter which provides: 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.'

Secondly, during the same session, the African Commission established the Advisory Committee on Budgetary and Staff Members. The Committee is tasked to work with the Secretariat of the Commission to identify activities from the Commission's Strategic Plan that should feature in its budget proposals; to prepare budget programmes of the Commission; to ensure proper execution of the programmes; and to implement the approved new structure of the Secretariat of the Commission. The Commission was for many years financially incapacitated and acutely understaffed, but it has also had difficulties in the preparation, presentation and execution of its budget. As such, the establishment of the Advisory Committee was long overdue. Indeed, the Committee could not have been established at a better time, considering that in 2008 the Commission, despite having received the highest budget allocation ever, failed to put the allocation to full use. As a consequence, the AU reduced the Commission's budget allocation for 2009 by almost half from US \$6 million for 2008 to US \$3,6 million for 2009.<sup>39</sup>

Thirdly, the African Commission changed the name of the Robben Island Guidelines Follow-up Committee to the Committee for the Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Committee for the Prevention of Torture in Africa) during its 46th ordinary session.<sup>40</sup> The change of the name was necessitated by the 'difficulty of national, regional and international stakeholders and partners in associating the name "Robben Island Guidelines Follow-Up Committee" with its torture prevention mandate'. It is thus anticipated that with the change of name, stakeholders will 'easily identify with the name of the Committee as a torture prevention mechanism'. While the change in name is welcomed, it tends to suggest that the Committee has a mandate akin to that of the UN Sub-Committee on the Prevention of Torture, established under the Optional Protocol to the Convention against Torture, or that of the European Committee for the Prevention of Torture, both of which operate a system of preventative visits to places of detention. Yet, contrary to the expectations that the change of name raises, the new Committee will have the same mandate as its predecessor, that is, to disseminate the Robben Island Guidelines, to work out strategies

<sup>39</sup> Decision on the budget for the African Union for the 2009 financial year, AU Executive Council, EX CL/Dec 454(XIV), January 2009.

<sup>40</sup> Resolution on the Change of Name of the 'Robben Island Guidelines Follow-Up Committee' to the 'Committee for the Prevention of Torture in Africa' and the Reappointment of the Chairperson and Members of the Committee, ACHPR/Res158(XLVI)09.



for their promotion, and to follow up on their implementation at the national level.<sup>41</sup>

Finally, the African Commission established a new Working Group on Extractive Industries, Environment and Human Rights Violations in Africa. This is in response to concerns of human rights violations and environmental destruction by extractive industries on the continent.<sup>42</sup> The Working Group has an eight-fold mandate, which includes the examination of the impact of extractive industries in Africa and the formulation of recommendations on appropriate measures for the prevention and reparation of human and peoples' rights by these industries. The Working Group is also mandated not only to research violations of human and peoples' rights by non-state actors, but to also to inform the African Commission on the possible liability of non-state actors for these violations. It is vital to note that the liability of non-state actors is an issue of which there has been much debate without any consensus.<sup>43</sup> The African Commission has so far taken the position that the state is liable for violations occasioned by non-state actors.<sup>44</sup> The establishment of the Working Group on Extractive Industries, therefore, signifies that the Commission is inclined towards extending liability for human rights violations to non-state actors.

## 2.5 The death penalty in Africa

In 2009, the African Commission bolstered its campaign for the abolition of the death penalty on the continent.<sup>45</sup> In particular, as part of the work of the Working Group on the Death Penalty, the Commission organised the First Conference on the Question of the Death Penalty in

<sup>41</sup> See Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa.

<sup>42</sup> Resolution on the Establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa, ACHPR/Res148 (XLVI).

<sup>43</sup> See generally P Alston (ed) *Non-state actors and human rights* (2005); A Clapham *Human rights in the private sphere* (1993).

<sup>44</sup> See *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

<sup>45</sup> While the African Charter impliedly permits the death penalty, the African Commission has been advocating for the abolition of the death penalty on the continent for a decade now. In 1999, the Commission adopted a resolution urging African states to 'consider a moratorium on executions' and to 'reflect on the possibility of abolishing the death penalty'. Similarly, in its decision in *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003), the Commission encouraged all states party to the African Charter to 'take all measures to refrain from exercising the death penalty'. This decision was followed in 2004 with the creation of the Working Group on the Death Penalty which was mandated to develop a strategic plan for the abolition of the death penalty. In 2008, the Commission reiterated its 1999 Resolution by urging states that still retain the death penalty to 'observe a moratorium on the execution of death sentences with a view to abolishing the death penalty'. On the death penalty in Africa, see L Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007); D van Zyl Smit 'The death penalty in Africa' (2004) 4 *Africa Human Rights Law Journal* 1.

Africa for Central, Eastern and Southern Africa. The conference brought together 50 participants representing states, AU organs, national human rights institutions, academic institutions and NGOs, with a view to debating issues concerning the death penalty and adopting a framework for its abolition.<sup>46</sup> At the conclusion of the conference, the participants adopted the Kigali Framework Document on the Abolition of the Death Penalty in Africa. The Framework Document sets out nine strategies to be employed in converting retentionist and *de facto* abolitionist states to abolitionist states. The strategies include conducting awareness campaigns and public debates on the death penalty and initiating public interest litigation to challenge the penalty. The document recommends the drafting of a Protocol to the African Charter on the Abolition of the Death Penalty in Africa to 'fill gaps in the African Charter on the inviolability and sanctity of human life'.

It is important to note here that in 2009, Burundi, Mali and Togo abolished the death penalty, in effect joining the ranks of abolitionist states in Africa.<sup>47</sup> Positive developments towards the abolitionist trend were also recorded in Kenya and Nigeria. In August 2009, the Kenyan President not only commuted 4 000 death row convicts to life imprisonment, but he also issued a directive that the relevance of the death penalty in the country's statute books be urgently reviewed.<sup>48</sup> However, in a move that threatened to reverse the gains made in Kenya towards becoming a *de jure* abolitionist state, the Kenyan police proposed the death penalty for persons found guilty of illegally possessing 'any automatic or semi-automatic self-loading military assault rifle of any other calibre'.<sup>49</sup> In Nigeria, the state of Lagos pardoned and released three death row prisoners, while the sentences of 37 other death row convicts were commuted.<sup>50</sup> Negative developments were recorded in Uganda, which proposed to introduce the death penalty for 'aggravated homosexuality'.<sup>51</sup>

## 2.6 Communications

The African Commission exercises its protective mandate through the communications procedure which serves to hold states accountable

<sup>46</sup> Concept note for a regional conference on the death penalty for Central, East and Southern Africa (on file with the authors).

<sup>47</sup> See Kigali Framework Document on the Abolition of the Death Penalty in Africa (on file with the authors) commending Burundi, Mali and Togo 'for being the latest countries to abolish the death penalty'.

<sup>48</sup> See 'Kibaki saves 4 000 prisoners from hangman's noose' <http://www.eastandard.net> (accessed 9 February 2010).

<sup>49</sup> See 'Owning AK-47 soon to be a hanging offence' <http://www.nation.co.ke/News/-/1056/669076/-/unii2d/-/index.html> (accessed 9 February 2010).

<sup>50</sup> See 'Pardons and commutations in Nigeria' <http://www.worldcoalition.org/modules/smartsection/item.php?itemid=360> (accessed 16 February 2010).

<sup>51</sup> See 'Ugandan Anti-homosexuality Bill should not be adopted' [http://www.chr.up.ac.za/press%20releases/Uganda-statement\\_1.pdf](http://www.chr.up.ac.za/press%20releases/Uganda-statement_1.pdf) (accessed 10 March 2010).

for violations of the African Charter.<sup>52</sup> It has used this procedure to progressively and generously interpret the African Charter, in effect yielding a rich jurisprudence. The decisions of the Commission following the consideration of communications are published upon the approval of the AU Assembly of Heads of State and Government.<sup>53</sup> In 2009, the Commission published nine decisions. Of these, two were decided in 2008 but only published in the 26th Activity Report in 2009: *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire (I)*<sup>54</sup> and *Wetsh'okonda Koso and Others v Democratic Republic of the Congo*.<sup>55</sup> Of the decisions delivered by the Commission in 2009, three were on communications submitted against Zimbabwe, two against Sudan, two against Cameroon and one against Kenya. One of the communications had been submitted in 2000, two in 2003, two in 2004, and two in 2005, illustrating the long time the Commission takes before reaching a decision on cases submitted to it.

### 2.6.1 Decisions at the 6th extraordinary session, April 2009

In *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe*,<sup>56</sup> the African Commission held that by preventing the publication of newspapers and seizing their equipment, the Zimbabwean government had violated the right to freedom of expression and property. By preventing the journalists to work, their right to income and livelihood and their right to work had been violated. In a related case, *Scanlen and Another v Zimbabwe*,<sup>57</sup> the Commission held that provisions in the Access to Information and Protection of Privacy Act, dealing with the compulsory accreditation of journalists and the criminalisation of the publication of 'falsehoods', violated the right to freedom of expression as set out in article 9(2) of the African Charter.

In *Zimbabwe Lawyers for Human Rights and Another (on behalf of Meldrum) v Zimbabwe*,<sup>58</sup> an American journalist, a long-term resident of Zimbabwe, published an article which caused the Zimbabwean authorities to deport him. In so doing, the authorities ignored the orders of the Zimbabwean courts. The African Commission held *inter alia* that the right to a deportation procedure 'in accordance with the law' (article 12(4)) and the independence of the judiciary (article 26) had been violated.

<sup>52</sup> See F Viljoen 'Communications under the African Charter: Procedure and admissibility' in Evans & Murray (n 15 above) 76.

<sup>53</sup> Art 59 African Charter.

<sup>54</sup> (2008) AHRLR 62 (ACHPR 2008).

<sup>55</sup> (2008) AHRLR 93 (ACHPR 2008).

<sup>56</sup> Communication 284/2004, 26th Activity Report.

<sup>57</sup> Communication 297/2005, 26th Activity Report.

<sup>58</sup> Communication 294/2004, 26th Activity Report.

### 2.6.2 Decision at the 45th ordinary session, May 2009

In *Gunme and Others v Cameroon*,<sup>59</sup> the complainants alleged that the right to self-determination of Southern Cameroonians had been violated continuously since the 1961 plebiscite in which they were not given the opportunity to choose territorial independence. They contended that Southern Cameroonians had suffered marginalisation and discrimination, particularly in the education sector, in the political arena and in relation to access to basic infrastructure and justice. The complainants also alleged that Cameroon's membership in the *Organisation pour l'Harmonisation des Droits d'Affaires en Afrique* (OHADA), which adopts legislation in French only and which becomes directly applicable in Cameroon, constituted discrimination against English-speaking people of Cameroon. In its decision, the African Commission affirmed its earlier position as set out in *Katangese Peoples' Congress v Zaire*,<sup>60</sup> that the African Charter could not be invoked to threaten state sovereignty. Consequently, it did not find that the right to self-determination of Southern Cameroonians had been violated. However, the Commission found that the people of Southern Cameroon could legitimately claim to be a 'people' and they qualified to be regarded as such since they manifested numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook. Therefore, while Southern Cameroonians could not secede, they were entitled to exercise their right to self-determination in a number of other ways.

### 2.6.3 Decisions at the 46th ordinary session, November 2009

In *Centre for Minority Rights Development (Kenya) and Another v Kenya*,<sup>61</sup> the African Commission held in a 298-paragraph decision that members of the Endorois community, who had been evicted from their ancestral land, had had their rights to freedom of religion, property, cultural life, free disposal of natural resources, and development violated. The Commission declared the communication admissible based on the fact that the state had not contested admissibility. The Commission recommended that Kenya *inter alia* give back the Endorois ancestral land to the community, pay adequate compensation for loss suffered and pay royalties to the community for economic activities on their land. The Kenyan government was given three months to report back on their implementation of the Commission's recommendations. The decision is a significant contribution to jurisprudence on the rights of indigenous peoples. The decision is also significant as being the first decision in which the Commission has found a violation of the right to development in article 22 of the African Charter, the only international

<sup>59</sup> Communication 266/2003, 26th Activity Report.

<sup>60</sup> (2000) AHRLR 72 (ACHPR 1995).

<sup>61</sup> Communication 276/2003, 27th Activity Report.

treaty that includes the right to development. In finding that the right to development had been violated, the Commission held that the government had not sufficiently consulted the community. The government had also failed to provide compensation or suitable alternative land for grazing.<sup>62</sup>

In *Association of Victims of Post-Electoral Violence and Another v Cameroon*,<sup>63</sup> the claim was that compensation had not been paid to the victims of post-electoral violence in October 1992 in Bamenda, Cameroon, despite a committee responsible for compensation having been established in February 1993. The victims brought a case before the Administrative Chamber of the Supreme Court in 1998 which to date had not decided the matter. In April 2003 the case was brought before the African Commission. In December 2004 the Commission declared the case admissible as it considered the 'delays by the Administrative Chamber of the Supreme Court of Cameroon excessive'.<sup>64</sup> The Commission held that by 'failing to prevent the 1992 post-electoral violence even though there were early warning signs', the state had violated article 1 of the African Charter.<sup>65</sup> The Commission further found a violation of article 7 in relation to the right to have a cause heard within reasonable time and of article 4 (physical integrity) and article 14 (right to property). The Commission held that Cameroon should compensate the victims but, in line with its case law, left it to the state to determine the amount 'in accordance with applicable laws'.<sup>66</sup>

*Doebbler v Sudan*<sup>67</sup> dealt with the termination of refugee status for thousands of Ethiopian refugees from Sudan in 1999. The communication was submitted in February 2000 and the African Commission declared it inadmissible due to a failure to exhaust local remedies in November 2003. In February 2004, the complainant requested the Commission to reconsider its decision. It decided to do so and invited the parties to submit new arguments on admissibility. In May 2006 the Commission declared the communication admissible since<sup>68</sup>

it was not reasonable to expect refugees to seize the Sudanese Courts of their complaints, given their extreme vulnerability and state of deprivation, their fear of being deported and their lack of adequate means of legal representation.

In November 2009, nearly ten years after the submission of the communication, the Commission found that no provisions of the African Charter had been violated as it found no proof of forcible repatriation.

<sup>62</sup> Para 298.

<sup>63</sup> Communication 272/03, 27th Activity Report.

<sup>64</sup> Para 65.

<sup>65</sup> Para 121. The Commission comes to this conclusion after an excessively long analysis of art 1; see paras 93-121.

<sup>66</sup> Para 138.

<sup>67</sup> Communication 235/00, 27th Activity Report.

<sup>68</sup> Para 116.

In *Darfur Relief and Documentation Centre v Sudan*,<sup>69</sup> it was claimed that the government of Sudan owed 33 Sudanese citizens compensation for their imprisonment in Iran from 1983 to 1990. The Sudanese citizens, who at the time were employed by a state-owned Iraqi oil company, were arrested by Iran during the Iran-Iraq war. After their release, Iraq agreed to compensate them. The payment had to be done through the Sudanese Ministry of Finance and Economic Planning and Iraq cancelled debt owed by Sudan equivalent to the sum agreed to be paid to the released workers. Part of the agreed compensation was paid in 1992, but the remainder has never been paid out. A case against the Ministry of Finance was pursued before the Sudanese courts between 2000 and 2003. The Commission declared the case inadmissible on the basis of non-exhaustion of local remedies as the complainant had failed to bring the case before the Sudanese Constitutional Court.<sup>70</sup> The Commission went on to find that the case had also not been submitted within a reasonable time as the complainant had waited two years and five months after the decision of the High Court (in 2003) to submit the case to the African Commission.

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

The African Court is charged with the function of judicial enforcement of human rights on the continent. As a judicial body, the Court complements the quasi-judicial mandate of the African Commission. It is composed of 11 judges, who convene four times per year in ordinary sessions that last for about 15 days each. The Court has its seat in Arusha, Tanzania. In 2009, the African Court made initial steps towards being fully operational. It harmonised its rules of procedure with those of the African Commission and rendered its first judgment.

Members of the African Court and the African Commission held two joint meetings, on 14-17 July and 12-16 October 2009. At these meetings, the Commission and the Court agreed on revisions of the provisions in the African Commission's interim Rules of Procedure dealing with the relationship between the Commission and the Court. By the end of 2009, the Commission and Court had not yet published their respective final Rules of Procedure.

The Court handed down its first judgment on 15 December 2009, almost six years after the entry into force of the Protocol establishing the Court.<sup>71</sup> The case was submitted by a Chadian national residing in Switzerland against Senegal with the aim of the Court suspending the proceedings instigated in Senegal against Hissène Habré, for crimes he committed while he was president of Chad. Senegal has not made a

<sup>69</sup> Communication 292/2004, 27th Activity Report.

<sup>70</sup> Para 73.

<sup>71</sup> *Yogogombaye v Senegal*, Application 001/2008.

declaration under article 34(6) of the Protocol establishing the Court allowing for direct individual access to the Court. The case in question could therefore easily have been struck off the roll by the Court registry. Instead, the Court delivered a 13-page judgment to which Judge Ouguergouz appended a separate opinion.

Due to the slow processing of cases before the Commission, it might still be some time before a case is submitted by the African Commission to the African Court. Arguably, the Commission can only submit a case which claims that the violation took place after the state against which the complaint was submitted ratified the Court Protocol. The exception would be cases of continuous violations. Under the interim Rules of Procedure of the Commission, a state has six months from being informed about the decision to supply the Commission with information about how it has implemented the decision.<sup>72</sup> If no response is received, the Commission shall send a reminder giving the state three months to respond.<sup>73</sup> If the Commission then decides that a state has not complied with its recommendations, it can proceed with bringing the case to the Court. It is worth noting that of the cases decided in 2009, in which the Commission found violations of the African Charter, only one was against a country that had ratified the Court Protocol, namely Kenya.

#### 4 The African Committee of Experts on the Rights and Welfare of the Child

The African Children's Committee is Africa's continental body of experts charged with the function of monitoring the implementation of the African Charter on the Rights and Welfare of the Child (African Children's Charter).<sup>74</sup> It is composed of 11 members of 'high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child',<sup>75</sup> who meet twice a year to, *inter alia*, consider state reports and communications. In 2009, the Committee held its 13th and 14th ordinary sessions, both of which were held in Addis Ababa, Ethiopia.<sup>76</sup> The main activities of the Committee during these two sessions are discussed below.

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<sup>72</sup> Art 115(2).

<sup>73</sup> Art 115(4).

<sup>74</sup> (1990) OAU Doc CAB/LEG/24.9/49 (1990).

<sup>75</sup> Art 33(1) African Children's Charter.

<sup>76</sup> The Committee held its 13th session from 20 to 22 April 2009 and its 14th session from 16 to 19 November 2009.



#### 4.1 State reporting

Every state party to the African Children's Charter is obliged to report to the African Children's Committee on the measures it has adopted to give effect to the provisions of the Children's Charter.<sup>77</sup> This obligation should be discharged within two years of the entry into force of the Charter in respect of a state party and, thereafter, every three years.<sup>78</sup> The Committee considered its first batch of state reports in 2008. In 2009, the Committee further cemented its role in monitoring compliance with the African Children's Committee through the state reporting procedure. The Committee held a pre-session for consideration of six state party reports during its 13th session.<sup>79</sup> The reports of Burkina Faso, Kenya, Mali, Niger, Rwanda and Tanzania were considered during the pre-session. Issues to be raised and questions to be posed to the respective states during the examination of the reports at the 14th session were formulated. As planned, the Committee examined the reports of the six states during the 14th session,<sup>80</sup> but failed to promptly adopt concluding observations after considering the reports.

#### 4.2 Communications

The African Children's Committee is mandated to receive and consider communications alleging violations of the African Children's Charter.<sup>81</sup> Since its inauguration in 2001, the Committee had received two communications. The Committee had by the end of 2009 not yet reached any final decision on any of these communications, despite the fact that it received the first communication way back in 2005. Such delay renders hollow the communications procedure of the African Children's Committee, and is an issue that should be addressed urgently for, with time, the Committee will most definitely receive more communications. Thus, during its 14th session, the Committee was implored by the NGO Forum to<sup>82</sup>

[a]mend its guidelines for the consideration of [c]ommunications to include a timeframe of six weeks for the ACERWC to acknowledge receipt of a communication, to make a decision on admissibility and finally to give its decision on the merits of the [c]ommunication within a reasonable period of time to ensure that victims are not left without redress.

It would do well for the Commission to implement this recommendation because, as it has been rightly observed, '[t]he longer the consideration

<sup>77</sup> Art 43(1) African Children's Charter.

<sup>78</sup> As above.

<sup>79</sup> See J Sloth-Nielsen & B Mezmur 'Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9 *African Human Rights Law Journal* 336.

<sup>80</sup> See Report of the 14th session of the African Children's Committee.

<sup>81</sup> Art 44(1) African Children's Charter.

<sup>82</sup> Report of the 14th session, para 31(iv).

of a communication takes, the more it allows the perpetuation of the violation of children's rights'.<sup>83</sup>

## 5 African Union main organs

### 5.1 Standard setting

On 23 October 2009, Africa witnessed a landmark development in standard setting when a Special Summit of the AU convened in Kampala, Uganda,<sup>84</sup> and adopted the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). It is estimated that Africa is home to 11,6 million internally displaced persons (IDPs), representing 45 per cent of the world's population of IDPs.<sup>85</sup> The Convention therefore seeks to address the problem of internal displacement on the continent by 'eradicating the root causes, especially persistent and recurrent conflicts as well as addressing displacement caused by natural disasters'.<sup>86</sup> It establishes a legal framework for preventing internal displacement,<sup>87</sup> for protecting and assisting IDPs,<sup>88</sup> and for solidarity, co-operation and mutual support between states in combating internal displacement.<sup>89</sup> Moreover, the Convention sets out general duties of states,<sup>90</sup> non-state actors<sup>91</sup> and the AU.<sup>92</sup>

As the first ever regional treaty to address the plight of IDPs, the Kampala Convention is a 'landmark legal instrument in international human rights and humanitarian law'.<sup>93</sup> It sets a precedent that is worth being emulated at the international and regional levels. The impact of the Convention will, however, turn on a number of factors, including its rapid ratification by states and implementation at the national level.

<sup>83</sup> Sloth-Nielsen & Mezmur (n 79 above) 336 346.

<sup>84</sup> African Union Special Summit of Heads of State and Government on Refugees, Returnees, and Internally Displaced Persons in Africa, Kampala, Uganda, 22-23 October 2009.

<sup>85</sup> Internal Displacement Monitoring Centre (IDMC) *Internal displacement: Global overview of trends and developments in 2008 (2009)* 9.

<sup>86</sup> Preamble, para 5 Kampala Convention.

<sup>87</sup> Art 4 Kampala Convention.

<sup>88</sup> Art 5 Kampala Convention.

<sup>89</sup> Art 5(2) Kampala Convention.

<sup>90</sup> Art 3 Kampala Convention.

<sup>91</sup> Arts 6 & 7 Kampala Convention.

<sup>92</sup> Art 8 Kampala Convention.

<sup>93</sup> 'Press Release' issued by the Special Rapporteur on Refugees, Asylum Seekers, Returnees and Internally Displaced Persons, [http://www.achpr.org/english/Press%20Release/Kampala%20CONVENTION\\_IDPs.pdf](http://www.achpr.org/english/Press%20Release/Kampala%20CONVENTION_IDPs.pdf) (accessed 26 January 2010).

At the end of 2009, 25 African states had signed the Convention,<sup>94</sup> while none had ratified it. The Convention will come into force upon the ratification of 15 states.<sup>95</sup> The greater challenge, however, lies in preventing and eradicating violent conflicts in Africa which are the primary generators of IDPs on the continent.

In addition to the Kampala Convention, two other instruments with relevance to human rights in Africa, adopted by the AU in 2009, should be mentioned. In February 2009, the AU Assembly adopted the Statute of the African Union Commission on International Law which is set to play a leading role in the drafting of new treaties, including in the field of human rights.<sup>96</sup> The African Charter on Statistics was also adopted at the same session. The Charter will come into force upon the 15th ratification. So far, only Mauritius has ratified the Charter. Hopefully, the Charter will contribute to the development of more accurate statistics from African countries which in turn would be beneficial for monitoring compliance with human rights.

## 5.2 African Union Assembly

Seemingly as a result of the indictment of the Sudanese President al-Bashir by the ICC, the Assembly in February mandated the AU Commission, in consultation with the African Commission and the African Court, to examine the implications of giving the African Court competence to try international crimes.<sup>97</sup> By the end of 2009, no concrete proposals had been presented. Ways in which to finance an expansion of the African Court's mandate would need to be considered seriously. According to a decision of the AU Assembly in July 2006, the former Chadian president Hissène Habré is due to be prosecuted in Senegal on behalf of the AU. However, his trial has not begun due to a lack of money. The Assembly in July 2009 again called for contributions from member states for the trial and requested the government of Senegal and the AU Commission to consider convening a donors' conference.<sup>98</sup>

It remains to be seen whether the suggestion to establish criminal jurisdiction for the African Court will remain on the AU agenda. If concrete proposals emerge, it will be important to ensure that such jurisdiction should not be used to shield African perpetrators against

<sup>94</sup> Burundi, Central African Republic, Côte d'Ivoire, Comoros, Republic of Congo, Djibouti, Democratic Republic of Congo, Ethiopia, Equatorial Guinea, Gabon, The Gambia, Ghana, Liberia, Mali, Namibia, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Sierra Leone, Somalia, São Tomé and Príncipe, Togo, Uganda, Zambia and Zimbabwe.

<sup>95</sup> Art 17 Kampala Convention.

<sup>96</sup> The members of the Commission were appointed by the Assembly in July 2009. See Assembly/AU/Dec 249(XIII). Of the 11 members only one is a woman.

<sup>97</sup> Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/Dec 213(XII) para 9.

<sup>98</sup> Decision on the *Hissène Habré* case, Assembly/AU/Dec 240(XII); Decision on the *Hissène Habré* case, Assembly/AU/Dec 246(XIII).

the jurisdiction of the ICC, but that the two courts should constructively complement each other.

## 6 Conclusion

The year 2009 witnessed numerous human rights developments on the African continent. The regional human rights treaty bodies bolstered their efforts towards discharging their specific mandates. The African Commission established a new working group on extractive industries, in addition to making significant changes to existing working groups. It also adopted a number of resolutions, including on emerging issues such as climate change and the global financial crisis. Moreover, the Commission adopted reporting guidelines under the African Women's Protocol and a framework document for the abolition of the death penalty in Africa. The African Court handed down its first judgment, while the African Children's Committee cemented its role in examining state reports under the African Children's Charter. For its part, the AU adopted a treaty for the protection and assistance of internally displaced persons, a move that is welcomed, although the focus should now shift to the ratification and implementation of the treaty.

However, despite the positive developments recorded in 2009, the protection and promotion of human rights continued to face challenges. The African Commission continued to suffer from a lack of capacity in relation to *inter alia* effectively handling individual communications. This problem has persisted despite the increased budget allocated to the Commission over the last couple of years. Similarly, the African Children's Committee continued to score poorly in executing its protective mandate through the communications procedure. Save for a single judgment it delivered, the African Court remained dormant for the larger part of 2009. Admittedly, the Court is not fully to blame for this situation as it is dependent on the African Commission to submit cases to it or alternatively on states submitting a declaration allowing for direct access to the Court. Thus, it is hoped that in 2010 the AU and the regional human rights bodies will harness their efforts towards tackling these challenges while simultaneously building on the gains that have been made so far in the promotion and protection of human rights on the African continent.

