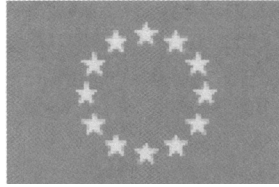


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Editorial

With the publication of this issue of the *African Human Rights Law Journal*, the second of 2010, we mark the end of the first ten years of the *Journal's* existence. In reaching this milestone, we look back with satisfaction and celebrate the fact that we have to a great extent achieved our two main objectives: to provide a forum for African voices often not commonly heard; and to stimulate discourse on human rights in Africa. As the present editors, we warmly thank everyone who has made it possible for the *Journal* to reach this milestone: the international editorial advisory board, editorial assistants, subscribers, contributors, reviewers and readers. Three individuals must be singled out: Christof Heyns, now chairing the international editorial advisory board, and who was one of the driving forces behind the *Journal* and part of the initial editorial team; Isabeau de Meyer, whose title of 'Publication manager' spectacularly fails to do justice to her dedication and incalculable contribution to ensure the high quality and regular and timely publication of the *Journal*; and Annelize Nienaber, now part of the editorial team, who has been responsible for implementing the *Journal's* approach of working with authors on the language editing of their contributions, where required.

Next year will see two commemorative events of particular significance to the *Journal*: On 27 June 2011 it will be 30 years since the adoption of the African Charter on Human and Peoples' Rights; and on 21 October 2011 it will be 25 years since its entry into force. Focusing on the second of these events, the *Journal* plans to devote the second issue of 2011 to papers providing historical perspectives of or overviews of developments in the African regional human rights system. We therefore invite contributions on the theme 'The significance of 25 years in the life of the African Charter'. These contributions should reach us by the end of May 2011. Selected authors may be invited to present their papers at a conference, co-organised by the *Journal* and the African Human Rights Moot Court Competition which, like the *Journal*, is a project of the Centre for Human Rights.

In the last six months of 2010 a number of important developments took place pertaining to the African regional human rights system. In July, at the African Union Assembly's session in Kampala, Uganda, the following four judges were elected to the African Court on Human and Peoples' Rights for six-year terms: Mr Fatsah Ouguergouz (Algeria); Mr Augustino SL Ramadhani (Tanzania); Mr Duncan Tambala (Malawi);

and Ms Elsie Nwanwuri Thompson (Nigeria). Mr Sylvain Ore (Côte d'Ivoire) was elected for a four-year term. The following members of the Committee of Experts on the Rights of the Child have also been elected for five-year terms: Ms Amal Muhammad Al-Hanqari (Libya); Mr Alfas M Chitakunye (Zimbabwe); Mr Benyam Dawit Mezmur (Ethiopia); Ms Fatima Delladj-Sebaa (Algeria); Mr Clement Julius Mashamba (Tanzania); and Ms Félicité Muhimpundu (Rwanda). (Benyam Dawit Mezmur is a regular contributor to this *Journal*; see for example the last contribution under 'Recent developments' in this issue.)

The vacancy on the African Commission on Human and Peoples' Rights which was left by Commissioner Melo who took up a position with UNESCO, was eventually filled by the election of Mrs Lucy Asuagbor, member of the judiciary of Cameroon, for the remaining three-year term. It should be noted that the terms of three of the most progressive commissioners come to an end after the next session of the African Commission. They are the present Chairperson (Commissioner Alapini-Gansou from Benin), the present Vice-Chairperson (Commissioner Malila from Zambia) and Commissioner Pansy Tlakula from South Africa. Civil society in the relevant countries should mobilise in time to ensure that these individuals are again nominated by their governments, and should work with others to ensure their re-election by the African Union Assembly in July 2011.

The African Union has also embarked upon devising a Human Rights Strategy and Governance Architecture. The next AU Assembly session, in January 2011, is earmarked for a discussion of 'African values'. As human rights may be viewed as the legal formulation of the normative consensus about human dignity and worth, this topic resonates with the 'values debate'. In this regard, the AU Assembly decision at its most recent meeting, in Kampala in July 2010, is disconcerting in its 'strong rejection' of 'any attempt to undermine the international human rights system by seeking to impose concepts or notions pertaining to social matters, including private individual conduct, that fall outside the internationally-agreed human rights legal framework, taking into account that such attempts constitute an expression of disregard for the universality of human rights' (Decision on the Promotion of Cooperation, Dialogue and Respect for Diversity in the Field of Human Rights, Assembly/AU/Dec.328(XV)). In our view, the AU debate on values should use as its starting point the numerous human rights treaties adopted by the OAU and AU, in particular the African Charter, the Protocol thereto on the Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child, the Charter on Democracy, Elections and Governance, and the Convention for the Protection and Assistance of Internally Displaced Persons. In respect of treaties that have entered into force, the jurisprudence and other interpretations of the treaty-monitoring bodies should supplement the understanding of these treaties.

In this regard, it is regrettable that the African Commission recently – by a slender majority – rejected the application of the Coalition of African Lesbians (CAL) for observer status. It is clearly untenable. The rights bearers under the African Charter are ‘everyone’, ‘every human being’ and ‘every individual’ (see articles 2 to 17 of the Charter). These rights are thus available to everyone without any distinction. This position is underlined in article 2 of the Charter, which provides that there is no ground on which any person may be denied the protection of the Charter. In other words, every person enjoys the Charter’s rights, irrespective of her or his sexual orientation or gender identity. (Such an interpretation is supported by articles 60 and 61 of the Charter: ‘Sex’, one of the specific grounds for non-discrimination in article 2, has also been interpreted by the UN Human Rights Committee in *Toonen v Australia* to include ‘sexual orientation’; and the Commission is empowered to have reference to international law in interpreting the Charter by virtue of these two articles.)

The decision to refuse the application is similarly incompatible with the African Commission’s own practice, since the Commission itself has on numerous occasions acknowledged that the rights of sexual minorities are included in its mandate. This inclusive approach appears from the exercise of the Commission’s principal mandate to examine state reports. On numerous occasions, the Commission posed questions on the situation of sexual minorities during the examination of state reports. In one notable example, when it examined Cameroon’s state report, in October 2006, not only did three of the commissioners pose questions related to the abuse of 11 gay men’s rights, but the Commission as a whole included ‘concern for the upsurge of intolerance towards sexual minorities’ in its official record of the proceedings, the Concluding Observations. In addition, special mechanisms of the Commission have also on numerous occasions engaged with and protected the rights of sexual minorities. The Commission has also made reference to the prohibition of discrimination on the grounds of sexual orientation in its case law. (See *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005) para 169.)

For many years now, the African Commission has allowed numerous ‘mainstream’ non-governmental organisations (NGOs) with observer status to raise, during public sessions, issues pertaining to the protection of the rights of gays, lesbians and other sexual minorities. The logical conclusion from this practice is that an NGO with a direct interest in these issues is better placed to raise these issues and should therefore be granted observer status.

In this issue, contributing authors cover aspects of the human rights systems in particular countries: Ethiopia, Kenya, Malawi, Nigeria and South Africa. For instance, De Wet and Du Plessis deliberate on the meaning for constitutional environmental rights in South Africa of certain substantive obligations distilled from international human rights instruments; Asaala explores transitional justice as a vehicle for social

and political transformation in Kenya; Abebe explores more liberal standing rules to enforce constitutional rights in Ethiopia; and two articles deal with education in Nigeria – one by Akinbola and another by Coetzee.

We acknowledge with appreciation and sincerely thank the independent reviewers who gave their time and talents to ensure the consistent quality of the *Journal*: Ernest Ako, Yvonne Dausab, Lee Anne de la Hunt, Solomon Dersso, Solomon Ebobrah, Yonatan Fessha, Jacqui Galinetti, Paul Graham, Ilze Grobbelaar-Du Plessis, Michelo Hansungule, Victor Jere, Thoko Kaime, Serges Djoyou Kamga, Ivy Kihara, Magnus Killander, Joanna Mansfield, Remember Miamingi, George Mukundi, Godfrey Musila, Thandabantu Nhlapo, Dejo Olowu, David Padilla, Don Rukare, Werner Scholtz, Ann Skelton, Gina Snyman, Nahla Valji, Johan van der Vyver and Dunia Zongwe.

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Reflections on the right to development: Challenges and prospects

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Summary

The right to development is one of the most contested rights, continuing to attract the attention of academics, international lawyers and scholars in the development discourse. Since the adoption of the United Nations Declaration on the Right to Development in 1986, the question whether a legal right to development exists, particularly in the context of states' rights, is unresolved. The article seeks to explore the challenges and prospects of recognising the right to development as a legal right. In making such an inquiry, the article discusses the legal framework governing the right to development, the theoretical controversies surrounding its articulation and the prospects of its implementation. Beyond reinvigorating the discussion on the right to development, the article aims to give the reader new insights on the subject.

1 Introduction

Human rights are the product of the human struggle throughout history. The right to development in an international context is partly the result of the struggle of developing countries for a new international economic order.¹ The right to development belongs to third generation rights, which includes the right to a healthy environment and the

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¹ The collective struggle of developing countries for the establishment of an international order that favours their special needs culminated in the adoption of the UN Declaration on the Establishment of a New International Economic Order; GA Res 3201(S-VI) UN GAOR 6th special session Agenda Item 6, 2229th plen mgt at UN Doc A/RES/3201(S-VI) (1974).

right to peace.² According to the proponents of third generation rights all actors, including the state, the individual, public and private firms and the entire international community have to make an effort to realise these rights.³ Supporters of third generation rights stress the danger posed by globalisation to existing human rights structures. This renders individual states, acting alone, unable to satisfy the obligations imposed by international human rights instruments.⁴

Since the idea of a right to development was born, the subject has been the focus of human rights and development literature. The idea was conceived in 1972 in an inaugural lecture at the International Institute of Human Rights in Strasbourg by Senegalese jurist and the then head of the United Nations High Commission on Human Rights, Keba M'Baye.⁵ From the moment of its inception, developing countries advocated the inclusion of the right to development as a human right through the United Nations (UN). This advocacy culminated in 1986 in the adoption of the Declaration on the Right to Development, which recognised the right to development as a fundamental principle of human rights.⁶ Subsequently, scholars from the south articulated the notion and enumerated the possible subjects and objects of the right, while jurists from the north questioned whether such a right existed at all.⁷

The right to development was reaffirmed by the Vienna Declaration and Programme of Action (Vienna Declaration) adopted by 171 countries participating in the World Conference on Human Rights in 1993, as a universal and inalienable right and an integral part of fundamental human rights.⁸ The African Charter on Human and Peoples' Rights (African Charter), adopted in 1981, in article 22 expressly incorporates

² O Sheehy 'The right to development and the proliferation of rights in international law' (2002) 5 *Trinity Law Review* 253.

³ Sheehy (n 2 above) 254.

⁴ R Rich *The right to development: A right of peoples?* (1992) 312, cited by Sheehy (n 2 above) 254.

⁵ K M'Baye 'Le droit au développement comme un droit de l'homme' in *Revue internationale des droits de l'homme* (1972), cited in RL Barsh 'The right to development as a human right: Results of the Global Consultation' (1991) 13 *Human Rights Quarterly* 322.

⁶ Declaration on the Right to Development adopted by General Assembly Resolution 41/128 (4 December 1986).

⁷ Barsh (n 5 above) 322. With respect to scholars from the south, see also M'Baye (n 5 above); UN Independent Expert on the Right to Development; A Sengupta 'Implementing the right to development' in N Schrijver & F Weiss (eds) *International law and sustainable development: Principles and practices* (2004) 15; TA Aguda *Human rights and the right to development in Africa* (1989). For arguments forwarded by academics from the north, see J Donnelly 'In search of the unicorn: The jurisprudence and politics of the right to development' (1985) 15 *California Western International Law Journal* 475.

⁸ Vienna Declaration and Programme of Action A/CONF 157/23 (12 July 1993).

this right; in fact, it is the only legally-binding international document containing an express recognition of the right to development.⁹

Under the UN, initiatives to implement the right to development were incorporated through its Charter-based bodies such as the Economic and Social Council (ECOSOC) and resolution-based working groups. In 1989, the UN Commission on Human Rights established a Global Consultation on the Realisation of the Right to Development as a human right, involving experts with relevant experience, representatives of the UN system, including its specialised agencies, regional intergovernmental organisations and non-governmental organisations (NGOs).¹⁰ Currently, the UN is making efforts to implement the principles of the right to development through the Working Group on the Right to Development and the Special Task Force on the Right to Development.¹¹ Although there are still legal and theoretical controversies surrounding the notion of the right to development, the emerging consensus on the subject and the initiative of the UN under the Working Group on the Right to Development reinvigorate the prospects of its implementation.

2 The legal framework

Although the legal foundation of the right to development was laid in 1986, its genesis may be traced to the Universal Declaration of Human Rights (Universal Declaration) and the subsequent international covenants. The Universal Declaration, by proclaiming the right of individuals to be free from fear and want, aspires towards the creation of an international order where the human rights of individuals may be enjoyed to the fullest extent. These principles were later incorporated under binding international treaties that impose obligations on states to respect, protect and fulfil human rights. As a composite right that incorporates other rights, it may be said that the right to development was implicitly recognised in the international Bill of Rights.

It should be pointed out that the right to development has unique features that characterise it as a separate and independent right. Its emphasis on establishing a fair international economic order, the pivotal role that it plays in the development discourse, as well as its comprehensive nature are some of the elements that necessitate its characterisation as a separate right. This right encourages an interdisciplinary analysis of human rights and tries to fill in the inadequacies of the existing human rights system. It provides an opportunity to

⁹ African Charter on Human and Peoples' Rights, adopted 27 June 1981.

¹⁰ UN Commission on Human Rights Resolution 1989/45 (6 March 1989) 'The Realisation of the Right to Development' Global Consultation on the Right to Development as a Human Right HR/PUB/91/2 United Nations, New York (1991).

¹¹ Open-Ended Working Group on the Right to Development E/CN/4 RES/1998/72.

strengthen the efforts of the international community to examine and address international human rights challenges in a wide and comprehensive context. Currently, the UN, under the High-Level Task Force on the Right to Development, serves as an important forum where states, international financial institutions (IFIs), inter-governmental organisations and other development actors meet to solve the challenges of ensuring development, particularly in the developing world.

2.1 Universal Declaration of Human Rights – A precursor to the right to development

The Universal Declaration, by incorporating civil and political rights as well as social, economic and cultural rights, laid the foundation of the concept. In its Preamble, the Universal Declaration reiterates the obligation of member states under the UN Charter to promote universal respect for and observance of human rights and fundamental freedoms.¹² In its promise of ‘larger freedom’; it emphasises social progress and the achievement of a better standard of living. It aims at achieving a social and international order that ensures the realisation of all the rights enshrined in the Declaration.¹³

By incorporating all categories of rights, the indivisibility and universality of human rights are articulated. The greatest achievement of the Universal Declaration was, in fact, its inclusion of economic, social and cultural rights. According to the Universal Declaration economic, social and cultural rights are indispensable for a person’s dignity and the free development of a person’s personality.¹⁴

The issues outlined here have important elements related to the concept of the right to development. The incorporation of social, economic and cultural rights, in particular, serves a ‘dual function of freedom and equality’ which the right intends to achieve.¹⁵ By emphasising the significance of creating an international order where all human rights may be enjoyed to the fullest extent, it laid the foundation for the content of the right to development. The two international Covenants of 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), transformed the contents of the Universal Declaration into legally-binding treaties, thereby strengthening the enforcement of these rights.

¹² Universal Declaration of Human Rights, adopted 10 December 1948, Preamble para 6.

¹³ Preamble, para 5 Universal Declaration.

¹⁴ Arts 22 & 25 Universal Declaration.

¹⁵ BA Andreassen & S Marks (eds) *Development as a human right: Legal, political and economic dimensions* (2006) 241.

2.2 Declaration on the Right to Development

In 1977, the UN Commission on Human Rights adopted a resolution which for the first time formally recognised the right to development as a human right. The resolution called on the Secretary-General to undertake a study on 'the international dimensions of the right to development as a human right in relation to other human rights based on international co-operation'.¹⁶

In 1979, the Secretary-General published a report which laid down the ethical and legal foundation for the right to development. The report states:¹⁷

There are a variety of ethical arguments which may be considered to support the existence in ethical terms of a right to development. These include the fact that development is the condition of all social life, the international duty of solidarity, the duty of reparation for colonial and neo-colonial exploitation, increasing moral interdependence, economic interdependence, and the cause of world peace, which is threatened by underemployment.

The report of the Secretary-General highlights the major reason behind the articulation of the notion of the right to development. It is a claim for global justice and equity. Developing countries felt that if human rights are to be realised for all, not only the nation state but also the international community at large should bear this responsibility. The increasing interdependence among nations as a result of globalisation makes unilateral development endeavours fruitless unless backed by international co-operation. Hence, a concerted effort is needed to solve primarily the problem of poverty in developing countries through international co-operation, not as a matter of charity but as a matter of responsibility.

In November 1979, the UN General Assembly passed a resolution recognising the right to development as a human right.¹⁸ Subsequently, the General Assembly proclaimed and adopted the Declaration on the Right to Development (Declaration) by a vote of 146 to one, with eight abstentions.¹⁹ The adoption of the Declaration showed an overwhelming support for the recognition of the right to development as a human right. The single dissenting vote from the United States and the eight abstentions came from developed countries, showing the negative attitude of these countries towards the idea of a right to development.

The Declaration includes 10 provisions which define the content of the right, the right holders and duty bearers. Development as defined

¹⁶ UN Doc E/CN.4/SR1389, 1392-98 (1977), Resolution 5 (XXXIII) para 4.

¹⁷ UN Doc E/CN.4/1334 (1979). For a further discussion on the ethical grounds of the RTD, see RY Rich 'The right to development as an emerging human right' (1983) 23 *Virginia Journal of International Law* 322.

¹⁸ General Assembly Resolution 34/46 (1979).

¹⁹ The United States of America was the only country that cast a vote against the Declaration, while Denmark, Finland, the Federal Republic of Germany, Iceland, Israel, Japan, Sweden and the United Kingdom abstained.

in the Declaration is a comprehensive process that goes beyond economics and covers social, cultural and political fields to achieve the continuous improvement of the well-being of human beings.²⁰ This definition differs from the traditional definition which views development as a simple expansion of gross domestic product (GDP), industrialisation or capital inflows.²¹ The traditional understanding that development is just an increase in GDP has thus been abandoned, thereby paving the way for this new conception.²²

According to the Declaration, the right to development refers to a process of development that leads to the fulfilment of all human rights through a rights-based approach that takes account of international human rights standards,²³ participation,²⁴ non-discrimination,²⁵ accountability,²⁶ transparency and equity in decision making and sharing the benefits of the process.²⁷ Both the process of development and its objectives are, thus, important components of the right to development.