# Human rights developments in African sub-regional economic communities during 2009

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## Summary

*The year 2009 saw important judicial and non-judicial human rights developments within the framework of three of the most active regional economic communities in Africa. During the year, each of the three communities engaged in some form of standard-setting in the field of human rights. Further, in East Africa, thematic meetings relevant to human rights were convened. In Southern Africa and West Africa, the communities embarked on activities aimed at strengthening democracy. Sub-regional courts in Southern Africa and West Africa were also involved in human rights cases during 2009. These developments are reviewed to highlight their overall significance in the context of human rights in Africa.*

## 1 Introduction

Keen observers of the African human rights system would agree that over the past few years, the traditional architecture of human rights realisation on the continent has changed significantly.<sup>1</sup> One form in which this change has manifested itself is the expansion of the system, especially in relation to the creation or development of new institutions or mechanisms concerned with the promotion and protection of human rights. Most of the expansion has been internal in the sense that it has occurred within the framework of the African Union (AU),

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<sup>1</sup> African human rights scholars are increasingly acknowledging this fact. See generally F Viljoen *International human rights law in Africa* (2007) and J Akokpari & DS Zimble (eds) *Africa's human rights architecture* (2008).

the institutional platform upon which the African human rights system is founded. However, some expansion has taken place outside the AU framework. Increasingly, important human rights developments have occurred in the frameworks of various regional economic communities (RECs) on the continent.

Although Africa currently boasts over 14 regional economic groupings of different compositions and sizes, only eight of these are recognised by the AU as building blocks of the African Economic Community erected by African Heads of State and Government as part of the AU framework.<sup>2</sup> While the concept of human rights manifests itself in some form or another in nearly all the AU-recognised RECs, the East African Community (EAC), the Economic Community of West African States (ECOWAS), and the Southern Africa Development Community (SADC) have engaged more actively in the issue area of human rights within their respective institutional frameworks. To varying degrees, the EAC, ECOWAS and SADC have all been involved in the judicial and non-judicial promotion and protection of human rights within their jurisdictional spheres. Thus, while the judicial protection of human rights by African RECs appears to have attracted greater attention over the years,<sup>3</sup> each of these RECs has also made non-judicial contributions to the expansion of international human rights protection on the continent. In fact, it is safe to assert that human rights protection in Africa no longer is limited to the regional level. In 2009, EAC, ECOWAS and SADC engaged in human rights activities or activities that, although not entirely rights-related, could be seen to have clear implications for human rights in parts of the continent. Consequently, this contribution records and analyses some of the most important human rights activities of these RECs.

In this contribution, the work during 2009 of the three RECs is reviewed. The human rights activities of each REC is sub-divided into judicial and non-judicial aspects and considered from that perspective. This contribution does not present an exhaustive record of all the human rights developments that occurred in African RECs in 2009; instead it presents a window onto the expansive work of the RECs in the field.

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<sup>2</sup> Viljoen (n 1 above) 488.

<sup>3</sup> See eg ST Ebobrah 'Human rights developments in sub-regional courts in Africa during 2008' (2009) 9 *African Human Rights Law Journal* 312; OC Ruppel 'Regional economic communities and human rights in East and Southern Africa' in A Bösl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 275 -319.

## 2 The East African Community

The EAC was established in 1999 when its founding treaty was adopted by Kenya, Tanzania and Uganda.<sup>4</sup> Under article 5 of the EAC Treaty, the main objective of the Community is to develop and engage in 'policies and programmes aimed at widening and deepening co-operation among the partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs'. To achieve this objective, the Treaty sets out a programme of action for the progression of the Community from a Customs Union, through a Common Market and a Monetary Union to the establishment of a Political Federation.<sup>5</sup> Thus, while the EAC has begun as an organisation for economic integration, it aims to emerge as a political integration initiative.

In addition to the main objectives set out in article 5, the 1999 EAC Treaty authorises the Community to engage in other activities related to human rights. These include 'mainstreaming of gender' in all Community programmes and 'the promotion of peace, security, and stability within, and good neighbourliness among the partner states'.<sup>6</sup> The partner states<sup>7</sup> further agreed that the achievement of Community objectives is to be governed by certain fundamental principles. In that regard, the EAC is expected to proceed on the fundamental principle of respect for good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights (African Charter).<sup>8</sup>

The 1999 EAC Treaty further sets out an undertaking by partner states 'to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally-accepted standards of human rights'. Thus, while the recognition, promotion and protection of human rights is not the main objective of the EAC, the legal foundations of the Community is not completely bereft of interest in the realisation of human

<sup>4</sup> Kenya, Tanzania and Uganda were members of the original East African Community which was established in 1967 but was dissolved in 1977. The 1999 Treaty of the rejuvenated EAC was adopted in culmination of efforts commenced in 1991 to revive the EAC after a period of inactivity following the dissolution of the original organisation. The 1999 Treaty was amended in 2007. On 18 June 2007, Burundi and Rwanda acceded to the EAC Treaty, bringing the membership of the organisation to five states. The EAC Treaty is available at <http://www.eac.int>. (accessed 28 February 2010).

<sup>5</sup> Art 5(2) of the EAC Treaty as amended.

<sup>6</sup> Arts 5(3)(e) & (f) of the EAC Treaty as amended.

<sup>7</sup> Converging states of the EAC are referred to as partner states.

<sup>8</sup> Art 6(d) of the EAC Treaty as amended.



rights. Despite the promise of human rights realisation contained in the Treaty, there were few significant human rights developments in the EAC during 2009.

## 2.1 Non-judicial human rights developments

The term 'non-judicial human rights developments' is used here to cover all activities that promote and protect human rights within the Community other than through judicial processes.

### 2.1.1 Standard-setting<sup>9</sup>

During the period under review, the adoption of a resolution by the East African Legislative Assembly (EALA) to urge action to tackle violence against women in the region was arguably the most significant human rights development in the EAC.<sup>10</sup> Entitled 'Resolution of the Assembly urging the East African Community and partner states to take urgent and concerted action to end violence against women in the EAC region and particularly in the partner states' (Resolution), the Resolution builds on global and regional human rights instruments adopted to promote and protect the rights of women. The Resolution was timed to coincide with the International Day for the Elimination of Violence against Women and forms part of the EALA's activities to mark the day.<sup>11</sup>

Although the significance of the Resolution is watered down by the fact that it is not a binding instrument and was adopted by the EALA which appears less influential than the Summit of the EAC, the Resolution represents one of the most daring human rights actions taken on the platform of the EAC.<sup>12</sup> Couched in terms that compliment action and shame inaction on the part of partner states, the Resolution holds the promise of having a strong persuasive effect on EAC partner states in addressing violence against women. For example, the Resolution identifies Rwanda and Tanzania for commendation 'for having ratified

<sup>9</sup> This sub-heading is used advisedly in the whole of this contribution in recognition of the fact that the term 'standard-setting' is more commonly associated with the adoption of treaties and, to a lesser extent, declarations by legislative and decision-making bodies of international organisations.

<sup>10</sup> The EALA is the legislative organ of the EAC. Other organs of the EAC are the Summit, the Council of Ministers, the Co-ordinating Committee, the Sectoral Committees, the East African Court of Justice and the Secretariat. See generally art 9 of the 1999 EAC Treaty as amended.

<sup>11</sup> 25 November of each year is generally set aside as the International Day for the Elimination of Violence Against Women.

<sup>12</sup> The EALA is the legislative arm of the EAC and has some form of actual legislative powers, but it is the Summit that drives the process of integration in the EAC.

the Maputo Protocol<sup>13</sup> and then shames other states by expressing concern that 'the Republic of Kenya, Uganda and Burundi are yet to ratify the Maputo Treaty'.<sup>14</sup> The Resolution further conveyed concern that 'Kenya expressed reservations on the Maputo Protocol'.<sup>15</sup>

The 'complimenting and shaming' approach adopted in the Resolution is important for a variety of reasons. Firstly, the EALA is the popular arm of the Community as it consists of parliamentarians elected by citizens to represent their interests in the affairs of the EAC. Accordingly, it can be argued that the endorsement of action by the EALA carries weight almost equivalent to that of national parliaments. Further, it is possible to argue that the condemnation of reservations and endorsement of ratifications by the EALA is suggestive of popular support for the Maputo Protocol. This is relevant because some would argue that there is usually a disconnect between executive action by national governments in the ratification of international instruments and the informed will of ordinary people, especially in African states. Second, there is the creation of an expectation that legislative approval of domestication of the Maputo Protocol would be easier in the region since legislators have demonstrated acceptance of the Protocol. Third, in the absence of a corresponding advocacy mechanism at the continental level to put pressure on states to ratify the Maputo Protocol, the importance of sub-regional pressure is self-evident.

In terms of substance, the Resolution is a significant addition to the normative framework for the protection of women in the region from gender-based violence. There is a feeling that the Resolution strongly complements the Maputo Protocol in addressing the scourge of violence against women.<sup>16</sup> It would be noticed, for example, that in a manner that is more expansive than the Maputo Protocol, the Resolution recognises that there is an intersection between violence against women and HIV and AIDS.<sup>17</sup> The Resolution also pays particular attention to the precarious position of women who are already vulnerable, identifying them as 'chief targets of organised violence against them because of their vulnerability'.<sup>18</sup> The Resolution essentially amplifies the main concerns around violence against women and calls on EAC

<sup>13</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted in 2003 and entered into force in 2005) is generally referred to as the Maputo Protocol. See para 14 of the Resolution. Also see para 8 of the Resolution where Tanzania is congratulated for being a signatory to UNIFEM's 'Say No to Violence against Women Campaign'.

<sup>14</sup> See para 15 of the Resolution.

<sup>15</sup> Para 16 of the Resolution.

<sup>16</sup> See generally F Banda 'Building on a global movement: Violence against women in the African context' (2008) 8 *African Human Rights Law Journal* 1-22 on the highlights of the Maputo Protocol.

<sup>17</sup> Para 17 of the Resolution.

<sup>18</sup> Para 19 of the Resolution.

partner states to take concrete action at the national level to fulfil obligations imposed by the relevant international instruments.

As already noted, the Resolution is not binding on the EAC or its partner states. However, the advocacy value of the document cannot be overemphasised. Apart from the persuasive value it has among EAC partner states and the EAC Council, the Resolution can be employed by civil society organisations involved in this aspect of human rights work. Further, in the absence of a region-specific human rights catalogue, documents like this Resolution become significant in proceedings before the East African Court of Justice (EACJ) and other Community institutions.

### 2.1.2 Thematic meetings

Other important human rights developments that took place within the institutional framework of the EAC during 2009 were high-level meetings with implications for human rights. In October 2009, a meeting of the Forum for EAC Ministers Responsible for Social Development was held in Bujumbura, Burundi. Convened as part of the EAC calendar of activities for 2009, the meeting was significant for human rights purposes because of the nature of the rights-related recommendations that it produced. The Forum recommended that the EAC Council urge EAC partner states which had not ratified the African Youth Charter to do so.<sup>19</sup> The Forum further recommended that the EAC 'conduct regional campaigns against harmful cultural practices including female genital mutilation, gender-based violence, HIV and AIDS and drug abuse'.<sup>20</sup> The Forum called on the EAC Council to 'develop a gender policy', 'harmonise and mainstream youth, disabled and elderly and children issues in development policies, strategies and plans'.<sup>21</sup> Similarly, the Forum made recommendations for the regional campaigns on 'child labour and trafficking and all forms of violence against children', the establishment and harmonisation of 'policies on orphans and vulnerable children' and the promotion of 'social protection for poor and vulnerable groups'.<sup>22</sup>

Viewed from the lens of global and continental human rights lawyers, the conduct and outcome of the meeting may not be too important since norms in the form of hard law currently exist on these issues at those levels. However, it has to be noted that the scope for implementation and, more importantly, close monitoring of implementation of existing norms by global and continental supervisory mechanisms remains acutely limited. This gap of implementation amplifies the

<sup>19</sup> See para 4.5.2(i) of Report Ref EAC/SDF/10/2009 (Report of the Forum for EAC Ministers Responsible for Social Development) of 7 October 2009.

<sup>20</sup> Para 4.5.2(iv) of Report Ref EAC/SDF/10/2009.

<sup>21</sup> See paras 4.5.2 (v) and (vii) of Report Ref EAC/SDF/10/2009.

<sup>22</sup> See paras 4.5.2(xii), (xiii) and (xiv) of Report Ref EAC/SDF/10/2009.

significance of sub-regional interventions, even of a soft law variety. Further, considering the hesitant manner in which the EAC and its organs have approached the subject of human rights, meetings such as this carry the promise of more robust engagements with human rights within the Community. Proximity to the partner states and their institutions and the possibilities of reinforced pressure for implementation at this level make such an intervention desirable.

The rights of persons with disabilities were also a subject for discussion. In December 2009, a meeting was organised by the EAC with partner states to address 'matters relating to persons with disabilities in the region'.<sup>23</sup> The meeting is a precursor to a proposed East African conference on persons with disabilities.<sup>24</sup> The overall aim of these meetings is to enhance the creation of appropriate regional mechanisms for the promotion and protection of the rights of persons with disabilities.<sup>25</sup> With article 120(c) of the 1999 EAC Treaty, the partner states undertook to adopt a common approach towards disadvantaged and marginalised groups. Thus, all the meetings and processes initiated by the EAC to promote and protect the rights of vulnerable groups are not without treaty foundations.

It is important to note that these initiatives are taking place independently of wider continental efforts initiated by the African Commission on Human and Peoples' Rights (African Commission) to address issues concerning the right of disabled and elderly persons in Africa. Arguably, there is the potential for a duplication of efforts between the EAC and the African Commission. However, this could also be more apparent than real since, in the spirit of their position as building blocks of the AEC, RECs such as the EAC are supposed to aid the implementation of regional policies and norms. From another perspective, the sub-regional approach to policy development could be beneficial to vulnerable peoples as it directly engages partner states and EAC institutions and has a better chance of ownership and implementation. This contrasts with the current continental approach in which the African Commission sometimes appears to be operating without the active involvement of AU member states and the main organs of the AU.<sup>26</sup>

<sup>23</sup> 'EAC set to improve social protection for the disabled in East Africa' <http://www.newstimesafrica.com> (accessed 14 March 2010).

<sup>24</sup> As above.

<sup>25</sup> As above.

<sup>26</sup> In August 2009, the African Commission hosted an experts' meeting in Accra, Ghana, to discuss modalities for the adoption of an African Protocol on Disabled Persons and Elderly Persons. As the commissioners are expected to act independent of the states that nominated them, the extent of state participation in the process can only be negligible. While there is a possibility of the AU Authority of Heads of State and Government taking over the process, there is also the possibility of the process ending up like the Declaration of Principles on Freedom of Expression.

## 2.2 Judicial protection by the East African Court of Justice

During 2009, the EACJ, which is the main judicial organ of the EAC, did not hear any human rights cases. This may not be too surprising as the Court is yet to be endowed with express jurisdiction to hear human rights cases. Although the Court had previously heard cases touching on human rights issues,<sup>27</sup> the Protocol's requirement that the Court's jurisdiction be extended to the field of human rights has yet to be adopted.<sup>28</sup> However, during 2009, pressure was exerted on the EAC to expand the jurisdiction of the EACJ not only to cover human rights cases, but also to extend it to the field of international criminal law. In October 2009, at a conference on East African Peace and Security, a representative of the International Criminal Tribunal on Rwanda (ICTR) introduced the idea of the EAC considering the option of 'letting the East African Court of Justice handle cases of Rwandan genocide that will not be concluded by the end of the tribunal's life'.<sup>29</sup>

While this suggestion was made outside the framework of the EAC, it is significant as it created an opportunity to assess Community feelings on the matter. At the conference itself, some participants opposed the idea on the grounds that it will 'negate the philosophy behind the establishment of the regional court'.<sup>30</sup> Clearly, such concerns relate to the legitimacy of such a process but do not affect the legality of the idea as the partner states can elect to expand the jurisdiction of the Court to cover such issues. A possible significant outcome of planting the idea at the October conference is that similar ideas resurfaced in December 2009 at a meeting of the EAC Forum of Chief Justices convened by the EAC Secretariat. The Forum made recommendations 'to the EAC Council of Ministers for consideration with a view to strengthening the administration of justice in the region', and called for the 'ratification and domestication of relevant international law instruments dealing with impunity and human rights abuses and allowing for empowerment of regional and national judicial mechanisms to handle these issues'.<sup>31</sup> The final report of the Forum advocated the establishment

<sup>27</sup> See *Katabazi & Others v Secretary-General of the East African Community & Another* (2007) AHRLR 119 (EAC 2007)

<sup>28</sup> By art 27(2) of the 1999 EAC Treaty as amended, the EACJ is expected to have a clear jurisdiction to hear human rights cases when a protocol to that effect is adopted by partner states. Although the process towards adopting such a protocol had begun as far back as 2007 with the EAC Secretariat-initiated draft, the protocol is yet to come into being.

<sup>29</sup> See 'Bid to let EA Court of Justice to try genocide and human rights suspects' *The East African* <http://www.theeastafican.co.ke/news> (accessed 14 March 2010).

<sup>30</sup> As above.

<sup>31</sup> See 'EAC chief justices propose harmonisation of regional legal systems' <http://www.appablog.wordpress.com> (accessed 14 March 2010).

of 'an *ad hoc* committee to study and recommend ways to expand the Court's jurisdiction as well as give it teeth'.<sup>32</sup>

From a human rights perspective, the calls for the expansion of the jurisdiction of the EACJ are important because under the existing legal regime, the Court is only authorised to interpret and apply the Treaty of the Community.<sup>33</sup> While there is a statement of intent to endow the Court with human rights jurisdiction, the failure to do so in practice creates difficulties for litigants with human rights complaints. This is because the partner states of the EAC have not removed the obstacles that hinder access of individuals and NGOs in the region to the African Court of Human and Peoples' Rights (African Court).<sup>34</sup> Accordingly, East African citizens lack direct access to international judicial mechanisms for the protection of human rights. Further, without popular use, the EACJ has little or nothing to do as states are unlikely to engage in litigation. In fact, there have even been calls for transformation of the EACJ into a regional Court of Appeal similar to the regime under the defunct EAC in order to create activity for the Court.<sup>35</sup> Similar pressure in West Africa, with the active involvement of the ECOWAS Court of Justice, resulted in the adoption of a protocol in 2005 to confer express human rights jurisdiction on the ECOWAS Community Court of Justice (ECCJ). Thus, the current wave of pressure in East Africa could work in favour of an expanded jurisdiction for the EACJ.

The emerging pressure for the expansion of the jurisdiction of the EACJ is also important from the perspective of international criminal law and international humanitarian law. In view of the growing conflict between the political interests in Africa and the International Criminal Court (ICC), there have been increasing agitations for the establishment of an international criminal jurisdiction in Africa.<sup>36</sup> The agitation has even led to questions within and outside the structures of the AU whether existing continental judicial and quasi-judicial structures should be endowed with criminal jurisdiction. In this regard, it is important to note the risk of conflict between such a continental criminal jurisdiction and the mooted criminal jurisdiction of the EACJ. Further, in view of the fact that many of the conflicts that have given rise to demands for an end to impunity in Africa occur in East Africa and the Horn of Africa regions, there has to be a concern about the risk of

<sup>32</sup> 'East Africa Court to try rights-abuse cases' <http://allafrica.com/stories> (accessed 13 March 2010).

<sup>33</sup> See art 27 of the 1999 EAC Treaty as amended.

<sup>34</sup> As at 15 March 2010, no EAC partner state had made the declaration required by art 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights.

<sup>35</sup> See 'CJ touts for East Africa Court of Appeal' *Daily News* <http://www.dailynews.co.tz> (accessed 14 March 2010) on the call by the Chief Justice of Tanzania for the transformation of the EACJ into an East African Court of Appeal.

<sup>36</sup> Civil society and African research organisations have been involved in research around this issue.

political interference with an EACJ exercising criminal jurisdiction.<sup>37</sup> It is also important to consider how all of these developments influence the relationship between the EAC as a building block of the AEC and the AU as a body into which RECs, including the EAC, may eventually converge.

Overall, while there was no concrete standard-setting or judicial protection of human rights in the EAC during 2009, it is obvious that there is a growing recognition of the importance of human rights within the Community framework. What remains to be seen is whether these will culminate in concrete and tangible human rights benefits for the citizens of EAC Partner states.

### 3 The Economic Community of West African States

ECOWAS was established in May 1975 when a treaty for that purpose was adopted by 15 West African states.<sup>38</sup> Following a series of events that challenged the legal foundations of the Community in the 1990s, the 1975 ECOWAS Treaty was amended. In 1993, a revised ECOWAS Treaty was adopted by ECOWAS member states.<sup>39</sup> Under the 1993 revised Treaty, ECOWAS, among other things, aims to establish an economic union in West Africa with a view to raising the living standards of its peoples, enhancing economic stability and contributing to development of the African continent.<sup>40</sup>

Although the promotion and protection of human rights are not mentioned in the statement of objectives contained in the 1993 revised ECOWAS Treaty, the Treaty contains references to human rights that have been employed to sustain a budding ECOWAS human rights regime. The 1993 revised Treaty makes reference to human rights in its Preamble as well as in the body of the Treaty itself.<sup>41</sup> In its statement of fundamental principles, the Treaty affirms the desire of member

<sup>37</sup> Issues in Kenya, Somalia, Sudan and the Democratic Republic of Congo have been touted as areas where the ICC should act. While Kenya is the only member of the EAC among the states listed, there is sufficient proximity to encourage any of these states to join the EAC and shut out the ICC. However, it is important to note that the clause that allows the ICC to exercise jurisdiction where national proceedings appear to be aimed at protecting perpetrators could also be applicable.

<sup>38</sup> The original member states of ECOWAS were Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Sierra Leone and Togo. With the accession of Cape Verde to the 1975 ECOWAS Treaty, membership of the Community grew to 16. In 2000, Mauritania withdrew its membership of the Community.

<sup>39</sup> 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.

<sup>40</sup> Art 3(1) of the 1993 revised ECOWAS Treaty.

<sup>41</sup> See para 4 of the Preamble to the 1993 revised ECOWAS Treaty.



states to pursue integration based on an adherence to the principle of 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.<sup>42</sup> ECOWAS member states further agree in article 56(2) of the Treaty to 'co-operate for the purpose of realising the objectives' of the African Charter. These treaty provisions form the legal foundation upon which the organs and institutions of ECOWAS have based their involvement in the field of human rights promotion and protection.<sup>43</sup> In addition to (and perhaps in furtherance of) these treaty foundations, the ECOWAS Authority of Heads of State and Government (ECOWAS Authority) has adopted instruments with human rights implications, one of the most prominent of which is the supplementary protocol that empowers the ECCJ to hear human rights cases.<sup>44</sup> During 2009, ECOWAS organs were involved in the judicial and non-judicial spheres of human rights promotion and protection.

### 3.1 Non-judicial human rights developments in ECOWAS

Non-judicial human rights developments under the ECOWAS framework cover the human rights and rights-related activities of ECOWAS organs other than the ECCJ.

#### 3.1.1 Standard-setting

During the period under review, standard-setting in the field of human rights within the ECOWAS framework was essentially by way of the formulation of policy documents on specific human rights concerns. In April 2009, Ministers responsible for women and children in ECOWAS member states met on the platform of ECOWAS to adopt a regional policy for the rehabilitation of victims of human trafficking in the West African region.<sup>45</sup> Aimed at creating a 'supportive and friendly environment' for victims, the policy commits member states to 'the restoration of victims of human trafficking and exploitative and hazardous child labour to the fullest possible state of physical, psychological, social, vocational and economic wellbeing through sustainable assistance programmes'.<sup>46</sup> The policy's 12 core areas of intervention elaborate strategies for reception, identification, sheltering, health, counselling,

<sup>42</sup> See art 4 of the 1993 revised ECOWAS Treaty on the principles of ECOWAS.

<sup>43</sup> 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.

<sup>44</sup> Supplementary Protocol A/SP1/01/05 Amending Protocol A/P1/7/91 relating to the Community Court of Justice adopted in 2005.

<sup>45</sup> 'Regional policy for rehabilitation of trafficked persons for adoption' <http://news.ecowas.int/presseshow> (accessed 31 March 2010).

<sup>46</sup> As above.

family tracing, return/repatriation, integration, empowerment, follow-up, after care and disengagement of victims.<sup>47</sup>

The adoption of this regional policy is significant for at least two reasons. First, despite the challenge that trafficking in persons poses for African states, very little attention has been paid to the phenomenon at the continental level. Hence, save for isolated articles in continental instruments obligating states to prevent trafficking in persons,<sup>48</sup> the AU does not have a satisfactory normative regime on trafficking in persons. Consequently, the involvement of sub-regional organisations in Africa is important to the extent that it contextualises the phenomenon to local realities. Second, in view of the arguably criminal law approach of global instruments on trafficking in persons, a policy that focuses on the rights and needs of victims rather than on their supposed criminality is a welcome development. Further, the cross-boundary nature of trafficking in persons and the fact that free movement in the region has a tendency to facilitate trafficking, make it desirable for ECOWAS to engage actively in addressing the phenomenon.

In the course of April 2009, Ministers of Labour and Employment in ECOWAS member states also met on the platform of the Community to adopt a regional policy and plan of action on labour.<sup>49</sup> The Ministers used the opportunity to call on ECOWAS member states to ratify and domesticate 'all legal texts relating to labour and employment, especially the fundamental ILO Conventions'.<sup>50</sup> The labour policy is aimed at promoting dignity of labour, promoting employment for young people and persons who are physically challenged as well as promoting the rights of migrant workers. It is worth noting that the AU does not have a labour policy nor does it have any document that speaks to the needs and rights of migrant workers. Thus, the sub-regional documents fill gaps in the continent's normative framework in these areas. More importantly, as one of the aims of integration is to promote the mobility of capital and labour within the region, it is necessary to put in place a region-specific structure to address concerns which will arise.

At their 62nd session held in May 2009, the ECOWAS Council of Ministers endorsed both the regional Policy on the Protection and Assistance to Victims of Trafficking in West Africa and the ECOWAS

<sup>47</sup> The Policy is only the latest in the ECOWAS response to the challenge of trafficking in persons in the region. In 2001, ECOWAS adopted a plan of action to combat trafficking in persons in West Africa. This was followed in 2006 with the adoption of a joint plan of action with the Economic Community of Central African States to address the scourge of trafficking in the two regions.

<sup>48</sup> See eg art 4(2)(g) of the Maputo (African Women's) Protocol and art 29 of the African Charter on the Rights and Welfare of the Child.

<sup>49</sup> 'ECOWAS Ministers adopt labour policy' <http://news.ecowas.int/presseshow> (accessed 31 March 2010).

<sup>50</sup> As above.

Labour Policy and Plan of Action.<sup>51</sup> With these endorsements, both documents will enter into force as soon as they are approved by the ECOWAS Authority. It is important to note that the Council of Ministers used the opportunity to urge ECOWAS member states to 'endeavour to respect and apply all the Community's decisions and protocols with a view to accelerating the integration process', emphasising that it might consider the possibility of imposing sanctions against defaulting states. Though not specific to human rights, the statement may be significant as state obligations under the ECOWAS framework include the human rights decisions of the ECCJ and other organs of the Community.

### 3.1.2 Strengthening democracy

ECOWAS activities relating to democracy and democratisation are governed by a protocol on democracy and good governance adopted in 2001.<sup>52</sup> During 2009, the Community focus in this area was mostly on Guinea and Niger. Following the death in December 2008 of long-time President Lansana Conte, the armed forces of Guinea seized power in a bloodless *coup* in violation of the principles of the 2001 ECOWAS Protocol on Democracy and Good Governance. ECOWAS reacted in January 2009 when the ECOWAS Authority rejected the unconstitutional change of government as a violation of the 2001 Protocol. As a first step, the Authority barred the military leaders of Guinea from attending meetings of all decision-making bodies of the Community. By this action, ECOWAS had immediately implemented the sanction regime contained in article 45(2) of the 2001 Protocol. In a continental environment where the culture of sanction is nearly as weak as the culture of voluntary compliance with standards and decisions, the action by the ECOWAS Authority was a rare demonstration of political will.

It is important to note that by article 45(3) of the 2001 Protocol, despite the suspension of a member state, ECOWAS retained a duty to 'encourage and support the efforts being made by the suspended member state to return to normalcy and constitutional order'. Accordingly, the summit of the ECOWAS Authority resolved<sup>53</sup>

<sup>51</sup> 'Council of Ministers urge respect for regional decisions and protocols' 045/2009 <http://news.ecowas.int/presseshow> (accessed 31 March 2010).

<sup>52</sup> Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, adopted on 21 December 2001 and entered into force on 28 February 2008.

<sup>53</sup> The UN Peace-Building Fund allocates money through two funding facilities, the Immediate Response Facility and the Peace-Building Recovery Fund. Both facilities fund initiatives that respond to imminent threats to the peace process and initiatives that support peace agreements and political dialogue; build or strengthen national capacities to promote coexistence and peaceful resolution of conflict; stimulate economic revitalisation to general peace dividends and re-establish essential administrative services. See <http://www.unpbf.org/index> (accessed 31 March 2010).

to push for the inclusion of Guinea on the agenda of the UN Peace-Building Commission as a *de facto* fragile and post-conflict country to enable the country to access the UN Peace-Building Fund to develop its infrastructure and facilitate the return to sustainable development.

In addition, the Summit agreed to pursue international and internal co-operation to 'establish benchmarks and timelines for the completion of transition to democratic rule'. This 'carrot and stick' approach is commendable as it avoids total disengagement that might have resulted in more harm to democracy in the country.

While the engagement between ECOWAS and the military junta in Guinea was happening, the junta allegedly approved the use of repressive force against unarmed demonstrators. ECOWAS responded by issuing a statement in September 2009, condemning the action. More importantly, the statement called for the setting up of an International Committee of Inquiry in collaboration with the 'AU and the UN Commission for Human Rights' to identify the perpetrators and those responsible and to take the necessary measures to address the situation.<sup>54</sup> This approach is interesting as it is an indication that the ECOWAS authorities recognise the apparently superior role of the UN and the AU in maintaining global and continental peace through human rights protection and democratic good governance. It is also a commendable attempt at co-operation and co-ordination.

In the course of 2009, a constitutional crisis that qualified as 'power maintained by unconstitutional means'<sup>55</sup> occurred in Niger. This resulted in a statement by the ECOWAS Council of Ministers in which the Council expressed concern that the developments in that country had the potential to 'threaten the significant gains made in that country in the area of constitutional governance'.<sup>56</sup> As a result of the refusal of the government of Niger to comply with the directives of ECOWAS to comply with democratic principles, Niger was suspended for 'its failure to comply with the 17 October 2009 Decision of the Heads of State and Government to postpone the legislative elections of Tuesday 20 October 2009'.<sup>57</sup> The imposition of sanctions on the sitting government in Niger is significant progress as there has always been the impression that continental and sub-regional norms on democratic governance tended to be overtly protective of sitting governments, even where they remain in office unconstitutionally.<sup>58</sup> Further, the immediate imposi-

<sup>54</sup> 'ECOWAS condemns acts of repression in Guinea' 096/2009 <http://news.ecowas.int/presseshow> (accessed 31 March 2010).

<sup>55</sup> See art 1(c) of the 2001 ECOWAS Protocol on Democracy and Good Governance.

<sup>56</sup> 'ECOWAS delegation in Niger' 047/2009 <http://news.ecowas.int/presseshow> (accessed 31 March 2010).

<sup>57</sup> 'ECOWAS suspends Niger from membership of organisation' 113/2009 <http://news.ecowas.int/presseshow> (accessed 31 March 2010).

<sup>58</sup> The attitude of the AU to the Zimbabwe saga is a clear example.

tion of sanctions is indicative of a growing trend on the continent to reject any form of unconstitutional change of government.<sup>59</sup>

### 3.2 Judicial protection of human rights by the ECOWAS Community Court of Justice

Originally established by the 1975 ECOWAS Treaty, the ECCJ was operationalised by a protocol adopted by ECOWAS member states in 1991.<sup>60</sup> Following a dearth of judicial activity and initial challenges to its jurisdiction, a supplementary protocol to the Court's 1991 Protocol was adopted in 2005 to expand the competence of the Court and effect individual access to the Court, among other things.<sup>61</sup> One of the highlights of the 2005 Supplementary Protocol of the ECOWAS Court was the addition of a human rights competence to the jurisdiction of the Court.<sup>62</sup> It is on the basis of this expanded competence that the ECCJ has been actively involved in the judicial protection of rights. During 2009 there were four decisions from the ECCJ that were significant from a human rights perspective.

#### 3.2.1 *Bayi and Others v Nigeria and Others*

The string of 2009 decisions in human rights cases before the ECCJ began in January with its judgment in the case of *Bayi and Others v Nigeria and Others* (*Bayi case*).<sup>63</sup> In an action brought by Djot Bayi and 14 others against Nigeria and four others, the ECCJ considered whether the rights of the 15 non-Nigerian ECOWAS citizens had been violated by their arrest in international waters and subsequent prosecution by Nigerian officials.<sup>64</sup> In their action, the applicants, who were crew members of a foreign registered ship, complained that their arrest on the high seas, 16 nautical miles off the Nigerian coast, their detention for varying lengths of time, parading them before local and international press and their subsequent loss of employment, amounted to a violation of their rights by Nigeria and its officials.<sup>65</sup>

The applicants contended that their arrest was in violation of article 6 of the African Charter and section 35 of the Nigerian Constitution. They contended further that their detention from 1 December 2003

<sup>59</sup> In this regard, the AU and SADC responses to the impasse in Madagascar are instructive.

<sup>60</sup> Protocol/P1/7/91 of 6 July 1991 on the ECOWAS Community Court of Justice.

<sup>61</sup> See Supplementary Protocol A/SP1/01/05 Amending Protocol A/P1/7/91 relating to the Community Court of Justice adopted in 2005.

<sup>62</sup> See the new art 9(4) in art 4 of the 2005 Supplementary Protocol.

<sup>63</sup> Unreported Suit ECW/CCJ/APP/10/06, Judgment ECW/CCJ/JUG/01/09 delivered on 28 January 2009.

<sup>64</sup> The other four defendants were all statutory officers of Nigeria and include the Attorney-General of Nigeria, the Chief of Naval Staff, the Inspector-General of Police and the Controller-General of the Nigerian Prisons.

<sup>65</sup> See paras 1-8 of the *Bayi* case. All the applicants were subsequently discharged.

to 1 March 2004, the continued detention of ten of them until 30 March 2005, as well as their subsequent prosecution, violated the provisions of the African Charter and the Nigerian Constitution. Further, they contended that parading them before the press was in violation of their right to dignity under article 5 of the African Charter and the subsequent loss of employment as a result was attributable to the state.<sup>66</sup> It was contended on behalf of the state that the action was statute-barred and that the principle of privity of contract excluded the state from responsibility for the applicant's loss of employment.

The Court's position on the question of statutory limitation under the ECOWAS judicial regime deserves attention.<sup>67</sup> By the Court's determination, 'this provision only concerns cases against the Community or those of the Community against another',<sup>68</sup> hence limitation does not apply. In taking this position, the Court appears to have ignored reference to 'members of the Community' in the provision in question. Perhaps the Court could still have come to the same conclusion that the action was not statute-barred if it had seen a 'continuing violation' in the facts rather than trying to tie the date the cause of action arose to the specific date of arrest of the applicants. It is important to note further that the operation of the statute of limitation in the ECOWAS regime adds to the requirement in article 56(6) of the African Charter relating to the submission of communications within a reasonable time. Under the jurisprudence of the African Commission, it would appear that there is no fixed time for submission and the circumstances of each case determines the interpretation that would be given to that requirement.<sup>69</sup>

In its analysis of the question whether the arrest and detention of the applicants violated article 6 of the African Charter and section 35 of the Nigerian Constitution,<sup>70</sup> the ECCJ seems to have replaced the constitutional provision with article 9 of the Universal Declaration of Human Rights (Universal Declaration). In so doing, the Court re-affirms its position that the Universal Declaration is an applicable catalogue of rights in the ECOWAS regime despite the fact that it is merely a declaration. The Court also appears to be making a statement that it does not have jurisdiction over national constitutions even though it would be noted that it referred to the constitutional provision in its final decision. While the Court found the initial arrest 'justified by the necessity

<sup>66</sup> A claim that the seizure of their vessel was in violation of art 21(2) of the African Charter was abandoned.

<sup>67</sup> Art 9(3) of the 2005 Supplementary Protocol is the regime's provision on temporal limitation of action. It provides that '[a]ction by or against a Community institution or any member of the Community shall be statute barred after three (3) years from the date when the right of action arose'.

<sup>68</sup> See para 32 of the *Bayi* case.

<sup>69</sup> See eg *Chinhamo v Zimbabwe* (2007) AHRLR 96 (ACHPR 2007) on how the African Commission interprets this provision.

<sup>70</sup> Both provisions relate to the right to liberty.

of preliminary investigation', it found the subsequent and continued detention and prosecution unjustified.<sup>71</sup> It would be noticed that the Court was apparently encouraged to reach this conclusion because a Nigerian court had previously declared the action by the Nigerian officials unlawful. The question is whether the ECCJ would continue to defer to national decisions before it can find violations of human rights. Considering the need for the ECCJ to establish its judicial authority in the region, the Court may need to reconsider its practice in this regard. However, in the present case, the nexus between the findings cannot be denied and the ECCJ should be blameless in making the link.

Another aspect of the decision that calls for attention is the finding on whether article 5 of the African Charter was violated.<sup>72</sup> The ECCJ came to a conclusion that the fact of being paraded before the press in a manner that suggested a declaration of guilt before trial may have violated the right to a presumption of innocence under article 7(b) of the African Charter rather than article 5 of the Charter.<sup>73</sup> However, there is no indication that a violation was found in the final and effective part of the decision.<sup>74</sup> It raises the question as to whether the ECCJ prefers to insist on strict technicality in the formulation of relief. Such a position would contradict the more liberal approach of the African Commission.

On the issue of reparations, it was significant that the Court came to the conclusion that it had a duty to make relevant orders even though the 2005 Supplementary Protocol is silent on the point. Considering that it is the 2005 Supplementary Protocol that empowers it to hear human rights cases, a restrictive reading by the Court could have left it powerless to make orders for reparation. However, the Court chose to explore its legal framework, specifically finding the required competence in article 19 of the 1991 Protocol which authorises the ECCJ to apply article 38(1) of the Statute of the International Court of Justice.<sup>75</sup> Arguably, such courageous display of innovation works in favour of human rights victims in the region.

### **3.2.2 *Registered Trustees of the Socio-Economic Rights Accountability Project (SERAP) v Nigeria and Another***

On 27 October 2009, the ECCJ delivered its ruling on a preliminary objection raised by the second defendant in the case of *Registered Trustees of the Socio-Economic Rights Accountability Project (SERAP) v*

<sup>71</sup> Para 37 of the *Bayi* case.

<sup>72</sup> Art 5 of the African Charter protects the right to dignity.

<sup>73</sup> Para 42 of the *Bayi* case.

<sup>74</sup> See para 51 of the *Bayi* decision.

<sup>75</sup> Para 49 of the *Bayi* case.



*Nigeria and Another (SERAP case)*.<sup>76</sup> The case related to a complaint by SERAP that the defendants had violated 'the right to quality education, the right to dignity, the right of peoples to their wealth and natural resources and the right of peoples to economic and social development' guaranteed in the African Charter.<sup>77</sup>

Before the hearing of the case on its merits, an objection was raised on the grounds that the Court lacked jurisdiction to entertain the matter. The preliminary objection was based on three main grounds. First, it was argued that article 9 of the Supplementary Protocol of the ECCJ upon which the Court sought to exercise jurisdiction could not sustain the exercise of jurisdiction by the Court over the subject-matter as it only gave the Court power over the treaties, conventions and protocols of ECOWAS. Second, it was contended that the right to education was not justiciable under the Nigerian Constitution and the Court could therefore not hear that issue. Third, it was argued that SERAP lacked *locus standi* to initiate the action.

Affirming that its jurisdiction hinged on article 9 of the 2005 Supplementary Protocol, the ECCJ emphasised that article 9 empowered it to hear human rights cases. The Court stressed that article 9 had to be read as a whole in order to appreciate the scope of its jurisdiction.<sup>78</sup> The Court's resolution of the first ground of objection is arguably straightforward as the Court has always hinged its human rights competence on the expanded article 9 of the 2005 Supplementary Protocol.<sup>79</sup> However, it is important that the Court emphasised the need for a holistic reading of the provisions for a clearer appreciation of its jurisdiction.

The second ground of objection relating to the justiciability of the right to education was also critical. It had remained a matter of debate whether the inclusion of certain rights, essentially of a socio-economic nature, in chapter II of the 1999 Nigerian Constitution could be translated as a blanket exclusion of those rights from the terrain of justiciability of any sort.<sup>80</sup> On this point, the ECCJ observed that, although the claim was factually based on domestic legislation, pri-

<sup>76</sup> Unreported Suit ECW/CCJ/APP/08/08. The case was against Nigeria as first defendant and the Nigerian Universal Basic Education Commission as second defendant.

<sup>77</sup> See para 2 of the *SERAP* case (n 76 above). The rights claimed were allegedly in violation of arts 1, 2, 17, 21 and 22 of the African Charter.

<sup>78</sup> Para 14 of the *SERAP* case.

<sup>79</sup> See eg *Essien v The Gambia*, unreported Suit ECW/CCJ/APP/05/05.

<sup>80</sup> See eg, ST Ebobrah 'The future of socio-economic rights litigation in Nigeria' in F Emiri (ed) *Called to the law: Essays in honour of Late Justice E Igoniware* (2009). The debate is sparked off by the fact that sec 6(6)(c) of the 1999 Nigerian Constitution declares that judicial powers vested in Nigerian courts 'shall not, except as otherwise provided in this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution'.

mary reliance was placed on the International Covenant on Economic, Social and Cultural Rights (ICESR) and the African Charter.<sup>81</sup> Accordingly, the Court took the view that, despite the fact that the right to education was contained in the directive principles of state policy in chapter II of the 1999 Constitution of Nigeria (1999 Constitution), that fact alone did not oust the ECCJ's jurisdiction to hear a matter alleging a violation of those rights, where reference is made to the international instruments.<sup>82</sup>

One of the critical issues in the justiciability of chapter II debate relates to whether a claim for any of the rights contained in one form or another in chapter II of the Nigerian Constitution could not be made in a court of law, where the claim is based on an instrument or law other than the provisions in the Nigerian Constitution. Tackling the issue in a rather progressive manner, the ECCJ stressed:<sup>83</sup>

It is essential to note that most human rights provisions are contained in domestic legislations as well as international human rights instruments ... Hence the existence of a right in one jurisdiction does not automatically oust its enforcement in the other. They are independent of each other.

By this *dictum*, the Court appears to be taking a dualist approach to the relationship between international law and domestic law in the sense that the Court sees the operation of individual international human rights systems to be independent just as domestic systems are independent. This would mean that each system takes responsibility for the protection of the rights guaranteed as norms in that particular system. Thus, the *dictum* appears to reinforce an understanding that a state which has ratified an international human rights instrument remains bound to international supervisory bodies notwithstanding the domestic consequences that may result from a transformation or domestication of parts or the whole of the instrument into national law.

Further, the ECCJ reaffirmed its position that it has competence to supervise the implementation of the African Charter in ECOWAS member states. Thus, the Court emphasised that Nigeria's ratification and domestication of the African Charter and ratification of the revised ECOWAS Treaty brought it under the scrutiny of the Court notwithstanding the domestic effect of the Nigerian Constitution. By taking this position, the ECCJ has created an avenue for judicial enforcement of African Charter-based socio-economic rights. However, it also increased the potential for forum shopping as between the ECCJ and continental supervisory bodies of the African Charter.

On the third ground of objection, the Court felt that the argument in favour of the *actio popularis*, as presented by the plaintiff, was more

<sup>81</sup> Para 17 of the *SERAP* case.

<sup>82</sup> Para 18 of the *SERAP* case.

<sup>83</sup> Para 19 of the *SERAP* case.

convincing. Hence, the Court ruled that SERAP had standing before it.<sup>84</sup> This approach was significant in relation to enhancing access to the Court and providing human rights victims with access to remedies. Although the 2005 Supplementary Protocol does not expressly provide for the *actio popularis*, the Court had no difficulty in allowing itself to be swayed towards finding that it is 'a healthy development in the promotion of human rights' that the Court finds itself obliged to 'lend weight to'.<sup>85</sup> The Court was convinced that this route was necessary 'in order to satisfy the aspirations of citizens of the sub-region in their quest for a pervasive human rights regime'. It is interesting that the ECCJ followed the path that the African Commission had taken in the early days of its work. However, it is worth pointing out that the ECCJ made no reference to the African Commission's jurisprudence on this issue or any of the other issues that came up in the ruling. Hence, the ECCJ appears to be further limiting judicial dialogue between itself and the continental supervisory bodies of the African Charter.

One last point to be noted about the *SERAP* ruling is that it exemplifies the challenge of forum shopping that the African human rights system faces in the sense that cases that have been unsuccessful before continental mechanisms could be resubmitted to a sub-regional mechanism, albeit in a reformulated format. The applicants in the *SERAP* ruling had previously brought a communication before the African Commission, among other things, alleging a violation of the right to education by Nigeria.<sup>86</sup> Although the communication before the African Commission was formulated differently and could even be said to have arisen on the basis of different facts, the fact that it was declared inadmissible for the non-exhaustion of local remedies suggests that the *SERAP* ruling could have failed on similar grounds if it were brought before the African Commission. Hence, the chances of litigants bringing such cases before the ECCJ would be stronger. However, from the perspective of greater access to a remedy for a human rights violation, the point must be made that this is not necessarily a negative trend.

### 3.2.3 *Habré v Senegal (Application for intervention)*

During the period under review, the ECCJ delivered its ruling on an application by certain persons to join the case of *Habré v Senegal* (*Habré* ruling).<sup>87</sup> In October 2008, the former President of Chad,

<sup>84</sup> Para 30 of the *SERAP* case.

<sup>85</sup> Para 34 of the *SERAP* case.

<sup>86</sup> *Socio-Economic Rights and Accountability Project v Nigeria* (2008) AHRLR 108 (ACHPR 2008).

<sup>87</sup> Unreported Case ECW/CCJ/APP/07/08; ADD NO ECW/CCJ/APP/11/09.

Hissène Habré, brought an action against Senegal before the ECCJ.<sup>88</sup> In his action, Mr Habré contended that by amending its Constitution and part of its national laws in order to create the legal foundation for his trial on a retroactive basis, Senegal had violated Community law generally and his rights specifically.

Seeking intervention in their capacities as right-holders who are alleged victims of Mr Habré's repressive government or as assignees of such right-holders, the applicants for intervention jointly brought this application in December 2008. The main thrust of the application was that, in some form or another, the applicants have pursued or are in the process of pursuing action against Mr Habré. Particular mention was made of the fact that some of the applicants were beneficiaries of a decision by the UN Committee against Torture.<sup>89</sup> Consequently, the applicants were of the view that a finding in favour of Mr Habré by the ECCJ in his 2008 action would render the existing decision and other process redundant and ineffective. Thus, the applicant contended that they had sufficient interest in the *Habré v Senegal* matter to warrant their intervention. The application for intervention was brought in accordance with article 89 of the Rules of Procedure of the ECOWAS Court.

While Senegal did not take part in the intervention proceedings, counsel for Mr Habré opposed the application for intervention on certain procedural and substantive grounds. Among other things, it was argued on Mr Habré's behalf that the application for intervention touched the heart of the substantive action, that intervention before international courts was an exclusive preserve of states and that article 21 of the 1991 Protocol of the ECCJ relating to intervention in cases before the Court anticipated state parties rather than non-state parties or individuals.<sup>90</sup>

In addressing the question relating to competence to intervene in cases before it, the ECCJ rightly noted that article 21 of the 1991 Protocol on intervention was unaffected by the amendment introduced by the 2005 Supplementary Protocol. However, the Court recognised that its *ratione materiae* and *ratione personae* had been significantly altered by the 2005 Supplementary Protocol and in that spirit, it found no reason to restrict the competence of legal and natural persons to intervene where states have opened up direct access in human rights cases

<sup>88</sup> Hissène Habré ruled Chad from 1982 to 1990 when he was overthrown in a military coup. Since he was deposed, Mr Habré has lived in asylum in Senegal where several attempts have been made by alleged victims of his regime's repression to seek justice against him in Senegalese and Belgian courts.

<sup>89</sup> Communication 181/2001, *Guengueng v Senegal*, decision of 17 May 2006. See para 7 of the *Habré* ruling.

<sup>90</sup> See para 14 of the *Habré* ruling. It was also subtly suggested that Senegal colluded with the applicants as there was no explanation for the access that the applicants had to the processes filed by Mr Habré before the court.

before the Court.<sup>91</sup> Using strong language that considered human rights obligations of states as *erga omnes*, the ECCJ stressed that once the right of access to court for remedy was granted, it could not be limited and thereby be rendered ineffective.<sup>92</sup>

The position taken by the Court is positive as it demonstrates a determination on the part of the Court not to be unduly literal in its interpretation, especially where the outcome would be absurd. It seems to acknowledge that drafters of international instruments could inadvertently omit phrases and create ambiguities that courts should be courageous enough to fill. Consequently, reading the relevant protocols together in a progressive manner, the ECCJ considered the principal right of access and the right to intervene as two sides of the same right of access to court. Thus, it emphasised that ECOWAS member states would be violating a norm highly valued by the 'family of nations' if they granted the principal right of access and withheld the right to intervene.<sup>93</sup> While it may be observed that the Court seems to use the term *erga omnes* with ease and thereby risks watering down the weight that the term should carry, the Court's approach to interpretation in this case carries some promise for judicial protection of human rights in the region.

On the question whether the applicants had sufficient interest to warrant intervention, the ECCJ had no difficulty in finding that there was no necessity for the applicants to show direct interest in the principal claim in the main case.<sup>94</sup> Accordingly, the Court concluded that the possibility of its decision in the main action affecting the interests of the applicants was sufficient for intervention.<sup>95</sup> This is important because in the widening landscape for international litigation in Africa, there is a strong chance that defendants in human rights cases can collude with willing litigants to get a conflicting decision in one court to undermine a favourable decision of another court. Thus, allowing intervention by persons with subsisting or anticipated judgments on similar or related facts can be a useful bulwark against such a challenge. Regrettably, despite the interesting premise, the ECCJ still found that the overall interests of the applicants would not be restricted by whatever judgment it would give in the main *Habré* case.<sup>96</sup> Thus, while the ECCJ has shown a tendency to be liberal in interpretation, it also shows that

<sup>91</sup> Paras 18–21 of the *Habré* ruling.

<sup>92</sup> See para 21 of the *Habré* ruling where the court stated: '[L]a Cour, au regard de la valeur d'obligation *erga omnes* des droits fondamentaux de l'homme affirmés dans plusieurs conventions de portée universelle et régionale, estime que le droit au recours, une fois reconnu, ne peut souffrir de limitation tendant à le rendre inefficace.'

<sup>93</sup> Para 23 of the *Habré* ruling. The court also saw the right to intervene as an *erga omnes* obligation.

<sup>94</sup> Para 27 of the *Habré* ruling.

<sup>95</sup> Para 30 of the *Habré* ruling.

<sup>96</sup> Paras 32–34 of the *Habré* ruling.

it would require evidence of strong probability of negative impact on interests before it would allow interventions in cases before it.

### 3.2.4 *Amouzou and Others v Côte d'Ivoire*

On 17 December 2009, the ECCJ delivered its judgment in the case of *Amouzou and Others v Côte d'Ivoire* (*Amouzou case*).<sup>97</sup> Filed in January 2009, the case related to a request by Amouzou and five others, linked to the management of the cocoa and coffee trade in Côte d'Ivoire, seeking certain relief for wrongful detention and treatment by the state. Following investigation of the cocoa and coffee sector of the Ivorian economy, the state prosecutor allegedly held a press conference to update the public on the progress of the investigations. At the press conference, 23 persons were pronounced as being under indictment for a series of offences touching on dishonesty. The names released during the press conference, including those of the applicants and their images, were allegedly subsequently published in the news media. A government daily newspaper was specifically quoted as emphasising that 'heads will roll'. The applicants were also detained in preventive custody for a period of time. On these grounds, the applicants concluded that they were made the objects of 'judicial and media lynching' and exposed to 'condemnation by public opinion' even before the trial.<sup>98</sup>

Upon the facts, the applicants brought the action before the ECCJ alleging that their rights had been violated on five main grounds. Relying on article 11 of the Universal Declaration, it was alleged that their right to be presumed innocent until proven guilty had been violated. On the basis of article 12 of the Universal Declaration, it was alleged further that the events had resulted in a violation of the applicants' right to respect for honour and reputation. Further relying on article 137 of the Ivorian Penal Procedure Code and article 9 of the Universal Declaration, the applicants alleged a violation of their right not to be subjected to arbitrary detention. On the basis of article 11 of the Universal Declaration, it was claimed that the applicants had a right to be tried in an equitable and public judicial process in which all guarantees necessary for their defence are provided. In relation to one of the applicants, who was pregnant at the time of arrest and delivered in detention, it was argued that article 3 of the Convention on the Rights of the Child (CRC) and article 30 of the African Charter on the Rights and Welfare of the Child (African Children's Charter)<sup>99</sup> had been violated. These provisions deal respectively with the best interests of the child and the right of pregnant or nursing women to receive special treatment when they are in conflict with the law. The defendant state argued, *inter alia*, that the Universal Declaration and the African Char-

<sup>97</sup> Unreported Suit ECW/CC/APP/01/09; Arrêt ECW/CCJ/JUG/04/09.

<sup>98</sup> Paras 4-8 of the *Amouzou case*. Also see paras 9-10 of this case.

<sup>99</sup> Generally see paras 12-26 of the *Amouzou case*.

ter guaranteed freedom of the press and it was incumbent on the state to protect that right. The state also argued that the some of the claims were vague while the detention could be justified on the grounds that it was upon judicial order necessary in view of the circumstances of the alleged offences.<sup>100</sup>

In its analysis, the ECCJ considered the rights as guaranteed in the Universal Declaration, the African Charter and the International Covenant on Civil and Political Rights (ICCPR). The Court then emphasised the significant position of these instruments in the ECOWAS legal order.<sup>101</sup> This is important in view of the fact that the ECOWAS legal regime lacks its own human rights catalogue. With respect to the Universal Declaration, the Court took the view that reference to the instrument in the Preamble to the ECOWAS Protocol on Democracy was the foundation for its recognition as a vital source of human rights in the ECOWAS order.<sup>102</sup> In the face of the constant usage of the Universal Declaration in cases before the Court, it is open to debate whether this is sufficient foundation for applying the Universal Declaration, especially in view of its existence as a declaration rather than a treaty. However, the counter argument could be that the Universal Declaration now constitutes customary international law. Overall, the *dictum* re-affirms the fact that the non-existence of an ECOWAS-specific catalogue is not fatal to the Court's human rights competence.