The emphasis given to the process of development as a basic component of the right to development is reflected in many of its provisions. For example, it states that the development process should be ‘the constant improvement of the well-being of the entire population and of all individuals, on the basis of their free and meaningful *participation*’.²⁸ It further states that the purpose of development should be to ensure ‘*equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income*’.²⁹

The purpose of a development process, according to the Declaration, is aimed at the full realisation of all human rights, that is, civil and political as well as social, economic and cultural rights.

2.3 Vienna Declaration and Programme of Action

The Vienna Declaration was a turning point for the general human rights discourse and the right to development in particular.³⁰ It laid down an important precedent by stating that all human rights, that is, civil and political rights as well as social, economic and cultural rights,

²⁰ Art 1 Declaration on the Right to Development.

²¹ Andreassen & Marks (n 15 above) 11.

²² A Eide ‘Human rights requirement to social and economic development’ (1996) 21 *Food Policy* 23.

²³ Art 6 Declaration on the Right to Development.

²⁴ Art 1(1) Declaration on the Right to Development.

²⁵ Art 5 D Declaration on the Right to Development.

²⁶ Arts 3, 4 & 10 Declaration on the Right to Development.

²⁷ Art 2(3) Declaration on the Right to Development.

²⁸ Art 2(3) Declaration on the Right to Development (my emphasis).

²⁹ Art 8(1) Declaration on the Right to Development (my emphasis).

³⁰ Vienna Declaration (n 8 above).

are universal, indivisible, interdependent and interrelated. Reiterating the significance of the right to development, the Declaration specifically states:³¹

The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.

The Declaration was significant in that it reflected a fundamental consensus on the inalienable, universal and interdependent nature of human rights in general. The consensus was also important as some countries that made reservations to the adoption of the Declaration, including the United States, which cast the only single objection against the adoption of the Declaration, accepted the right to development as a fundamental human right.

2.4 African Charter on Human and Peoples' Rights

The African Charter is the only supra-national human rights instrument that recognises the right to development as a legally-binding and enforceable right. The African Charter included this right as a human right long before the adoption of the Declaration on the Right to Development by the General Assembly. As discussed above, it was also the product of an African intellectualism that gave rise to the notion of the right to development. Because of this, the right is considered as a uniquely African contribution to the international human rights discourse.³²

The Preamble of the African Charter highlights the special emphasis given to the right to development by stating that it is 'essential to pay particular attention to the right to development' and civil and political rights and social, economic and cultural rights cannot be dissociated from each other.³³ Article 22, which spells out the normative basis of the right to development, states:

All peoples have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually and collectively, to ensure the exercise of the right to development.

The inclusion of this provision in the African Charter is significant to enriching the content of the right to development and its jurisprudence. The African Commission on Human and Peoples' Rights (African Commission), in its landmark decision of the *Ogoniland* case, stated that the

³¹ Art 10 Vienna Declaration.

³² BS Santos *Towards a new common sense: Law, science and politics in the paradigmatic transition* (1995) 357; see also M Bedjaoui *The right to development in international law: Achievements and prospects* (1991), cited in RW Pery 'Rethinking the right to development: After the critique of development, after the critique of rights' (1996) 18 *Law and Policy* 228.

³³ Preamble, para 9 African Charter.

state of Nigeria, by failing to protect the people of Ogoni, has violated their right to food implicitly incorporated in the right to development.³⁴

More clear findings of a violation of article 22 of the African Charter are also found in the *DRC case*³⁵ and the *Endorois case*.³⁶ In the *Endorois case*, the applicant alleged that

the Endorois' right to development has been violated as a result of the respondent state's creation of a game reserve and the respondent state's failure to adequately involve the Endorois in the development process.

In response to this allegation, the African Commission stated that 'the Endorois community has suffered a violation of article 22 of the Charter'.³⁷ In coming to this finding, the African Commission reiterated the importance of the right to be consulted and the importance of participation in the development process as key components of the right to development which the respondent state failed to meet in accordance with the requirements of article 22.³⁸ The Commission also emphasised the *constitutive* and *instrumental* role of the right to development serving both as a means and an end.³⁹ Accordingly, a violation of either the procedural or substantive elements of the right to development will be a violation of article 22 of the African Charter. The Commission, noting the complainant's submissions, stated that the right to development requires five main elements:⁴⁰

It must be equitable, non-discriminatory, participatory, accountable and transparent, with equity and choice as important, overarching themes in the right to development.

Ruling on whether these conditions were met, the African Commission stated that the inadequacy of the consultation made by the respondent state with the Endorois community and the lack of choice of the Endorois community to remain in their land, leaving them with no choice but to leave their land, failed to meet the requirements of article 22 and was a violation of the right to development.⁴¹

State reports that are submitted periodically by state parties also provide another opportunity for the African Commission to monitor the compliance of member states to ensure the right to development. Each

³⁴ *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 64.

³⁵ *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004) para 95.

³⁶ Communication 276, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2003) 27th Activity Report of the African Commission, para 269.

³⁷ *Endorois case* (n 36 above) para 298.

³⁸ *Endorois case* (n 36 above) paras 297 & 298.

³⁹ *Endorois case* (n 36 above) para 277.

⁴⁰ As above.

⁴¹ *Endorois case* (n 36 above) para 279.

state party has to show the efforts it has taken to ensure each of the rights incorporated under the Charter.⁴² In some of the state reports that the author consulted, some important elements of the right to development were reflected.⁴³

It is also interesting to see that the right to development is included in national constitutions of African countries, including Ethiopia. The Constitution of the Federal Democratic Republic of Ethiopia *inter alia* reiterates to ensure the rights of the people of Ethiopia as a whole and each nation, nationality or people to improved living standards and to sustainable development.⁴⁴ One of the most interesting aspects of this provision also makes direct reference to essential elements of the Declaration on the Right to Development. It states that 'nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community'.⁴⁵ Similarly, Uganda and Malawi incorporate the right to development in their national constitutions.⁴⁶ This shows that the right to development can, indeed, be included in binding human rights instruments both nationally and regionally as well as in an international context if there is a political commitment.

In general, the work of the African Commission as well as the African Court on Human and Peoples' Rights (African Court) will make an important contribution in the development of the jurisprudence of the right to development. It is important to note that the cross-pollination of international and regional human rights systems has made a significant contribution to the general human rights discourse. As the only regional human rights system that incorporates the right to development, other regional human rights systems and the international human rights system in general may benefit from this emerging jurisprudence.

2.5 Right to development as part of customary international law

Some scholars contend that the series of resolutions and declarations on the right to development have transformed it into a norm of *jus*

⁴² Art 62 African Charter.

⁴³ See the 3rd and 4th Periodic Report of Algeria (2006). This report stated that the state was concerned with *equitable distribution of the benefits of development* and this was supported by statistical data on the measures taken to fulfil socio-economic rights. See also the 8th, 9th and 10th Periodic Reports of the Democratic Republic of Congo (2007) para 208.

⁴⁴ Art 43(1) Ethiopian Constitution.

⁴⁵ Art 43(2) Ethiopian Constitution.

⁴⁶ See the Constitution of the Republic of Uganda, National Objectives and Directive Principles of State Policy, Objective IX and the Constitution of the Republic of Malawi, art 31.

cogens that creates a legal obligation on states.⁴⁷ Dugard states that ‘an accumulation of declarations and resolutions on a particular subject may amount to evidence of collective practice on the part of states’ and hence may constitute a customary rule.⁴⁸

Although contentious when the Declaration was adopted, the subsequent declarations, resolutions and decisions of UN human rights bodies and international conferences have shown that there is a major consensus emerging to respect the principles of the right to development. Bedjaoui contends that ‘the right to development is, by its nature, so incontrovertible that it should be regarded as belonging to a norm of *jus cogens*’.⁴⁹ A more elaborate discussion on this issue in the context of development assistance is presented in section 5 below.

3 Subjects and duty bearers

Developing countries were for many years in favour of the idea of a right to development in the context of state rights only.⁵⁰ The current general understanding is that, depending on the context, different categories of entities may be the subjects of the right to development. These include individuals, peoples and states. With respect to individuals, as much as they are the central subjects of the right to development, they also have a duty ‘to promote and protect an appropriate political, social and economic order for development’.⁵¹ Every person has the duty to be able to develop his or her personality that would enable him or her to lead a worthy and dignified life. Individuals also have the duty to help their family and the larger community to ensure the right to development. Thus, they should be active participants in development planning as well as in all the processes of implementation.

Individual states are the traditional duty bearers in respect of human rights, including the right to development. This traditional notion is also emphasised by the Declaration in that it makes it clear that states, both individually and *collectively*, have the *primary responsibility* to create national and international conditions favourable to the realisation of the right to development.⁵² In the first place, the fundamental obligation for ensuring development lies within each nation state. It has the obligation to undertake all measures necessary for the realisation

⁴⁷ M Bedjaoui *International law achievements and challenges* (1991), cited in H Steiner & P Alston (eds) *International human rights in context: Law, politics and morals* (2000) 1321.

⁴⁸ J Dugard *International law: A South African perspective* (2005) 34.

⁴⁹ Bedjaoui (n 47 above) 1323.

⁵⁰ J Makarczyk *Principles of a new international economic order* (1988) 186, cited in SR Chowdhury *et al* (eds) *The right to development in international law* (1992) 11.

⁵¹ Art 2(2) Declaration on the Right to Development.

⁵² Art 3(1) Declaration on the Right to Development.

of the right to development and the progressive enhancement of the right.⁵³

Much of the impetus for the adoption of the Declaration centred on the needs of developing countries.⁵⁴ The UN General Assembly also adopted the Charter of Economic Rights and Duties of States which reaffirmed the responsibility of every state to promote economic, social and cultural development of its own people and those of developing countries.⁵⁵ These may include financial and technical assistance, providing better terms of trade, and the transfer of technology to developing countries.⁵⁶

The Declaration emphasises the crucial importance of international co-operation. It states that states have a duty 'to co-operate with each other in ensuring development and eliminating obstacles to development',⁵⁷ to promote universal respect for and observance of all human rights and fundamental freedoms.⁵⁸

The duty to co-operate also exists in international human rights treaties. In respect of socio-economic rights, there is a collective duty for countries that have ratified ICESCR to promote the fulfilment of socio-economic rights.⁵⁹ In its General Comment on the Nature of States Parties' Obligations, the ESCR Committee stated that the phrase 'to the maximum of its available resources' was intended to include both resources existing within a state and those available from the international community, clearly indicating the obligations of the international community, in particular that of the developed countries, in that regard.⁶⁰

4 Concerns of justiciability and feasibility

There are two major concerns that are raised against the right to development as a human right, namely that of justiciability and feasibility. In the following section the article discusses these arguments.

⁵³ Arts 2, 3, 7 & 10 Declaration on the Right to Development.

⁵⁴ Report of the Secretary-General on the International Dimensions of the Right to Development as a Human Right UN ESCOR 35th session paras 152-159, UN Doc E/CN.4/1334 (1979). See also Report of the Open-Ended Working Group of Governmental Experts on the Right to Development UN ESCOR 45th session para 25 UN Doc E/CN.4/1989/10 (1989).

⁵⁵ GA Res 3281 (XXIX), UN GAOR, 2nd Comm, 29th session, Agenda Item 48 arts 7 & 9, UN Doc A/RES/3281 (XXIX) (1975).

⁵⁶ GS Vargas *The new international economic order legal debate* (1983) 39 42-43, cited in ID Bunn 'The right to development: Implications for international economic law' (1999-2000) 15 *American University International Law Review* 1431.

⁵⁷ Art 3(3) Declaration on the Right to Development; see also art 4(2).

⁵⁸ Art 5 Declaration on the Right to Development.

⁵⁹ Art 2 ICESCR.

⁶⁰ General Comment 3 para 13.

4.1 Concerns of justiciability

From a theoretical perspective, positivists consider an element of formal validity a fundamental and essential attribute of a right.⁶¹ Similar to the arguments that are usually raised against socio-economic rights, much of the opposition against the notion of the right to development emanates from the allegedly non-justiciable nature of the right. Criticism gains strength due to the comprehensive nature of the notion of the right to development itself and the declaratory nature of its normative content.

From a legalistic perspective, critics of the right to development argue that it was adopted only as a declaration of the General Assembly and does not have a binding nature as is the case with a multilateral treaty.⁶² They point out that, in other international human rights instruments, state parties have obligations to protect, respect and fulfil different categories of rights. Donnelly, one of the prominent critics on the right to development, characterises the right as a ‘search for the unicorn’ and contends that it is pointless within the framework of international legal argument.⁶³ He notes that its language confuses rights with moral claims without indicating specific right holders and duty bearers.

The closest that the UN General Assembly has come to prescribe the requirements for a norm to be considered a human right is Resolution 41/120 of 1986.⁶⁴ The General Assembly noted that new human rights instruments should, among others, ‘be sufficiently precise [as] to give rise to identifiable and practicable rights and obligations [and] to provide, where appropriate, realistic and effective implementation machinery, including reporting systems’.⁶⁵ Two separate requirements are laid down under Resolution 41/120. The first requirement is that any right articulation needs to have normative precision.⁶⁶ It is said that the term ‘identifiable’ requires a degree of specificity as to the content of the right. In the case of the right to development, the Declaration on the Right to Development sets out the nature and content of the right as well as the right holders and duty bearers and hence meets the requirements of Resolution 41/120. This, however, does not mean that the content of a certain human right has to give a complete picture of its meaning and application. Initially all human rights, such as equal protection or due process, emerge as general and imprecise formulations.

⁶¹ S Marks ‘Making space for new human rights: The case of the right to development’ (1998) 1 *Harvard Human Rights Yearbook* 3, 33.

⁶² L Irish ‘The right to development versus a human rights-based approach to development’ (2005) 3 *International Law Journal of Civil Society* 6.

⁶³ Donnelly (n 7 above) 475.

⁶⁴ GA Res 41/120, para 4 (d), 41 UN GAOR Suppl (No 53), UN Doc A/41/53 (1986).

⁶⁵ As above.

⁶⁶ As above.

The second requirement of Resolution 41/120 is that new instruments should 'provide, where appropriate, realistic and effective implementation machinery, including reporting systems'.⁶⁷ This requirement raises two fundamental questions. The first is whether implementation mechanisms are always required and, secondly, whether a reporting system *per se* is sufficient.

With respect to the first, the inclusion of the phrase 'where appropriate' may be intended to imply that new rights could be proclaimed without a simultaneous implementation provision. It may also be that supervision mechanisms in existing instruments are adequate. In relation to the second possibility, it has for long been accepted by most prominent international lawyers that an international system for the 'supervision' of states' compliance with international human rights obligations is sufficient to satisfy the requirements of 'enforceability'.⁶⁸

The right to development is 'a [composite] of rights' encompassing civil and political as well as socio-economic rights'.⁶⁹ Thus, from a traditional conception of justiciability, it would be difficult to enforce this whole set of rights in a formalised and rigid judicial or quasi-judicial body. Nevertheless, the right to development is a legally-enforceable human right reaffirmed in the Declaration on the Right to Development and numerous other declarations and resolutions of the General Assembly and its subsidiary bodies. The manner in which this right may be implemented is something that is evolving under its Working Group on the Right to Development; yet it suffices to say that it is a legal right with identifiable duty bearers. One has to recognise that much of the international human rights mechanism is based on supervision and implementation rather than adjudication, and hence the right to development can well fit under such a system. Thus, depending on the nature of the right, the nature of the obligations involved and the factual circumstances, judicial remedies are not the only ways of implementing a right.

Although no concrete enforcement mechanism has yet been established for the right to development under a treaty-based system, there is no reason why it cannot be done in the future. Whenever there is political will, a binding international human rights treaty may be devised within the framework of the right to development. Moreover, the Working Group, through the Special Task Force, serves as a supervising organ for different development actors, including developed countries, international financial institutions and other inter-governmental organisations complying with the principles of the right to development. The experience of the Working Group and the Special

⁶⁷ As above.

⁶⁸ H Lauterpacht *An international bill of the rights of man* (1945), cited in Marks (n 61 above) 38.

⁶⁹ Andreassen & Marks (n 15 above) 5.

Task Force on the Right to Development demonstrates that a supervisory mechanism may be devised in the framework of the right.

The experience of the African Charter clearly demonstrates that the right to development could be justiciable under a supra-national human rights system if there is the political commitment of states in that regard. The landmark decisions of the African Commission in the *Endorois*⁷⁰ and *DRC* cases⁷¹ show that the judicial application of the right to development is feasible in the current legal discourse. Thus, one can say that serious concerns about justifiability cannot be raised in the case of a failure to implement the right to development.

4.2 Concerns of feasibility

The second major objection to the idea of a right to development stems from the fact that development is not likely to be fulfilled for all.⁷² Much of the argument for the realisation of socio-economic rights arises from this as detractors argue that the full enjoyment of these rights is impossible and hence one should abandon attempts to realise such rights. This conception puts the right to development and most socio-economic rights which are central to it outside the scope of human rights. They argue that it would not be feasible to fulfil and guarantee these rights for all, especially in developing countries where there is a formidable resource barrier.

This argument has been attacked by prominent scholars, including Sen. Sen contends that feasibility should not be a standard by which the cogency of human rights is measured when the objective itself is to work towards expanding their feasibility and full realisation.⁷³ The fact that certain rights cannot be realised under current circumstances does not rule out the fact that they are rights.

Efforts are being made under the UN not only to articulate and elaborate the notion of the right to development, but also regarding its implementation. First, under the Global Consultation on the Right to Development and later on under the Working Group on the Right to Development, the UN has been working towards a meaningful realisation of the right to development through consultations with IFIs, intergovernmental organisations and other development actors.⁷⁴

In general, the series of international agreements, custom and practices have created legal obligations on states and other non-state actors for which they will be accountable. Because of this, it may be said that the right to development satisfies the characteristics of a human right by identifying specific duty bearers and specifying their obligations

⁷⁰ *Endorois case* (n 36 above).

⁷¹ *DRC case* (n 35 above).

⁷² Andreassen & Marks (n 15 above) 6.

⁷³ As above.

⁷⁴ Open-Ended Working Group (n 11 above).

and the corresponding national,⁷⁵ regional⁷⁶ and international monitoring and enforcement mechanisms. It is also important to note that the discourse of international human rights law adopts notions of implementation and supervision rather than those of justiciability and enforceability.⁷⁷ This fits with the current trend on implementing the right to development through the Working Group on the Right to Development.

5 Does the right to development include a right to development assistance?

One of the most controversial aspects of the concept of the right to development is whether it can be claimed as a right to development assistance by developing countries from developed countries. Official development assistance or foreign aid has been one of the major ways of ensuring international economic co-operation.⁷⁸ Other ways of bilateral and multilateral economic co-operation include market access through preferential trade liberalisation, incentives to increase investment flows and technology transfer and debt relief. The concessional nature of official development assistance, the failure of developing countries to successfully attract private investors and generate sufficient market returns to provide incentives, makes it indispensable in the context developing countries. Official development assistance makes a significant contribution in financing activities which have important social returns such as education, nutrition, health, housing and other items of social development; all crucial to realize the right to development.⁷⁹ Because of this, the discussion would focus on official development assistance in the context of the right to development.