On the merits of the case, the Court did not find a link between the release of information at the press conference and the treatment of the issues by the media. Consequently, the Court found no fault on the part of the state.<sup>103</sup> The ECCJ went on to stress that a violation of respect for honour and reputation that occurs in the course of the exercise of press freedom could not invoke the liability of the state. In other words, the Court tried to strike a balance between contending rights. It is open to debate whether the Court could have arrived at a different decision on the link between the press conference and the media reports, in view of the calibre of officials and the presentation at the conference. However, it is important that the Court stressed that the main responsibility of a state was to provide the framework for the applicant to pursue civil vindication if they felt aggrieved.<sup>104</sup> What can be said to be the most controversial part of the decision is the Court's finding that in the circumstances of the case, pre-trial detention of seven months could not be said to be unreasonable.<sup>105</sup> Interestingly, while it took the view that prior judicial sanction and the necessity

<sup>100</sup> See paras 27 & 34 of the *Amouzou* case.

<sup>101</sup> See para 58 of the *Amouzou* case.

<sup>102</sup> Para 60 of the *Amouzou* case.

<sup>103</sup> Paras 76-77 of the *Amouzou* case.

<sup>104</sup> See para 81 of the *Amouzou* case. This is similar to the position that the ECCJ took in *Koraou v Niger* (2008) AHRLR 182 (ECOWAS 2008).

<sup>105</sup> Para 95 of the *Amouzou* case.



of criminal investigation justified the preventive detention, the Court admitted that unreasonable detention could make an otherwise lawful detention arbitrary.<sup>106</sup> The Court even considered international instruments and jurisprudence to support its position that there are no laid down criteria for determining reasonableness.

On the question of special treatment of pregnant or nursing mothers, the Court found that there was no clear obligation on the state to refrain from incarcerating this category of persons.<sup>107</sup>

While the analyses by the Court cannot be faulted in certain aspects, detractors would argue that the general impression created by the *Amouzou* case appears to be that it cannot be taken for granted that the ECCJ would find state responsibility each time it finds that there has been a violation. It remains to be seen whether this would turn out to be a justifiable concern.

### 3.2.5 *Co-ordination Naitonale Des Delegates Departmentaux de la Filiere Café Cacao (CNDD) v Côte d'Ivoire*

In the *Co-ordination Naitonale Des Delegates Departmentaux de la Filiere Café Cacao (CNDD) v Côte d'Ivoire (CNDD case)*,<sup>108</sup> a legal person, the CNDD, sought a declaration that the rights of its members to equitable remuneration and to equal treatment before the law as guaranteed in the Universal Declaration had been violated. The claim was premised on the ground that the fiscal regime imposed by the state was discriminatory against cocoa and coffee producers and thereby limited the profit that accrued to them.<sup>109</sup> The state argued *inter alia* that the applicant lacked the capacity to bring the case and the subject matter was outside the competence of the Court or was baseless.<sup>110</sup> The state's argument partly touched on the question whether legal persons could bring a claim for human rights before the ECCJ on the basis of the 2005 Supplementary Protocol.

Addressing the question of access to legal persons in human rights cases, the ECCJ emphasised that, although the 2005 Supplementary Protocol did not expressly grant access to legal persons, there was room to accommodate claims from such entities. The Court specifically referred to the ECOWAS Protocol on Democracy to support its posi-

<sup>106</sup> See paras 83-90 of the *Amouzou* case.

<sup>107</sup> Paras 99-104 of the *Amouzou* case.

<sup>108</sup> Unreported Suit ECW/CCJ/APP/02/09; Arrêt ECW/CCJ/JUD/05/09, delivered on 17 December 2009.

<sup>109</sup> Paras 6-11 of the *CNDD* case (n 108 above).

<sup>110</sup> Para 12 of the *CNDD* case.

tion.<sup>111</sup> Very importantly, the Court considered itself bound to apply measures that guaranteed a greater degree of protection for human rights.<sup>112</sup> By taking such an approach, the ECCJ once again exhibits a tendency to be more protective than restrictive of human rights. This is a positive trait in a court that increasingly appears to regard itself as a human rights court. It therefore holds some promise for the guarantee of the right of access in borderline cases. The other point to be noted is that the Court appears to be looking more often and deeper into the Community legal framework to find a foundation for its human rights jurisdiction.

The ECCJ failed to find a violation on the merits of the case. It pointed out that there was a need to show a labour relationship in order to successfully invoke the right to equitable remuneration. This position is consistent with the Court's earlier decision in *Essien v The Gambia*<sup>113</sup> which the Court itself cited. Considering that the continental bodies are yet to have an opportunity to interpret the equivalent provision in the African Charter, the ECCJ is setting the pace in that area. This raises the question whether the judicial and quasi-judicial continental bodies would consider themselves bound by the ECCJ's interpretation if a similar case comes before them. On the question of equality, it is significant that the Court pointed out that the issue should only arise as between comparable indices.<sup>114</sup>

The ease with which the Court appears to be engaging in human rights issues suggests that the Court is becoming increasingly comfortable with its character as an ever-growing international human rights court. Although the trend in some of its decisions may raise a debate regarding its qualification for the purpose, the Court can only improve. However, one major question remains whether the Court would be able to co-ordinate its existence with the other human rights supervisory bodies in the African human rights system. From a more general perspective, the involvement of the main Community organs in soft standard-setting and the willingness to enforce sanctions make the ECOWAS regime similar to the national tripartite governmental structure for human rights realisation.

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<sup>111</sup> See art 1(h) of the ECOWAS Democracy Treaty which states that 'each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on human rights, to ensure the protection of his/her rights'.

<sup>112</sup> Para 29 of the *CNDD* case.

<sup>113</sup> n 74 above.

<sup>114</sup> See paras 55-56 of the *CNDD* case.

## 4 The Southern African Development Community

Originally founded in 1980 as the Southern Africa Development Co-ordination Conference (SADCC), the SADC was established in 1992 when a treaty was adopted to transform the SADCC into a new organisation to be known as SADC.<sup>115</sup> In 2001, the 1992 SADC Treaty was amended and this resulted in increasing Community objectives to include the promotion of<sup>116</sup>

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.

In addition, the Community 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'.<sup>117</sup> These provisions are indicative of a Community that goes beyond the narrow confines of economic integration.

Under its amended Treaty, SADC and its member states undertake to proceed in accordance with principles which include human rights, democracy and the rule of law.<sup>118</sup> It should be noted that reference to human rights in the SADC Treaty is not linked to the African Charter or any other human rights catalogue. Consequently, over the years the Community has engaged in various forms of standard-setting in the field of human rights.<sup>119</sup> The SADC Tribunal has also been involved in the judicial protection of human rights.<sup>120</sup> During 2009, SADC's involvement in human rights was essentially in the promotion of democracy and in the judicial protection of human rights.

<sup>115</sup> 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, Namibia, Mozambique, Swaziland, South Africa, Tanzania, Zambia and Zimbabwe.

<sup>116</sup> See art 5(1)(a) of the Consolidated SADC Treaty. The Treaty is available at <http://www.sadc.int/index> (accessed 31 March 2010).

<sup>117</sup> Generally see art 5 of the Consolidated SADC Treaty.

<sup>118</sup> Art 4(c) of the SADC Treaty as amended.

<sup>119</sup> Eg, SADC has a region-specific Fundamental Rights Charter and a Protocol on the rights of women.

<sup>120</sup> The SADC Tribunal is the judicial organ of SADC. Other organs of the Community are the Summit of Heads of State and Government; the Organ on Politics, Defence and Security Co-operation; the Council of Ministers; the Integrated Committee of Ministers; the Standing Committee of Officials; the Secretariat; and the SADC National Committees.

## 4.1 Non-juridical human rights developments

Non-juridical activities that promote and protect human rights in SADC occur mostly in the work of the Summit of Heads of State and Government or the Secretariat, but to a lesser degree also in the work of other organs. These organs often delegate responsibilities in the field to other bodies.

### 4.1.1 Standard-setting

During 2009, some form of standard-setting in the field of human rights was undertaken at Ministerial level. In May 2009, the SADC Ministerial Conference on the Development of a Strategic Plan of Action on Combating Trafficking in Persons adopted the SADC Draft Strategic Plan of Action on Combating Trafficking in Persons, Especially Women and Children in the SADC region.<sup>121</sup> The Plan of Action is founded and builds on the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; the Ouagadougou Action Plan to Combat Trafficking in Persons, especially Women and Children of the African Union, and the SADC Protocol on Gender and Development. In the absence of a strong continental normative framework and in view of the expected increase in trafficking during the FIFA World Cup in South Africa in 2010, the Plan of Action is relevant. The Plan's chances of implementation are arguably better at the sub-regional level.

### 4.1.2 Strengthening democracy

Owing to the number of elections that took place in the region during 2009, the most visible human rights-related work of the SADC Community was in this area. In the period under review, SADC Electoral Observation Missions were dispatched to observe elections in Botswana, Mozambique and Namibia. SADC work in the field of elections is founded on the SADC Principles and Guidelines Governing Democratic Elections.<sup>122</sup> In each of the elections observed during 2009, the mission was sent prior to the elections to allow for adequate consultation with relevant stakeholders.<sup>123</sup> In view of the importance of the pre-election events, it is significant that SADC missions give allowance for constructive engagements.

While in each case the observer mission took note of complaints from opposition parties and other stakeholders concerning the elections, each mission took the view that 'though some of the concerns

<sup>121</sup> See Record of SADC Ministerial Meeting of May 2009 (on file with author).

<sup>122</sup> A set of non-binding principles adopted in 2004.

<sup>123</sup> The Botswana elections took place on 16 October 2009 and the mission was launched on 8 October 2009. The mission to Mozambique was launched on 18 October 2009 while the elections took place on 28 October 2009. The elections in Namibia took place on 27 and 28 November 2009.

raised were pertinent, they were not of such a magnitude as to affect the credibility of the overall electoral process'.<sup>124</sup> The similarity of the phrasing in the three reports gives the impression that the three missions uncritically follow what could be a unified SADC position. However, it could also be argued that the similarity results from the fact that members are trained together and have standard formats in which to report back. It is important that SADC missions do not create negative impressions that could result in a loss of confidence on the part of national stakeholders.

Another important development during 2009 was the triggering of the SADC sanctions regime against Madagascar for the unconstitutional change of government that took place in that state. Following the refusal of the head of the junta to restore democratic governance in Madagascar, in March 2009 SADC decided to impose sanctions on the junta for violating 'the basic principles, protocols and treaties' of SADC.<sup>125</sup> The imposition of sanctions is important as it sends a clear message that SADC does not intend to accommodate unconstitutional changes of governments. However, it also raises concerns as to whether the SADC regime is aimed at protecting sitting regimes as the organisation failed to take similar decisive actions against Zimbabwe. On a more general note, the imposition of sanctions reinforces the continental resolve to discourage unconstitutional changes of government.

## 4.2 Judicial protection of human rights by the SADC Tribunal

The SADC Tribunal is established by articles 9 and 16 of the 1992 SADC Treaty, as amended. The Tribunal itself is constituted by the Protocol on the Tribunal and the Rules of Procedure thereof adopted in 2000. Although no express human rights mandate is given to the Tribunal, it has held that it is competent to hear human rights cases on the basis of its competence to interpret and apply the SADC Treaty.<sup>126</sup> During 2009, there were three decisions from the Tribunal that had human rights implications.

### 4.2.1 *Campbell and Another v Zimbabwe*

Despite the judgment in favour of the applicants in the *Campbell* case in 2008, issues from the case arose in 2009 as Zimbabwe allegedly refused to comply with the orders of the Tribunal. Consequently, the case of *Campbell and Another v Zimbabwe (2009 Campbell case)*<sup>127</sup> was filed in accordance with article 32(4) of the Tribunal's Protocol. The main

<sup>124</sup> The reports of the observer missions are on file with the author.

<sup>125</sup> 'SADC suspends Madagascar' <http://www.mg.co.za/article/2009-03-31-madagascar-neighbours-mull-sanction> (accessed 27 February 2010).

<sup>126</sup> See *Mike Campbell (Pvt) Limited & Others v Zimbabwe* (2008) AHRLR 199 (SADC 2008) (*Campbell case*) in which judgment was delivered on 28 November 2008.

<sup>127</sup> Unreported Case SADC (T) 03/2009.

question was whether Zimbabwe was in breach and contempt of the Tribunal's decision of 28 November 2008. Although Zimbabwe refused to take part in the proceedings, the Tribunal found that the actions and omissions of the Zimbabwean authorities provided evidence of the state's breach. Thus, the Tribunal declared that it would invoke article 32(5) of its Protocol to report its finding to the SADC Summit.<sup>128</sup>

Although the case itself was straightforward, the events triggered by the finding and the report of the finding to the Summit have been monumental. The Summit had referred the matter to the SADC Ministers of Justice and Zimbabwe had challenged the legality and legitimacy of the SADC Tribunal. These events raise questions on the legitimacy of the Tribunal's human rights competence and amplify the need for a decision on whether to confer express human rights jurisdiction on the Tribunal. They also demonstrate the difficulty of enforcing decisions against un-co-operating states and the question whether options for encouraging compliance other than enforcement sanctions need to be explored.

#### 4.2.2 *Zimbabwe Human Rights NGO Forum v Zimbabwe*

The main question decided by the SADC Tribunal in *Zimbabwe Human Rights NGO Forum v Zimbabwe* (NGO Forum case)<sup>129</sup> was whether an NGO could take the place of aggrieved persons as a party in a human right case before the Tribunal. The Tribunal found that only the aggrieved persons could properly come before it and ordered that the application be amended to enable the proper parties to come before the Tribunal.<sup>130</sup> On a continent where victims of human rights violations are often too poor to seek a remedy, the importance of civil society intervention cannot be overemphasised. However, the decision triggers the question whether public interest litigation cannot be undertaken in the name(s) of the alleged victim(s).

#### 4.2.3 *Tembani v Zimbabwe*

During 2009, the SADC Tribunal gave its decision in the case of *Tembani v Zimbabwe* (Tembani case).<sup>131</sup> Similar to the 2008 Campbell case, the question before the Tribunal was whether sections of Zimbabwean national legislation was in conformity with the principles of human rights, democracy and the rule of law contained in the SADC Treaty.<sup>132</sup> It is important to note that despite the challenges thrown up from the 2008 Campbell case, Zimbabwe took part in the Tembani proceedings, albeit belatedly and to challenge the jurisdiction of the Tribunal. The

<sup>128</sup> 2009 Campbell case 2.

<sup>129</sup> Unreported Case SADC (T) 05/2008.

<sup>130</sup> See NGO Forum case 3.

<sup>131</sup> Unreported Case SADC (T) 07/2008.

<sup>132</sup> Tembani case 2.

Tribunal used the case to re-emphasise the importance of exhaustion of local remedies in international human rights law and cited provisions from the African Charter and the European Convention on Human Rights and Fundamental Freedoms. This is significant in the sense that the Tribunal holds out its intention to engage in dialogue with the norms and jurisprudence of other human rights systems.

In its analysis before it found the case admissible, the Tribunal took the view that one of the aims of the requirement to exhaust local remedies is to avoid parallel proceedings.<sup>133</sup> This recognition is important as it has the potential to prevent a conflict of jurisdiction between the Tribunal and national courts. While it acknowledged the applicability of the requirement, the Tribunal employed the exceptions to declare the case admissible.<sup>134</sup> In relation to the merits of the case, the Tribunal followed its precedent in the 2008 *Campbell* case and found in favour of the applicant.<sup>135</sup> It was interesting that the Tribunal made a subtle suggestion that Zimbabwe could have elected to pursue what can be described as an amicable settlement.<sup>136</sup>

Notwithstanding the fact that it has no clear competence in human rights matters, the SADC Tribunal continues to stand out as an institution with a strong potential for the judicial protection of human rights. This is significant in the face of the limited access to the African Human Rights Court granted by states in the region. The Community's involvement of promoting democratic governance is also commendable even though it may be necessary to ensure that a substantial impact is made rather than allowing the SADC mechanisms to become rubber stamps for otherwise inadequate processes. In terms of enforcement, there is a clear challenge that needs to be addressed if the Community mechanisms are to remain relevant.

## 5 Conclusion

The human rights developments in the three sub-regional systems considered in this contribution are illustrative of the emergence of another level of human rights regionalism in Africa. To different degrees, the involvement of the RECs in the field of human rights is becoming bolder as much in the non-judicial sector as in the sector of judicial protection. Both the ECCJ and the SADC Tribunal are increasingly becoming more analytical and positive in their engagement in determining complex human rights questions. The EACJ is taking an active part in seeking the expansion of its competence to include human rights issues. RECs

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<sup>133</sup> *Temhani* case 12.

<sup>134</sup> As above.

<sup>135</sup> See Ebobrah (n 3 above).

<sup>136</sup> See *Temhani* case 24.



and their organs are also taking the lead in expanding the normative framework for human rights protection in Africa.

While these developments may be positive signals, they also come with some challenges. The potential for conflicting decisions from the different judicial bodies continues to exist and calls for conscious action. It is also open to debate whether there is a threat of lowered judicial standards. In the realm of non-judicial human rights developments, the involvement of all organs of the RECs in the field should serve as a lesson for the AU where most of its human rights work is seen as a concern of the African Commission. In this area also, there is a need for co-ordination in order to protect the sanctity of the African human rights system.

## Developments in international criminal justice in Africa during 2009

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### Summary

*An overview of 2009 shows the dramatic influence of developments pertaining to international criminal justice in shaping not only legal but also political and human rights discourses in Africa. This contribution, which reviews selected events in 2009, includes a selective analysis of the work of two important international jurisdictions — the International Criminal Court and the International Criminal Tribunal for Rwanda. This year, the ‘hybrid’ Special Court for Sierra Leone concluded its last trial and appeal in Freetown and heard the testimony of Charles Taylor. Both are significant for the pursuit of justice in Sierra Leone. In Kenya, the failed efforts to establish a special tribunal and the attempts to prosecute suspected pirates apprehended off the coast of Somalia, shape the debate on the prosecution of international crimes in domestic judicial spheres. The first case before the African Court on Human and People’s Rights, concerning Hissène Habré, and the attempts to establish a criminal chamber to try crimes defined under international law within the African Court are touched upon. Events in Sudan are highlighted, including the International Criminal Court’s arrest warrant against the President of Sudan, and the report by the African Union Panel on Darfur.*

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## 1 Introduction

Over the last year international criminal jurisdictions based or operating in Africa, notably the permanent International Criminal Court (ICC),<sup>1</sup> the United Nations (UN) International Criminal Tribunal for Rwanda (ICTR)<sup>2</sup> and the Special Court for Sierra Leone (SCSL),<sup>3</sup> have continued their efforts to investigate, prosecute and try individuals for 'core international crimes': genocide, crimes against humanity and war crimes.

This overview of recent developments summarises some of the main developments pertaining to the ICTR and to the SCSL, before examining current proceedings before the ICC in Uganda, the Democratic Republic of the Congo, Central African Republic, Sudan and Kenya, that occurred in 2009. The review also examines efforts to investigate and prosecute international crimes in national jurisdictions, including developments pertaining to the crime of piracy, which has gained prominence as the international community seeks ways to bring those suspected of piracy to justice. Finally, it assesses the progress in the case against Hissène Habré in Senegal, before concluding on the challenges international criminal justice faces at the beginning of 2010.

## 2 Rwanda

Different transitional justice mechanisms continue to be used to foster accountability for international crimes committed in the early 1990s in Rwanda. Domestically these are conducted by the Rwandese national criminal judicial system and the *Gacaca* courts and, internationally,

<sup>1</sup> The Statute of the ICC was adopted in Rome in July 1998 (Rome Statute) by 120 states and entered into force in 2002, triggering the temporal jurisdiction of the ICC. The Court is competent for war crimes, crimes against humanity and genocide, as defined in its Statute, and will also be competent over the crime of aggression when state parties to the Rome Statute agree on a definition of this crime.

<sup>2</sup> United Nations Security Council Resolution 955 (1994) of 8 November 1994 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement> (accessed 31 March 2010).

<sup>3</sup> 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> (accessed 31 March 2010). This was further to Security Council Resolution 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).

by the UN's International Criminal Tribunal for Rwanda.<sup>4</sup> Both the *Gacaca* courts and the ICTR are in the process of winding down their operations.

As of January 2010, the ICTR has concluded the trials of 39 accused, of which eight have been acquitted.<sup>5</sup> Thirteen cases are in the process of being tried in the first instance or pending judgment, including three cases involving multiple defendants (the so-called *Government II* case concerning members of the 1994 interim government, the *Military II* case concerning high-ranking military officers, and the *Butare* case, the longest running trial before the ICTR). Two detained accused still await the start of their trials and nine await the finalisation of appeals against their convictions in the first instance.

In the course of 2009, the ICTR rendered six judgments at first instance<sup>6</sup> and two appellate judgments.<sup>7</sup> Of note, in the case of *The Prosecutor v Protais Zigiranyirazo*, the Appeals Chamber, in an unprecedented move, reversed the conviction and directly acquitted Zigiranyirazo, without sending the case to be retried.<sup>8</sup>

As indicated in our review last year, the ICTR was conceptualised as an *ad hoc* entity with limited temporal jurisdiction and a definitive time-span. As a subsidiary organ of its parent body, the United Nations Security Council, its 'completion strategy' has been closely monitored and the conclusion of the development of the framework of the residual mechanism that will replace the ICTR is expected soon. In accordance with Security Council Resolutions 1503 (2003) of 28 August 2003 and 1534 (2004) of 26 March 2004, the ICTR continues to pursue this completion strategy which is based on two main pillars: the completion of all high-profile pending cases without delay, and the transfer of cases involving lower-ranking accused to domestic jurisdictions.<sup>9</sup> In 2009, the Security Council extended the terms of office of several

<sup>4</sup> n 2 above. The ICTR was established by the UN Security Council in 1994 'to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994'. See art 1 of the ICTR Statute.

<sup>5</sup> For up-to-date status of ICTR cases, see <http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx> (accessed 31 March 2010).

<sup>6</sup> See the cases of (a) Bagaragaza Michel (ICTR-05-86) – sentenced to eight years; (b) Kalimanzira Callixte (ICTR-05-88) – sentenced to 30 years; (c) Nsengiyumva Anatole (ICTR-96-12) – acquitted and since relocated; (d) Nshogoza Léonidas (ICTR-2007-91) – sentenced to 10 months; (e) Renzaho Tharcisse (ICTR-97-31-DP) sentenced to life; (f) Rukundo Emmanuel (ICTR-01-70) – sentenced to 25 years.

<sup>7</sup> See ICTR cases of Zigiranyirazo Protais (ICTR-01-7) and Karera François (ICTR-01-74).

<sup>8</sup> See *The Prosecutor v Protais Zigiranyirazo*, Judgment (Appeals) (Case ICTR-01-73-A), 17 November 2009.

<sup>9</sup> In addition to the transfer of these cases, the ICTR prosecutor can and has also transferred dossiers concerning suspects who were investigated but not indicted by the ICTR.

permanent and *ad litem* judges so that they may complete ongoing trials and conduct additional trials as soon as possible in order to meet the goals of the Completion Strategy.<sup>10</sup> The reliance of the Security Council on the transfer of cases to domestic courts to ensure a timely completion strategy remains problematic. ICTR judges have repeatedly indicated that they are not satisfied that the accused would receive a fair trial in Rwanda, which is the only country that has publicly indicated interest in hearing these cases. It therefore still remains unclear when the Tribunal will finally close its doors.

### 3 Sierra Leone

In Sierra Leone, the Special Court for Sierra Leone<sup>11</sup> concluded its final trial in Freetown at both first instance and at appeal with the case against the leaders of the Revolutionary United Front (RUF). Save for the case against Charles Taylor, the former President of Liberia whose trial is being conducted in The Hague, the SCSL is in the final stages of its 'completion strategy'.

On 25 February 2009, the SCSL convicted the senior leaders of the RUF — Issa Hassan Sesay, Morris Kallon and Augustine Gbao — of war crimes and crimes against humanity for their roles in Sierra Leone's 11-year civil war that was marked by the use of child soldiers and the issues of forced marriage and sexual slavery.<sup>12</sup> Of significance in the RUF case was the emphasis placed by the Trial Chamber on the gravity of the crime of intentionally directing attacks against personnel involved in humanitarian assistance or peacekeeping missions, issuing the first conviction of its kind in an international tribunal. Both Kallon and Sesay were found guilty of this crime punishable under article 4(b) of the Statute; Gbao was found guilty of aiding and abetting the attacks. This judgment is of particular import in light of the increasing attacks against peacekeepers, more recently in Sudan and Somalia. In its analysis of the gravity of the above crime in the sentencing judgment, the Trial Chamber, referring to the vulnerability of peacekeeping operations and their personnel in (post)-conflict situations, and their 'mandate ... and the purpose of their deployment ... to facilitate peace and security with an objective of bringing to an end ... conflict', emphasised the importance of peacekeeping operations as an 'important instrument used by the

<sup>10</sup> See Security Council Resolutions 1878 (2009) of 7 July 2009 and 1901 (2009) of 16 December 2009.

<sup>11</sup> n 3 above.

<sup>12</sup> *Prosecutor v Issa Hassan Sesay, Morris Kallon & Augustine Gbao* (Case SCSL-04-15-T) Judgment (Trial) dated 2 March 2009 and Sentencing Judgment dated 8 April 2009. The accused were sentenced to 52, 40 and 25 years respectively. Of the 18 charges, Sesay and Kallon were found guilty of 16 counts and Gbao of 14. None of the accused were convicted for murder or the taking of hostages or found responsible for the attack in Freetown that resulted in over 5 000 deaths in January 1999.

international community for the maintenance of international peace and security and therefore ... adequate protection must be granted'.<sup>13</sup>

On 26 October 2009, the Appeals Chamber, in its final judgment delivered in Freetown, upheld the convictions of Issa Hassan Sesay, Morris Kallon and Augustine Gbao. A large portion of the judgment was dedicated to the judicial notion of joint criminal enterprise.<sup>14</sup>

Joint criminal enterprise continues to play a critical role in the trial of Charles Taylor. On 1 May, the Appeals Chamber dismissed the accused's motion dated 14 December 2007 in which he argued that joint criminal enterprise was defectively pleaded in the Second Amended Indictment.<sup>15</sup> Nevertheless, the issue of joint criminal enterprise arose again in the defence motion for a judgment of acquittal, which was dismissed on 4 May 2009, in which the Trial Chamber held that '[i]n relation to the alleged participation of the accused, the Trial Chamber finds that there is evidence that the accused participated in the joint criminal enterprise'.

Taylor himself took the stand on 18 July 2009 and gave evidence for 13 weeks. While he did not deny his relationship with the RUF, he eloquently emphasised his role as a peacemaker, disassociating himself from involvement in the conflict and denying all allegations of support to the RUF. In his defence, Taylor also stressed the challenges and responsibilities he faced as a head of state, and the internationalisation

<sup>13</sup> This jurisprudential precedent may be of significance in the case against *Bahr Idriss Abu Garda* before the ICC, concerning attacks against personnel of the African Union Mission in Sudan. See section on Sudan below. *Sesay, Kallon and Gbao*, Sentencing Judgment paras 189–194–195. See more generally paras 188–203. For this reason, the Chamber found that the 'inherent gravity of the criminal acts in question [were] exceptionally high'. For intentionally directing an attack against peacekeepers, Sesay was sentenced to 51 years, Kallon to 40 years and Gbao to 25 years (para 204).

<sup>14</sup> On this notion and the way it has been formulated before the SCSL, see C Aptel & W Mwangi 'Developments in international criminal justice in Africa during 2008' (2009) 9 *African Human Rights Law Journal* 274.

<sup>15</sup> *Prosecutor v Taylor* (Case SCSL-2003-01-T) Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE dated 14 December 2007 ('Original Defence Motion'). The Trial Chamber had permitted both parties to file new submissions in light of the Appeals Chamber's judgment in the case of *Prosecutor v Brima & Others* (*Prosecutor v Brima & Others* (Case SCSL-2004-16-A), Judgment (Appeals) dated 22 February 2008, filed on 3 March 2008). It subsequently dismissed the defence's motion in an oral decision on 19 February 2009 (*Taylor* Transcript, 19 February 2009 24052 In 26 – 24053 In 3.) The majority of the Trial Chamber in Impugned Decision on 27 February 2009 had held that the Second Amendment needed to be read as a whole (*Taylor*, Prosecution's Second Amended Indictment, 29 May 2007 para 33.) It also held that the prosecution had fulfilled the pleading requirements of the alleged joint criminal enterprise and provided sufficient details to put the Defence on notice of the case against him, although in agreement with the majority of the bench on that there was sufficient material presented by the prosecutor to put the defence on notice, in his dissent, Justice Lasik held that the Second Amended Indictment defectively pleaded joint criminal enterprise as a mode of liability at paras 6–23 (*Taylor*, Decision on Public Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE dated 27 February 2009).

of the Sierra Leonean conflict. The defence also attempted to discredit many of the witnesses called by the prosecution by drawing attention to the inconsistencies in their evidence.<sup>16</sup>

Of particular interest in both the *Taylor* and *RUF* cases has been the overwhelming evidence pointing to the significance of diamonds in the conflict, which mirrors the findings of the Sierra Leone's Truth and Reconciliation Commission.<sup>17</sup>

On 18 March 2009, the government of Rwanda entered into an agreement with the SCSL on the enforcement of sentences handed down by the SCSL.<sup>18</sup> The convicted accused were transferred to the newly-built Rwandan Mpanga Prison on 31 October 2009. This prison has a special wing that was specifically constructed to house ICTR prisoners in order to enable the transfer of convicted persons to Rwanda in accordance with article 26 of the ICTR statute.<sup>19</sup>

As the Special Court winds down its operations in Freetown, it embarks on the challenging task of leaving a durable legacy for the country and the region as part of the transitional justice mechanisms put in place against the background of the Lomé Peace Accords of 1999 (Lomé Agreement).<sup>20</sup> The Court's most significant contribution to the development of international criminal jurisprudence includes the first convictions in the history of international courts for the crimes of intentional attacks on peacekeeping personnel, forced marriages and the

<sup>16</sup> In order to secure a conviction, the prosecution will need to demonstrate the command responsibility that it alleges Taylor had over the RUF as well as his participation in a joint criminal enterprise with the guerrilla group to gain control over Sierra Leone by committing crimes that amount to crimes against humanity and war crimes. The Taylor defence aims to distance him from the RUF, thus undermining the prosecution's argument of JCE.

<sup>17</sup> See also more generally JL Hirsch *Sierra Leone: Diamonds and the struggle for democracy* (2001).

<sup>18</sup> Amended Agreement between the Special Court for Sierra Leone and the government of the Republic of Rwanda on the Enforcement of Sentences of the Special Court for Sierra Leone, 18 March 2009 <http://www.sc-sl.org/LinkClick.aspx?fileticket=WNTKRbIUNNC%3d&tabid=176> (accessed 31 March 2010).

<sup>19</sup> Rwanda, as evidenced by this transfer, continues to assert that it has put in place the requisite conditions and procedures in accordance with UN standards to enable the ICTR to transfer its convicted persons to Mpanga Prison. This bold initiative to accept the SCSL-convicted persons by Rwanda is likely to play a critical role in future decisions concerning where to house ICTR-convicted persons once the ICTR concludes its activities.

<sup>20</sup> The Lomé Peace Accords were signed on 7 July 2009 between the government of Sierra Leone and the RUF. The agreement also provided for the establishment of a Truth and Reconciliation Commission (TRC) that was created in 2002 'to establish a historical record of violations and human rights abuses from July 7, 1991 – 1999; to address impunity; to respond to the needs of victims; to promote healing and reconciliation; and to prevent a repetition of such events in Sierra Leone'. Its final report was published on 27 October 2004.



recruitment and use of child soldiers.<sup>21</sup> However, several residual issues remain that will need to be addressed after the life of the SCSL. These include matters concerning the continued protection of witnesses, particularly those considered vulnerable; the maintenance and management of its archives which are an important record of the crimes that were committed in Sierra Leone during the civil war and, together with records of the Truth and Reconciliation Commission, are of important educational and heritage value; the supervision of the enforcement of sentences of convicted persons and issues concerning their provisional release where applicable; and the role the site upon which the SCSL was built could play in Sierra Leone's future. These questions will need to be determined before the conclusion of the *Taylor* case to ensure that the legacy of this Court is not relegated to obscurity.<sup>22</sup>

## 4 Uganda

The ICC's involvement in Uganda commenced in 2004. Its investigation, opened on the basis of a 'self-referral' from the government of Uganda,<sup>23</sup> led to the issuance of arrest warrants against senior leaders of the Lord's Resistance Army (LRA) in October 2005.<sup>24</sup> With no realistic prospect of arresting these individuals, the cases were essentially stalled in 2009.

Nevertheless, there were interesting jurisprudential developments at the ICC pertaining to the representation of victims<sup>25</sup> and the admissibility of cases in light of the complementarity principle.<sup>26</sup> On the latter, ICC Pre-Trial Chamber II clarified that<sup>27</sup>

[c]omplementarity is the principle reconciling the states' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same

<sup>21</sup> On this last crime, see C Aptel 'International criminal justice and child protection' in UNICEF-Harvard University *Children and transitional justice: Truth-telling, accountability and reconciliation* (2010).

<sup>22</sup> Special Court for Sierra Leone: Completion Strategy, June 2009 <http://www.sc-sl.org/LinkClick.aspx?fileticket=yiUyKldB3OY%3d&tabid=176> (accessed 31 March 2010).

<sup>23</sup> The referral by the government of Uganda was announced in January 2004.

<sup>24</sup> The four individuals are Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen.

<sup>25</sup> See eg decisions in *The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo & Dominic Ongwen* (Case ICC-02/04-01/05) dated 9 February 2009 and 10 March 2009.

<sup>26</sup> *Kony & Others*, decision on the admissibility of the case under art 19(1) of the Statute dated 10 March 2009. See also dismissal of the defence appeal of this decision — *Kony & Others*, judgment on the appeal of the defence against the 'Decision on the admissibility of the case under article 19 of the Statute' of 10 March 2009 dated 16 September 2009.

<sup>27</sup> *Kony & Others*, decision on the admissibility of the case under art 19(1) of the Statute dated 10 March 2009, para 34.

crimes; admissibility is the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or for the Court to proceed.

It noted that '[o]nce the jurisdiction of the Court is triggered, it is for the latter and not for any national judicial authorities to interpret and apply the provisions governing the complementarity regime and to make a binding determination on the admissibility of a given case'.<sup>28</sup> In conclusion, the Pre-Trial Chamber noted that<sup>29</sup>

it would be premature and therefore inappropriate to assess the features envisaged for the Special Division and its legal framework. Accordingly, the purpose of the proceedings remains limited to dispelling uncertainty as to who has ultimate authority to determine the admissibility of the case: It is for the Court, and not for Uganda, to make such determination.

Until such time that the leaders of the LRA are arrested and in the custody of the Ugandan authorities, coupled with the commencement of domestic investigations, it is indeed clearly premature to determine whether Uganda will be found willing and genuinely able to investigate and prosecute the LRA leadership for the alleged international crimes.

Uganda, however, continues to build its domestic judicial capacity to try the leaders of the LRA for 'international crimes'. Further to the establishment in 2008 of a special War Crimes Division composed of three High Court judges and a unit in the Department of Public Prosecutions to investigate and prosecute these crimes, the Ugandan Parliament is expected in 2010 to adopt legislation to incorporate international crimes (as defined under the ICC Statute) into its domestic legislation. Interestingly, this bill is expected to be adopted before the 'review conference on the Rome Statute' to be held in Kampala in May or June 2010 by the major state parties to the Rome Statute.

## 5 The Democratic Republic of the Congo

Similar to Uganda and the Central African Republic, the investigations into the crimes committed in the Democratic Republic of the Congo (DRC) were the product of a self-referral.<sup>30</sup> All, bar one, of the detained accused at the ICC are from the DRC, and cases under the 'Situation in the Democratic Republic of Congo' were the first to be heard before the ICC.<sup>31</sup>

<sup>28</sup> n 28 above, para 45.

<sup>29</sup> n 28 above, para 51.

<sup>30</sup> The referral was made on 3 March 2004. On this basis, the ICC prosecutor opened investigations in Eastern DRC.

<sup>31</sup> The individuals from the DRC currently in ICC custody are Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui, all charged in connection with crimes committed in the DRC. Jean-Pierre Bemba, hailing from the DRC, is charged for crimes allegedly committed in the Central African Republic (see section below).

## 5.1 Thomas Lubanga Dyilo

The first trial before the ICC — of Thomas Lubanga Dyilo, former President of the *Union des Patriotes Congolais* (UPC) and leader of the *Forces patriotiques pour la libération du Congo* (FPLC) — opened on 26 January 2009.<sup>32</sup> This first case has been beset with numerous start-up challenges prior to and during the commencement of the trial.<sup>33</sup>

Thomas Lubanga Dyilo is accused of enlisting and conscripting children under the age of 15 years into the FPLC and using them to participate actively in hostilities. Interesting questions were raised concerning the protection of victims and the role that they play in the proceedings.

The protective measures that provided for vulnerable witnesses (particularly children and those who witnessed or were victims of crimes as children) were tested with the testimony of the first prosecution witness, a former child soldier. Proceedings were suspended when during his testimony he recanted his evidence and appeared frightened. The witness appeared again a few days later, under increased protective measures, with fewer persons present in the courtroom and in the public gallery, and a decision that the witness testify without any prompting or interruptions from the prosecution or the defence and, importantly, be shielded from the direct view of the accused. As both the prosecution and defence are bound to call vulnerable witnesses to provide evidence of crimes they witnessed or were victims of, it is important to ensure that these witnesses are not only duly informed of the aims, objectives and limitations of the trial process, but are also provided with culturally-appropriate psychological support.<sup>34</sup>

The role of victims in determining the charges against an accused was also raised in this trial. The judges had granted 101 persons victim status, authorising them under the Rome Statute to participate in the proceedings. In May 2009, legal representatives for a victim group, predominantly children formerly associated with armed groups and their families, requested the addition of new charges against Lubanga. They argued that, in addition to the existing charges for recruiting and using child soldiers, Lubanga had committed other crimes against the

<sup>32</sup> *Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v Thomas Lubanga Dyilo* (Case ICC-01/04-01/06). It is also in that case that the ICC issued its first arrest warrant, unsealed in 2006. Having been previously arrested by DRC authorities for a different crime, Lubanga was transferred to the ICC in March 2006. The charges against him were confirmed on 29 January 2007 following a series of postponements.

<sup>33</sup> For an analysis of these issues, notably pertaining to the disclosure of confidential material obtained by the prosecutor from third parties to assist with the investigations, as well as the clarification of the definition of 'a victim' before the ICC, see Aptel & Mwangi (n 14 above).

<sup>34</sup> For more analysis on these issues, see C Aptel 'Children and accountability for grave crimes: The role of the ICC and other international courts' Innocenti Working Paper (2010), Florence, UNICEF Innocenti Research Centre.

children, notably sexual slavery and inhumane and cruel treatment.<sup>35</sup> Their request was denied.<sup>36</sup>

The trial has since progressed and the prosecution concluded its case on 14 July 2009, having called 28 witnesses, including three experts. The defence's case is ongoing, with a judgment expected in the course of 2010.

## 5.2 Germain Katanga and Mathieu Ngudjolo Chui

On 24 November, the second trial under the 'Situation in the Democratic Republic of the Congo' opened with the cases against Germain Katanga<sup>37</sup> and Mathieu Ngudjolo.<sup>38</sup> These two individuals are jointly tried on 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.<sup>39</sup>

<sup>35</sup> *Lubanga* 'Demande conjointe des Représentants Légaux des Victimes aux Fins de Mise en Oeuvre de la Procédure en Vertu de la Norme 55 du Règlement de la Cour' dated 22 May 2009. Surprisingly, the prosecutor in his response of 29 May 2009 limited himself to stating that '[i]f the Chamber considers that it might be appropriate to [consider the possibility of modifying the legal characterisation of the facts] it will give the participants notice and invite submissions. In that event, the prosecution will provide its factual and legal response.' See also *Lubanga*, Prosecution's Response to the Legal Representatives, 'Demande conjointe des Représentants Légaux des Victimes aux Fins de Mise en Oeuvre de la Procédure en Vertu de la Norme 55 du Règlement de la Cour', dated 29 May 2009.

<sup>36</sup> On 14 July 2009, the Trial Chamber issued its 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'. The Appeals Chamber reversed this decision, ruling that the Trial Chamber's finding that the legal characterisation of the facts may be subject to change was based on a flawed interpretation of Regulation 55. The Appeals Chamber did not rule on the question of whether the majority of the Chamber erred in determining that the legal characterisation of the facts may be changed to include crimes under arts 7(1)(g), 8(2)(b)(xxvi) [sic], 8(2)(e)(vi), 8(2)(a)(ii) and 8(2)(c)(i) of the Statute because the Trial Chamber had not yet done a detailed review of the questions in this issue. See *Lubanga*, judgment on the Appeals of Mr Lubanga Dyilo and the prosecutor against the decision of Trial Chamber 1 of 14 July 2009 entitled 'Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court' dated 8 December 2009.

<sup>37</sup> Germain Katanga, arrested in October 2007, was a former leader of the Patriotic Resistance Force in Ituri (FRPI).

<sup>38</sup> Mathieu Ngudjolo Chui, arrested in February 2008, was a former leader of the National Integrationist Front (FNI) and a Colonel in the National Army of the government of the DRC.

<sup>39</sup> *Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Case ICC-01/04-01/07), Decision on the Confirmation of Charges, dated 30 September 2008. Pre-Trial Chamber I authorised the joinder of the cases of Mathieu Chui and Katanga following a prosecutorial request which alleged co-responsibility for crimes committed during and after the attack on the village of Bogoro. See *Katanga and Chui*, Decision on the joinder of the cases against Germain Katanga and Mathieu Ngudjolo Chui, dated 10 March 2008.

In a subsequent important development prior to the commencement of the trial, Katanga challenged the principle of complementarity, as applied in his case, arguing that he could be tried in the DRC. Interestingly, the Congolese government replied that its judicial system had neither the capacity — due to security concerns and insufficient resources — nor the intention of investigating or prosecuting Katanga.<sup>40</sup> The distinction between unwillingness and inability risks being blurred in this context, questioning the fundamental basis and application of the complementarity principle, and also potentially undermining the underlying principles according to which states themselves remain primarily responsible for investigating and prosecuting international crimes.<sup>41</sup>

### 5.3 Bosco Ntaganda

The ambiguous position of states *vis-à-vis* their responsibility for the investigation and prosecution of cases that fall under the jurisdiction of the ICC was also highlighted in the case of Bosco Ntaganda, where the position of the government of the DRC is less clear.

Bosco Ntaganda was the former Deputy-Chief of the General Staff of the FPLC, and charged jointly with Thomas Lubanga for alleged war crimes committed in Ituri, including the enlistment and conscription of children under the age of 15 to actively participate in hostilities.<sup>42</sup> He later joined the *Congrès national pour la défense du peuple* (CNDP) where he served as chief of staff, apparently closely associated with Laurent Nkunda, until the latter was arrested by the Rwandan authorities in January 2009. Some have argued that the DRC and Rwanda had reached a political agreement pursuant to which Ntaganda helped oust Nkunda, replaced him, led the integration of the CNDP into the Congolese national army and was himself integrated as a senior commander into the Congolese army.<sup>43</sup> Strikingly at odds with the arguments presented by the government of the DRC in the *Lubanga* case, the government here has openly stated that it will not pursue Ntaganda's arrest in the interests of peace, given his critical role in the integration of the CNDP troops into the Congolese national army.<sup>44</sup>

<sup>40</sup> See *Katanga and Chui* (n 39 above) *Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire* (article 19 du Statut) dated 16 June 2009.

<sup>41</sup> n 41 above, paras 76-78.

<sup>42</sup> *Situation in the Democratic Republic of the Congo, In the Case of The Prosecutor v Bosco Ntaganda* (Case ICC-01/04-02/06), Warrant of Arrest dated 22 August 2006. This warrant was made public pursuant to the Pre-Trial Chamber's *Decision to unseal the warrant of arrest against Bosco Ntaganda* dated 28 April 2008.

<sup>43</sup> See International Center for Transitional Justice 'Focus: Bosco Ntaganda', February 2009 [http://www.ictj.org/static/Factsheets/ICTJ\\_DRC\\_BoscoNtaganda\\_fs2009.pdf](http://www.ictj.org/static/Factsheets/ICTJ_DRC_BoscoNtaganda_fs2009.pdf) (accessed 31 March 2010).

<sup>44</sup> As above.

Over six years have elapsed since the DRC referred the situation of the crimes committed in its territory to the ICC. While the above contribution of the ICC is important in the fight against impunity for grave international crimes in that country, much more remains to be done. The current geographical focus of the work of the ICC concentrates on crimes committed in the Ituri region from 2002 to 2003 and appears limited when examined against a backdrop of wide-ranging, grave crimes committed in other parts of the DRC since 2002.<sup>45</sup> In addition, the ICC has been criticised by some for its relatively narrow set of charges in each case: The decision to charge Thomas Lubanga only for recruiting and using child soldiers has been criticised as too limited because of widespread allegations that he committed many other international crimes, including killings and sexual crimes.<sup>46</sup> While the attention given by the ICC to the recruitment and use of child soldiers is extremely important, it should not be to the exclusion of other crimes committed against child soldiers and more generally other children and victims.

In general, all serious international crimes committed in the DRC prior to the entry into force of the Rome Statute in 2002 fall outside the temporal jurisdiction of the ICC. In the DRC, it is the military justice system that retains and exercises jurisdiction over such crimes.<sup>47</sup> The UN Office of the High Commissioner for Human Rights completed a mapping of these crimes in 2009, apparently raising concern about their massive scale and grave nature. In view of the need to provide the DRC with the legislative tools to address these crimes and bring the perpetrators to justice, it is imperative that the DRC adopts the proposed ICC Bill incorporating the Rome Statute into domestic law and transferring jurisdiction over these crimes from the military justice system to the civilian courts.<sup>48</sup>

<sup>45</sup> The ICC prosecutor has also alluded since 2008 to a third investigation into crimes committed in the North and South Kivu, but this was not publicly concretised until recently.

<sup>46</sup> In a 'Joint Letter to the Chief Prosecutor of the International Criminal Court' dated 31 July 2006, eight international human rights organisations (including Human Rights Watch) indicated that this 'undercut the credibility of the ICC' as well as limited victims' participation; [http://www.iccnw.org/documents/DRC\\_joint\\_letter\\_eng.PDF](http://www.iccnw.org/documents/DRC_joint_letter_eng.PDF) (accessed 31 March 2010).

<sup>47</sup> In 2002, the DRC transitional legislature granted Congolese military courts exclusive jurisdiction over international crimes, including civilian suspects or accused. Despite art 156 of the 2006 Constitution of the DRC, which limits the jurisdiction of military justice to members of the armed forces and of the police, the exclusive jurisdiction of military courts has not yet been abrogated.

<sup>48</sup> The draft bill was submitted to the Congolese National Assembly in March 2008.

## 6 Central African Republic

In the Central African Republic (CAR), as in the cases of the DRC and Uganda, the ICC undertook investigations in this case further to a 'self-referral'.<sup>49</sup> The focus of the ICC investigation in the CAR is on allegations of crimes committed by the *Mouvement de Libération du Congo* (MLC) led by Jean-Pierre Bemba during their intervention in the CAR in 2002 and 2003, following the *coup* mounted by François Bozizé, former Chief of Staff of the Central African armed forces, against former President Ange-Félix Patassé.<sup>50</sup> According to the ICC prosecutor, Jean-Pierre Bemba as the leader of the MLC, under command or superior responsibility, committed grave international crimes, including mass rapes, killings and looting in the CAR.

Bemba was arrested in 2008.<sup>51</sup> The hearing to confirm the charges against him was repeatedly postponed until 12 January 2009, and the charges against him were entered on 15 June 2009.<sup>52</sup> He is charged as a military commander on two counts of crimes against humanity (rape and murder) and on three counts of war crimes (rape, murder and pillaging). His trial is expected to commence this year.<sup>53</sup> Bemba has repeatedly challenged his preventive detention, requesting bail, but remains detained pending full determination of the matter.<sup>54</sup>

<sup>49</sup> *The Situation in the Central African Republic in the Case of The Prosecutor v Jean-Pierre Bemba Gombo* (Case ICC-01/05-01/08). On 22 May 2007, the prosecutor announced the opening of an investigation in the CAR; <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic?lan=en-GB> (accessed 31 March 2010).

<sup>50</sup> Jean-Pierre Bemba was the President and Commander-in-Chief of the MLC. He was one of four Vice-Presidents in the DRC transitional government from 2003 to 2006, and a runner-off in the 2006 DRC presidential elections. In 2007, he was elected to the DRC Senate where he led the opposition against President Joseph Kabila. On 23 May 2008, the ICC Pre-Trial Chamber found that there were reasonable grounds to believe that Bemba bore individual criminal responsibility for war crimes and crimes against humanity committed in the CAR from 25 October 2002 to 15 March 2003; *Bemba*, Warrant of Arrest Replacing the Warrant of Arrest issued on 23 May 2008 dated 10 June 2008.

<sup>51</sup> Bemba was arrested in May 2008 in Brussels, Belgium, and transferred to the ICC in July 2008 on three counts of war crimes and five counts of crimes against humanity.

<sup>52</sup> See *Bemba*, decision pursuant to arts 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo dated 15 June 2009.

<sup>53</sup> On 18 September 2009 the case was referred to the ICC Trial Chamber III for trial.

<sup>54</sup> See *Bemba*, Decision on application for interim release dated 20 August 2008, Decision on application for interim release dated 16 December 2008 and Decision on application for interim release dated 14 April 2009; all of which rejected Bemba's applications for interim release. A decision by the Pre-Trial Chamber on 14 August 2009 granted Bemba conditional release 'until decided otherwise' in its 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal



## 7 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. The ICC has since issued four warrants of arrest for crimes committed in the Darfur region against President Omar Hassan Ahmad Al Bashir (President of the Sudan), Ahmed Harun (State Minister for Humanitarian Affairs), Ali Kushayb (militia leader) and Bhar Idriss Abu Garda (Chairperson and General Co-ordinator of Military Operations of the United Resistance Front).<sup>55</sup>

In the case against Bahr Idriss Abu Garda (Abu Garda), the Pre-Trial Chamber unsealed its decision ordering his appearance, having found on 17 May 2009 that there were reasonable grounds to believe that he was criminally responsible (directly or indirectly) as a co-perpetrator of the attacks against African Union (AU) peacekeepers.<sup>56</sup> Abu Garda appeared on 18 May 2009, charged under article 8 of the Rome Statute on three counts of war crimes committed during an attack at the military group site Haskanita against the AU Mission in Sudan on 29 September 2007. A decision pertaining to the confirmation of these charges is expected to take place in 2010.

On 4 March 2009, in the case against Omar Hassan Ahmad Al Bashir, the Pre-Trial Chamber reviewed the evidence provided by the prosecutor in his application of 14 July 2008 and found that there were 'reasonable grounds to believe' that Al-Bashir had committed five counts of crimes against humanity and two counts of war crimes.<sup>57</sup> The Chamber did

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Republic of Germany, the Italian Republic and the Republic of South Africa', pending a decision in which state the accused would be released and under what conditions. The prosecutor appealed this decision and on 3 September 2009, the Appeals Chamber rendered its 'Decision on the Request of the Prosecutor for Suspensive Effect' which suspended the decision to grant Bemba interim release pending a decision on the merits of the prosecution's appeal.

<sup>55</sup> In this 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. For a discussion on the warrants of arrest for Bashir, Harun and Kushayb, see Aptel & Mwangi (n 14 above).

<sup>56</sup> *Situation in Darfur, Sudan, In the case of the Prosecutor v Bahr Idriss Abu Garda* (Case ICC-02/05-02/09), 'Public Redacted Version — Decision on the Prosecutor's Application under Article 58' dated 7 May 2009.

<sup>57</sup> *Situation in Darfur, Sudan, In the Case of the Prosecutor v Omar Hassan Ahmad Al Bashir (Omar Al Bashir)* (Case ICC-02/05-01/09) 'Public Redacted Version: Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir' dated 4 March 2009. These charges comprised murder, extermination, forcible transfer, torture and rape, constitutive of crimes against humanity under art 7 of the Rome Statute, and intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities, and pillaging, constitutive of war crimes under art 8 of the Statute. One area not examined in this article were reports in 2009 of indiscriminate or disproportionate attacks on civilians in Mogadishu by insurgent groups and members of the transitional federal government of Somalia's security forces, as well as allegations

not include the crime of genocide in the warrant of arrest that was subsequently issued, the majority finding that the material provided by the prosecutor in support of his application failed to provide reasonable grounds to believe that Al-Bashir acted with the specific intent to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups. The prosecutor appealed this decision.<sup>58</sup>

On the question of immunity, the Pre-Trial Chamber concluded that the 'current position of Omar Al-Bashir as head of a state which is not a party to the [Rome] Statute, has no effect on the Court's jurisdiction over the present case'.<sup>59</sup> Noting that a core goal of the Rome Statute is to put an end to impunity for those who commit 'the most serious crimes' which 'must not go unpunished', the Chamber held that it was guided by the principals detailed in articles 27(1) and (2) of the Rome Statute which provide (a) for equality of treatment without 'distinction based on official capacity'; (b) that official capacity in and of itself does not provide for an exemption from criminal responsibility or reduction in sentence; and (c) that 'immunities which may attach to the official capacity of a person ... shall not bar the Court from exercising its jurisdiction'. Alternative sources of law as provided for in articles 21(1)(b) and (c) of the Rome Statute, the Chamber noted, would only be resorted to in the event that there was a '*lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules' which could not be filled by the 'application of the criteria of interpretation provided for in articles 31 and 32 of the Vienna Convention on the Law of Treaties and article 21(3) of the Statute'. In addition, the Chamber noted that by referring the matter to the Court, the Security Council had 'accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the [applicable] statutory framework ... as a whole'.<sup>60</sup>

The decision to indict Al-Bashir has been plagued by intense and polarised legal and political controversy. Prior to the issuance of the warrant of arrest for Al-Bashir, two Sudanese non-governmental organisations (NGOs) filed a motion arguing that the warrant would have detrimental implications for the peace-building process in Sudan;

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of the use of mortars and heavy artillery by the African Union Mission to Somalia (AMISOM) in civilian populated areas during fighting – see Amnesty International 'Public statement, Somalia: Civilians pay the price of intense fighting in Mogadishu' 4 March 2009, AI index: AFR 52/002/2009 <http://www.amnesty.org/en/library/info/AFR52/002/2009/en> (accessed 31 March 2010). The implications in international criminal and humanitarian law will be explored further in the next report.