On the one hand, developed countries have argued that the right to development does not create any legal obligation on their part to economically or technically assist developing countries. They contend that if there is any obligation to that effect, it is merely moral. From the perspective of developed countries, international assistance is given for three major reasons. The first reason is purely based on moral grounds and sees it as a compassionate response to extreme poverty in developing countries. The second is based on the enlightened self-interest of developed countries to ensure political stability, social cohesion, human security and economic prosperity in developing countries. Lastly, development assistance is also motivated by international

⁷⁵ See art 43 of the Ethiopian Constitution which expressly guarantees the right of the people of Ethiopia to development.

⁷⁶ Art 22 African Charter.

⁷⁷ Marks (n 61 above) 35.

⁷⁸ A Sengputa *et al* (eds) *Reflections on the right to development* (2005) 93.

⁷⁹ As above.

solidarity, that is, a common desire of all nations to address common problems and deal with issues that reach across borders, such as environmental protection.⁸⁰

On the other hand, developing countries have argued that the right to development includes the right to seek development assistance from developed countries. Slavery, colonialism and the neo-colonial socio-economic hegemony of the North are raised as justifications for the legal right of states to seek development assistance from developed countries. A broader obligation of states to co-operate has its foundation in article 56 of the UN Charter and article 28 of the Universal Declaration. These two provisions impose a broader international duty to co-operate.⁸¹

In trying to analyse whether official development assistance forms part of the legal obligations of developed countries, it is important to consider state practice in this regard. Official development assistance is commonplace and the existence of this widespread practice raises the question whether official development assistance has become a legal obligation of developed countries. The United States unilaterally began development aid programmes in 1949. Subsequently, other Western countries followed and, by the 1950s, they were providing aid that counts for one per cent of their GDP. Currently, all members of the Organisation for Economic Co-operation and Development (OECD) and members of the Organisation of Petroleum Exporting Countries (OPEC) are continuously providing development assistance to developing countries and they consider this as one of their serious and demonstrated national objectives. In the Millennium Declaration, developed countries pledged to provide 0,7 per cent of their GDP to development assistance.

Many scholars, including Schachter, argue that international law relating to development includes a 'new conception of entitlement to aid and preferences based on need'.⁸² The widespread practice and the long history of providing aid and preferences made to developing countries demonstrate evidence of the acceptance by developed countries of this new responsibility and hence the fulfilment of the necessary *opinio juris*. Moreover, many countries consider the obligation to provide official development assistance as part of their domestic law. The fact that official development assistance has been continuing for decades, even in the presence of domestic criticism, further strengthens the fact that developed countries consider themselves legally obliged to do so. In general, on the basis of state practice, one can conclude that official development assistance and the general obligation to provide aid are part of international law and forms an integral part of the right to development.

⁸⁰ OECD *Shaping the 21st century: The contribution of development co-operation* (1996).

⁸¹ Steiner & Alston (n 47 above) 1319.

⁸² Sengputa *et al* (n 78 above) 10.

6 Way forward

6.1 Necessity of a binding international treaty

Although I maintain that the right to development is a legal right, I have to concede the fact that one of the major problems in its implementation, from a global perspective, is the nature of the Declaration on the Right to Development. The normative basis of the right to development still remains in the 1986 Declaration. Unlike a treaty that has the effect of imposing a legally-binding obligation on ratifying states, a declaration merely shows a willingness and the statement of intent by a state to give effect to the principles embodied in the declaration. Moreover, the 10-provision Declaration is written less specifically and most of its provisions are framed in a general manner. An international treaty on the right to development would be indispensable, not only in terms of having a legally-binding international obligation, but also in terms of coming up with more specific and elaborate legal obligations that have greater normative precision.

One would think that, given the negative attitude of developed countries towards the notion of a right to development, there would be no chance that a binding international treaty will be adopted. Nevertheless, the recent attitude of developed countries shows that they are accepting the right, at least on theoretical grounds. In the Vienna Declaration, which was important for the universality, interdependence and indivisibility of human rights, many developed countries that were against the idea of the right to development adopted and endorsed the inherent nature of the right to development as a fundamental human right.

This changed attitude of developed countries towards a notion of a right to development and the general emerging consensus call for efforts to come up with a binding international human rights instrument. The UN, through the Human Rights Council, should take the initiative in drafting the treaty and taking the whole process of adopting a treaty on the right to development. This in many ways strengthens implementation mechanisms already initiated under the UN through the Working Group on the Right to Development.

One may wonder how a new treaty on the right to development will take shape, given its comprehensive nature and issues of justiciability and feasibility. In this regard, the lessons to be drawn from the recently-adopted Convention on the Rights of Persons with Disabilities are significant. Some commentators state that the recent Convention expresses new developments in human rights thinking which are important in the context of the right to development.⁸³ The inclusion in the new treaty of the possibility of ratification by intergovernmental

⁸³ AE Gouwenberg 'The legal implementation of the right to development' unpublished LLM thesis, Leiden University (2009).

organisations and the provision of a monitoring body which would receive collective complaints are significant developments in this regard.

Gouwenberg also states that another option could be to adopt a framework convention on the right to development similar to the UN Framework Convention on Climate Change (UNFCCC).⁸⁴ Framework conventions are treaties which show the commitment of states on principles that will be developed in order to bring action-oriented rules into international politics. In brief, the legal status of these conventions is similar to that of a declaration. This is because framework conventions provide generally-phrased obligations which are open-ended and seek further elaboration.⁸⁵

With respect to the right to development, a framework convention may stipulate a commitment to ensure the right, the basic principles underlying the right, right holders and duty bearers, and the general mechanisms of implementation and review of state obligations. The UNFCCC can provide important guidance on the structure of the framework convention on the right to development and the above procedural issues. After laying down such a framework convention, different protocols may then provide specific obligations and detailed matters in relation to different aspects of the right to development. This flexible legal framework would elevate the legal recognition of the right to development, while still giving states time to agree on the specifics of the right and states' obligations. This whole range of possibilities demonstrates that the right to development can indeed be brought under the framework of international human rights conventions if the political will exists.

6.2 Strengthening the Working Group on the Right to Development

The UN Charter-based system, such as the General Assembly and ECOSOC, as well as its resolution-based organs that are created by the different organs of the UN, such as working groups, are important mechanisms of ensuring human rights accountability mechanisms.

The Working Group on the Right to Development is among the first international monitoring bodies that made clear and direct attempts to make formal consultation and institutionalised ties with intergovernmental organisations, IFIs and the wider donor community.

Through the Working Group, supported by the High-Level Task Force on the Right to Development, a series of discussions are being conducted between IFIs in order to ensure the right to development in their institutional framework. The emphasis is recognising the role of these institutions in ensuring the right to development and human

⁸⁴ As above.

⁸⁵ As above.

rights in general shows their crucial roles and elaborates some of their legal positions in this regard.

The High-Level Task Force on the Right to Development, under the Working Group on the Right to Development, has now become an important body that applies human rights standards to international organisations. It evaluates the human rights impact of IFIs and other important development actors from the perspective of the right to development. Recently, reflecting on the possibility of evaluating a World Bank plan for Africa, the Task Force stated:⁸⁶

Given the preponderant role of the World Bank in the development of Africa and the influence of its thinking and operations on the donor community at large, its partnership should be critically scrutinised. Accordingly, the Bank should therefore be invited by the Working Group to allow the African Action Plan and its partnerships with governments of sub-Saharan Africa to be evaluated against the criteria of the right to development.

In brief, the Working Group on the Right to Development provides a tremendous opportunity to integrate the notion of the right to development in a comprehensive and multi-disciplinary manner. It serves as a forum whereby states, IFIs, donor communities, NGOs, intergovernmental organisations and other stakeholders can deliberate on mechanisms of implementing the right to development in a wider context.

7 Conclusion

The right to development prompts an examination of human rights issues in a comprehensive and much wider context than has traditionally been the case; encouraging an interdisciplinary analysis of human rights problems and showing the inadequacy of the existing human rights framework to address structural problems.⁸⁷ The right to development provides a unique opportunity to promote an international economic order that is based on equity, social justice, and one that integrates human rights in different dimensions. It has been argued in this article that the right to development, though conceived under a declaration, has evolved into a legal right through a series of declarations and resolutions. The fact that it is a composite right that incorporates all other rights also makes its normative foundation implicit in the different international human rights instruments.

By emphasising the indivisibility and interdependence of human rights, the right to development shows that any development process must acknowledge that the promotion and protection of human rights

⁸⁶ Report of the High-Level Task Force on the Implementation of the Right to Development, 3rd session (2007) UN Doc A/HRC/4/WG.2/TF/2, para 87.

⁸⁷ Marks (n 61 above) 7.

are part of that process. Importantly, development is defined as a human right that has the objective of fulfilling the continuing improvement of the well-being of individuals by expanding their capabilities and their freedom.

The article highlights the challenges and prospects of implementing the right to development from various perspectives. The adoption of a legally-binding treaty on the right to development with more normative precision of its contents and clear obligations on duty bearers is indispensable for a meaningful realisation of the right. Thus, a binding treaty with a competent supervisory body that is able to monitor the implementation of the right to development is crucial for its effective realisation. In this regard, if there is a political commitment, the experience of the African Charter has shown that the right to development can be a legally-enforceable right through a treaty body. The adoption of framework conventions and the advent of new types of international human rights conventions, such as that of the Convention on the Rights of Persons with Disabilities that brought new developments in human rights thinking and implementation mechanisms, are important lessons relevant for the right to development.

The meaning of certain substantive obligations distilled from international human rights instruments for constitutional environmental rights in South Africa

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Summary

The South African Constitutional Court has not yet had sufficient opportunity to clarify the meaning of positive obligations of the state imposed by the environmental right contained in section 24 of the Constitution of the Republic of South Africa, 1996. The contribution attempts to determine some of the positive obligations of a substantive nature implied by this section. It does so by drawing inspiration from the way in which international (both universal and regional) human rights bodies have interpreted and applied relevant provisions of different human rights instruments within their respective jurisdictions. In addition, it illuminates the extent to which these obligations may have already been given effect to in domestic law. The human rights instruments that are considered for the purposes of this article include the International Covenant on Civil and Political Rights; the African Charter of Human and Peoples' Rights; the European Convention of Human Rights and Fundamental Freedoms; the American Declaration of the Rights and Duties of Man; and the American Convention of Human Rights.

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1 Introduction¹

Environmental rights contained in domestic bills of rights and international human rights instruments often consist of a complex combination of legal obligations. Their interpretation tends to be a particularly challenging task.² Arguably, this also holds true for the environmental right in section 24 of the Constitution of the Republic of South Africa Act, 1996 (Constitution).³ Fortunately, however, there is a growing body of public international law, as well as foreign domestic law, on which one may draw to render the abstract language of section 24 more concrete for judicial application.⁴

In light of the fact that the South African Constitutional Court has not yet had sufficient opportunity to clarify the meaning of section 24 of the Constitution,⁵ this contribution attempts to determine some of the positive obligations with specific reference to substantive duties, implied by this section.⁶ In doing so, it draws inspiration from the way in which international human rights bodies (both universal and regional) have interpreted and applied the relevant provisions of the respective human rights instruments within their jurisdiction.

¹ The authors wish to express their gratitude to the South Africa-Netherlands Research Programme on Alternatives in Development (SANPAD) for its financial support that enabled the research for this publication. This contribution also forms part of a project of the Netherlands Organisation for Scientific Research (NWO) titled 'The emerging international constitutional order: The implications of hierarchy in international law for the coherence and legitimacy of international decision-making' and a project of the South African National Research Foundation (NRF) titled 'Local government and environmental rights'. The authors would further like to express their gratitude to Proff Jonathan Verschuuren and Dinah Shelton for their valuable comments on an earlier draft.

² D Garcia San José *Enforcing the human right to environment in Europe: A critical overview of the European Court of Human Rights case law* (2004) 15.

³ Constitution of the Republic of South Africa Act 108 of 1996, assented to on 16 December 1996, <http://www.constitutionalcourt.org.za/site/theconstitution/english-09.pdf> (accessed 13 July 2010).

⁴ The Constitutional Court's willingness to draw on international and foreign domestic law in its application of the Constitution has been shown in several of its judgments over the last couple of years. Two examples include *S v Zuma & Others* 1995 2 SA 642 (CC) paras 14-15 and *Sanderson v Attorney, Eastern Cape* 1998 2 SA 38 (CC) para 26.

⁵ Although *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province & Others* 2007 6 SA 4 (CC) (*Fuel Retailers* case) was decided by the Constitutional Court and based on parts of sec 24 of the Constitution (n 3 above), the case merely focused on the need to create a balance between sustainability considerations in public environmental decision making. In addressing the most recent case of environmental significance, *Mazibuko v The City of Johannesburg & Others* 2010 3 BCLR 239 (CC), the Constitutional Court primarily relied on the right to access to sufficient water provided for in sec 27 of the Constitution.

⁶ The need for such a determination is clear from *inter alia* Feris's assessment as quoted by LJ Kotzé & AR Paterson 'South Africa' in LJ Kotzé & AR Paterson (eds) *The role of the judiciary in environmental governance: Comparative perspectives* (2009) 579.

In addition, it illuminates the extent to which these obligations may already have been given effect to in domestic law.

An investigation of this kind seems particularly relevant to South Africa, given that section 39(1)(b) of the Constitution obliges courts to consider international law when interpreting the Bill of Rights, while sections 239(1) and 233 of the Constitution oblige courts to interpret legislation in conformity with international law. In relation to environmental protection these obligations find additional resonance in the National Environmental Management Act 107 of 1998 (NEMA),⁷ which, as a framework statute, provides that global and international responsibilities relating to the environment must be discharged in the national interest.⁸

According to the Constitutional Court, section 39(1)(b) embraces both binding and non-binding instruments of international law.⁹ Binding instruments include treaties to which South Africa is a party (or binding obligations resulting from such a treaty, such as United Nations (UN) Security Council resolutions) and customary international law. Non-binding instruments include those which are not open to ratification (such as declarations of the UN General Assembly), instruments which are only open to ratification within a particular region (such as the European Convention of Human Rights and Fundamental Freedoms (European Convention),¹⁰ as well as decisions by international bodies that interpret and apply human rights and which are either not binding in themselves (such as decisions of the UN Human Rights Committee (HRC)), or which are only binding on the parties to the case (such as those handed down by the European Court of Human Rights (European Court) or the International Court of Justice (ICJ)).¹¹

As will come to light in subsequent paragraphs, the human rights instruments that are of particular relevance for the purposes of this article include the African Charter on Human and Peoples' Rights (African Charter);¹² the American Declaration of the Rights and Duties of Man (American Declaration);¹³ the American Convention of Human

⁷ National Environmental Management Act 107 of 1998 (NEMA), assented to on 19 November 1998, <http://www.info.gov.za/view/DownloadFileAction?id=70641> (accessed 13 July 2010).

⁸ Sec 2(4)(n) and ch 6 of NEMA (n 7 above).

⁹ For a brief overview of the relevance of international human rights instruments and South African law, see J Dugard *International law A South African perspective* (2005) 336-340.

¹⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms 4 November 1950, 213 UNTS 221.

¹¹ See extensively E de Wet 'The "friendly but cautious" reception of international law in the jurisprudence of the South African Constitutional Court: Some critical remarks' (2005) 28 *Fordham International Law Review* 1529.

¹² African (Banjul) Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217.

¹³ American Declaration on the Rights and Duties of Man, April 1948, reprinted in OAS/SerL/V/I4 Rev 9 (2003).

Rights (American Convention);¹⁴ the European Convention; and the International Covenant on Civil and Political Rights (ICCPR).¹⁵ In relation to these instruments, the 'potentially environmental friendly' provisions have, to some extent, been concretised by the respective treaty-monitoring bodies. These include the African Commission on Human and Peoples' Rights (African Commission), the Inter-American Commission and the Inter-American Court of Human Rights (Inter-American Court), the European Court and the HRC.¹⁶

In accordance with section 39(1)(c) of the Constitution, the benchmarks developed by the aforementioned bodies may prove to be a useful tool in clarifying the scope of the positive obligations contained in section 24 of the Constitution. Moreover, one should keep in mind that – even in the absence of section 39(1)(c) – South Africa would be bound under international law to give effect to all obligations flowing from the African Charter and ICCPR, given that it has been a party to these instruments since 1996 and 1998 respectively.¹⁷

The Constitutional Court's liberal approach, adopted at its creation in 1996, marked a change of direction by the highest court of a country that has historically struggled to embrace international law – in particular during the apartheid era.¹⁸ The change of direction attests to the fact that South Africa is a member of an increasingly interdependent international community in which international law constitutes a common denominator in the search for solutions to global challenges.¹⁹ This common denominator can also be described as a minimum threshold of protection to which states are obliged to give effect within the domestic legal order.²⁰ This also holds true for environmental protection, the importance of which has gained recognition with the

¹⁴ American Convention on Human Rights, 21 November 1969, 1144 UNTS 123.

¹⁵ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

¹⁶ D Shelton 'The environmental jurisprudence of the international human rights tribunals' in R Picoletti & JD Taillant (eds) *Linking human rights and the environment* (2005) 12.

¹⁷ In the absence of an international supervisory body that renders authoritative decisions on the scope of treaty obligations, it is up to the state parties themselves to determine the scope of the obligations. See F Viljoen *International human rights law in Africa* (2007) 28-30.

¹⁸ See Dugard (n 9 above) 16-26. For comments on international law and the South African Constitution from an environmental law perspective, see also J Glazewski *Environmental law in South Africa* (2005) 29-30.

¹⁹ See K O'Regan 'Human rights and democracy – A new global debate: Reflections on the first ten years of South Africa's Constitutional Court' (2004) 32 *International Journal of Legal Information* 207.

²⁰ P Birnie & AE Boyle *International law and the environment* (2002) 259. The importance of international developments in domestic sustainable development policy is also recognised in the South African context in the (as it was called at the time) Department of Environmental Affairs and Tourism (DEAT) *People-planet-prosperity: Draft strategic framework development strategy for sustainable development in South Africa* (2006) 22.

adoption of environmental clauses in the domestic bills of rights of many countries.²¹ As these clauses are sometimes ill-defined, international decisions that concretise the operation of the legal obligation in practice can constitute a useful source of information in order to identify their core content.²²

The subsequent analysis focuses on the positive obligations flowing from the provisions in the aforementioned international instruments, which have thus far been identified as relevant for environmental protection. By now, it is well established that international human rights instruments, including those that have consequences for environmental protection, impose positive and negative obligations on member states.²³ Negative obligations pertain to the obligation to respect the right in question, such as authorities refraining from interference with the enjoyment of a fundamental right. Positive obligations consist of two layers, namely, the obligation to protect a right through regulatory (legislative) measures against interference by others, as well as the obligation to fulfil rights, which concerns their realisation through, *inter alia*, financial and infrastructural support.²⁴

In addition, the analysis focuses specifically on (potential) substantive obligations that have been identified by international human rights bodies. It does not elaborate on procedural obligations that rest on governments in situations that (may) result in environmental degradation, notably guaranteeing access to information,²⁵ access

²¹ Birnie & Boyle (n 20 above) 257.

²² D Bodansky 'The use of international sources in constitutional opinion' (2004) 32 *Georgia Journal of International and Comparative Law* 425; see also O Tshosa *National law and international human rights law cases of Botswana, Namibia and Zimbabwe* (2001) 10; J Verschuuren *De zorg van de overheid en het recht van de burger* (1994) 79.

²³ See in particular A Ulvsbäck *Standardising individual environmental protection* (2004) 1-2 15-16. See also AR Mowbray *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004) 183.

²⁴ See in particular *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (SERAC case) paras 44-46. The African Commission also identified a fourth type of obligation, namely, that of promoting human rights; sec 7(2) of the Constitution similarly refers to the promotion of rights. However, this category, which concerns actions that promote tolerance or develop infrastructure, would also be adequately covered by the obligation of fulfilment; see also D Shelton 'International decisions' (2002) 96 *American Journal of International Law* 938-939.

²⁵ Inter-American Court *Marcel Claude-Reyes & Others v Chile* (Merits, Reparations and Costs) judgment of 19 September 2006, Case 12.108, Report 60/03, <http://www.corteidh.or.cr/casos.cfm> (accessed 13 July 2010); see Inter-American Commission *Report on the Situation of Human Rights in Ecuador* (Ecuador Report) OEA/serL/V/II66 Doc 10 Rev 1, (1997), <http://www.cidh.oas.org/countryrep/ecuador-eng/index%20-%20ecuador.htm> (accessed 13 July 2010); European Court *Anna Maria Guerra & 39 Others v Italy*, judgment of 19 February 1998 (*Guerra* case) (1998) I Reports of Judgments and Decisions 64; European Court *Öneryildiz v Turkey* (GC) (*Öneryildiz* case) judgment of 30 November 2004 (2004-XII) Reports of Judgments and Decisions 657; European Court *Tătar v Romania* (*Tătar* case) judgment of 27 January 2009 (unreported), Case 67021/01.

to participation in decision making²⁶ and judicial protection.²⁷ At present these obligations are well-established in the jurisprudence of international and regional human rights bodies in relation to situations affecting the environment in a manner that simultaneously impacts human rights, notably the right to life, the right to private life, home and family life, as well as the right to a fair trial and remedy.²⁸ Similarly, the South African courts have dealt with a number of environmental cases that concerned procedural rights and obligations.²⁹

The choice to focus on the substantive rather than the procedural is not intended to deny the added value of procedural obligations for environmental protection, nor their potential for strengthening the democratic process and environmental governance as a whole.³⁰ However, as these procedural obligations have thus far been fairly well-covered by constitutional, administrative and environmental law scholars and the South African courts, it seems appropriate to focus the attention on the more elusive substantive positive obligations flowing from the aforementioned human rights instruments.

2 Substantive environmental protection mandated by international human rights instruments

Most international human rights instruments were drafted before the emergence of environmental protection as a common concern and, as a result, do not mention the environment.³¹ Of the international instruments mentioned above, the African Charter is the only instrument that explicitly recognises a human right to a satisfactory environment, namely, in article 24.³² This right has also constituted the object of

²⁶ SERAC case (n 24 above) para 53; HRC *Apirana Mahuika & Others v New Zealand*, decision of 16 November 2000, Comm 547/1993, UN Doc CCPR/C/70/D/547/1993 (*Mahuika* case); HRC *Länsman & Others v Finland* (No 2) (*Länsman* case) decision of 22 November 1996, Comm 671/1995, UN Doc CCPR/C/58/D/671/1995; Inter-American Court *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (*Awas Tingni* case) judgment of 31 August 2001 (Ser C) No 79 (2001).

²⁷ See SERAC case (n 24 above) para 53; *Claude-Reyes* case (n 25 above); European Court *Hatton v United Kingdom* (GC) (*Hatton* GC case) judgment of 8 July 2003 (2003) 37 EHRR 28, paras 113-116.

²⁸ See *inter alia* cases cited in nn 25-27 above.

²⁹ See Kotzé & Paterson (n 6 above) 579-586 for an overview of some environmental cases in South Africa that concerned issues of administrative justice, access to information and *locus standi*.

³⁰ On this point, see D Shelton 'Human rights and the environment: Problems and possibilities' (2008) 38 *Environmental Policy and Law* 44.

³¹ D Shelton 'Human rights and the environment' in H Stockinger *et al* (eds) *Updating international nuclear law* (2007) 161.

³² In accordance with art 24 of the African Charter: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'

an individual complaints procedure before the African Commission.³³ Until such time as the African Court on Human and Peoples' Rights becomes active,³⁴ the African Commission remains the most important regional monitoring body in relation to the rights guaranteed in the African Charter. Decisions by this body are non-binding, and the track record of states in giving them (voluntary) effect remains mixed. Even so, the decisions and recommendations of the African Commission remain an authoritative source that provides guidance to states in relation to the scope and content of their obligations under the African Charter.³⁵

The same could be said for the non-binding decisions and recommendations of the HRC that functions as the international treaty-monitoring body of ICCPR and *inter alia* considers individual complaints from those member states that have ratified the [First] Optional Protocol to the ICCPR of 1996.³⁶ Although ICCPR does not explicitly protect the right to a healthy environment, some indirect substantive protection has been derived from the rights of minorities as protected in article 27 of ICCPR.³⁷

Neither the European Convention nor any of its additional protocols explicitly protect any interest in the preservation of the environment. However, environmental interests may merit protection if and to the extent to which this is required for the protection of any of the other

³³ The individual complaints procedure resulted from art 55 of the African Charter in conjunction with ch XVII of the Rules of Procedures of the African Commission, 10 June 1995, http://www.achpr.org/english/_info/rules_en.html (accessed 13 July 2010); See also F Viljoen 'The African Commission on Human and Peoples' Rights' in C Heyns (ed) *Human rights law in Africa* (2004) 420 ff; See also F Ouguerouz *The African Charter on Human and Peoples' Rights* (2003) 485 ff.

³⁴ See text of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 6 October 1998 CAB/LEG/66.5, <http://www.chr.up.ac.za> (accessed 13 July 2010). At the time of writing, the African Court had only dealt with one case which was declared admissible. See *Michelot Yoyogombaye v Senegal*, African Court on Human and Peoples' Rights, Appl 001/2008, judgment, 15 December 2009, <http://www.african-court.org/en/cases/latest-judgments/> (accessed 13 July 2010).

³⁵ See extensively F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human Rights and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 1 ff.

³⁶ See art 1 of the First Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 302; See also SN Carlson & G Gisvol *Practical guide to the International Covenant on Civil and Political Rights* (2003) 11.

³⁷ Art 27 of ICCPR determines that '[i]n 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'.

rights in the Convention.³⁸ Already under the former two-tier system of enforcement consisting of the European Commission of Human Rights (European Commission) and the European Court, the right to a private life, home and family (guaranteed in article 8(1) of the European Convention) emerged as the most likely vehicle for indirect substantive protection of environmental rights.³⁹ Since the replacement of the two-tier system by a single court on 1 November 1998, this role of article 8 has been developed further by the jurisprudence of the European Court.⁴⁰ The right to life in article 2 has also on occasion been relevant.⁴¹ The latter article implies a high threshold in the form of a real and immediate risk to life, as such is not a prominent vehicle for the indirect protection of the environment under the European Convention.

Neither the American Declaration nor the American Convention explicitly guarantees any environmental rights.⁴² Even so, the inter-American system of human rights, composed of the Inter-American Court and the Inter-American Commission, have provided indirect protection to the environment through the right to life, despite the high threshold applicable in this instance. The right to life is guaranteed both

³⁸ See Garcia San José (n 2 above) 29-30. This anthropocentric approach to environmental protection, whereby environmental harm must affect human well-being before human rights guarantees can be invoked, implies that unless there is a specific right to a healthy or ecologically-balanced environment, international human rights procedures cannot be used on behalf of the environment or to prevent threats to other species or to ecological processes. See Shelton (n 30 above) 45; For criticism on the limits of the anthropocentric approach, see G Lohmann 'Sollte es ein individuelles Menschenrecht auf eine angemessene Umwelt geben?' in PG Kirchenschläger & T Kirchenschläger (eds) *Menschenrechte und Umwelt* (2008) 104. See also A Peters 'Gibt es ein Menschenrecht auf saubere Umwelt? Menschenrechte und Umweltschutz: Zur Synergie völkerrechtlicher Teilregime' in Kirchenschläger & Kirchenschläger (above) 225-226.

³⁹ Art 8(1) of the European Convention determines: 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

⁴⁰ The single court consists of a chamber system with the possibility of appeal to the Grand Chamber. For a brief overview of the 'old' and 'new' systems of protection provided by the European Convention, see C Ovey & RCA White *Jacobs & White. The European Convention on Human Rights* (2006) 8 ff.

⁴¹ Art 2 of the European Convention determines that '[e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'

⁴² It is worth noting that art 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), 17 November 1988, OAS TS No 69, guarantees the right to a healthy environment. However, art 11 cannot form the object of an individual petition before the Inter-American Commission or the Inter-American Court and is therefore not directly enforceable. See Ulvsbäck (n 23 above) 28; see also IK Scott 'The Inter-American system of human rights: An effective means of environmental protection' (2000) 19 *Virginia Environmental Law Journal* 201.

in article 1 of the American Declaration⁴³ and article 4 of the American Convention.⁴⁴

The Inter-American Commission and the Inter-American Court both adjudicate violations of human rights.⁴⁵ The primary difference between the two bodies is that the Inter-American Court has the authority to render binding judgments on the parties involved and order reparations, while the Inter-American Commission publishes non-binding (albeit authoritative) recommendations.⁴⁶ Moreover, whereas complaints received by the Inter-American Court pertain to the rights guaranteed in the American Convention, the Inter-American Commission may also receive complaints based on the rights guaranteed in the American Declaration in relation to those members of the Organization of American States (OAS) that have not yet ratified the Inter-American Convention.⁴⁷ The Inter-American Commission thus assumes a dual role.

The above having been said, a number of substantive positive obligations relevant to environmental protection have crystallised in the jurisprudence of the above-mentioned human rights bodies. These obligations are discussed in the subsequent paragraphs.

2.1. Environmental assessments and regulation

A broad obligation to engage in environmental assessments⁴⁸ and regulation pertaining to environmental damage can be derived from

⁴³ Art 1 of the American Declaration states: 'Every human being has the right to life, liberty and the security of his person.'

⁴⁴ Art 4 of the American Convention states: 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.' See also Scott (n 42 above) 201.

⁴⁵ Scott (n 42 above) 200.

⁴⁶ Art 64 of the American Convention also provides for a broad jurisdiction in relation to advisory opinions. For a discussion, see Scott (n 42 above) 206-207.

⁴⁷ Scott (n 42 above) 201 205. Although this implies that the Inter-American Commission formally relies on different standards when reviewing human rights complaints against different OAS member states, on a practical level the standards in the American Declaration and American Convention often overlap and function as one set of standards.

⁴⁸ Environmental assessments refer in this context to either environmental impact assessments or environmental risk assessments. Due to some overlap no strict distinction between the two types of environmental assessments is made for purposes of this article. An environmental impact assessment is generally defined as a competent scientific analysis of the possible impacts on the environment, which is required by decision makers prior to the approval of certain activities or developments. See with reference to Robinson, JFC DiMento 'Science and environmental decision making: The potential role of environmental impact assessment' (2005) 45 *Natural Resources Journal* 297. An environmental risk assessment is more narrowly described as the process for identifying hazards and transforming related scientific data into meaningful information about the undesired effects of human activities on the environment; as well as combining it with an evaluation of the consequences. See F Klopff *et al* 'A road map to a better NEPA: Why environmental risk assessments should be used to analyse the environmental consequences of complex federal actions' (2007) 8 *Sustainable Development Law and Policy* 38.

article 24 of the African Charter. A similar obligation can be derived from articles 2 and 8(1) of the European Convention, at least in those instances where the harm posed by a particular activity for the environment, and as a result for certain aspects of human life, is beyond dispute.

The *SERAC* case⁴⁹ thus far constitutes the only case before the African Commission in which the latter interpreted the scope of the right to a satisfactory environment in article 24 of the African Charter.⁵⁰ The Commission determined that through its involvement in the exploitation of the Niger Delta, the Nigerian government contributed both directly and indirectly to gross violations of the rights of the Ogoni people, including the right to a satisfactory environment. The contamination of air, water and soil resulted from actions of the Nigerian military forces in protecting the government's interest in the oil venture of a multinational company, as well as the negligent and unsound management of oil exploration in the Niger Delta.⁵¹

The African Commission concluded that article 24 required the government to take reasonable measures to prevent pollution and ecological degradation,⁵² as well as to promote conservation and ensure ecological sustainable development and the use of natural resources.⁵³ Among other things, this implied that the government had to guarantee, or at least permit the conduct of independent environmental impact assessments (scientific monitoring) before oil exploitations were undertaken. In addition, it had to guarantee the independent oversight bodies for monitoring the safe operation of the petroleum industry.⁵⁴

The *Öneryildiz* decision of the European Court⁵⁵ concerned the death of nine persons and the injury of several others due to a methane explosion at a waste collection site close to the slum in which they lived. The European Court found a violation of article 2 of the European

⁴⁹ *SERAC* case (n 24 above).

⁵⁰ Under the African Charter, some indirect environmental protection has also been recognised through the right to health in art 16(1). In *Free Legal Assistance Group & Others v Zaire (Free Legal Assistance Group case)* (2000) AHRLR 74 (ACHPR 1995), the African Commission was confronted with the provision of safe drinking water. In determining that the failure by the government to provide such a basic service constituted a violation of the African Charter, the African Commission only focused on art 16(1) and refrained from making the obvious link to art 24 of the African Charter; See M van der Linde & L Louw 'Considering the interpretation and implementation of art 24 of the African Charter on Human Rights and Peoples' Rights in light of the *SERAC* communication' (2003) 3 *African Human Rights Law Journal* 177.

⁵¹ *SERAC* case (n 24 above) 'Summary of the facts'; see also Van der Linde & Louw (n 50 above) 168; see Viljoen (n 17 above) 288.

⁵² *SERAC* case (n 24 above) para 52.

⁵³ *SERAC* case (n 24 above) para 52; Van der Linde & Louw (n 50 above) 178; Viljoen (n 17 above) 288.

⁵⁴ *SERAC* case (n 24 above) para 53.

⁵⁵ *Öneryildiz* case (n 25 above) 657.

Convention, since the Turkish authorities did nothing to prevent the danger to the affected individuals, despite the fact that they were well aware of the dangers present at the site as *inter alia* outlined in an expert report to the authorities in 1991. In evaluating the circumstances of this case the European Court took particular note of the danger inherent in the activity in question, namely, the operation of a waste-collection site.⁵⁶ It underscored the point that when such activities are undertaken, the state must enact a regulatory framework that governs the licensing, setting up, operation, security and supervision of the activity. In addition, the authorities must oblige all those concerned to undertake practical measures that provide effective protection to individuals whose lives are endangered by the inherent hazards.⁵⁷

The importance of the existence and enforcement of a system of proper authorisation of activities that are inherently hazardous can also be distilled from cases pertaining to article 8(1) of the European Convention,⁵⁸ a provision with a lower threshold than article 2.⁵⁹ Worthy of noting, in particular, is the *Lopez-Ostra* case.⁶⁰ The applicant and her daughter suffered serious health problems over a period of six years from the fumes of a privately-owned tannery waste treatment plant that operated on public grounds alongside the apartment building where they lived. The European Court concluded that the severe environmental pollution resulted in a violation of article 8(1), as it deprived the applicants from the enjoyment of their homes in such a way as to adversely affect their private and family life. A particularly aggravating factor was the fact that the waste plant operated without the required authorisation, with the knowledge of the authorities.⁶¹

Article 8(1) of the European Convention further reaffirms the obligation on authorities to undertake practical measures for protecting individuals whose lives were affected adversely by dangers inherent

⁵⁶ *Öneryildiz* case (n 25 above) para 71 ff; Shelton (n 31 above) 145.

⁵⁷ Shelton (n 31 above) 145 166.

⁵⁸ European Convention (n 10 above).

⁵⁹ Art 2 European Convention (n 41 above); European Court *Lopez-Ostra v Spain* (*Lopez-Ostra* case) judgment of 9 December 1994 (1995) 20 EHRR 277 para 51. However, it remains essential to determine whether the adverse effects of the environmental pollution had a detrimental effect on one or more of the rights explicitly mentioned in art 8(1). It is not the purpose of that article (or any other in the European Convention) to prevent or address environmental pollution as such; See also Ovey & White (n 40 above) 286; J Verschuuren 'Invloed van het EVRM op het materiële omgevingsrecht in Nederland' in T Barkhuysen *et al De betekenis van het EVRM voor het materiële bestuursrecht*, VAR preadviezen No 132 (2004) 266.

⁶⁰ *Lopez-Ostra* case (n 59 above) para 51.

⁶¹ As above. See also M Fitzmaurice & J Marshall 'The human right to a clean environment – Phantom or reality? The European Court of Human Rights and English courts' perspective on balancing rights in environmental cases' (2007) 76 *Nordic Journal of International Law* 117.

in certain activities or situations. In the case of *Fadeyeva v Russia*,⁶² the applicant lived in a security zone affected by air pollution from a steel plant built in Soviet times. After obtaining a court order against the authorities for resettlement, the applicant found herself as number 6 820 on the general waiting list. Even though the cause of the air pollution was undisputed and domestic legislation declared the zone in which she lived unfit for habitation, no priority waiting list was introduced.⁶³ Under these extreme circumstances, the positive obligations under article 8(1) may require a state to re-house those living close to industrial plants where the level of toxic emission is shown to be hazardous to health.⁶⁴

An important common denominator in all the above cases is the fact that the inherent danger of a particular activity was not disputed. In addition, harm to the environment and certain aspects of human life had already occurred, often aggravated by the illegal behaviour of the authorities themselves. The situation was, however, different in the *Hatton* case before the European Court, where the United Kingdom demonstrated that it engaged in regular risk assessment and updating of measures directed at minimising harm resulting from the aircraft noise at Heathrow Airport.⁶⁵ While confirming that article 8(1) of the European Convention obliged authorities to prevent excessive noise from the privately-owned and operated airport, the European Court did not find a violation of this obligation under the circumstances.⁶⁶

The applicants who resided near Heathrow alleged that the increased noise level that resulted from a new night schedule that was introduced in 1993 violated article 8(1).⁶⁷ According to the majority of the Grand

⁶² European Court *Fadeyeva v Russia* (*Fadeyeva* case) judgment of 9 June 2005 (2005) 40 ECHR 376.