<sup>58</sup> On 6 July 2009, the prosecutor appealed this decision, submitting to the Appeals Chamber that the majority of Pre-Trial Chamber I erred when requiring that the existence of reasonable grounds to believe that the person has committed the alleged crime must be the only reasonable conclusion from the evidence presented by the prosecutor. A decision by the Appeals Chamber is expected in early 2010.

<sup>59</sup> *Al Bashir* (n 57 above) para 41.

<sup>60</sup> *Al Bashir* (n 57 above) paras 42-45.

would not serve the interests of justice; and would entrench negative perceptions of the ICC.<sup>61</sup> The motion referred to other transitional justice alternatives being pursued and which should be permitted to proceed without the involvement of the ICC at this stage.<sup>62</sup> It encouraged the finding of 'in-Africa' solutions as the 'most sensible route at this time'.<sup>63</sup> The Pre-Trial Chamber dismissed the application, ruling that it had<sup>64</sup>

neither the power to review, nor [was] it responsible for, the prosecutor's assessment that, under the current circumstances in Sudan, the initiation of the case against Omar al Bashir and the three alleged commanders of organised armed groups would not be detrimental to the interests of justice.

Similar arguments were put forward by several member states and regional organisations in their call for the Security Council to defer Al-Bashir's case in accordance with article 16 of the Rome Statute. This was illustrated in a meeting of the Security Council in December 2009 where Burkina Faso, whose concerns were shared by the AU, the League of Arab States, the Organisation of the Islamic Conference and the Non-Aligned Movement, argued that notwithstanding the importance of combating impunity, 'the objective of justice could not, in and of itself, bring peace in such a complex conflict without a political solution based on consensus'.<sup>65</sup>

The AU Peace and Security Council, at its 207th meeting in Nigeria on 29 October 2009, echoed the view that 'in-Africa' solutions to post-conflict situations should be sought as it endorsed the comprehensive report by the AU Panel on Darfur (AUPD) chaired by former South African President Thabo Mbeki. Commissioned to provide recommendations 'on how best the issues of accountability and combating impunity on the one hand and reconciliation and healing on the other, could be effectively and comprehensively addressed,' the report does not pur-

<sup>61</sup> ICC Pre-Trial Chamber I, Public document — Application on behalf of citizens' organisations of the Sudan in relation to the prosecutor's applications for arrest warrants of 14 July 2008 and 20 November 2008, ICC-02/05, 11 January 2009. The NGOs represented were the Sudan Workers' Trade Unions Federation (SWTUF) and the Sudan International Defence Group (SIDG).

<sup>62</sup> In relation to the latter, the two groups referred to the constitutional procedures set out in arts 60 and 61 of the Constitution of Sudan which provide for the investigation and prosecution of Sudanese heads of state and senior officials for crimes of 'high treason, gross violation of this Constitution or gross misconduct in relation to state affairs'; n 61 above, para 29 and fn 30.

<sup>63</sup> n 61 above, para 30.

<sup>64</sup> *Al-Bashir*, Public — Decision on Application under Rule 103 dated 4 February 2009, para 29.

<sup>65</sup> Meeting of the Security Council, 4 December 2009 (S/PV/6230). See also Meeting of the Security Council, 21 December (S/PV/6251); Meeting of the Security Council, 24 July 2009 (S/PV/6190); and Meeting of the Security Council, 20 March 2009 (S/PV/6096) <http://www.un.org/Depts/dhl/resguide/scact2009.htm> (accessed 31 March 2010).

port to gloss over the crimes committed in Darfur, nor to endorse or criticise the AU's promise not to surrender Al-Bashir to the ICC. Rather, it observes that attempts to dispense justice in Darfur have made little progress, and seeks to make recommendations that interconnect the three pillars of justice, peace and reconciliation in a Sudanese-owned context.<sup>66</sup> In this regard, the report signifies to the government of Sudan that it could divest the ICC of jurisdiction by pursuing 'credible measures' to address the atrocities committed, but it cannot ignore its duty to deal with the crimes that have been committed in Darfur.<sup>67</sup> In an interesting reference to the complementarity principle, the report signifies a striking shift by providing legitimate responses to the ICC as opposed to an outright dismissal of its jurisdiction, sending an underlying message that the pursuit of domestic prosecutions would entail significant reforms to the Sudanese criminal justice system.<sup>68</sup>

As for the use of traditional Sudanese reconciliation mechanisms, the Panel stressed that these are to be utilised only for 'those perpetrators who bear responsibility for crimes other than the most serious violations', effectively drawing a line between the 'overwhelming majority of potential criminal cases that must be dealt with by the national system' and Al-Bashir and his three commanders.

Significantly, the report recommends the establishment of a special court as one element of a comprehensive strategy. This court would consist of Sudanese and foreign judges appointed by the AU in consultation with the Khartoum government to try those suspected of committing atrocities in Darfur.<sup>69</sup> If the proposed court were to be constituted as a new, independent and impartial organisation, adequately protected from political interference, sustainably funded, and with a legal framework guaranteeing fair trials, due process and witness protection, it could usefully contribute to the fight against impunity, particularly in a context where it appears that the population does not trust the domestic system.<sup>70</sup> Yet, if the proposed court was to fall short of international standards, it would only serve to undermine the ICC and, more importantly, justice.

<sup>66</sup> 'Darfur: The quest for peace, justice and reconciliation' Report of the African Union High-Level Panel on Darfur (AUPD) as presented to the African Union Peace and Security Council on 29 October 2009 (PSC/AHG/2(CCVII) paras 217 219 221-228 236-238.

<sup>67</sup> n 66 above, paras 17, 18 & 25.

<sup>68</sup> n 66 above, paras 206 214-217 229-235 244-245 254-255.

<sup>69</sup> n 66 above, paras 25 246-254.

<sup>70</sup> It could be established by an international treaty between the government of Sudan and an international organisation, eg the AU.

## 8 A Criminal Chamber in the African Court of Justice and Human Rights?

In a related development, on 4 February 2009, the Assembly of Heads of State and Government of the AU called upon its member states not to co-operate in the arrest and surrender of President al-Bashir to the ICC, and requested the Commission of the AU, in consultation with the African Court on Human and Peoples' Rights, expected to become the African Court of Justice and Human Rights (African Court) and the African Commission on Human and Peoples' Rights (African Commission), to 'examine the implications of the [African] Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes'.<sup>71</sup> This position was further affirmed in July 2009 in a separate decision which requested the AU Commission to ensure the early implementation of its earlier decision.<sup>72</sup> Interestingly, the July 2009 decision also requested that, in preparation of the ICC Review Conference of State Parties to be held in Kampala in 2010, member states consider certain issues related to ICC procedures, including (a) clarification on the immunities of officials whose states are not party to the Statute; (b) a comparative analysis of the implications of the practical application of articles 27 and 98 of the Rome Statute; (c) the possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution; particularly against senior state officials.<sup>73</sup>

Concerning the project to extend the jurisdiction of the African Court, the AU has apparently consulted experts who have drafted a protocol which would establish a Criminal Chamber within the Court. This Chamber would be competent to prosecute and punish African individuals responsible for core international crimes, including at least genocide, crimes against humanity and war crimes.

Several African organisations have voiced their opinion that<sup>74</sup>

[t]he proposal to extend the jurisdiction ...to cover international crimes amount to creating a regional criminal court for Africa. This proposal

<sup>71</sup> Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc Assembly/AU/3 (XII) Assembly/AU/Dec.213 (XII), 4 February 2009, para 9 (2009).

<sup>72</sup> Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc Assembly/AU/13(XIII), 12 July 2009, para 5.

<sup>73</sup> n 72 above, para 8.

<sup>74</sup> 'Implications of the African Court on Human and Peoples' Rights being empowered to try international crimes such as genocide, crimes against humanity, and war crimes' opinion submitted by Coalition for an Effective African Court on Human and Peoples' Rights, Darfur Consortium, East African Law Society, International Criminal Law Centre of the Open University of Tanzania, Open Society Justice Initiative, Pan-African Lawyers Union, Southern Africa Litigation Centre, and West African Bar Association. In the absence of what would be a prohibitively costly exercise, the organisations argued that 'an extension of the jurisdiction of the Court would create

attempts to confront current legal and practical obstacles ... [including] the absence of: an instrument creating crimes within the jurisdiction of such a court; enumerating the elements of crimes within the scope of the court and punishment for them; establishing the procedures for proceedings with respect to such crimes; [and] a regional system of enforcement and co-operation in criminal matters.

It is anticipated that the Assembly of the AU will review the draft protocol which, if adopted, would lead to the establishment of a Criminal Chamber within the African Court in the course of 2010.

## 9 Kenya

In Kenya, the first quarter of 2009 was marked by intense debate around the envisaged creation of a 'Special Tribunal for Kenya', as recommended by the Commission of Inquiry into the Post-Election Violence (CIPEV) and also known as the Waki Commission.<sup>75</sup> Supported by an apparently strong popular desire for accountability for the crimes committed in late 2007 and early 2008, efforts to establish this court were intended to herald a new era for Kenya.

Three significant attempts were made in 2009 to put in place judicial mechanisms to try those responsible. The first tabling of the 2009 Constitution Amendment Bill (amendment of section 3A of the Kenyan Constitution) that promised to pave the way for the creation of the Special Tribunal for Kenya was defeated on 19 February 2009. In August 2009, the government sought to expand the mandate of the proposed Truth, Justice and Reconciliation Commission, a fact-finding body established to investigate past human rights violations and address historical injustices, to encompass the post-electoral crimes. A joint statement by two Kenyan human rights organisations highlighted the shortcomings of such a proposal, noting the Waki Commission's observations on the 'weaknesses of the Kenyan national legal system, including the potential frustration of prosecutions through litigation and the Attorney-General's powers to take over and terminate criminal proceedings'. They added that a deviation from the recommendation to establish a Special Tribunal constituted an 'unwillingness to prosecute which satisfies the requirement for referral to the [ICC]' and would

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a regional African exceptionalism to international criminal law and international justice, ultimately damaging the credibility and effectiveness of Africa's regional human rights system. In the space between African exceptionalism and an ineffectual regional system, an African impunity gap could become institutionalised, rendering international criminal law irrelevant to Africa. This outcome is both undesirable and avoidable'.

<sup>75</sup> CIPEV investigated the violence that followed the much-contested results of the presidential elections in December 2007.

be tantamount to a 'delay in the dispensation of justice'.<sup>76</sup> In September 2009, a last attempt was made to table a second Constitution Amendment Bill (2009) to bring the Special Tribunal into effect. It was never debated for lack of quorum.

With the paralysis of all endeavours to establish the Special Tribunal for Kenya, on 9 July 2009 Kofi Annan, Chairperson of the AU Panel of African Eminent Personalities, referred the undisclosed list of suspects and supporting information to the ICC prosecutor. This led the ICC prosecutor to use his *proprio motu* powers under article 15 of the Rome Statute for the first time. On 25 November 2009 he sought authorisation to initiate investigations into the post-election violence in Kenya, attaching a confidential list of 20 suspects who in his view bore the greatest responsibility for the crimes committed. Pursuant to article 15(3) of the ICC Statute, the prosecutor also invited victims of the violence to make representations to the Pre-Trial Chamber on whether there was a reasonable basis to open such an investigation.

This turn of events raises several important issues. In accordance with the principle of complementarity, the prosecutor will need to satisfy the Pre-Trial Chamber that the Kenyan government is either 'unwilling or unable genuinely to carry out the investigation or prosecution' of suspects. However, it can be argued that the Kenyan government has indicated its willingness to conduct the appropriate domestic investigations and prosecutions. It enacted the 2009 Truth Justice and Reconciliation Act, establishing a Truth, Justice and Reconciliation Commission that is expected to commence hearings in mid-2010; it enacted, in 2009, the International Crimes Act that defines crimes against humanity and other crimes under international law; and made three separate attempts to pass bills relating to the establishment of a Special Tribunal. It has also stated that in the event that the Special Tribunal is not created, the government would have the option to refer the matter to the prosecutor of the ICC for investigation. This, as in the case of Lubanga before the ICC, raises questions about the selective applicability of the principle of complementarity and the distinction between 'unwillingness' and 'inability'.

In the event that the Pre-Trial Chamber finds that there is a reasonable basis to initiate an investigation, the prosecutor will be reliant on the full co-operation of the Kenyan authorities, in particular the police. While the government has publicly underscored its intention to co-operate with the ICC, the Attorney-General's office is the formal point of contact for ICC investigators.

It is possible that international criminal prosecutions may do little to prevent future violence. Given that it is highly unlikely that the ICC will conclude all relevant prosecutions in the next two years, it has been

<sup>76</sup> Joint Statement on the Prosecution of Post-Election Violence Perpetrators, the Kenyan Section of the International Commission of Jurists (ICJ-Kenya) and the Federation of Women Lawyers (FIDA-Kenya), 9 August 2009.



argued that the impending general and presidential elections in 2012 may trigger further political tensions and foment violent acts between ethnic groups.<sup>77</sup> The post-electoral violence exhibited in 2007-2008 was a culmination of deep-rooted ethnic tensions in specific parts of the country, not sporadic acts of violence. This would indicate that additional transitional justice mechanisms are also required to deter and appease tensions and deter the commission of further crimes. However, it is not clear how effective these transitional measures, including prosecutions, will be in the absence of a meaningful political transition. The limitations in the International Crimes Act do not apply to crimes committed prior to January 2009, thus ruling out a large portion of the crimes examined in the Waki Report and the related responsibility of the alleged senior level perpetrators listed in the documents handed over to the ICC prosecutor. Furthermore, the International Crimes Act permits the Attorney-General, a political appointment, broad discretion to refuse to co-operate with the ICC, in effect granting him the capacity to limit the ability of the ICC to fully investigate. The 2008 Truth, Justice and Reconciliation Act, which established the Truth, Justice and Reconciliation Commission, is soon expected to commence its hearings. This raises issues of co-operation and whether these two mechanisms could in reality reinforce each other. In view of the many perpetrators who allegedly committed various serious crimes during this period but do not meet the requisite threshold to be tried before the ICC, there remains the fundamental question of whether they will be tried in the domestic sphere, with all the shortcomings contained in the Waki Commission's report, or whether a separate, more independent mechanism will be established.

Last seen labouring up Thika Road in Kenya, the back of a 'matatu' states '*Hague Siendi*', loosely translated as 'I am not going to The Hague'. This one phrase appears to aptly capture the mood on the ground. Only time will tell if it rings true.

## 10 The crime of piracy

Piracy, one of the oldest international crimes and until recently relegated to cinematic blockbusters courtesy of Hollywood, has raised interesting legal complexities and novel challenges to the practice of international criminal law in the East African region as a result of the increasing pirate attacks in the Gulf of Aden and the Somali Basin. The 1958 Convention on the High Seas and its successor, the 1982 UN Convention on the Law of the Sea (UNCLOS), codified the customary

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<sup>77</sup> T Murithii *The spectre of impunity and the politics of the Special Tribunal in Kenya* (2009).

principle of universal jurisdiction over this crime<sup>78</sup> and embodied the principle that all states could prosecute suspected pirates.<sup>79</sup>

The legal impact of the piracy epidemic in the region, representing about half of all maritime piracy incidents in 2009,<sup>80</sup> has been the subject of much debate, both in international and regional circles.

In the last two years, the current international legal regimes have appeared insufficiently robust to judicially address the growing problem of piracy. One of the means employed by the international community to address this limitation was the establishment of the Contact Group on Piracy off the Coast of Somalia by the Security Council in late 2008. Within this Contact Group, a working group was created to, *inter alia*, examine the legal complexities of prosecuting pirates. The Contact Group was also requested by the Security Council in its Resolution 1897 (2009) to explore possible additional mechanisms to bring pirates to justice. Simultaneously, in 2009 Denmark, the European Union, the United Kingdom and the United States also entered into bilateral agreements with the Republic of Kenya for the prosecution of pirates in Kenyan courts apprehended by their warships.<sup>81</sup> By the end of 2009, Kenya had become the lead prosecutor of suspected pirates apprehended in the Gulf of Aden and the Somali Basin. Using modern legal instruments to prosecute a once-archaic crime presents its own challenges to this state. The zeal with which Kenya has pursued the prosecution of pirates contrasts with the challenges faced in trying to realise a special court for Kenya to try those suspected of committing crimes in the post-election period.

By virtue of the adoption of the Merchant Shipping Act (MSA), signed into law on 29 May 2009 and entering into effect on 1 September 2009, Kenya incorporated both the 1982 UN Convention on the Law

<sup>78</sup> Art 105 of UNCLOS states that 'On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.'

<sup>79</sup> Art 101 of UNCLOS defines piracy as '(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)'.

<sup>80</sup> International Maritime Bureau. All reports of the IMB are accessible through the IMB Piracy Reporting Centre <http://www.icc-ccs.org> (accessed 31 March 2010).

<sup>81</sup> In 2009, China and Canada were reported to be considering similar arrangements. See C Wanja 'Kenya-China to sign MOU on anti-piracy' 4 March 2009 <http://www.kbc.co.ke/story.asp?ID=55949> (accessed 31 March 2010); D Lett 'Canada asks Kenya to prosecute pirates: MacKay' 21 May 2009 <http://www2.canada.com/topics/news/story.html?id=1617277> (accessed 31 March 2010).

of the Sea and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) into its domestic law, effectively establishing its universal jurisdiction over piracy. While all challenges facing the prosecution of piracy in Kenya cannot be examined here, the adoption of this Act raises interesting jurisdictional questions. Although complimentary to the offence of piracy *jure gentium* found in section 69(1) as read with section 63(3) of the Kenyan Penal Code, interestingly the MSA attempts to reach beyond Kenya's obligations under UNCLOS and SUA and provides for jurisdiction over non-nationals apprehended by third parties on the high seas for the crime of piracy.<sup>82</sup> It is interesting that Kenya took a decision to do so even though neither Convention requires states to establish jurisdiction over piracy on the high seas or in an Exclusive Economic Zone (EEZ). In addition, UNCLOS provides a discretionary power for pirates to be prosecuted and punished in the courts of the arresting state.<sup>83</sup>

While Kenya could argue that under the relevant Security Council resolutions it is playing its part in combating piracy by providing a venue for prosecution, the broad expansion of Kenya's extra-territorial jurisdiction over those suspected of acts of piracy and armed robbery at sea and captured by third states may yet be challenged in Kenyan courts. In view of the extra-territorial nature of the MSA, it is also not clear whether piracy cases can continue to be tried in magistrate's courts which are only conferred with jurisdiction 'throughout Kenya'.<sup>84</sup> Section 4 of the 2007 Magistrate's Court Act allows magistrate's courts to exercise jurisdiction in criminal proceedings conferred on them by the Criminal Procedure Code or 'any other written law'. It is, however, possible that by virtue of Kenya's Constitution which provides that the High Court has 'unlimited original jurisdiction in civil and criminal matters',<sup>85</sup> this Court has the jurisdiction to prosecute non-national suspected pirates for extra-territorial acts of piracy committed on the high seas. The case of Hassan Mohamad Hassan in the magistrate's court prior to the enactment of the MSA illustrates the weaknesses in this argument and the reliance of the government on article 101 of UNCLOS as justification for Kenya's jurisdiction for the prosecution of non-Kenyan nationals outside Kenya's territorial jurisdiction.<sup>86</sup> In this

<sup>82</sup> Merchant Shipping Act (2009) Part XVI sec 369. In contrast, under art 6(4) of SUA, territorial or at the very least a strong nexus is required for a state party to establish jurisdiction. This is mirrored in the United States Code, para 18.

<sup>83</sup> n 78 above.

<sup>84</sup> Magistrates Court Act, ch 10 (2007) sec 3(2).

<sup>85</sup> Sec 60 Kenya Constitution (2008).

<sup>86</sup> This was the first case of its kind in the Kenyan courts following the transfer of 10 suspected pirates to the Kenyan authorities for prosecution by the United States. *The Republic of Kenya v Hassan Mohamad Hassan & 9 Others* (2006) Criminal Case 434 of 2006 (Chief Magistrate Ct Kenya). See also *Hassan M Ahmed v Republic of Kenya* (2009) in the High Court of Kenya at Mombasa, Criminal Appeals 198, 199, 201, 203, 204, 205, 206 & 207 of 2006 of CM's Court at Mombasa (Justice F Azangalala) 12 May 2009.

appeal, the High Court held that in the event of the absence of jurisdiction under national legislation, the magistrate's court was 'bound to apply the provisions of [UNCLOS] should there have been deficiencies in the Penal Code and Criminal Procedure Code'.<sup>87</sup> The High Court went further and held that magistrate's courts were bound to invoke an international treaty to fill a statutory gap where Kenya had signed an international instrument which was yet to be domesticated, on the basis that Kenya is a member of the 'civilised world' and of the UN.<sup>88</sup> This purist interpretation of universal jurisdiction has thus far not attained much traction in either treaty law or state practice, which require at the very least territorial or nationality links.<sup>89</sup> It is also worth noting that those arrested and transferred into Kenyan custody prior to May 2009 have to be tried under the Penal Code due to the inapplicability of *ex post facto* laws, effectively creating a two-tier prosecutorial system for captured suspected pirates transferred to Kenya for trial.<sup>90</sup>

As the number of suspected pirates being dropped off at Mombasa harbour increases at the same rate as the attacks in the region, the Kenyan Ministry of Foreign Affairs has repeatedly stated in the context of the Kenya-US Agreement that it will only take on a select number of cases.<sup>91</sup> This is understandable considering the limited capacity of the Kenyan criminal judiciary to expeditiously try and incarcerate those convicted of piracy, a limitation magnified in light of the 'inadequate resources, inadequate remuneration of prosecutors, staff attrition, and placement of the police and the prosecutors under two separate authorities, preventing even the most basic institutional co-operation'.<sup>92</sup>

In view of the hundreds of suspected pirates that have been apprehended on the high seas and released due to a myriad of legal and political considerations, alternative options proffered to avoid large-

<sup>87</sup> Hassan (n 86 above) 10-11.

<sup>88</sup> As above.

<sup>89</sup> See eg KC Randall 'Universal jurisdiction: National courts and the prosecution of serious crimes under international law' (2005) 99 *American Journal of International Law* 293 793 (book review) (arguing that '[p]iracy's mere occurrence on the high seas thus does not alone subject the offence to universal jurisdiction'); BS Brown 'The evolving concept of universal jurisdiction' (2001) 35 *New England Law Review* 383 392-393.

<sup>90</sup> Sec 77(4) of the Constitution of Kenya (1998) provides: 'No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for such a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.'

<sup>91</sup> See 'Kenyan Foreign Minister shed light on US-Kenya piracy agreement' *Turkish Weekly* 28 January 2009 <http://www.turkishweekly.net/news/63755/kenyan-foreign-minister-shed-light-on-u-s-kenya-piracy-agreement-.html> (accessed 31 March 2010).

<sup>92</sup> US Ambassador to Kenya 'Speech to the Kenya Chapter of the International Commission of Jurists' 6 December 2006 [http://nairobiembassy.gov/speech\\_20061208.html](http://nairobiembassy.gov/speech_20061208.html) (accessed 31 March 2010).

scale impunity have included the use of 'ship-riders' (traditionally used to combat drug trafficking and illegal fishing) to circumvent legal impediments to arresting pirates on shared waters. These officials would make use of existing functional criminal justice systems in the region to arrest and try pirates. Such a practical arrangement would, however, only offer short-term relief. In the search for a regional solution, certain states have proposed the establishment of a regional or international mechanism dedicated specifically to the trials of pirates.<sup>93</sup> These discussions continue bilaterally and in the Contact Group.

The recently-adopted laws, jurisdictional ambiguity, lack of capacity and difficulties in securing evidence and witnesses in combination present Herculean challenges in an environment where prosecutorial experience and guidance on the elements of the crime of piracy is embryonic. With over 100 piracy cases currently pending before its courts, the political implications considering the large Somali refugee and Muslim population in the country, and the lack of a viable alternative at this stage, Kenya is unlikely to remain comfortable in its newly-found role as the only recipient of suspected pirates.

## 11 Senegal – Hissène Habré

As previously noted, Senegal enacted several constitutional amendments in 2008 that removed all legal obstacles to prosecute Habré.<sup>94</sup> Now formally charged with crimes against humanity, war crimes and crimes of torture in Senegal, will former Chadian President Hissène Habré ever face justice in that country or in another? <sup>95</sup> While the vic-

<sup>93</sup> This position has been supported by the Dutch, Russia and Germany. See 'Verhagen: International problem of piracy demands international action' <http://www.netherlandsmission.org/article.asp?articleref=AR00000707EN> (accessed 31 March 2010).

<sup>94</sup> Senegal amended its Constitution (art 9) and Code of Criminal Procedure to allow retrospective prosecution of Habré. Para 3 in art 9 of the Constitution of Senegal now allows courts in Senegal to prosecute crimes committed in the past and in foreign states, mentioning genocide, war crimes and crimes against humanity. See Aptel & Mwangi (n 14 above).

<sup>95</sup> 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 AU to recommend 'the competent jurisdiction' for his trial. On 2 July 2006, the AU 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.

tims of his alleged crimes in Chad continue to seek justice,<sup>96</sup> Belgium is seeking his extradition to face criminal charges under its 'universal jurisdiction' law. In late 2008, Hissène Habré seized the Economic Community of West African States (ECOWAS) Court of Justice with a claim against Senegal for a violation of his fundamental rights; and he is also the common denominator in the cases against Senegal decided by the Committee Against Torture and currently before the International Court of Justice.<sup>97</sup>

On 15 December 2009, Hissène Habré was again the centre of attention in the first-ever decision of the African Court on Human and Peoples' Rights.<sup>98</sup> This individual application was filed by Michelot Yogogombaye against the Republic of Senegal and requested that the Court prevent the government of Senegal from trying Hissène Habré for 'crimes against humanity, war crimes and acts of torture in the exercise of his duties as head of state'. The applicant argued that the proceedings would violate both the principle against non-retroactivity of laws and the principle of universal jurisdiction. In dismissing the case, the Court held that it lacked jurisdiction as Senegal had not made the requisite declaration under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights (African Court Protocol) granting individuals the opportunity to institute cases directly before the Court.

As stated by many legal scholars, the African Court appears to have squandered its first opportunity to commence its judicial career on an auspicious note.<sup>99</sup> It took almost 12 months to issue a 13-page decision on a relatively simple jurisdictional question, two-thirds of which was dedicated to facts and procedural matters. None of the interim orders referred to in the decision are available to provide scholars and

<sup>96</sup> In Chad, victims have filed criminal complaints against him for crimes of torture, murder, and 'disappearance' against former agents of his Directorate of Documentation and Security (DDS).

<sup>97</sup> Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*), Request for the Indication of Provisional Measures, Order of 28 May 2009, ICJ General List 144.; UN Committee against Torture, 36th session 'Decision of the Committee against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' Communication 181/2001 Senegal (CAT/C/36/D/181/2001 (Jurisprudence)) 19 May 2006. See also Human Rights Watch 'Chronology of the *Habré* case' <http://www.hrw.org/fr/news/2009/02/12/chronology-habr-case> (accessed 31 March 2010).

<sup>98</sup> In the matter of *Michelot Yogogombaye v The Republic of Senegal* Application 001/2008, African Court on Human and Peoples' Rights, Judgment 15 December 2009.