⁶³ *Fadeyeva* case (n 62 above) paras 67 & 68. See also Fitzmaurice & Marshall (n 61 above) 128-129.

⁶⁴ *Fadeyeva* case (n 62 above) para 134; *Ovey & White* (n 40 above) 28; Fitzmaurice & Marshall (n 61 above) 130.

⁶⁵ European Court *Hatton v United Kingdom* (GC) (*Hatton* GC case) judgment of 8 July 2003 (2003) 37 EHRR 28 paras 43-45; Similarly, European Court *Powell & Raynor v United Kingdom* (*Powell & Raynor* case) judgment of 21 February 1990 (1990) 12 EHRR 355. This case also confirmed that the right to enjoyment of property protected in art 1 of Protocol 1 of the European Convention can also be affected by pollution or other environmental harm, where such harm has resulted in a very substantial reduction of the property at stake. However, in practice, this right has played a marginal role in the indirect protection of the environment in the jurisprudence of the European Court.

⁶⁶ *Hatton* GC case (n 65 above) paras 113-116. From a procedural perspective it is worth noting that the Grand Chamber held that the absence of a judicial review procedure which could determine whether the introduction of a new night flight schedule at Heathrow violated the private and family life of those in the vicinity, constituted a violation of the right to a remedy under art 13 of the European Convention. See also Fitzmaurice & Marshall (n 61 above) 126; S Zeichen 'Das Recht auf unversehrte Umwelt und die Europäische Menschenrechtskonvention' in M Geistlinger (ed) *Umweltrecht in Mittel- und Osteuropa im International und Europäischen Kontext* (2004) 58.

⁶⁷ See also Garcia San José (n 2 above) 56.

Chamber there was no violation of this right, since the government of the United Kingdom had struck a fair balance between the rights of the plaintiffs and other public interests such as the economic well-being of the country, to which the night flights contributed. An important consideration was that the government had undertaken studies into aircraft noise and sleep disturbances over a long period of time, had complied with domestic regulations pertaining to environmental protection, and had repeatedly introduced certain measures to mitigate the effects of aircraft noise. In addition, the value of property in the Heathrow area was not negatively affected by the night flight schedule, as a result of which the plaintiffs could have moved away without incurring excessive costs.⁶⁸

In essence, the above decisions all acknowledge a positive obligation on state authorities to engage in risk and/or impact assessments of activities that pose a danger to the environment and/or human health. In relation to article 24 of the African Charter, this obligation concerns the impact of the activity (such as oil drilling) on the environment as such, regardless of whether the environmental impact also results in a violation of other rights of individuals. In the case of articles 2 and 8(1) of the European Convention, the obligation would be narrower, as it would be directed only at the impact of the situation or activity (such as the operation of waste disposal) on the rights contained in articles 2 and 8(1) respectively.

When referring to these rights, the European Court frequently makes reference to the impact of the particular environmental situation on the health and well-being of the claimants. These concepts both potentially have broad meanings, but the European Court has not given clear direction in this regard. In the cases under discussion, the European Court referred to physical health only (and did not elaborate on mental health), while well-being was closely connected to the enjoyment of home and family life. Where these rights were rendered meaningless, for example because the affected persons had to give up their homes as a result of an enduring environmental situation, their well-being was negatively affected.

In addition to impact studies and risk assessments, the state's regulatory system should be directed at the effective prevention of harm resulting from the activity in question. The scope of these measures would *inter alia* depend on the environmentally-relevant hazard inherent to the particular activity and the probability of any environmental harm occurring. This could for example require the introduction of a system of authorisation (such as licensing or permitting) for those wanting to engage in a particular activity, accompanied by measures ensuring its effective enforcement. The operation of the activity further

⁶⁸ *Hatton* GC case (n 27 above) paras 126-129; *Garcia San José* (n 2 above) 63; S Greer *The European Convention on Human Rights. Achievements, problems and prospects* (2007) 264.

has to be supervised in an ongoing manner. This could imply regular, updated impact- and risk assessments; adjustments of measures already in place to minimise harm to peoples' environment; as well as compliance audits and other monitoring and enforcement endeavours. In addition, the authorities have to undertake specific practical measures to protect vulnerable individuals from (further) harm resulting from the activity and its negative impact on the environment. These measures have to be appropriate to the circumstances of the case and can in extreme cases even imply the provision of alternative housing.⁶⁹

2.1.1 Protecting the way of life of indigenous peoples

A positive duty to limit the economic exploitation of natural resources, as well as to prevent pollution of water, air and soil and eradicate the consequences thereof, can also be derived from the rights of indigenous peoples.⁷⁰ The Inter-American Commission has relied on the right to life as a vehicle for the protection of the way of life of indigenous peoples, whereas the HRC has relied on the right to culture, which constitutes an element of minority protection under article 27 of ICCPR.

Although the trigger of the right to life as protected in the American Declaration and American Convention implies a high threshold,⁷¹ the Inter-American Commission has determined that environmental degradation *per se* can result in a violation of the right to life of indigenous groups in combination with other rights. In the case concerning the Yanomami Indians of Brazil, the Commission found that the construction of a highway through Yanomami territory and the authorisation of the exploitation of the territory's resources violated the community's right to life, liberty and personal security guaranteed in article 1 of the American Declaration, the right to residence and freedom of movement enshrined in article 8, as well as the right to health and well-being protected by article 11.⁷²

At the heart of the Inter-American Commission's decision was the fact that the economic undertakings led to a large influx of non-indigenous people, as well as the consequent spreading of contagious diseases that remained untreated due to a lack of medical care. The Inter-American Commission recommended the establishment of protected boundaries for the Yanomami lands and emphasised the responsibility

⁶⁹ D Shelton (n 31 above) 145 166.

⁷⁰ Scott (n 42 above) 215.

⁷¹ Scott (n 42 above) 212.

⁷² Inter-American Court *Comunidad Yanomami v Brazil (Yanomami case)*, decision of 5 March 1985, Case 7615, Res 12/85, reprinted in Inter-American Commission on Human Rights and Inter-American Court of Human Rights *Inter-American Yearbook of Human Rights* (1985), <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm> (accessed 13 July 2010). See also KSA Ebeku 'The right to a satisfactory environment and the African Commission' (2003) 3 *African Human Rights Law Journal* 149; Shelton (n 16 above) 20.

of member states to protect the cultural heritage and identity of indigenous people.⁷³

The Inter-American Commission took a similar approach in a country study that it undertook a decade later in relation to Ecuador.⁷⁴ However, it went further than in the case concerning the Yanomami Indians, as it explicitly addressed the issue of environmental degradation and its effects on the indigenous population. It lamented the fact that oil exploitation activities in the Oriente had resulted in the contamination of the water, air and soil, thereby causing illness in the region, and increasingly, the risk of serious illness. Both the government of Ecuador and the inhabitants agreed that the environment was contaminated, with inhabitants exposed to toxic by-products of oil exploitation, *inter alia* threatening food, fish supplies and wildlife. The Inter-American Commission stressed that the right to life and physical security may require positive measures that prevent the risk of severe environmental pollution that could threaten human life and health, as well as (government) response when persons have suffered injury.⁷⁵

The *Lubicon Lake Band* case⁷⁶ has thus far been the only case in which the HRC has determined a violation of the rights of indigenous peoples as a result of activities that affected the environment. According to the HRC, the government of the province of Alberta had deprived the Band of their means of subsistence by selling oil and gas concessions on their lands. A combination of historic inequities and more recent developments, including oil and gas exploitation, were threatening the way of life and culture of the Band, violating article 27(1) of ICCPR.⁷⁷

The situation in the *Lubicon Lake Band* case is distinguishable from that of the *Länsman* case,⁷⁸ where the HRC determined that stone-quarrying activities authorised by the Finnish Central Forestry Board did not violate the cultural rights of Sami reindeer breeders under article 27(1) of ICCPR. In this instance, the extent of quarrying did not (yet) disproportionately affect the way of life of the reindeer breeders.⁷⁹ The HRC observed that measures were taken to minimise the impact

⁷³ *Yanomani* case (n 72 above) consideration 10; Scott (n 42 above) 215.

⁷⁴ Ecuador Report (n 25 above).

⁷⁵ Ecuador Report (n 25 above) 77 ff; Shelton (n 16 above) 20 22.

⁷⁶ HRC *Chief Bernard Ominayak and the Lubicon Lake Band v Canada* (*Lubicon Lake Band* case) decision of 10 May 1990, Communication 167/1984 UN Doc CCPR/C/38/D/167/1984 para 33. See also Peters (n 38 above) 218.

⁷⁷ The flipside of the coin is that the rights of indigenous peoples may also at times be limited in order to protect the environment. This was confirmed by the HRC in the *Mahuika* case (n 26 above). In this case the government of New Zealand had regulated the fishing rights of the Maori community after a complicated process of consultation, in an attempt to conserve natural resources against the background of a dramatic growth in the fishing industry. The HRC confirmed that there was no violation of art 27 of ICCPR in this instance.

⁷⁸ *Länsman* case (n 26 above); Shelton (n 16 above) 8; S Joseph *et al* *The International Covenant on Civil and Political Rights: Cases, materials and commentary* (2005) 777.

⁷⁹ See Shelton (n 16 above) 18.

on reindeer herding activity and on the environment. However, the HRC did warn that if the respective mining activities were approved on a large scale and significantly expanded in the future, such developments could result in a violation of article 27(1). Finland was thus obliged to keep this in mind when either extending existing contracts or granting new ones.⁸⁰

In essence, these cases reflect a similar methodology than those discussed in section 2.2.1. A violation is only at stake where the environmental degradation and its impact on the rights of indigenous persons are beyond dispute. However, this does not detract from the positive obligation on the authorities to regulate and monitor the environmental risk posed by certain commercial activities to the way of life and cultural heritage of indigenous communities in an ongoing manner. Although the health (and therefore the right to life) of the respective indigenous communities was central to some of the decisions of the Inter-American Commission, the jurisprudence pertaining to article 27 of ICCPR illustrates that their way of life, as a manifestation of their culture, requires protection in and of itself. This implies measures that protect a lifestyle closely connected to the land and a particular natural habitat. Depending on the impact of the environmental risk on the health and way of life of these communities, authorities are obliged to demarcate certain lands, forests and waters essential to the survival of indigenous communities; and limit the type of commercial activity such as quarrying or oil exploitation within this area; or even exclude them from commercial activity.⁸¹

On the whole, the substantive obligations for (indirect) protection of the environment distilled from international human rights bodies underscore the anthropocentric dimension of environmental protection. At the same time they remain rather general in nature. This can be explained in part by the fact that judicial bodies deal with individual cases and sets of facts as opposed to broad policy making, and have neither the expertise nor the democratic mandate to engage in the detailed regulation of specifics in a highly technical and rapidly-changing area of law.⁸² Since this reality is linked to the nature of the judicial process itself, it is also visible in proceedings such as the *SERAC* case. In this decision, the African Commission interpreted article 24 of the African Charter, which explicitly guarantees the right to a satisfactory environment. Although a judicial body can in such an instance address environmental protection directly and more comprehensively than

⁸⁰ As above.

⁸¹ See also Inter-American Commission of Human Rights, Third Report on the Situation in Paraguay (IACHR Paraguay Report) OEA/Ser.L/V/II 110 Doc 52, 9 March 2001; Shelton (n 31 above) 158.

⁸² D Bodansky & J Brunnée 'Introduction: The role of national courts in the field of international environmental law' in M Anderson & P Galizzi (eds) *International environmental law in national courts* (2002) 7.

through indirect protection, the benchmarks it designs will depend on the circumstances of the case at hand. In addition, the explicit recognition of a right to a satisfactory environment would not relieve courts (or policy makers) from balancing the positive substantive obligations inherent in such a right with other legitimate public interests, including the economic development of an area or the country as a whole. A weighing of different interests will therefore always have to be undertaken when determining the scope of the positive obligations directed at environmental protection.

Even so, the substantive positive obligations pertaining to the environment, which have thus far been generated through international human rights bodies, illustrate the inter-twining of human life (health and well-being) and the environment. They serve as outer boundaries for government actions and omissions that can trigger state responsibility when crossed.⁸³ The subsequent paragraphs focus on the guidance that the South African legislature, executive and courts can infer from the (two strands of) substantive obligations identified above, when interpreting and enforcing section 24 of the Constitution.⁸⁴ In addition, there is an assessment of the extent to which these positive duties have already materialised in the South African context via legislation, judgments of the courts and/or recommendations of the South African Human Rights Commission (SAHRC).

3 Implications for section 24 of the Constitution and developments in domestic law

Constitutional transformation in the early 1990s brought along, for the first time, constitutional protection of the environment in South Africa. Section 24 of the Constitution states:

Everyone has the right:

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

⁸³ Bodansky & Brunnée (n 82 above) 8; Shelton (n 31 above) 159.

⁸⁴ It is acknowledged that constitutional interpretation requires that a right such as the environmental right be interpreted with, *inter alia*, contextual factors, constitutional values, the impact and scope of other constitutional rights as well as applicable internal limitations and the limitation clause (sec 36 of the Constitution) in mind. Guidance from international case law can accordingly only be a part of the domestic interpretation process.

A fair number of scholarly analyses pertaining to the scope and meaning of section 24 is available,⁸⁵ and it is widely accepted that this provision imposes both negative and positive obligations on the state.⁸⁶ Even so, judicial interpretation and clarification of the state's obligations contained in this right are crucial to guide the conduct of the legislature and the executive in relation to environmental governance. So far domestic judicial guidance in this respect has been limited due to the absence of cases dealing squarely with specifically the positive (substantive) obligations contained in section 24. Still, this does not free the legislative or executive branches of government from their duty to design and implement a regulatory framework that gives effect to this provision. In doing so, the jurisprudence of the international human rights bodies discussed above constitute a useful point of reference. In addition, the South African courts can draw guidance from the international jurisprudence once the need arises to interpret the substantive meaning of the environmental right.

With the exception of the *SERAC* case before the African Commission,⁸⁷ the obligations pertaining to environmental protection identified by international human rights bodies were all distilled from non-environmental human rights. Therefore, the scope of the substantive environmental obligations derived from the rights in question is likely to be more limited than what can be expected from a right explicitly directed at environmental protection such as section 24 of the Constitution. At the same time, section 24 is likely to cover those environmentally-relevant obligations that can be distilled from non-environmental human rights. If these obligations can already be generated by relying on human rights not directly aimed at protecting the environment, it is hard to see how such obligations could not be implied by a right explicitly directed at environmental protection.⁸⁸ This overlap suggests that the positive obligations generated through relevant international jurisprudence create a minimum threshold for environmental protection.

Section 24(a) of the Constitution is broad and carries considerable potential meaning. Sections 24(b)(i) to (iii) list a number of positive

⁸⁵ See, eg, the following: Glazewski (n 18 above) 67-68 72-81; M Kidd *Environmental law* (2008) 18-23; I Currie & J de Waal *The Bill of Rights handbook* (2005) 521-530; L Feris 'The socio-economic nature of section 24(b) of the Constitution – Some thoughts on *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* (2008) 23 *SA Public Law* 194-207; L Feris & D Tladi 'Environmental rights' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 249; Kotzé & Paterson (n 6 above) 560-562 572-579; AA du Plessis *Fulfilment of South Africa's constitutional environmental right in the local government sphere* (2009).

⁸⁶ These duties arise from an inclusive reading of secs 24 and 7(2) of the Constitution. Sec 7(2) determines that '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights'.

⁸⁷ *SERAC* case (n 24 above).

⁸⁸ Although the possibility exists that these internationally-recognised duties may assist further in the interpretation of other rights in the Constitution (eg the right to life or the right to dignity), it will not be discussed in any detail here.

state obligations such as the duty to prevent pollution and ecological degradation. These obligations are, however, without any detail. In principle, therefore, the added value of internationally-recognised positive obligations lies in clarifying the text and scope of section 24(a) as well as in concretising the obligations listed in section 24(b). With this in mind, the following section evaluates the potential meaning of the relevant international jurisprudence and the minimum threshold for environmental protection that it suggests, for the interpretation and enforcement of some of the positive duties that sections 24(a) and (b) impose on the state.

3.1 Environmental assessments and regulation

Section 24(a) read with section 7(2) of the Constitution places a positive duty on the state to ensure an environment that is conducive to health and well-being.⁸⁹ This obligation would *inter alia* imply environmental risk assessments in instances where a prevailing situation could be harmful to the health or well-being of individuals, in line with the *Öneryildiz*,⁹⁰ *Lopez-Ostra*⁹¹ and *Fadeyeva*⁹² cases. An environmental risk assessment can accordingly be triggered by potential hazards to human life, for example, human exposure to radioactive material or to high levels of uranium in drinking water. Section 24(b) further obliges the state to take reasonable legislative and other measures to promote conservation and secure ecologically sustainable development and the use of natural resources. It follows that an environmental impact assessment can also be triggered by potential harm to, or negative impacts on the natural environment *per se* as in the case of the development of an industrial site that would alter the ecological characteristics of an entire wetland, or for example a township development that would irreversibly disturb a significant portion of richly biodiverse grassland.

These obligations directed at the protection of natural resources are reminiscent of those contained in article 24 of the African Charter and confirmed by the *SERAC* case.⁹³ In this context it is important to note that the substantive obligations distilled from international human rights law stretch beyond the mere execution of environmental assessments. To be aware of the impact and risks that certain types of

⁸⁹ The exact meaning of health and well-being in this context has not yet been confirmed by the courts. Health in this context seems to refer to protection against environmental conditions that would negatively affect human health, such as excessive air or water pollution and exposure to toxic substances. Well-being seems to refer to environmental conditions that are not necessarily harmful to human health but that may otherwise negatively affect the interests that people hold in the environment, such as the aesthetic value of a wetland that attracts different bird species or the spiritual or religious value attached to a sacred forest.

⁹⁰ *Öneryildiz* case (n 25 above).

⁹¹ *Lopez-Ostra* case (n 59 above).

⁹² *Fadeyeva* case (n 62 above).

⁹³ *SERAC* case (n 24 above).

activities are likely to pose for humans and/or the natural environment is only one side to the positive duty of the state. Its regulatory system (including permitting, licensing, compliance monitoring, enforcement and other measures) must further be directed at the effective regulation, minimisation and prevention of environmental harm that may result from such activities. This translates into the duty to collect and record environmental information (on the state of the environment, environmental impacts, risks, etc.), and to act upon it. In this regard the *Lopez-Ostra* case⁹⁴ illustrates that when authorities are aware that a certain activity (in this case the operation of a private tannery waste treatment facility) takes place without the necessary environmental authorisation, it could reinforce a case against the state for non-compliance with its obligations under section 24 of the Constitution. The violation of article 2 of the European Convention identified in the *Öneryildiz* case⁹⁵ *inter alia* resulted from the fact that the authorities were aware of certain environmental dangers but refrained from taking action.

Some of the obligations related to environmental assessments and regulation that one finds in the international context have already found resonance in South African law. This applies in particular to environmental impact assessments (EIAs), which are widely accepted as one of the most successful environmental regulatory interventions to have emerged over the last four decades.⁹⁶ South Africa has a history of environmental impact assessments dating back to the 1970s.⁹⁷ An EIA is required to be able to obtain environmental authorisation prior to the commencement of certain listed activities. Both the EIA process and its requirements are currently regulated by chapter 5 of NEMA⁹⁸ combined with a set of EIA Regulations in terms of sections 24 of that Act.⁹⁹ NEMA determines that the potential consequences for or impacts on the environment of listed or specified activities¹⁰⁰

⁹⁴ *Lopez-Ostra* case (n 59 above).

⁹⁵ *Öneryildiz* case (n 25 above).

⁹⁶ More than 100 countries around the globe have adopted some form of EIA through legislation. See F Retief & LJ Kotzé 'The lion, the ape and the donkey: cursory observations on the misinterpretation and misrepresentation of Environmental Impact Assessment (EIA) in the chronicles of fuel retailers' unpublished conference paper delivered on 31 May 2009 at the Annual Environmental Law Association Conference, Johannesburg, South Africa.

⁹⁷ For a brief overview of the development of the EIA system in South Africa, see UN Economic Commission for Africa's report entitled *Review of the Application of Environmental Impact Assessment in Selected African Countries* (EIA Review) (2005) 24 http://www.unitednationonline.org/eca_programmes/sdd/documents/EIA_book_final_sm.pdf (accessed 13 July 2010).

⁹⁸ NEMA (n 7 above).

⁹⁹ Government Notices R385, R386 & R387 (EIA Regulations) in *Government Gazette* 28753, 21 April 2006, <http://www.environment.gov.za/> (accessed 13 July 2010).

¹⁰⁰ In this context, sec 1 of NEMA (n 7 above) broadly defines 'activities' as policies, programmes, processes, plans and projects.

must be considered, investigated, assessed and reported on to the competent authority or the Minister of Minerals and Energy.¹⁰¹ NEMA compels the competent authorities at national and provincial level to publish notices in the *Government Gazette* with the areas or activities that are subject to EIAs.¹⁰² A variety of activities and areas are currently listed¹⁰³ and include, for example, the construction of facilities or infrastructure (including associated structures or infrastructure) for the temporary storage of hazardous waste; the transmission and distribution of electricity above ground with a capacity of more than 33 kilovolts and less than 120 kilovolts; and the development of a new facility or the transformation of an existing facility for storage or manufacturing, generally, which occupies an area of 1 000 square meters or more outside an existing area zoned for industrial purposes. The types of activity at stake in the *Öneryildiz*,¹⁰⁴ *Lopez-Ostra*,¹⁰⁵ *Fadeyeva*¹⁰⁶ and *SERAC*¹⁰⁷ cases are in principle all covered by at least one of the categories of activities or areas that are currently listed in terms of section 24 of NEMA.

Of relevance are at least three of the framework environmental management principles that apply across the Republic to the actions of all organs of state that may significantly affect the environment and which apply 'alongside ... the state's responsibility to respect, protect, promote and fulfil the social and economic rights in chapter 2 of the Constitution'.¹⁰⁸ These principles are legally binding and should guide the interpretation, administration and implementation of NEMA, and any other law concerned with the protection or management of the environment.¹⁰⁹ NEMA requires 'the consideration of all relevant factors, including that a *risk-averse* and *cautious* approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions'. In addition, '*negative impacts* on the environment and on people's environmental rights must be anticipated and prevented, and where they cannot be altogether prevented, they must be minimised and remedied'.¹¹⁰ It further provides that '(t)he social, economic and environmental *impacts* of activities, including disadvantages and benefits, must be considered, assessed

¹⁰¹ Sec 24(1) of NEMA (n 7 above).

¹⁰² Sec 24D of NEMA (n 7 above).

¹⁰³ See the extensive list of activities in Government Notice R386 in *Government Gazette* 28753, 21 April 2006 (n 99 above).

¹⁰⁴ Erection and operation of a waste collection site in close proximity of a human dwelling (*Öneryildiz* case (n 25 above)).

¹⁰⁵ Erection and operation of a waste treatment facility (*Lopez-Ostra* case (n 59 above)).

¹⁰⁶ Erection and operation of a steel manufacturing plant (*Fadeyeva* case (n 62 above)).

¹⁰⁷ Oil extraction (*SERAC* case (n 24 above)).

¹⁰⁸ Sec 2(1)(a) of NEMA (n 7 above).

¹⁰⁹ Sec 2(1)(e) of NEMA (n 7 above).

¹¹⁰ Secs 2(4)(a)(vii) & (viii) of NEMA (n 7 above) (our emphasis).

and evaluated, and decisions must be appropriate in the light of such consideration and assessment.’¹¹¹

Formally, the NEMA principles above are judicially enforceable, but may nonetheless come across as a mere pooling of unclear terms and vague objectives. Even so, repeated references to ‘risk’ and ‘impact’ indicate that the state has a positive obligation to estimate and act upon environmental risks and impact as part of decision making and governance even in the event of an activity not listed in the EIA Regulations.¹¹² In essence, authorities must take decisions that are ‘appropriate’.¹¹³ NEMA links such appropriateness directly to known and unknown information about environmental impacts and risks. For example, in the (unlikely) event that the development of an off-shore wind-energy facility is not covered by any of the listed activities in the EIA Regulations, the section 2 NEMA principles still compel the state to apply its mind to the potential impact on marine life and the risks for conservation of the seabed. Another example would be if the facilities necessary for carbon sequestration were not (yet) covered by the EIA Regulations and where it would not (yet) be known if such facilities could harm human health in the long term. Even in such uncertain circumstances the state still has the duty to act with great caution in relation to potential harm and impact in terms of the overarching NEMA-principles.

South Africa may be lauded for the fact that its legal framework for environmental risk and impact is fairly tight and seems to take due account of the positive environmental obligations that were distilled in international human rights jurisprudence. With a set of new EIA Regulations published in June 2010,¹¹⁴ it also appears as if this area of environmental law is rapidly developing and under continuous scrutiny. This conclusion is not intended to deny the challenges that the state may face concerning the actual execution of its duties in relation to environmental impact, risk and regulation.¹¹⁵ Likely challenges in this respect *inter alia* relate to the procedural dimension of estimating

¹¹¹ Sec 2(4)(i) of NEMA (n 7 above) (our emphasis).

¹¹² EIA Regulations (n 99 above).

¹¹³ See sec 2(4)(i) of NEMA (n 7 above).

¹¹⁴ Amendments to the EIA Regulations (n 99 above) have recently been finalised by Department of Water Affairs and Forestry. The new Regulations were published on 18 June 2010 and will soon come into effect on a date to be announced. The 2010 Regulations can be retrieved via <http://www.environment.gov.za/> (accessed 13 July 2010).

¹¹⁵ For a discussion of some of the challenges that are generally experienced in relation to the institutionalisation of EIA systems and the conducting of EIAs *per se*, see EIA Review (n 97 above).

and regulating environmental risk and impact.¹¹⁶ However, the current legislative framework provides necessary preliminary steps for ensuring that the state gives effect to section 24 of the Constitution in a manner that also gives due consideration to South Africa's international obligations.

The South African courts for their part have thus far only dealt with cases related to the procedural dimensions of EIA studies.¹¹⁷ In addition, these cases were primarily based on the statutory provisions pertaining to EIA procedures and did not arise from disputes that directly involved section 24 of the Constitution.¹¹⁸ Even so, the courts have used these cases to give some (vague) indications of the positive obligations implied by section 24. In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*¹¹⁹ (BP case), the High Court had to decide a matter between British Petroleum (BP) and the environmental authority which had denied the oil company an environmental authorisation for purposes of a new petrol filling station based on the content of the EIA study and the application of various decision-making guidelines. The Court gave an indication of the obligations implied by section 24 for the conduct of EIAs, which the environmental authority and the Court perceived as being part of the state's positive mandate to 'take reasonable legislative and other measures' towards fulfilment of the environmental right. With reference to the notion of sustainable development¹²⁰ and the concept of inter-generational equity in the protection of the environment, the Court held that section 24 of the Constitution must be interpreted to extend the environmental authori-

¹¹⁶ An in-depth assessment of the effectiveness of the EIA system that considers in detail, eg, the qualifications and conduct of EIA practitioners, the scientific quality of assessments, fraud and corruption or the effectiveness of government in the issuing of records of decisions and monitoring of compliance, falls beyond the scope of this article. For further analysis, see SAIEA *Improving the effectiveness of environmental impact assessment and strategic environmental assessment in Southern Africa* (2003) 29-30 http://www.saiea.com/html/may_2003.pdf (accessed 13 July 2010).

¹¹⁷ See, eg, *Sasol Oil (Pty) Ltd & Another v Metcalfe NO* 2004 5 SA 161 (W); *All the Best Trading CC t/a Parkville Motors & Others v SN Nayagar Property Development and Construction CC & Others* 2005 3 SA 396 (T); *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd & Another* 2006 5 SA 483 (SCA); and *Capital Park Motors CC & Another v Shell South Africa Marketing (Pty) Ltd & Others* (unreported) [2007] JOL 20072 (T).

¹¹⁸ This is in line with the Constitutional Court's approach. In the case of *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) 51, 52 O'Regan J confirmed that '[w]here legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging the legislation as failing short of the constitutional standard'.

¹¹⁹ *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* (BP case) 2004 5 SA 124 (W).

¹²⁰ Sec 24(b) of the Constitution makes explicit reference to the notion of sustainable development. In terms of sec 1 of NEMA (n 7 above), sustainable development is defined in the South African context as 'the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that development serves present and future generations'.

ties' mandate in the conducting of EIAs beyond a consideration of strictly environmental impacts.¹²¹ In this respect, the Court held that:¹²²

Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principle of inter-generational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental judiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, inter alia, socio-economic concerns and principles.

Furthermore, in the 2007 *Fuel Retailers* case,¹²³ the Constitutional Court confirmed that both the need to protect the environment and the need for social and economic development, as well as 'their impact on decisions affecting the environment and obligations of environmental authorities in this regard, are important constitutional questions'.¹²⁴ Similar to the *BP* case, this case dealt with the nature and scope of the obligation to consider the social, economic and environmental impact of the proposed establishment of a petrol filling station, as well as whether the environmental authorities complied with that obligation. With reference to section 24 of the Constitution, the Court confirmed that socio-economic development had to be balanced with environmental protection.¹²⁵ However, these references were of a broad and general nature and the Court did not engage in an analysis of the complexities inherent in such a balancing act.

3.2 Protecting the way of life of indigenous peoples

Section 24 of the Constitution affords constitutional protection of the environment to everyone in South Africa. This includes the country's indigenous people and traditional communities. Defining indigenous people of South Africa is marked by controversy and uncertainty relating to the suitability of criteria that signify an indigenous community. However, for the purpose of this article the authors adopt the view that the country's indigenous people are the San, Khoe (Nama), Griquas, Koranas and revivalist Khoesan, all of whose way of life is closely

¹²¹ See for a more detailed discussion of this case Kotzé & Paterson (n 6 above) 573-575.

¹²² *BP* case (n 119 above) para B-D 144.

¹²³ *Fuel Retailers* case (n 5 above).

¹²⁴ *Fuel Retailers* case (n 5 above) para 41.

¹²⁵ *Fuel Retailers* case (n 5 above) paras 44-45. Although the facts were quite different, the Constitutional Court's thinking seems to signify the reasoning of the HRC in the *Länsman* case (n 26 above).

connected to nature and a particular natural habitat.¹²⁶ A traditional community refers to a community that is characterised by a particular social, cultural, language or religious system such as a black African community with distinct cultural practices (for example a Sotho or Xhosa community) or a religious community (for example a Muslim or Hindu community).¹²⁷

It is worth noting that the distinctions between the concepts of 'indigenous' and 'traditional' communities are blurred and that it is fair to conclude that a certain measure of overlap exists within the South African context. For example, in its Preamble, the Traditional Leadership and Governance Framework Act (Traditional Leadership Act)¹²⁸ explicitly refers to indigenous communities as consisting of a 'diversity of cultural communities', which would imply that they also qualify as traditional communities. The Intellectual Property Laws Amendment Bill (IPLA Bill) of 2010,¹²⁹ for its part, defines an 'indigenous community' as 'any community of people currently living within the borders of the Republic, or who historically lived in the geographic area currently located within the borders of the Republic'. This definition would be broad enough to cover a variety of (traditional) communities that share, for example, a particular cultural or religious tradition.

For the purposes of this article, this potential overlap in the scope of indigenous and traditional communities is relevant in as far as it indicates that a broad category of persons could claim protection of their natural habitat in order to preserve their traditional way of life – if section 24 of the Constitution is to be interpreted in accordance with international human rights jurisprudence. Of particular importance is the view of international human rights bodies that the protection of the way of life of indigenous peoples as a manifestation of their culture requires a limitation of the economic exploitation of their natural habitat, the prevention of pollution of their environment, as well as the eradication of the consequences of such pollution.¹³⁰

¹²⁶ For a detailed discussion, see *Country Report of the Research Project by the International Labor Organization (ILO) and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples: South Africa* (2009) 3-4 (ILO & African Commission Country Report) http://www.chr.up.ac.za/indigenous/country_reports/Country_reports_SouthAfrica.pdf (accessed 13 July 2010).

¹²⁷ Ch 12 of the Constitution acknowledges the role of 'traditional' leadership; according to sec 2 of Traditional Leadership and Governance Framework Amendment Act 41 of 2003, http://www.saflii.org/za/legis/num_act/tlagfa2003431.pdf (accessed 13 July 2010) (Traditional Leadership Act), a community is recognised as a 'traditional' community for purposes of application of the Act if it is subject to a system of traditional leadership and observes a system of customary law.

¹²⁸ Traditional Leadership Act (n 127 above).

¹²⁹ Intellectual Property Laws Amendment Bill (IPLA Bill) of 2010, http://www.pmg.org.za/files/bills/100422b8-10_0.pdf (accessed 13 July 2010).

¹³⁰ See also ILO & African Commission Country Report (n 126 above) 47, which submitted that sec 24 of the Constitution should be seen as a mechanism to protect the environment of South Africa's indigenous people.

The reasoning of international human rights bodies regarding the relationship between indigenous communities and the need for environmental protection is reinforced by a number of international instruments that protect the rights of indigenous people. Even though none of these instruments is legally binding on South Africa, they serve as a valuable source of interpretation of section 24 in a manner that compliments the standards distilled by human rights bodies. One such instrument is the United Nations Declaration on the Rights of Indigenous People (UN Declaration),¹³¹ which explicitly recognises that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment. The Declaration makes it clear that indigenous people have the right to health, conservation and the protection of the environment.¹³² Furthermore, the International Labour Organisation (ILO)'s Indigenous and Tribal Peoples Convention¹³³ (ILO Convention) provides that the rights of peoples concerned with the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of indigenous and tribal peoples to participate in the use, management and conservation of natural resources.

Internationally, the established view is that the natural habitat of indigenous peoples merits special protection due to their particular dependence for their way of life on such an environment.¹³⁴ This view has also been confirmed closer to home by the Botswana High Court in the case of *Sesana and Others v Attorney-General*.¹³⁵ In deciding this matter, and with reference to the UN Cobo Report,¹³⁶ the Court observed that there is 'a deeply spiritual relationship between indig-

¹³¹ See the Preamble of the UN Declaration on the Rights of Indigenous People (UN Declaration) adopted on 13 September 2007, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed 13 July 2010). South Africa has signed the Declaration at the time of its adoption. For a discussion of the Declaration with a focus on its meaning for indigenous communities in Africa, see WJM van Genugten 'Protection of indigenous peoples on the African continent: Concepts, position seeking, and the interaction of legal systems' (2010) 104 *American Journal of International Law* 29-65.

¹³² Art 29 of the UN Declaration.

¹³³ Art 15 of the ILO Indigenous and Tribal Peoples Convention adopted on 27 June 1989 (ILO Convention) <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> (accessed 13 July 2010). South Africa and most other African countries have not ratified the ILO Convention.

¹³⁴ Already in 1983, the ECOSOC Final Report on the Problem of Discrimination against Indigenous People, submitted by Special Rapporteur José R Martínez Cobo (Cobo Report) underscored the complexity and deep-seated implications of the relationship between indigenous communities and their land as reminiscent of their natural resource base. The Cobo Report is available at http://www.un.org/esa/socdev/unpfii/documents/MCS_xxi_xxii_e.pdf (accessed 13 July 2010).

¹³⁵ *Sesana & Others v Attorney-General* (*Sesana* case), High Court judgment, Misc No 52 of 2002; ILDC 665 (BW 2006).

¹³⁶ Cobo Report (n 134 above).

enous peoples and their land'.¹³⁷ However, it is true that, despite the special relationship between indigenous people and their natural resource base, activities in various African countries grossly disturb this relationship.¹³⁸ It is against this backdrop that the positive substantive duties of section 24 of the Constitution must be interpreted.

At first sight it is more difficult to link the positive obligation to protect the way of life and culture of indigenous peoples to the text of section 24 of the Constitution, than it is in the case of the obligation to undertake environmental assessments. Neither indigenous peoples nor issues of tradition, religion or culture have been explicitly included in section 24. Still, the state has the obligation to fulfil the right of everyone in South Africa to an environment that is not detrimental to their health or well-being (section 24(a)) and to secure the ecologically-sustainable development and use of natural resources while promoting, *inter alia*, social development (section 24(b)). It seems likely that 'the way of life' of indigenous peoples and traditional communities fits within the realm of the protection afforded by a right that mentions notions such as 'health', 'well-being' and 'social development'. These are all intrinsically part of human life.

The Constitution provides further guidance in this regard. Section 31(1(a)) determines that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practise their religion and use their language. This wording is reminiscent of article 27 of ICCPR.¹³⁹ In line with the jurisprudence of the relevant international human rights decisions analysed above, one can interpret article 24 (combined with article 31) as obliging the state *inter alia* to demarcate certain natural resources such as land, waters or forests essential to the survival of indigenous people, to limit or even exclude certain commercial activities and development within this area, to prevent the risk of environmental pollution that could threaten the way of life

¹³⁷ *Sesana case* (n 135 above) para H.1.5.b.