<sup>99</sup> The case is instructive in its jurisdictional limitations over complaints brought by individuals or NGOs. For a case to be heard, the respondent state must give its consent. With only Malawi and Burkina Faso having filed the necessary declarations to this effect, it may be a while before the Court is provided with another opportunity to test its judicial muscle.

practitioners with an understanding of the case or the procedure, calling into question the transparency of the process.<sup>100</sup>

It is also understandable why critics would hypothesise that the 'aim of the application [was] certainly to put an end to the saga against Habré and to free Habré after years of house arrest'.<sup>101</sup> Senegal has again stated in late 2009 that it will not commence the trial of Hissène Habré without the financial assistance of the international community.<sup>102</sup>

## 12 Concluding remarks

This survey of some of the important developments that have taken place in 2009 highlights the growing relevance of international criminal jurisdictions and of the use of the principle of universal jurisdiction in Africa and for Africa, further to the release on April 2009 of the African Union-European Union Expert Report on the Principle of Universal Jurisdiction.<sup>103</sup>

Africa continues to be at the forefront of the fight to end impunity against international crimes. The *ad hoc* tribunals established on the continent — ICTR and SCSL — are still recording significant successes and charting important jurisprudential developments, even as they face important challenges in their preparations to close down.

For the ICC, the year 2009 has been one of extremes. The Court has taken several steps forward, including the start of its first two trials, and the issuance of an arrest warrant against the serving head of state of the Sudan, President Omar Al-Bashir. Yet, the ICC has also been the subject of increased criticism and attempts to circumvent or even undermine it, in particular on the African continent. In concluding last year's review, these authors, while lauding the efforts of the ICC to further accountability in Africa, expressed the hope that it would begin to cast its net further afield to other parts of the world. While the

<sup>100</sup> As above. See also CB Murungu 'Judgment in the first case before the African Court on Human and Peoples' Rights: A missed opportunity or mockery of international law in Africa?' SSRN 21 December 2009 <http://ssrn.com/abstract=1526539> (accessed 31 March 2010).

<sup>101</sup> R Adjovi 'Questionable precedent: The first ruling by the African Court on Human and Peoples' Rights' *Jurist Commentary* 21 December 2009 <http://jurist.law.pitt.edu/forumy/2009/12/questionable-precedent-first-ruling-by.php> (accessed 31 March 2010).

<sup>102</sup> J Terzief 'African Rights Court's disappointing first decision' *World Politics Review* 21 December 2009 <http://www.worldpoliticsreview.com/blog/show/4848> (accessed 31 March 2010). In relation to constitutional amendments in Senegal that address immunity of former heads of state and retrospective prosecution of Habré, see also Aptel & Mwangi (n 14 above).

<sup>103</sup> The African Union-European Union Report on the Principle of Universal Jurisdiction, Council of European Union, 8671/1/09/Rev 1, Brussels, 16 April 2009. Joint meetings of the AU and the European Union were held in 2008, and a joint advisory technical group was established to advise the two regional organisations.



mandate of the ICC has a broad geographical scope, and considering that international crimes are being committed in many areas of the world, all the formal investigations and cases conducted thus far relate exclusively to crimes committed in Africa by Africans. To maintain its credibility it is imperative that the ICC begins to geographically expand its investigations.

The decision to explore whether to confer criminal jurisdiction to the African Court appears to be in direct contrast to the decision taken by the AU in 2008 when it rejected a similar recommendation when adopting the Statute of the African Court.<sup>104</sup> Even though this move would be coherent with articles 4(h) and 4(o) of the Constitutive Act of the AU, which reject impunity in respect of international crimes of genocide, war crimes and crimes against humanity, it is unclear whether the work of any regional courts would qualify under the complementarity regime established by the Rome Statute. It is clear that no role was anticipated in the Rome Statute for a supranational, regional court within the complementarity framework, which lays the responsibility for prosecuting these crimes squarely with criminal domestic systems.

The architecture of international criminal justice remains fragile, sparse and selective in its application. Therefore, it remains as important as ever that the fight against impunity and for accountability in Africa and beyond, be multi-faceted, and that it takes place at different levels, internationally and nationally. Justice should be done as close as possible to the victims, whenever possible. But if the mechanisms to further accountability at the local or national level fail or present risks for failure, it is critical that there exist viable international mechanisms to replace them. The frequent involvement of state structures in the commission of international crimes makes it unrealistic to accept that national criminal justice will always and fully sanction these crimes. This involvement also often directly explains the reluctance of states to fully support international criminal jurisdictions.

Credible sanctions against those violating the most basic and fundamental human norms and rights — whoever they are and whatever positions they hold — remain undeniably necessary for the advancement of these rights.

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<sup>104</sup> See African Union *Summary Report of the Working Group on the Draft Single Instrument Relating to the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union*, UA/EXP/Fusion.Cours/Rpt.1.

# The Human Rights Council's Resolution on Maternal Mortality: Better late than never

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## Summary

*The article examines data in relation to maternal mortality and the causes of death during pregnancy and childbirth. It analyses the United Nations Human Rights Council's Resolution on Maternal Mortality and its importance to the prevention of maternal deaths worldwide. The article argues that, although the Resolution of the Human Rights Council should have come sooner, nonetheless it remains a strong statement by a UN body to the international community, particularly poor regions such as Africa, to take adequate measures to address the causes of maternal deaths. The article concludes by commending the Human Rights Council for this Resolution and expresses the hope that greater attention will be given to the issue of maternal mortality by the international community in regions worst affected, such as Africa.*

## 1 Introduction

The newly-constituted United Nations (UN) Human Rights Council (UNHRC), agreed to the Resolution on preventable maternal mortality and human rights at its 11th session, on 21 June 2009.<sup>1</sup> The Resolution could not have come at a better time. Maternal mortality has remained a great challenge, particularly in poorer countries. It is estimated that every day about 1 500 women die due to pregnancy-related complica-

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<sup>1</sup> Human Rights Council Preventable Maternal Mortality and Morbidity and Human Rights A/HRC/11/L.16/Rev 1, 16 June 2009.

tions, translating to about half a million deaths each year.<sup>2</sup> Moreover, it is believed that somewhere in the world a woman dies every minute during childbirth.<sup>3</sup> Maternal deaths among women of reproductive age are widespread in developing countries.<sup>4</sup> For every woman that dies during pregnancy, many more suffer a lifetime of disabilities or morbidities. Approximately 99 per cent of maternal deaths occur in poor regions such as Asia and Africa.<sup>5</sup> Sadly, pregnancy is therefore a very risky venture in developing countries, particularly in Africa.

Against this background, this article examines data on maternal mortality and the causes of deaths during pregnancy and childbirth. It analyses the UN Human Rights Council's Resolution on Maternal Mortality and comments on its importance in preventing maternal deaths worldwide. The article argues that, although the Resolution of the Human Rights Council may be a little late, nonetheless it remains a strong statement by a UN body to the international community, particularly poor regions such as Africa, that they should take adequate measures in order to address the causes of maternal deaths. The article concludes by commending the Human Rights Council for the Resolution and expressed the hope that greater attention will be given to the issue of maternal mortality by regions that are worst affected, among them Africa.

## 2 Maternal mortality as a health challenge

According to the World Health Organization (WHO), a maternal death is 'the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management, but not from accidental or incidental causes'.<sup>6</sup> Deaths during pregnancy and childbirth are generally preventable and have almost been eliminated in developed countries. However, maternal mortality has remained one of the leading causes of death and morbidity among women in Africa.<sup>7</sup> The reasons why women die during pregnancy are well known, and include problems such as haemorrhages (25 per cent), unsafe abortions (13 per cent), eclampsia (12 per cent), infections (16 per cent) and obstructed labour and other

<sup>2</sup> World Health Organization *Report of a meeting: Parliamentarians Take Action for Maternal and Newborn Health* (2009) 8.

<sup>3</sup> As above.

<sup>4</sup> A Glasier *et al* 'Sexual and reproductive health: A matter of life and death' (2006) 368 *Lancet* 1595-1607.

<sup>5</sup> As above.

<sup>6</sup> WHO *The tenth revision of the international classification of diseases* (1992).

<sup>7</sup> See WHO *Maternal mortality in 2000: Estimates developed by WHO, UNICEF and UNFPA* (2004).

direct causes (16 per cent).<sup>8</sup> It should be noted that, while these are the general causes of maternal deaths, the reasons why women die during pregnancy may differ from country to country.<sup>9</sup> There are also indirect causes, such as HIV/AIDS, malaria, anaemia and hepatitis (20 per cent). These complications can be addressed through the provision of emergency obstetric care services. However, such services are generally unavailable in poorer regions. It is estimated that in developing countries, about 60 per cent of all deliveries take place outside health facilities<sup>10</sup> and only about 60 per cent of births are attended to by skilled health care providers.<sup>11</sup> In Africa, the percentage of deliveries attended to by skilled health care providers is even lower, at about 47 per cent.<sup>12</sup> Besides medical reasons, other reasons for deaths during pregnancy and childbirth include the so-called three delays: delays in reaching treatment; delays in identifying the problem; and delays in getting help. Also, the low status of women, early marriage and a general lack of respect for women's rights often aggravate deaths during pregnancy.

In 1987, the Safe Motherhood Initiative was launched in Kenya with a view to addressing the challenges posed by maternal deaths.<sup>13</sup> However, more than 20 years after the launching of this initiative, little or no progress has been made in preventing women from dying during pregnancy and childbirth. Despite the remarkable achievements man has recorded in science during the last century, it is scandalous that half a million women (99 per cent of them in Asia and Africa) still die each year during pregnancy and childbirth. As Fathalla *et al* rightly point out, the world lacks neither the resources nor the technologies to prevent women from dying during pregnancy and childbirth; what is lacking is the political will and commitment to take action.<sup>14</sup>

<sup>8</sup> WHO *The World Health Report 2005 – Make every mother and child count* (2005).

<sup>9</sup> Eg, a report has shown that unsafe abortion constitutes about 30% to 40% of all maternal deaths in Kenya. See Center for Reproductive Rights *Failure to deliver: Violations of women's human rights in Kenyan facilities* (2007) 24. In Zimbabwe a study has shown that a lack of access to transportation is responsible for 28% of maternal deaths in rural areas. See Center for Reproductive Rights *Briefing paper: Surviving pregnancy and childbirth: An international human right* (2005), whereas in Ethiopia early marriage has been attributed as a major cause of maternal death in the country. See S Hailu *et al* 'Health facility-based maternal deaths audit in Tigray, Ethiopia' (2009) 23 *Ethiopia Journal of Health Development* 115-119.

<sup>10</sup> WHO (n 8 above).

<sup>11</sup> WHO 'Skilled attendant at birth – 2006 updates. Geneva: World Health Organization, 2006 [http://www.who.int/reproductivehealth/global\\_monitoring/skilled\\_attendant.html](http://www.who.int/reproductivehealth/global_monitoring/skilled_attendant.html) (accessed 23 December 2009).

<sup>12</sup> WHO, UNICEF, UNFPA and World Bank *Maternal mortality in 2005* (2007) 18.

<sup>13</sup> The Safe Motherhood Initiative that was launched by the WHO, the World Bank, the United Nations Population Fund, the United Nations Children's Fund, the International Planned Parenthood Federation and the Population Council in 1987.

<sup>14</sup> M Fathalla *et al* 'Sexual and reproductive health for all: A call for action' (2006) 368 *Lancet* 2095-2100.

The situation of African women is more precarious than that of other women. Africa accounts for more than half of the total number of women who die each year during pregnancy or childbirth.<sup>15</sup> It is estimated that in Africa, the average lifetime risk of a woman dying during or after pregnancy is one death in 16 live births, compared to a woman in Western Europe whose corresponding risk is about one in 2 800 live births.<sup>16</sup> In some countries, such as Sierra Leone, the risk of a woman dying during pregnancy is even higher, at one in eight, compared to her counterpart in Ireland whose corresponding risk is one in 48 000.<sup>17</sup> In actual fact, with the exception of Afghanistan, the 14 countries with the highest maternal mortality ratios in the world are in Africa.<sup>18</sup> For instance, the maternal mortality ratio in Nigeria is estimated at 1 100 deaths out of 100 000 live births, compared to just one death out of 100 000 live births in Ireland.<sup>19</sup> Also, it is estimated that about 117 000 women die yearly during childbirth in India, making it the country with the largest number of maternal deaths in the world.<sup>20</sup> It should be noted that the surviving children of a woman who dies as a result of pregnancy-related complications are at a great risk of dying themselves. There is also a wider and far-reaching negative impact on older siblings, families and neighbours as well as the entire community. Thus, each year maternal health complications contribute to the deaths of 1,5 million infants in the first week of life and 1,4 million stillborn babies.<sup>21</sup>

It should be borne in mind that under the African human rights system, the issue of maternal mortality has been addressed by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).<sup>22</sup> For instance, article 14 of the Protocol, which contains elaborate provisions on the sexual and reproductive rights of women, also addresses the issue of safe delivery and antenatal care for women. Specifically, article 14(2) (b) requires states to establish and strengthen existing prenatal, delivery and post natal health and nutritional services for women during pregnancy and while breastfeeding. Surely this provision is aimed at ensuring that women will go through pregnancy safely in the region.

<sup>15</sup> WHO *et al* (n 12 above).

<sup>16</sup> WHO *Global burden of disease 2000, Version 1 estimates* (2000).

<sup>17</sup> WHO *et al* (n 12 above).

<sup>18</sup> As above.

<sup>19</sup> As above.

<sup>20</sup> As above.

<sup>21</sup> V Boama & S Arukumaran 'Childbirth: A rights-based approach' (2009) *International Federation of Gynaecology and Obstetrics* 125-127.

<sup>22</sup> Adopted by the 2nd ordinary session of the AU General Assembly in 2003 in Maputo CAB/LEG/66.6 (2003), entered into force 25 November 2005.

Inspired by General Comment 14<sup>23</sup> of the Committee on Economic, Social and Cultural Rights (ESCR Committee), article 14(2)(a) of the African Women's Protocol requires African governments to provide adequate, affordable and accessible health care services to women, especially those in rural areas. The African Commission on Human and Peoples' Rights (African Commission) in one of its recent resolutions has affirmed maternal mortality as a human rights challenge in the region and called on African governments to redouble their efforts in preventing women from dying during pregnancy and childbirth.<sup>24</sup> Therefore, the Human Rights Council Resolution on maternal death is complementary to the African Commission's resolution and further affirms the need for urgency in addressing the issue of maternal mortality.

### 3 Maternal mortality and the Millennium Development Goals

Maternal mortality represents one of the most telling instances of inequality between rich and poor countries and between women in rural and urban areas. One of the eight Millennium Development Goals (MDGs) relates to reducing maternal deaths from 1990 rates, by 75 per cent by 2015.<sup>25</sup> In order to achieve this goal, certain indicators were agreed to. These include the maternal mortality ratio, contraceptive use, adolescents' birth rates, antenatal care coverage and universal access to sexual and reproductive health services.<sup>26</sup> However, a report has shown that the target may not be met by some countries in poor regions, particularly those in Africa.<sup>27</sup> This is because little or no progress has been made in these regions with regard to reducing the incidence of maternal deaths. In many developing countries, the maternal mortality ratio has remained very high, while contraceptive prevalence is very low and many deliveries are still being attended to by unskilled traditional birth attendants or family members.<sup>28</sup> It is therefore a welcome development that the highest UN body on human rights deems it fit to agree to a resolution on such an important issue.

<sup>23</sup> The Right to the Highest Attainable Standard of Health; ESCR Committee General Comment 14, UN Doc E/C/12/2000/4.

<sup>24</sup> See the African Commission on Human and Peoples' Rights Resolution on Maternal Mortality in Africa Meeting at its 44th ordinary session held in Abuja, Nigeria, 10-24 November 2008, ACHPR/Res 135 XXXVIII.

<sup>25</sup> Goal 5 specifically relates to reducing maternal deaths by three-quarters by 2015. The MDGs are an outcome of the UN Millennium Declaration and Millennium Development Goals launched in 2000.

<sup>26</sup> As above.

<sup>27</sup> UN Department of Publication Information *Africa and the Millennium Goals 2007 update* (2007).

<sup>28</sup> See WHO *et al* (n 12 above).

The next section examines the content of the Human Rights Council's Resolution and its relevance for the challenge of reducing maternal mortality. Given the fact that targets under goal 5 of the MDGs to reduce maternal deaths by three-quarters by 2015 seem to be proving almost impossible for countries in poor regions such as Africa, the importance of this Resolution to galvanise international commitment to prevent maternal deaths cannot be overemphasised. While it is noted that the Resolution is by no means binding on states, it nonetheless represents a strong statement by the UN on a very worrisome situation.

## 4 Analysis of the Human Rights Council's Resolution

The seven-paragraph Resolution begins with a Preamble which reiterates commitments made by states at consensus meetings, such as the International Conference on Population and Development,<sup>29</sup> the Fourth World Conference on Women (Beijing Platform for Action)<sup>30</sup> and the MDGs. At these meetings it was agreed that women would be assured good health throughout their lives and that they should be prevented from dying during pregnancy and childbirth. This is not the first time that the highest UN human rights body passed a resolution regarding a health issue. It would be recalled that in 2001 at the peak of the HIV/AIDS pandemic and in light of the difficulties facing infected persons in poor regions to get access to life-saving drugs, the then Human Rights Commission agreed to a Resolution on access to essential medicines as a fundamental right.<sup>31</sup> That Resolution was crucial in influencing the historic Doha Declaration agreed to by World Trade Organization (WTO) Ministers in November 2001.<sup>32</sup> However, the Resolution on Maternal Mortality by the newly-constituted Human Rights Council can be regarded as the body's first resolution specifically addressing an important health issue. The Council emphasises the need for increased political will and commitment, including co-operation and technical assistance at the international and national levels, in order to address the 'unacceptably high global rate of preventable maternal mortality and morbidity'.

### 4.1 Maternal mortality as a human rights challenge

The Human Rights Council reiterates the fact that maternal mortality is a human rights challenge which deserves urgent attention from

<sup>29</sup> Report of the International Conference on Population and Development 7 UN Doc A/CONF 171/13 (1994).

<sup>30</sup> Fourth World Conference on Women Beijing held on 15 September 1995, A/CONF 177/20.

<sup>31</sup> See UN Commission on Human Rights adopted Resolution 2001/33 on Access to Medication in the Context of Pandemics such as HIV/AIDS, April 2001.

<sup>32</sup> WTO Doha Ministerial Declaration on the TRIPS Agreement and Public Health, WTO Doc WT/MIN(01)/DEC/2 (2001).



governments across the world. In particular, the Resolution restates that death during pregnancy and childbirth violates women's rights to life, dignity, health and non-discrimination, all guaranteed in international and regional human rights instruments.<sup>33</sup> This is highly commendable and seems to coincide with the view of other commentators on the issue. For instance, Cook *et al*<sup>34</sup> note that the failure by governments to address maternal deaths and disability represents one of the greatest injustices of our times and constitutes gross violations of women's rights. Framing maternal mortality as a human rights violation underscores the importance of holding governments accountable for their failure to prevent maternal deaths.

As stated earlier, most deaths during pregnancy in developing countries are due to the low status of women and a lack of access to comprehensive health care to meet women's needs. In its General Recommendation 24, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee has enjoined states to 'ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation'.<sup>35</sup> The CEDAW Committee notes further that the failure by states to ensure access to health care services peculiar to women's needs constitutes an act of discrimination against women.<sup>36</sup> Equally, the Human Rights Committee, charged with monitoring the implementation of ICCPR, in some of its concluding observations on reports of states parties on what they have done to bring their laws, policies and practices into compliance with their treaty obligations, has framed maternal mortality as a violation of women's rights to life and survival.<sup>37</sup>

Applying a human rights-based approach to an issue such as maternal mortality is important in the sense that it reminds states of their obligations under international law to respect, protect and fulfil women's rights. It also emphasises the point that access to health care services for women should not be viewed as a privilege, but rather as an important entitlement. A human rights-based approach can also be used to hold states accountable for their failure to fulfil their obligations

<sup>33</sup> n 31 above, para 2.

<sup>34</sup> RI Cook *et al* *Advancing safe motherhood through human rights* (2002). See also A Yamin & D Maine 'Maternal mortality as a human rights issue: Measuring compliance with international treaty obligations' (1999) 21 *Human Rights Quarterly* 563-607; F Leeuwen & R Amollo 'A human rights-based approach to improving maternal health' (2009) 10 *ESR Review* 21-24.

<sup>35</sup> CEDAW Committee General Recommendation 24 on Women and Health UN GAOR 1999 Doc A/54/38 Rev, para 8(2).

<sup>36</sup> n 35 above, para 14.

<sup>37</sup> See, eg, Concluding Observations to Democratic Republic of the Congo, para 14, UN Doc CCPR/C/COD/CO/3 (2006); see also Concluding Observations to Mali, para 14, UN Doc CCPR/CO/77/MLI (2003).

under international human rights law to prevent women from dying during pregnancy and childbirth. In this regard, states will need to take adequate measures to repeal laws that not only discriminate against women, but also hinder their access to sexual and reproductive health care services. Conversely, states will need to enact appropriate laws that will facilitate unhindered access to high-quality sexual and reproductive health services, and ensure non-discrimination and autonomy in reproductive decision making to women and girls in order to ensure safe pregnancy and childbirth.<sup>38</sup>

More importantly, a human rights-based approach can be used to remind the international community of commitments made at different consensus meetings and gatherings. For instance, during the International Conference on Population and Development it was agreed by the countries of the world that the reproductive health of women would be given priority and that all individuals shall have the right to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.<sup>39</sup> Furthermore, it was agreed that governments should remove all legal, medical and regulatory barriers to access to information and services on reproductive health for all women.<sup>40</sup> Thus, the human rights approach will remind states of the steps they have taken with regard to these promises and comments. Equally, at the African Ministers' meeting in Maputo in 2005, a continental sexual and reproductive health framework was drawn up. This framework aims at realising universal access to sexual and reproductive health care services, including services related to antenatal, childbirth and postnatal care.<sup>41</sup>

#### 4.2 Resource allocation for maternal health

The Resolution laments the unacceptably high incidence of maternal deaths across the globe and enjoins states to<sup>42</sup>

renew their political commitment to eliminating preventable maternal mortality and morbidity at the local, national, regional and international levels, and to redouble their efforts to ensure the full and effective implementation of their human rights obligations.

<sup>38</sup> Center for Reproductive Rights *Briefing paper* (n 9 above).

<sup>39</sup> n 29 above, para 7.3.

<sup>40</sup> n 29 above, para 7.20.

<sup>41</sup> Special Session: The African Union Conference of Ministers of Health, Universal Access to Comprehensive Sexual and Reproductive Health Services in Africa: Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights 2007-2010 Sp/MIN/CAMH/5(1) September 2006.

<sup>42</sup> n 31 above, para 3.

More importantly, the Human Rights Council calls on states to commit more of their resources to addressing maternal mortality.<sup>43</sup> This call is very important, given the recent development in the world where funds to address sexual and reproductive health issues have been diverted to HIV/AIDS. Fathalla *et al* have observed that funding for HIV/AIDS-related activities has increased greatly since 1995 compared to other sexual and reproductive health issues.<sup>44</sup> For instance, HIV/AIDS-related funding has increased from 9 per cent of the sexual and reproductive health total to about 56 per cent in 2004.<sup>45</sup> On the other hand, funding for sexual and reproductive health services (including services for maternal health) grew slightly, from 18 per cent to 26 per cent, whereas funding for family planning, including maternity services, diminished greatly from 55 per cent to 9 per cent.<sup>46</sup> While it is no doubt important to sustain spending on reversing the impact of HIV/AIDS in the world, care must be taken not to do this at the expense of other important sexual and reproductive health issues, especially maternal mortality.

Most of the deaths arising during pregnancy and childbirth are preventable, but one of the problems is that many governments do not pay enough attention to the health needs of women. If the goal of reducing maternal deaths by 75 per cent by 2015 is to be realised, then governments in poor regions, particularly sub-Saharan Africa, will need to redouble their efforts to prevent maternal deaths in their countries. This will require allocating more resources than at present to the health sector to address family planning and maternal health. At present, African governments are spending too little on the health of their population. A report has shown that the *per capita* expenditure on the health sector by some African countries ranges from US \$65 in Kenya, US \$51 in Nigeria, US \$29 in Tanzania to US \$45 in Mozambique.<sup>47</sup> The only exception is South Africa whose *per capita* expenditure on health is about US \$700. This scenario contrasts sharply with spending in some developed countries where, for instance, spending ranges from US \$5 274 in the United States, US \$3 446 in Switzerland to US \$3 409 in Norway.<sup>48</sup>

At the Abuja Declaration in 2001,<sup>49</sup> African governments agreed to commit 15 per cent of their annual budget allocations to the health

<sup>43</sup> n 31 above, para 4.

<sup>44</sup> Fathalla *et al* (n 14 above).

<sup>45</sup> As above.

<sup>46</sup> As above.

<sup>47</sup> N Master 'Per capita total expenditure on health in international dollars by country' [http://www.nationmaster.com/graph/hea\\_per\\_cap\\_tot\\_exp\\_on\\_hea\\_in\\_int\\_dol-capita-total-expenditure](http://www.nationmaster.com/graph/hea_per_cap_tot_exp_on_hea_in_int_dol-capita-total-expenditure) (accessed 11 June 2009).

<sup>48</sup> As above.

<sup>49</sup> African Summit on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, Abuja, Nigeria, 24-27 April 2001, OAU/SPS/ABUJA/3.

sector. This position was reiterated at the Gaborone Declaration<sup>50</sup> and the Maputo Plan of Action.<sup>51</sup> Sadly, however, many countries in the region have not kept to this promise. Rather, a report has shown that African governments have continued to commit a greater part of their resources on acquiring arms and ammunition even when most of these countries are not at war or threatened by war. For instance, a report has shown that spending on the military by African governments has increased by about 51 per cent in the past ten years.<sup>52</sup> Ironically, millions of women have lost their lives and suffered life-time injuries due to childbirth during the same period. This is contrary to article 10(h) of the African Women's Protocol, which enjoins African governments to spend less on war and more on women's health and development. Therefore, it will be necessary, in line with article 2(1)(c) of the African Women's Protocol, for African governments to adopt gender-responsive budgeting in their respective countries.<sup>53</sup> This will ensure that the health needs of women in general, and maternal health in particular, are given adequate attention.

It is unacceptable that a woman should be allowed to die every minute from pregnancy-related complications. The Resolution thus reminds states of commitments made to reduce maternal mortality at important meetings, including the ICPD, the Beijing Platform and the MDGs. In essence, the international community should fulfil commitments made at these meetings and fora to address factors that contribute to maternal deaths. The Human Rights Council, unlike the Resolution of the African Commission on Maternal Mortality,<sup>54</sup> did not call for a state of emergency to be declared in countries where maternal mortality is highest. Considering the magnitude of loss of lives and slow progress to address maternal deaths in these countries, such a call for a declaration of emergency would not have been out of place. It will reinforce the urgency in addressing maternal mortality

<sup>50</sup> The 2nd ordinary session of the Conference of the African Ministers of Health CAMH/MIN/Draft/Decl (II), Gaborone, Botswana, 10-14 October 2005. At this Conference, AU countries committed themselves to the achievement of universal access to treatment and care for all and reiterated the need to allocate 15% of their national budgets to health in line with the Abuja Declaration.

<sup>51</sup> Maputo Declaration on Malaria, HIV/AIDS, Tuberculosis and Other Related Diseases Assembly/AU/Decl 6(II) 2003.