¹³⁸ Van Genugten (n 131 above) 32-34. In relation to the pastoralist indigenous communities of other African countries such as Nigeria and Tanzania, conflicts over land and other natural resources between these communities and state authorities are reportedly increasing 'at an alarming rate'; see International Working Group for Indigenous Affairs *The Indigenous world yearbook* (2009) 13 <http://www.iwgia.org/sw29940.asp> (accessed 13 July 2010). These tensions are of an ethnic nature and follow the forceful removal of indigenous communities from what they regard as 'their' land; For a critical view of the way in which climate change affects the way of life some of the pastoralist indigenous communities in Africa and the role of governments in addressing this impact through mitigation and adaptation strategies, see JO Simel 'The threat posed by climate change to pastoralists in Africa' in International Work Group for Indigenous Affairs *Climate change and indigenous affairs* 34-43, <http://www.iwgia.org/sw29928.asp> (accessed 13 July 2010).

¹³⁹ ICCPR (n 15 above); see also sec 30 of the Constitution, which determines 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'.

of these communities, as well as to provide reparations in instances where members of these communities have suffered injury as a result of environmental degradation.

The South African legislature has made a particular effort to protect the cultural heritage resources of *inter alia* traditional communities and indigenous people through the enactment of the National Heritage Resources Act (NHRA).¹⁴⁰ This is significant since the NHRA defines a heritage resource as any place or object of cultural significance. It may typically include landscapes and natural features of cultural significance such as rivers, mountains and forests.¹⁴¹ Heritage resources are furthermore defined to include, for example, ancestral graves, royal graves and graves of traditional leaders. The NHRA further defines 'living heritage' as intangible aspects of inherited culture such as indigenous knowledge systems.¹⁴² The NHRA endorses the view that the cultural heritage of traditional communities and environmental protection go hand in hand. It provides that the identification, assessment and management of the heritage resources of South Africa must promote the use and enjoyment of and access to heritage resources (which may include natural resources) in a way consistent with their cultural significance and conservation needs.¹⁴³ Also, South Africa's framework environmental statute provides that 'decisions' must take into account the interests, needs and values of all interested and affected parties, and this includes recognising 'traditional knowledge'.¹⁴⁴ In similar vein, the National Department of Trade and Industry's Policy Framework for the Protection of Indigenous Knowledge through the Intellectual Property System (Policy Framework)¹⁴⁵ states that one of the objectives with formally protecting indigenous knowledge is to conserve the environment. The Policy Framework acknowledges, for example, that traditional farming methods by nature ensure the protection of the environment on which they depend and that land races, rotation

¹⁴⁰ National Heritage Resources Act 25 (NHRA) of 1999, assented to on 28 April 1999, http://www.saflii.org/za/legis/num_act/nhra1999278.pdf (accessed 13 July 2010). The importance of this Act for purposes of the protection of the environment of indigenous people is illuminated in the Country Report (n 126 above).

¹⁴¹ Sec 1 of NHRA (n 140 above).

¹⁴² As above.

¹⁴³ Sec 5(7) of NHRA (n 140 above).

¹⁴⁴ Sec 2(4)(g) of NEMA (n 7 above). Unfortunately the meaning of 'decision' and 'indigenous knowledge' is not clarified in the Act. It can, however, be derived from the scope of application of NEMA that a decision pertains to any decision taken in the public or private domain that is or could be of environmental relevance. Indigenous knowledge is in a very technical way defined in the IPLA Bill (n 129 above) as 'traditional intellectual property' which is reminiscent of indigenous knowledge systems and which comprises of traditional works, traditional designs, traditional performances and traditional terms and expressions.

¹⁴⁵ Policy Framework for the Protection of Indigenous Knowledge through the Intellectual Property System (Policy Framework) of 2008, <http://www.dti.gov.za/ccrd/ip/policy.pdf> (accessed 13 July 2010).

of crops and other traditional methods not only protect the land, but in fact increase harvest yields.¹⁴⁶

The National Environmental Management: Biodiversity Act (Biodiversity Act)¹⁴⁷ further provides that before a permit (environmental authorisation) for bio-prospecting¹⁴⁸ may be issued, the issuing authority must first protect any interests that an indigenous community may have where the proposed bio-prospecting project will involve such community's traditional uses of the indigenous biological resources at stake, or such community's knowledge of or discoveries about the biological resources to which the application relates.¹⁴⁹ The Biodiversity Act further provides for the sharing of any future bio-prospecting benefits with indigenous communities in the event that such communities' interests are involved.¹⁵⁰

It seems therefore that South African law protects indigenous peoples' interests in the event of economic developments that may exploit their natural resources or otherwise impact on their natural habitat. Arguably, the strength of this protection will depend on the availability to indigenous communities of information in relation to proposed developments, the accessibility of environmental and legal knowledge, as well as the ability and means to take action. An indigenous community can only protect and enforce protection of its environmental interests when it fully grasps the long-term ecological impact and consequences (including financial risks and benefits) of a bio-prospecting project, for example.

At this point it is worth mentioning a few developments in the South African courts and before the SAHRC in relation to the protection of the way of life of indigenous and traditional communities. The decision of the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹⁵¹ was based on section 31(1) of the Constitution. The question before the Court was whether the existence of graves and places of religious significance can be taken into account in township-establishment applications. The case concerned more than 20 graves that had special religious and cultural significance to

¹⁴⁶ Policy Framework (n 145 above) 9.

¹⁴⁷ National Environmental Management: Biodiversity Act 10 (Biodiversity Act) of 2004, assented to 7 June 2004, <http://www.info.gov.za/acts/2004/a10-04/index.html> (accessed 13 July 2010).

¹⁴⁸ Bio-prospecting is defined in sec 1 of the National Environmental Management: Biodiversity Act (n 147 above) as any research on, or development or application of, indigenous biological resources for commercial or industrial exploitation, and includes *inter alia* the utilisation for purposes of such research or development of any information regarding any traditional uses of indigenous biological resources by indigenous communities. An example is the commercialisation of the medicinal uses of the indigenous Hoodia plant as originally discovered by the San people.

¹⁴⁹ Sec 82(1) of the Biodiversity Act (n 147 above).

¹⁵⁰ Sec 83 of the Biodiversity Act (n 147 above).

¹⁵¹ *Oudekraal Estates (Pty) Ltd v The City of Cape Town & Others* (25/08) [2009] ZASCA 85; 2010 1 SA 333 (SCA) (3 September 2009).

the members of the Cape Town Muslim community. Two of the graves were so-called 'kramats' with particular spiritual significance. The Court held in favour of this traditional community, stating that the exercise of property rights could be constrained by the law and by the protection of other constitutional rights (legal interests) of a particular group of people. Even though this decision concerned a religious minority (which would satisfy the definition of a traditional community)¹⁵² as opposed to an indigenous community and had a more nuanced bearing on environmental protection,¹⁵³ it reflects sensitivity on the part of the courts for heritage resources, cultural practices and the way of life of minorities.¹⁵⁴ It is likely that the courts will display a similar sensitivity towards the way of life of indigenous people, including their dependency on the preservation of a particular natural habitat.

Although no relevant cases involving indigenous peoples have thus far come before the courts, the SAHRC Report on the Inquiry into Human Rights Violations in the Khomani San Community in the Andriesvale-Askham Area of 2004¹⁵⁵ explicitly highlights the environmental rights of the Khomani San people. The inquiry (research, public hearings and a final report) followed a number of alleged human rights violations in the area, subsequent to the settlement of the Khomani San's land claim in 1999 in terms of the national Land Reform Programme provided for by the Restitution of Land Rights Act.¹⁵⁶ Amongst others, the SAHRC's enquiry involved a consideration of the alleged violation by the state (the government in its entirety and specifically the Mier Local Municipality) of section 24 of the Constitution. The land of the Khomani San was found to lack the necessary environmental management practices to secure an environment not detrimental to health and well-being

¹⁵² For the definition of a 'traditional community', see n 127 above.

¹⁵³ See the inclusion of cultural interests in the definition of the environment, sec 1 of NEMA (n 7 above). Note also that the NHRA (n 140 above) is often classified as an environmental law despite it being administered by the national department responsible for arts and culture.

¹⁵⁴ In this regard, although this matter dealt specifically with the retrospective application (statutory interpretation) of sec 28 of NEMA (n 7 above), the case of *Bareki NO & Another v Gencor Ltd & Others* 2006 1 SA 432 (TPD) should be noted. It addressed the historic pollution caused by an asbestos mine. The main applicant was a traditional leader acting in his own name and on behalf of the community living adjacent to the mine. The applicants alleged that the mine caused, and continued to cause, significant pollution due to the dispersion of asbestos fibers, which were causing ill health in the traditional community. The court confirmed, without further elaboration, that pollution and degradation of the environment present a serious health risk to residents and occupiers of the areas concerned, as well as a significant threat to the environmental integrity of the region.

¹⁵⁵ SAHRC Report on the Inquiry into Human Rights Violations in the Khomani San Community in the Andriesvale-Askham Area (November 2004). This report is on file with the authors.

¹⁵⁶ Restitution of Land Rights Act 22 of 1994, assented to 25 November 1994, <http://www.info.gov.za/acts/1994/a22-94.pdf> (accessed 13 July 2010).

and the protection of this community's fragile and vulnerable natural resource base.¹⁵⁷

Furthermore, the SAHRC found that the Khomani San lacked access to basic environmental services such as access to water, sanitation and waste management.¹⁵⁸ The SAHRC's findings and recommendations acknowledged that section 24 in the broad sense imposes positive environmental duties on the state in relation to the Khomani San as an indigenous community.¹⁵⁹ However, no mention was made of a special kind of constitutional protection by virtue of this community's 'indigenous' status, nor of the international discourse on the close relationship between their natural environment and indigenous peoples' way of life.

4 Conclusion

In the final analysis the two strands of substantive obligations pertaining to the protection of the environment that were distilled from international human rights jurisprudence contribute to an improved understanding of the meaning and scope of section 24 of the South African Constitution. At first sight one might conclude that positive obligations to conduct and monitor environmental impact and risk assessments do not have much added value in the South African context, since these obligations have already been concretised extensively in domestic legislation. Similarly, there is domestic legislation in place to give effect to the obligation to preserve the culture and way of life of indigenous communities. However, so far the South African courts and other judicial bodies have not yet explicitly acknowledged that these obligations have a constitutional character, nor have they buttressed such an interpretation with international human rights jurisprudence. If South African judicial bodies were to do so, it would confirm the special nature of the obligations at stake, notably that they constitute a minimum threshold of protection, which cannot be discarded through policy whims of the legislature and the executive. In addition, such an approach would underscore the inter-twining of environmental protection with (other) human rights and therefore serve as an indication of the priority that environmental governance should receive at all levels of governance. Such recognition of priority can in turn serve as a useful tool for informing the public and political debate pertaining to the challenges that the state faces in relation to the implementation of its environmental obligations.

The above analysis further illustrates that international human rights jurisprudence has inherent limitations when identifying positive

¹⁵⁷ SAHRC Report (n 155 above) 28.

¹⁵⁸ SAHRC Report (n 155 above) 12.

¹⁵⁹ SAHRC Report (n 155 above) 11 28.

obligations pertaining to the environment. This is related to the fact that environmental protection *per se* is not yet a justiciable right before most international human rights bodies. As a result, these bodies can only distill positive obligations pertaining to the environment where they are also clearly linked to the protection of other (internationally justiciable) human rights. This reality necessarily limits the role of international human rights bodies in determining positive obligations directed at environmental protection to particular categories of cases. The only exception in this regard is the right to a satisfactory environment in article 24 of the African Charter which is justiciable before the African Commission and African Court of Human and Peoples' Rights. It is possible that in future these bodies may build on and further concretise the positive obligations identified in the *SERAC* case. Such a development would be of particular relevance to South Africa, given the broad scope of section 24 of the Constitution and the fact that South Africa is a party to the African Charter.

For the time being, however, South African courts may be confronted with the concretisation of particular substantive duties pertaining to section 24 of the Constitution, in relation to which international jurisprudence does not yet exist. In such a situation, the roles would be reversed in the sense that the South African courts could contribute to the development of international law in a bottom-up manner. By linking their interpretations explicitly to article 24 of the African Charter, which is binding on South Africa, domestic courts could provide the regional human rights bodies with an indication of the substantive meaning of this article. Some of the substantive questions that may arise before the courts in future could include the meaning of and positive obligations attached to the concepts of health and well-being (section 24(a) of the Constitution), how authorities are to determine and implement the notion of 'environmental benefit for future generations' (section 24(b) of the Constitution), as well as what may be regarded as 'reasonable' legislative and other measures on the part of the state given the limited and diminishing availability of natural resources such as water and minerals (section 24(b) of the Constitution).

When confronted with these questions, the courts will face the challenge of giving concrete meaning to constitutional and international obligations in an area that is highly technical and subject to rapid change and scientific development. It is to be expected that the domestic courts (like their international counterparts) will act prudently under these circumstances and limit their findings to the concrete context of the case at hand. However, this should not detract from the fact that their jurisprudence plays an important role in clarifying and enforcing the minimum threshold of protection pertaining to the environment that is mandated under the South African Constitution and international law.

Exploring transitional justice as a vehicle for social and political transformation in Kenya

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Summary

The eventful defeat of the Kenya African National Union political party in the 2002 general elections ushered in a new era for Kenya. With the change of regime an opportunity for transitional justice presented itself. A task force established by the Minister for Justice and Constitutional Affairs advised that there was a need for transitional justice. However, given the political differences among the political elite, this path of transitional justice proved not to be as easy as contemplated. The report and recommendations by the task force were shelved and the sentiments revived only in the aftermath of the December 2007 election violence. The period after the election violence witnessed the establishment of the Kenya National Dialogue and Reconciliation Committee which became the avenue through which the government and the opposition discussed an agenda for power sharing as well as specific issues in need of reform. The KNDRC adopted various measures to deal with the country's political crisis. These included a review of the Constitution; the investigation of the root causes of the violence; the setting up of a Truth, Justice and Reconciliation Commission; the need to establish a Commission of Inquiry into the Post-Election Violence; and numerous institutional reforms. This article investigates the necessity and utility of the various ongoing transitional justice initiatives. In particular, the article undertakes an assessment of prosecution and non-prosecutorial mechanisms of transition as well as the constitutional review process.

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Other key issues arising from this discourse which the article attempts to address are whether Kenya is a society in transition, the influence of the volatile political context currently obtaining in Kenya on transitional justice efforts; and Kenya's legal obligations on the subject of transitional justice.

1 Introduction

New political regimes are never created on a *tabula rasa*. Hence any new regime must establish some relationship to the actors and subjects of its predecessor regime. Also it must establish reasons supporting the nature of this retrospective relationship. The retrospective relationship must be justifiable in terms of the new regime. Whereas new authoritarian regimes may be able to repress and destroy the traces and memories of the predecessor regime, this option is precluded in new democracies. The latter must deal, in order to secure their viability and credibility of their principles in the future, with past injustices through means and procedures that are consistent with presently valid standards of justice ...¹

Recently, societies around the world have been overthrowing oppressive, tyrannical and autocratic regimes and moving towards democratic rule.² Emerging post-conflict societies ponder over at least three critical questions.³ First, how do they hold past autocratic regimes accountable? Second, how could emerging democracies be consolidated? Finally, how do they deal with the victims of the abuses of past regimes?

The evolution of the concept 'transitional justice' in the twenty-first century could, therefore, have supplied such 'new democracies' with pertinent panacea. Modern or democratic transitional justice:⁴

... embodies attempts to build sustainable peace after conflict, mass violence or systematic abuse of human rights. It involves prosecuting perpetrators, revealing the truth about past crimes, providing victims with reparations, reforming institutions and promoting reconciliation.

From the historical narrative relating to countries that have instituted one or other form of transitional justice, three salient variables – which could be regarded as 'pre-requisites' for transitional justice – stand out: the society must have experienced a conflict; mass violence must have occurred; or systemic abuse of human rights must have taken place.⁵ This list is, however, not exclusive and exhaustive. Neither are there

¹ C Offe & U Poppe 'Transitional justice in the German Democratic Republic and in unified Germany' in J Elster (ed) *Retribution and reparation in the transition to democracy* (2006) 239.

² Eg, in the 1980s, Argentina, Bolivia, Brazil, Mexico, Chile and Uruguay embraced different forms of transition to democracy; so did Asia, East/Central Europe and Africa.

³ Z Miller 'Effects of invisibility: In search of the "economic" in transitional justice' (2008) 2 *The International Journal of Transitional Justice* 266-299.

⁴ P van Zyl 'Promoting transitional justice in post-conflict societies' 209 http://www.dcaf.ch/_docs/Yearbook2005/Chapter10.pdf (accessed 8 October 2009).

⁵ Van Zyl (n 4 above) 209.

hard and fast rules to determine which society is ready for transitional justice.

A number of states on the African continent have variously experimented with transitional justice. The Republic of South Africa,⁶ Rwanda,⁷ Chad,⁸ Sierra Leone,⁹ Nigeria,¹⁰ Ghana,¹¹ Zimbabwe¹² and Liberia¹³ have specifically established truth and reconciliation commissions (TRCs). In addition, a few of these countries have undertaken prosecution – either through national courts, traditional mechanisms or hybrid tribunals – of alleged perpetrators.¹⁴ Some countries, such as Liberia, Sudan, Mozambique and Angola, have dealt with the question of justice by deciding (expressly or otherwise) to avoid it,¹⁵ while others, such as the Democratic Republic of Congo (DRC) and Burundi,¹⁶ have introduced piecemeal transitional justice legislation or amnesty laws. Still, other states have had failed attempts at transitional justice. Uganda for example, established a Truth Commission,¹⁷ the upshot of which has been described as irrelevant.¹⁸ The latest attempt at transitional justice on the continent is underway in the Republic of Kenya, which is the focus of this contribution.

The current section is an introduction to the article. The second section answers the question as to whether Kenya is a society in transition and lays down the general political context currently prevailing

⁶ Promotion of National Unity and Reconciliation Act 34 of 1995.

⁷ Established by Law 03/99 of 12 March 1999.

⁸ The Commission was established on 29 December 1990 to investigate crimes committed during the eight-year rule of Hisssein Habre.

⁹ Established by the TRC Act 4 of 2000.

¹⁰ Established on 4 June 1999 by President Olusegun Obasanjo to investigate violations of human rights abuses committed between 1 January 1994 and 29 May 1999.

¹¹ Established in 2002 to investigate human rights violations for the period from 6 March 1957 to 6 January 1993.

¹² Established in 1985 by ZANU-PF government to investigate the killings of an estimated 1 500 political dissidents and other civilians in Matabeleland in 1983.

¹³ Established by President Ellen Johnson-Sirleaf on 22 June 2006 to investigate human rights abuses that occurred between 1979 and 2003.