<sup>52</sup> See, eg, *The Guardian* 'Africa's military spending rises by 51 per cent' 10 June 2008 <http://www.guardiannewsngr.com/news/article06> (accessed 10 October 2009).

<sup>53</sup> Art 2(1)(c) provides that '[s]tate parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard, they shall: integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life.'

<sup>54</sup> See the African Commission Resolution (n 24 above). Para 4 of the Resolution provides: 'Consider the declaration on the state of maternal health in Africa as a continental emergency and to take appropriate regional actions.'

and the need for governments in developing countries to wake up to their responsibilities as regards women's health.

The Resolution, in the spirit of goal 8 of the MDGs, requests states to give increased attention to maternal mortality and morbidity initiatives in their development partnership and co-operation arrangements. This is an important point which should propel rich countries and donor agencies to give technical support to poorer countries in order to address the causes of maternal mortality. It is worthy of mention here that the Human Rights Council requires such initiatives to adhere to human rights principles and standards generally, particularly the impact of such initiatives on gender inequality. In other words, such initiatives must put women at the centre of the solution and must address gender inequality and other factors that predispose women to dying during pregnancy.

Moreover, there should be an increased and equitable allocation of resources to address health care services needed by women and such health care services must be culturally acceptable to women.<sup>55</sup> Most countries with high maternal mortality ratios are from Africa. Many of these countries are regarded as least-developed countries<sup>56</sup> and are unable to meet the health demands of their people due to a lack of resources. In this regard, the ESCR Committee in its General Comment 14 has called on rich nations to promote socio-economic rights in other countries. Particularly, the Committee has noted:<sup>57</sup>

Depending on the availability of resources, states should facilitate access to essential health facilities, goods and services in other countries, wherever possible, and provide the necessary aid when required.

Therefore it is clear that, unless poor countries receive help from rich countries, it may remain difficult, if not impossible, for them to effectively reduce maternal deaths.

Also, it is important to note that beyond the challenge of a lack of resources, there are also problems of corruption and the mismanagement of resources. For instance, a country like Nigeria, which has one of the highest maternal mortality ratios (1 100 deaths per 100 000 live births), cannot be said to lack the resources to prevent women from dying during pregnancy. Rather, what has been the problem in that country is endemic corruption and a gross abuse of state resources by its leaders.<sup>58</sup> It is estimated that Nigeria has lost about US \$380 billion

<sup>55</sup> See Center for Reproductive Rights *Failure to deliver* (n 9 above) 87.

<sup>56</sup> They include Angola, Benin, Burkina Faso, Burundi, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, The Gambia, Guinea, Lesotho, Liberia, Malawi, Mauritania, Mozambique, Niger, Rwanda, Sierra Leone, Togo, Uganda, Tanzania and Zambia.

<sup>57</sup> General Comment 14 (n 23 above) para 39.

<sup>58</sup> O Nnamuchi 'Kleptocracy and its many faces: The challenges of justiciability of the right to Health care in Nigeria' (2008) 52 *Journal of African Law* 1-42.

to corruption and embezzlement since independence in 1960.<sup>59</sup> Such a huge sum of money can be utilised more judiciously in a country where one in 18 women is likely to die during childbirth. The World Bank has estimated that approximately US \$2 spent on a woman per year can ensure basic maternal health services and prevent maternal deaths.<sup>60</sup> It would therefore have been necessary that the Human Rights Council emphasised the need for prudence and accountability in the use of available resources to address maternal deaths. Such a call would no doubt have assured rich countries and donor agencies of probity and judicious use of donations made to countries with high maternal mortality ratios.

Moreover, given the challenges poor regions continue to face in addressing maternal mortality, due largely to poor funding of the health care system, one would have expected the Human Rights Council to advocate a global fund on maternal mortality. While it is agreed that such a fund may not necessarily address the root causes of maternal deaths in poorer regions, it should contribute greatly to addressing some of the health-related problems that often result in maternal deaths. It would be recalled that in 2001, due to high mortality related to HIV/AIDS, tuberculosis and malaria and a lack of access to care and treatment, the international community established the Global Fund on HIV/AIDS, Tuberculosis and Malaria.<sup>61</sup> The impact of this Fund has been positive and funds disbursed to poor nations affected by these diseases have helped in providing access to care and treatment for those in need, thereby reducing mortality associated with these diseases. For example, in only six years the number of people receiving HIV treatment in low and middle-income countries has increased ten-fold, reaching almost 3 million people by the end of 2007.<sup>62</sup> This in turn has led to a reduction in the number of AIDS-related deaths across the globe.

#### **4.3 Role of non-governmental organisations and other national institutions in reducing maternal deaths**

The Human Rights Council also makes an important call to non-governmental organisations (NGOs) and human rights institutions to be more involved in monitoring governments' performance with regard to maternal mortality. It is a matter of fact that NGOs play a key role in complementing governments' efforts with regard to health-related

<sup>59</sup> See conversation with Nuhu Ribadu, anti-corruption crusader, *The Sun* 24 May 2009.

<sup>60</sup> Based on a presentation by A Tinker 'Safe motherhood as an economic and social investment', Safe Motherhood Technical Consultation in Colombo, Sri Lanka, 18-23 October 1997.

<sup>61</sup> The decision to create the Global Fund was taken by heads of state at the 2001 G8 Summit in Genoa, Italy, at the urging of UN Secretary-General Kofi Annan.

<sup>62</sup> UNAIDS *AIDS Epidemic Report* (2008) 17.

issues in many poor countries. Indeed, NGOs have been very dynamic and have been a great resource to many governments in the fight against HIV/AIDS in Africa. Nevertheless, apart from complementing governments' activities, NGOs and human rights institutions can play an important role in ensuring that governments are meeting their obligations under international human rights law with regard to addressing maternal mortality. The monitoring of governments' activities with regard to maternal mortality can help to bring the attention of governments to neglected issues that contribute to maternal deaths within a community or a country. Moreover, it can reveal disparities with regard to the nature and scope of maternal deaths among different communities within a country and pinpoint shortcomings in governments' policies and plans towards addressing maternal mortality.<sup>63</sup>

NGOs and human rights institutions may work together with governments to come up with realistic human rights indicators, in addition to existing health indicators, that will assist governments in meeting their obligations with regard to preventing maternal deaths. Human rights indicators, in the context of preventing maternal deaths, are important in the sense that they reveal the steps a government has taken to address maternal mortality and whether such steps are consistent with the government's obligations under international human rights law.<sup>64</sup> In this regard, the South African Human Rights Commission (SAHRC), mandated under section 184(3) of the Constitution, has been playing an important role in monitoring government's activities with regard to realising the rights to health, as guaranteed under section 27 of the South African Constitution of 1996. In addition to providing advocacy and training programmes on the right to health generally, the SAHRC has documented the rising infant and maternal mortality in the country, attributing this to the high incidence of HIV/AIDS and the dearth of health care providers in the country.<sup>65</sup> The SAHRC has therefore called on the South African government to take adequate steps and measures with a view to addressing these challenges.<sup>66</sup> Other human rights institutions in the region can learn a lot from the experience of the SAHRC.

Also, a good example of the role of NGOs in addressing maternal mortality is that of a community-based organisation-led initiative in India. It was stated earlier that India has one of the largest numbers of maternal deaths in the world. The National Rural Health Mission (NRHM) is conducting community-based monitoring of health services in order

<sup>63</sup> See E Durojaye 'Monitoring the right to health and sexual and reproductive health: Some considerations for African governments' (2009) 42 *Comparative and International Law Journal of Southern Africa* 227-263.

<sup>64</sup> Durojaye (n 63 above) 245.

<sup>65</sup> South African Human Rights Commission *Fifth Economic and Social Rights Report* (2004).

<sup>66</sup> As above.



to ensure that health care services, including maternal health services, reach those for whom they are meant, especially those residing in rural areas, the poor, women and children.<sup>1</sup> This approach places people at the centre of the process of regularly assessing whether the health needs and rights of the community are being fulfilled. Through its activities, the organisation has identified key issues which were never contemplated by governments as major barriers to reducing maternal deaths in rural areas. Similarly, in Nigeria several NGOs are playing important roles in ensuring that childbirth is safe in that country. For instance, the Society of Gynaecology and Obstetrics of Nigeria (SOGON) has been involved in training and advocacy programmes across the country to address the problem of maternal mortality. More importantly, SOGON has continued to research and document the maternal mortality situation in Nigeria. The outcome of such research has been used as an advocacy tool to call government's attention to how maternal mortality may become a serious threat to women's health and lives.<sup>67</sup>

While it is true that NGOs and human rights institutions can play an important role in monitoring governments' obligations with regard to preventing maternal deaths, courts are also important institutions which can hold governments accountable for failing to meet their obligations under international law. Moreover, courts can set standards which will guide governments in realising their obligations to fulfil women's right to health, including maternal health. Already in some jurisdictions courts are beginning to question governments' unwillingness or reluctance to provide health care services needed by women.<sup>68</sup> Also, courts are beginning to affirm the sexual and reproductive autonomy of women to make decisions concerning their bodies. For instance, the South African Constitutional Court has affirmed the right of a girl below 18 to consent to medical abortion since this will fulfil her right to reproductive self-determination.<sup>69</sup> This decision is very crucial in the context of maternal mortality, given the fact most women in Africa do not have a say with regard to the number and spacing of their children and bearing in mind that unsafe abortion remains a major cause of maternal death in the region.<sup>70</sup> Therefore, the Human Rights Council perhaps could have pinpointed the importance of courts and other institutions in addressing the challenge posed by maternal mortality in poor regions.

<sup>67</sup> See A Bankole *et al* *Barriers to safe motherhood in Nigeria* (2009) 17.

<sup>68</sup> See the case of *Minister of Health v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC), where the South African government was held to be in breach of its obligation to fulfil the right to health of its citizens by failing to provide medicines to prevent mother-to-child transmission of HIV in accordance with constitutional provisions.

<sup>69</sup> *Christian Lawyers Association v National Ministers of Health & Others* 2004 10 BCLR 1086.

<sup>70</sup> See Glasier *et al* (n 4 above).

#### 4.4 Role of the UN and its agencies

In paragraph 6 of the Resolution, the Human Rights Council calls on the Office of the UN High Commissioner for Human Rights, in conjunction with states and UN agencies such as the WHO, UNFPA and UNICEF, to prepare a thematic study on preventing maternal mortality in the world. This study is undertaken to identify the human rights dimension of maternal mortality, to give an overview of initiatives and activities within the UN to address maternal mortality, and to show how the Council can add value to addressing human rights implications of maternal deaths. It is hoped that such a study will be found very useful by states with high maternal mortality ratios. These agencies have been at the forefront of advocating an international response to maternal mortality in poorer regions. They have, through their numerous activities, drawn the attention of the world to the appalling statistics with regard to maternal deaths in developing countries.

One important point which the Human Rights Council fails to emphasise is the fact that these agencies need to promote a more co-ordinated and integrated approach in working with community-based organisations in order to address the issue of maternal mortality in local communities.<sup>71</sup> In those regions where maternal deaths are high, many of the women who lose their lives during pregnancy are women in rural areas where access to basic amenities such as water, food and medical care, is acutely lacking. Studies have shown that most of the deaths resulting from maternal mortality could have been avoided had there been access to basic infrastructure in the health care setting.<sup>72</sup> This emphasises the need for a more collaborative and integrated approach between UN agencies and community-based organisations to address the root causes of maternal deaths.

The study proposed in paragraph 6 is expected to be submitted at the 14th session of the Human Rights Council, in June 2010, and further activities on the nexus between maternal mortality and human rights are expected to follow. The Council also invited the Office of the Commissioner for Human Rights, the WHO, UNFPA and the Special Rapporteur on the Right to Health to contribute to a discussion on this study.

<sup>71</sup> See Report of the Secretary-General on 'Co-ordinated and integrated United Nations system approach to promote rural development in developing countries, with due consideration to least developed countries, for poverty eradication and sustainable development' made at the substantive session of the Economic and Social Council, New York, 28 June to 23 July 2004, where it is stated that, although UN agencies have continued to play important roles in rural areas across the world, better results can be obtained if the activities of these agencies are well co-ordinated and integrated.

<sup>72</sup> Center for Reproductive Rights *Broken promises: Human rights, accountability and maternal death in Nigeria* (2008); Amnesty International *Out of reach: The cost of maternal health in Sierra Leone* (2009).

## 5 Conclusion

One may argue that the Resolution emerging from the UN's highest human rights body should have come earlier, considering the fact that maternal mortality has been a major health challenge in the world for several years. On the other hand, however, one may say that it is better late than never. Unlike other health challenges, such as HIV/AIDS, tuberculosis and malaria, maternal mortality has not received sufficient attention from the UN and the international community as a whole.<sup>73</sup> It is in light of this that one must commend the Human Rights Council for finding the courage to agree to this very important Resolution. The fact that the Resolution frames maternal deaths as a human rights issue and calls on the international community to renew their political commitment to addressing maternal deaths has further brought to the fore the need for countries of the world to join hands in reducing deaths associated with pregnancy.

More importantly, the Resolution is a wake-up call to all nations, particularly those in developing regions such as Africa, to improve on the funding of the health care sector in general, and sexual and reproductive health care in particular. This is particularly true if the ambitious goals of the MDGs, especially goal 5 on reducing maternal mortality by 75 per cent, are to be realised. Although, as stated earlier, the Resolution is by no means binding, it remains an important reference point for member states of the UN on steps that should be taken in order to address maternal deaths. Indeed, this resolution represents a strong message by a UN organ to the international community on the need to pay greater attention to maternal mortality.

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<sup>73</sup> Eg, in 2001 the UN General Assembly held a Special Session on HIV/AIDS known as the Declaration of Commitment.

## You may not refuse a blood transfusion if you are a Nigerian child: A comment on *Esanubor v Faweya*

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### Summary

*This comment examines a decision of the Nigerian Court of Appeal that a Nigerian child is not entitled to refuse a blood transfusion. The comment notes that the decision was handed down at a time when the Child Rights Law was in operation and that, had this legislation been taken into consideration, the best interests of the child would have led to a more nuanced interpretation and guidance on conditions under which a Nigerian child, in furtherance of the right to freedom of religion, may refuse a blood transfusion.*

In *Esanubor v Faweya* (*Esanubor case*),<sup>1</sup> the Nigerian Court of Appeal ruled that a Nigerian child cannot refuse a blood transfusion. The events giving rise to this case occurred in Lagos, Lagos State, Nigeria. The Child Rights Law of Lagos State, 2007, was operational at the time the Court of Appeal delivered its decision.<sup>2</sup> The facts of the case are as follows: A child, a Jehovah's Witness, sued through his mother because of his young age. He claimed that he had been ill and admitted to a hospital. He was diagnosed with a severe infection leading to acute

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<sup>1</sup> [2009] All FWLR (Pt 478) 380 (CA).

<sup>2</sup> The case began in 1997 at the chief magistrate's court, Lagos. The application for an order of *certiorari* was made to the Lagos State High Court and judgment was delivered on 30 May 2001. An appeal was filed at the Nigerian Court of Appeal in 2003 and the judgment of the Court of Appeal was handed down in 2008. This judgment is subject to appeal to the Nigerian Supreme Court.

blood shortage for which a blood transfusion was recommended. His mother withheld her consent to the transfusion on the ground that her faith as a Jehovah's Witness compelled her to do so. The matter was reported to the Nigerian police, who applied for and obtained an order from a chief magistrate's court authorising the hospital to do everything necessary to save the child's life. Consequently the child was given a transfusion; his condition improved and he was discharged. The child sought a reversal of the order of the Magistrate's Court on the grounds of fraud, which was rejected. Thereafter he applied to the High Court seeking judicial review of the order as well as damages for the unlawful transfusion of blood (without his own or his mother's consent). After the High Court had dismissed the claim, the child's mother appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal as well and held that the magistrate's court was right to have issued an order to save the life of the child and protect his right to life.<sup>3</sup> The Court held that it was proper to overrule the refusal of consent to a blood transfusion by the mother on the grounds of her faith since the infant was incapable of giving consent to die on account of the religious belief<sup>4</sup> of the mother. The Court further held that the mother's desire to sacrifice her son's life 'is an illegal and despicable act which must be condemned in the strongest terms'.<sup>5</sup> In effect, the Court held that the right to life of the child trumped the religious right of the mother, which the Court conceived gave her the right to determine whether the son should receive a blood transfusion. The Court relied on a decision of the Nigerian Supreme Court in *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* (Okonkwo case),<sup>6</sup> where the Court held:<sup>7</sup>

The right of freedom of thought, conscience or religion implies a right not to be prevented, without lawful justification, from choosing the course of

<sup>3</sup> See sec 33(1) of the Constitution of the Federal Republic of Nigeria 1999: 'Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.'

<sup>4</sup> See sec 38 of the Nigerian Constitution 1999: '(1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance. (2) No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian. (3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination. (4) Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.'

<sup>5</sup> *Esanubor* case (n 1 above) 397.

<sup>6</sup> (2001) 7 NWLR (Pt. 711) 206.

<sup>7</sup> *Okonkwo* case (n 6 above) 245.

one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to one's religious belief. The limits of these freedoms in all cases are where they impinge on the right of others or where they put the welfare of society or public health in jeopardy. The sum total of the right to privacy and of the freedom of thought, conscience or religion which an individual has, put in a nutshell, is that an individual should be left alone to choose a course of life, unless a clear and compelling overriding state interest justifies the contrary if a decision to override the decision of a patient not to submit to blood transfusion or medical treatment on medical grounds, is to be taken on grounds of public interest or recognised interest of others, such as dependant minor children, it is to be taken by the courts.

It appeared throughout the judgment that no allowance was made for the fact that the child had a right to refuse the transmission. The Court proceeded on the assumption that the child's mother was the person who could give surrogate consent. It was therefore a clash of the mother's belief and the son's right to life. Framed in this way, it is not surprising that the Court was emphatic that the mother had no right to decide the future of the son's life. There was no discussion of the wishes or desires of the son. Clearly, the Court's decision is that under no circumstances can a Nigerian child refuse a blood transfusion since it is not possible for the child to raise attenuating circumstances to justify such a refusal.

Before proceeding to discuss some of the issues in *Esanubor*, it is important to draw attention to the possibility that the parties to the case may decide to appeal to the Nigerian Supreme Court. One of the issues that the judgment raises is the lack of consideration of the child's wishes. There is no evidence that the desires, wishes and opinions of the child were taken into consideration by the Court of Appeal. In this regard, the Court did not inquire into whether the child understood his faith and whether he also understood the implications of refusing a blood transfusion. Furthermore, there was no indication of the age of the child from the reports or that this was in any way considered important by the Court. In fact, the involvement of the Nigerian police was lauded as they were considered to be discharging the obligations of the state to protect its citizens and infants.

Until Nigeria's ratification of the United Nations (UN) Convention on the Rights of the Child, 1989 (CRC),<sup>8</sup> the African Union (AU)'s African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter)<sup>9</sup> as well as the domestication of these conventions at the fed-

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<sup>8</sup> Nigeria ratified this Convention in 1991.

<sup>9</sup> Nigeria ratified this Convention in 2000.

eral<sup>10</sup> and state<sup>11</sup> levels, it appeared that on the question of religion the child had no status and depended on its parent's choice. A few facts buttress this point. First, section 38(2) of the Nigerian Constitution, 1999, endows parents with some control over the choice of religion of their children.<sup>12</sup> Secondly, in the case of *Omosebi v Omosebi*,<sup>13</sup> a Nigerian High Court held that marriage created a corporate entity and that a married woman could not during the pendency of the marriage change her religion without her husband's consent. It is the implications of this ruling for children that concern us here, since it appears likely that such a ruling will extend to these children. Thirdly, the Infants Law of some Nigerian states<sup>14</sup> endows a court in custody proceedings with the power to order that a child should be brought up in the religion of a parent if it discovers that the child is being brought up in a religion different from that of the parent.

The promulgation of the Child Rights Act (2003) in Nigeria and the Child Rights Law (2007) in Lagos State enhanced the ability of a child to choose her religion and enjoy the consequences of this choice. Article 9(1) of the African Children's Charter recognises that every child has the right to freedom of thought, conscience and religion. Parents and legal guardians have the duty to provide guidance and direction in the exercise of these rights, having regard to evolving capacities and the best interests of the child.<sup>15</sup> State parties are expected to respect the duty of parents and legal guardians to provide guidance and direction in the enjoyment of these rights. Section 7 of the Child Rights Act recognises the child's freedom of thought, conscience and religion:

- (1) Every child has a right to freedom of thought, conscience and religion.

<sup>10</sup> In 2003 the Child Rights Act was promulgated into law by the National Assembly of Nigeria. However, since 'children' is under the Residual Legislative List of the Constitution of the Federal Republic of Nigeria, 1999, and therefore within the competence of state governments, it became necessary that state Houses of Assembly pass similar legislation. Accordingly, many state Houses of Assembly have passed a Child Rights Law which is identical to the Child Rights Act. In the 1999 Nigerian Constitution, the distribution of legislative powers between the federal state and local governments is found in the Exclusive List (first part Second Schedule) and the Concurrent List (second part Second Schedule). According to constitutional theory, all matters that are neither in the Exclusive or Conclusive List, nor reserved for Local Governments (Fourth Schedule) are reserved for the states.

<sup>11</sup> The Child Rights Act has been promulgated into a Child Rights Law in at least 16 of the 36 states of Nigeria: Abia, Anambra, Akwa Ibom, Bayelsa, Ebonyi, Ekiti, Imo, Jigawa, Kwara, Lagos, Nassarawa, Ogun, Ondo, Plateau, Rivers and Taraba States.

<sup>12</sup> 'No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or a religion not approved by his parent or guardian.'

<sup>13</sup> (1985) HCNR 666.

<sup>14</sup> See eg sec 18 of the Infants Law of Bayelsa State 2006, Cap A13 Laws of Bayelsa State, 2006.

<sup>15</sup> Art 9(2) of the Convention.



- (2) Parents, and where applicable, legal guardians, shall provide guidance and direction in the exercise of these rights having regard to the evolving capacities and best interest of the child.
- (3) The duty of parents and, where applicable, legal guardians to provide guidance and direction in the enjoyment of the right in subsection (1) of this section by their child or ward shall be respected by all persons, bodies institutions and authorities.
- (4) Whenever the fostering, custody, guardianship or adoption of a child is in issue, the right of the child to be brought up in and practice his religion shall be a paramount consideration.

It is clear, therefore, that had the Court in the *Esanubor* case reverted to the Child Rights Act and the Child Rights Law of Lagos State, it may have come to a different conclusion or at least shown more sensitivity to the best interests of the child. The age of the child would have been material in the proceedings; so too would have been the question of the manner in which the right of the child to his religion should be expressed. The Court would have acknowledged that the first line of inquiry is to acknowledge that the child has the freedom to choose a religion and thereafter inquire if the child's religion is the same as that of her parents. If this is so, it would appear that the duty of the parent to guide the child in the exercise of this right has been discharged. If the child maintains a faith different from that of her parents, the court needs to examine closely why this is so. The fact that a child has the right to freedom of religion does not automatically mean that the child is to be regarded as having full status with respect to the manifestation of that belief in all its ramifications, including the question of whether to refuse a blood transfusion. Much will depend on the age of the child, the child's ability to understand the consequences of such a refusal, including the risk of death. If a child professes a faith where the rejection of blood is fundamental to that faith, as in the case of Jehovah's Witnesses, it is incumbent upon the court to clearly satisfy itself that the child understands and appreciates the finality of a decision to refuse a blood transfusion. It may be important to take in evidence of parents and other adults as to the maturity of the child in this regard. It is also important that the duty of guidance of parents and legal guardians is properly appreciated by the court. To do this, a court ought to find that the decision of the child is not taken in complete obedience to the parent's wishes, but as a result of a well-considered personal judgment.

Of course, in many instances, the duty to provide guidance is one which is difficult to distinguish from a fact of undue influence. If a child is introduced to a particular religious faith in the course of her formative years, it is not easy to determine at what stage the child is supposed to have reflected and decided to continue with the choice made by the parents. The court could even rule that children of a particular age range are incapable of refusing blood transfusions, while within another age range this decision will be made after due consideration of a number of factors. This would accord with the need to ensure the best interests of the child declared by section 1 of the Child Rights Act

as the primary consideration in every action concerning a child. It will therefore be wrong to hold that under no circumstances can a Nigerian child reject a blood transfusion. A nuanced approach strikes a balance between the recognition of the bodily autonomy of the child and the duty of the state to protect vulnerable persons, including children. This is the approach that the Court ought to have taken in the *Esanubor* case. To have relied only on the *Okonkwo* dictum was insufficient, especially when the question of the capacity of children who are Jehovah's Witnesses to refuse a blood transfusion was not directly at issue in that case.<sup>16</sup>

The Court's complete reliance on the wishes of the mother is perhaps symptomatic of a cultural context in which the child has no status and all decisions concerning the child are taken by the parents. The fact that the Child Rights Law has not been promulgated in some parts of Nigeria is a consequence of this cultural context. In many parts of Nigeria, including some of the Islamic states in the northern part of the country as well as other areas where customary law is dominant, children have very limited or no rights with respect to their religion and or its manifestation. The Child Rights Law is therefore a novel and fundamental challenge to these normative systems. The depth of opposition to the Act is evident in the way the Court proceeded in *Esanubor* without even a mention of the Child Rights Law. It is therefore important to state that the domestication of CRC and the African Children's Charter by the federal and state governments in Nigeria is not enough and that more work, especially in raising awareness, needs to be done to ensure that the provisions of the Child Rights Law are operationalised and become the legislative framework determining the rights of the Nigerian child.<sup>17</sup> As Professor Uzodike observed long before the passage of the Child Rights Law:<sup>18</sup>

[T]he less it is accepted within the Nigerian society that children are the property of their parents, the more the authorities will take these laws seriously and actually interfere in the exercise of certain rights which are inimical to the interests of children.

<sup>16</sup> The *Okonkwo* case (n 6 above) dealt with the professional negligence of a medical doctor who had respected the wishes of a Jehovah's Witness to refuse a blood transfusion and who had died thereafter. The Nigerian Supreme Court held in this case that the medical doctor was not guilty of professional misconduct because in respecting the wishes of the patient, the doctor was acting in furtherance of patients' rights to freedom of religion and privacy guaranteed by the 1979 Constitution of the Federal Republic of Nigeria.

<sup>17</sup> It is worth noting that family courts at the High and Magistrate's Court levels, as required by the Child Rights Law, have not been so established. See, eg, sec 149 of the Child Rights Act, which requires the establishment of a family court to hear and determine matters relating to children. It seems to follow that such a court will strive to uphold the provisions of the Child Rights Law.

<sup>18</sup> EN Uzodike 'Implications and limits of parental rights in Nigeria' (1990) 2 *African Journal of International and Comparative Law* 282 297.

## AFRICAN HUMAN RIGHTS LAW JOURNAL GUIDE FOR CONTRIBUTORS

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- First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.
- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34 above) 243.

- Use UK English.
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1  
2  
3.1  
3.2.1
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## CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 December 2009

Compiled by: I de Meyer

Source: <http://www.africa-union.org> (accessed 30 April 2010)

	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			17/02/09
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	
<b>TOTAL NUMBER OF STATES</b>	<b>53</b>	<b>45</b>	<b>45</b>	<b>25</b>	<b>27</b>	<b>3</b>

\* Additional declaration under article 34(6)

Ratifications after 31 July 2009 are indicated in bold