¹⁴ Sierra Leone adopted the Special Court established by the Statute of the Special Court of 2002. In Rwanda the International Criminal Tribunal for Rwanda (ICTR) was established. This was complimented by *Gacaca* (traditional) tribunals, and national courts.

¹⁵ All these countries offered blanket amnesties to all violators. See eg art XXXIV of Liberia's Comprehensive Peace Agreement, signed on 18 August 2003.

¹⁶ The two signed peace agreements which embodied transitional mechanisms of amnesty and TRCs: DRC, Global and Inclusive Agreement on Transition, signed 17 December 2002 and Burundi, Arusha Peace and Reconciliation Agreement, signed 28 August 2000.

¹⁷ The Commission was mandated to investigate human rights violations by state forces that occurred from Uganda's independence in 1962 up to January 1986, when Museveni came to power (excluding abuses by Museveni's rebel forces).

¹⁸ M Mutua 'Beyond Juba: Does Uganda need a national truth and reconciliation process?' (2007) 13 *Buffalo Human Rights Law Review* 20.

in Kenya. The section concludes by interrogating Kenya's legal obligation on the subject of transitional justice. Section three undertakes an in-depth critical analysis of prosecution as one of the transitional justice mechanisms to be undertaken by Kenya. Section four assesses the efficacy of non-prosecutorial mechanisms of transitional justice. This analysis will, however, be limited to the Truth, Justice and Reconciliation Commission (TJRC) and its related themes on reparation, truth telling and reconciliation. Section five discusses the constitutional review process and the eventual promulgation of a new constitution. Finally, conclusions are reached.

2 Background to the article

In the general elections of December 2002 Kenyans voted out the Kenyan African National Union (KANU),¹⁹ which had governed the country since independence in 1963. The Jomo Kenyatta regime, which took power upon independence, became increasingly corrupt and authoritarian.²⁰ At the time of his death in 1978, Kenyatta had crafted a state characterised by personal rule, nepotism, public theft and gross violations of human rights.²¹ Of this regime, a report has observed thus:²²

In spite of the liberal constitution, the post-colonial state was autocratic at its inception because it inherited wholesale the laws, cultures and practices of the colonial state ... President Kenyatta quickly created a highly-centralised, authoritarian republic, reminiscent of the colonial state ...

President Daniel Moi succeeded Kenyatta.²³ At best, Moi's regime can be described as a perfection of Kenyatta's. Through the government and KANU, President Moi exercised extensive control over civic groups, trade unions, the press, the legislature and the judiciary.²⁴ Political murder, politically-instigated 'ethnic clashes', detention without trial, arbitrary arrests, torture, false and politically-motivated charges of opponents became part of state objectives.²⁵

Upon the change of regime in 2002, an opportunity for transitional justice presented itself. The Minister for Justice and Constitutional

¹⁹ Kenya holds its presidential, parliamentary and civic elections every five years. Following the re-introduction of multiparty democracy in 1992, Kenya has held four general elections: in 1992, 1997, 2002 and 2007.

²⁰ Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission chaired by Prof Makau Mutua, 26 August 2003, 9.

²¹ As above.

²² n 20 above, 19-20.

²³ Moi took over power in 1978 in a peaceful transition following the presidential elections that were held within 90 days of Kenyatta's death.

²⁴ n 20 above, 20.

²⁵ As above.

Affairs (Minister) appointed a Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (Task Force) in April 2003. The Task Force was mandated to consider the possibility of establishing a Truth, Justice and Reconciliation Commission (TJRC) to deal with the misgivings of past regimes following which it was to make recommendations to the Minister as to whether the establishment of a TJRC was necessary for Kenya.²⁶ The Task Force advised that there was a need for transitional justice, and that the TJRC was one way of achieving this objective.²⁷ The report and its recommendations were, however, shelved and the sentiments only revived in the aftermath of the December 2007 election violence.

Following the announcement of President Mwai Kibaki as the winner of the general elections of 27 December 2007, fierce violence ensued. The public contested the presidential results amidst allegations of massive rigging.²⁸

The post-election violence period witnessed the establishment of the Kenya National Dialogue and Reconciliation Committee (KNDRC). This became the avenue through which the ruling party (Party of National Unity) and the opposition (Orange Democratic Party) discussed the agenda for power sharing as well as specific issues in need of reform. These talks were initiated by the former Secretary-General of the United Nations (UN), Mr Kofi Annan. Annan and a panel of other eminent African personalities mediated the process.²⁹ On 14 February 2008, the KNDRC adopted a resolution establishing a TJRC as a measure to deal with the country's political crisis:³⁰

We recognise that there is a serious crisis in the country, we agree a political settlement is necessary to promote national reconciliation and unity... such reform mechanisms will comprise ... a truth, justice and reconciliation commission.

The KNDRC also agreed to the establishment of a Commission of Inquiry into the Post-Election Violence (CIPEV).³¹ This institution was to be mandated to investigate the facts and circumstances related to the violence that ensued in the aftermath of the 2007 disputed presidential elections, to prepare a report with its findings and to make a recommendation for redress or any legal measures that could be taken.³²

Subsequently, CIPEV was established.³³ According to its findings, more than 1 000 people succumbed to the violence and not less than

²⁶ n 20 above.

²⁷ n 20 above, 28.

²⁸ 'Kibaki won fair and square' *The Sunday Standard* 13 January 2008 34.

²⁹ The other panelists included Benjamin Mkapa, Graca Machel and Jakaya Kikwete.

³⁰ 'Agreement on agenda item three: How to resolve the political crisis' KNDRC (2008) 3.

³¹ 'Agreement on CIPEV' KNDRC (2008) 1.

³² As above.

³³ Kenya Gazette Notice 4473 vol cx-no.4 of 23 May 2008.

500 000 were displaced.³⁴ In the Commission's recommendations, the need for a special tribunal for the prosecution of those who bore the greatest responsibility for crimes against humanity arising from the post-election violence of 2007 was emphasised.³⁵

It is against this background that the article investigates the necessity and utility of the various ongoing transitional justice initiatives in Kenya. In order to do this, the question as to whether Kenya may be classified as a state in transition first will have to be resolved.

Indeed, the violence, the negotiation of peace and the assemblage of a Government of National Unity (GNU)³⁶ created a 'constitutional moment' which could bring far-reaching changes. The peace negotiators agreed on a number of reform items, amongst them, the review of the Constitution, the investigation of the root causes of the violence and the setting up of a TJRC.³⁷ However, analysts continue to doubt that the moment is ripe for transitional justice measures.³⁸ It is often alleged, for instance, that the perpetrators of the post-election violence occupy prestigious and strategic positions in the GNU.³⁹ Pundits also argue that a reconciliatory spirit is yet to be attained,⁴⁰ as the Kenyan nation remains ethnically polarised.

3 Kenya as a state in transition

Having sketched the background, the question as to whether Kenya would be considered a state in transition is considered. This is done by identifying the various prerequisites of transitional justice in the situation in Kenya.

A state could be said to be in transition when it has experienced a regime that massively violates the rights of its citizens, when it has encountered mass violence or has been in an armed conflict, and such a state is making attempts to deal with its past in order to democratise its future. These attempts may, however, take numerous forms: TRCs; amnesties; prosecutions; purges; institutional reforms; constitutional amendments; and the like.

The question as to whether a country is in transition, therefore, is answered in terms of history and context. A historical narrative of

³⁴ CIPEV Report (2008) Part IV.

³⁵ n 34 above, 472-475.

³⁶ As part of the peace process, KNDRC established a GNU. This was achieved through the signing of the National Accord and Reconciliation Act of 2008.

³⁷ n 30 above.

³⁸ O Ambani 'Conditions are hardly right for transitional justice' *Daily Nation* 7 September 2009.

³⁹ G Musila 'Options for transitional justice in Kenya: The Special Tribunal for Kenya, the Truth, Justice and Reconciliation Commission and the International Criminal Court' (2008) *South African Year Book of International Affairs* 2.

⁴⁰ Ambani (n 38 above) 10.

the post-independence regimes in Kenya perhaps corresponds to the definition of a country in transition. During the Kenyatta regime, the political murders of ethno-political opponents became a state objective. For example, the disposal of JM Kariuki in 1975,⁴¹ the assassination of Tom Mboya in July 1969⁴² and the public shooting of the radical Pio Gama Pinto⁴³ characterised the Kenyatta era. Political analysts have further pointed fingers to the Kenyatta regime for the death of other key political opponents who died in questionable circumstances. Some of these include Ronald Ngala and Argwings Kodhek.⁴⁴ The banning of opposition parties like KPU in 1969 was followed by the arbitrary arrest and detention of all its political leaders, including Shikuku, Seroney, Anyona and Mwaithaga; all typical of this epoch.⁴⁵ The irregular allocation of land and the embezzlement of government funds were yet other common phenomena of this era.⁴⁶

Under Moi, 'theft' of public land increased.⁴⁷ Inter-ethnic violence sanctioned by the state left thousands of people dead and others displaced.⁴⁸ The government established what has come to be called 'torture chambers' in which political opponents were subjected to gruesome torture after moot trials (popularly known as *mwakenya* trials).⁴⁹ In 1983, the government adopted a policy of 'detention without trial' under which several people, especially political opponents, were arrested and subjected to detention under torture.⁵⁰ Hideous economic crimes were the order of the day.⁵¹ The famous Goldenberg scandal and the Anglo leasing scandal caused large sums of money to disappear.

The Kibaki regime began by finalising the famous Anglo leasing scandal.⁵² It perpetrated yet another scandal that has come to be known as the grand regency scandal. Moreover, the extensive abusive use of

⁴¹ J Lonsdale 'Moral and political argument in Kenya' in B Berman *et al* (eds) *Ethnicity and democracy in Africa* (2004) 91.

⁴² G Muigai 'Ethnicity and the renewal of competitive politics in Kenya' in G Glickman (ed) *Ethnicity, conflict and democratisation* (1995) 171.

⁴³ R Ajulu 'Thinking through the crisis of democratisation in Kenya: A response to Adar and Murunga' (2000) 4 *African Sociological Review* 137.

⁴⁴ Ajulu (n 43 above) 141.

⁴⁵ As above.

⁴⁶ Muigai (n 42 above) 171.

⁴⁷ Lonsdale (n 41 above) 92.

⁴⁸ Report by the National Christian Council of Kenya 'The cursed arrow: Contemporary report on the politicised land clashes in Rift Valley, Nyanza and western provinces' (1992). See also report by Africa Watch 'Divide and Rule: State sponsored ethnic violence in Kenya' (1993).

⁴⁹ Ajulu (n 43 above) 143.

⁵⁰ As above.

⁵¹ C Odhiambo-Mbai 'The rise and fall of the autocratic state in Kenya' in W Oyugi *et al* (eds) *The politics of transition in Kenya: From KANU TO NARC* (2003) 65.

⁵² See generally M Wrong *It's our turn to eat* (2009).

government machinery in the aftermath of the 2007 election violence is self-evident. In its report, CIPEV documents a glaring 405 deaths resulting from police gunshots, while 243 others were wounded by the police.⁵³ Apart from these extra-judicial executions, the police has subsequently engaged with impunity in similar acts. In a report by the Kenya National Commission on Human Rights (KNCHR),⁵⁴ one of its major findings is documented as follows:⁵⁵

Initially, the police mainly used firearms to execute suspects, they subsequently changed their *modus operandi* and have since been using such methods as strangulation, drowning, mutilation and bludgeoning.

The murder of Dr Odhiambo-Mbai – a constant critic of the Kibaki administration – and the public shooting of four human rights activists by police officers⁵⁶ have left questions regarding a respect for human rights by the Kibaki regime.

The massive human rights violations characterising the post-independence regimes, coupled with the violence of 2007, paved the way for the country to embrace a transitional justice process. Indeed, the current government has adopted the Truth, Justice and Reconciliation Act (TJR Act), establishing a TJRC as well as making attempts towards prosecution of alleged wrongdoers. It is clear that Kenya is a society in transition.

It is, however, instructive that certain commentators on the subject emphasise the need for a change of regime or guard as a precursor to transitional justice.⁵⁷ The situation obtaining in Kenya (in which there has been no real regime change) has certainly not evaded criticism. According to Ambani:⁵⁸

Kenya is not experiencing a transition, and it is not about to ...The Kenya[n] state has had at least two moments when transitional processes were tenable. First, in 1963, on attainment of independence; second, in 2002, when the National Alliance Rainbow Coalition (NARC) was overwhelmingly elected to power. Both these moments were thrown out to the dogs. The potentially third moment, happening after the 2007 general elections, aborted somewhere in between the violence and the signing of the Peace Accord.

Although this reasoning may appear sound as a political theory, it is typical of 'radical idealism'. Conversely, the realist would argue that legal steps are necessary to precede political transformation.⁵⁹ This

⁵³ n 34 above, 335 342-343.

⁵⁴ KNCHR 'Follow-up Report on Extra Judicial Killings and Disappearances' August 2008.

⁵⁵ As above.

⁵⁶ 'Activists die with a heavy heart' *Daily Nation* 6 March 2009.

⁵⁷ F Aolain & C Campbell 'The paradox of transition in conflicted democracies' (2005) 27 *Human Rights Quarterly* 172.

⁵⁸ Ambani (n 38 above) 10.

⁵⁹ R Teitel *Transitional Justice* (2000) 1.

author holds that it does not matter which of the two comes first: political change or legal steps. Thus, Kenya remains a state in transition and the ongoing legal initiatives are vital in ushering in its political transformation. In fact, under general principles of international law, a change of regimes does not relieve (the Kenyan) government's human rights duties and obligations.⁶⁰ Given that some of the atrocities in Kenya were committed by previous regimes of which successor governments did not respond to, the incumbent government is bound to fulfil its obligations – whether within a transitional justice setting or otherwise.

3.1 Kenya's political context

Kenya's transitional justice is not to be dispensed in a vacuum – it is to be achieved within a political context. The current political milieu may best be understood in the framework of Kenya's political history, which history is shrouded in ethnic contestation. According to Musila, 'nowhere is ethnicity more at play in Kenya than in the political arena'.⁶¹ As a major feature of Kenya's political landscape, ethnicity remains the primary architecture of the current political context. Drawing its lineage from the 'divide and rule' colonial form of government, the post-independence elections of 1963 was essentially a political contest between larger tribes (Luo and Kikuyu) coalescing around KANU, and the smaller tribes under the umbrella of Kenya Africans Democratic Union (KADU).⁶² With KANU emerging as the winner, the then President, Kenyatta, hastened to create what Asingo describes as neo-patrimonialism (personal rule).⁶³

The patron-client political ties that later emerged from this leadership was soon to steer an authoritarian state⁶⁴ that entrenched a culture of nepotism, public theft and autocracy amidst horrendous abuses of human rights.⁶⁵ Leys captures this sad epoch in a most humorous way:⁶⁶

Kenyatta's court was based primarily at his country home at Gatundu about 25 miles from Nairobi in Kiambu district; but like the courts of old it moved with him, to state house in Nairobi, to his coastal lodge near Mombasa, and his lodge in Nakuru in Rift Valley. This corresponded to his actual roles of Kikuyu paramount and chief national leader of the comprador alliance.

⁶⁰ *Velasquez-Rodriguez v Hondarus* IACHR, judgment of 29 July 1988 (*Velasquez-Rodriguez case*) para 184.

⁶¹ G Musila 'Federalism and the ethnicity question in Kenya' in G Mukundi (ed) *Ethnicity, human rights and constitutionalism in Africa* (2008) 63.

⁶² D Kadima 'The article of party coalitions in Africa' in D Kadima (ed) *The politics of party coalitions in Africa*, (2006) 191.

⁶³ P Asingo 'The political economy of transition in Kenya' in Oyugi *et al* (n 51 above) 19.

⁶⁴ Asingo (n 63 above) 20.

⁶⁵ Odhiambo-Mbai (n 51 above) 51. See also Mutua (n 20 above) 9.

⁶⁶ C Leys *Underdevelopment in Kenya: The political economy of neo-colonialism* (1975) as cited in Odhiambo-Mbai (n 51 above) 64.

Upon his death, Kenyatta was succeeded by the then Vice-President, Moi. Moi's regime confirmed the delusion of democracy earlier on orchestrated by the Kenyatta regime. At the height of political hypocrisy, Moi proscribed multi-partyism and embedded a *de jure* one-party state in the Constitution.⁶⁷ Not only was allegiance to KANU made a precondition to participate in Kenyan politics, this era was also marked by a curtailment of fundamental rights, such as the curtailment of freedom of association and assembly; political murder; torture of political opponents; detention without trial; arbitrary arrest and detention; rape; extra-judicial police executions; as well as impunity, corruption and national decay.⁶⁸ Even with the re-introduction of multi-party democracy in 1992,⁶⁹ Moi continued to cling onto power and to govern with an iron fist, giving Kenya that which Mbai depicts as the character of an 'autocratic multiparty state'.⁷⁰

The significance of subsequent elections in 1992 and 1997 was undermined by similar trends of ethnic affiliations coupled with armed inter-ethnic clashes.⁷¹ Initially perceived to have been 'ethnicity proof', the 2002 elections turned out to be yet another ethnic ploy. Even though the then opposition party, the National Rainbow Coalition (NARC), which won the election had a reform based ideology,⁷² analysts had earlier on warned that this was yet another super alliance of ethnic groups. Of this election, Mbai writes:⁷³

The December 27, 2002 general elections, although they supposedly resulted in the collapse of the autocratic state, they also prepared fertile ground for the germination of new seeds of autocracy in the country.

Three months after the inception of the Kibaki regime, attempts to 'own the presidency' by an ethnic-based cabal of self seekers were already noticeable.⁷⁴ This happened amidst allegations by the Liberal Democratic Party (LDP) – one faction of the coalition government – that the President had violated the Memorandum of Understanding (MOU) signed between itself and NAK with respect to ministerial appointments.⁷⁵ That efforts were underway to immediately consolidate a new

⁶⁷ Kenya was a *de jure* one-party state from 1982 to 1992.

⁶⁸ Asingo (n 63 above) 22.

⁶⁹ Moi succumbed to pressure from the civil society, religious groups and the opposition, leading to a repeal of sec 2A of the Constitution.

⁷⁰ Odhiambo-Mbai (n 51 above) 52.

⁷¹ Asingo (n 63 above) 28. Ethnic civilian militia groups coalesced around ethnic tribes like *Mungiki*, *Kamjesh*, *Jeshi la mzee* and *Jeshi la kingole* played an instrumental role in this political violence. See also P Wanyande 'The politics of alliance building in Kenya: The search for opposition unity' in Oyugi *et al* (n 51 above) 145.

⁷² The NARC manifesto encompassed ideals such as the promulgation of a new constitution, the introduction of institutional reforms and the need to deal with past injustices.

⁷³ Odhiambo-Mbai (n 51 above) 92.

⁷⁴ As above.

⁷⁵ Wanyande (n 71 above) 151.

kind of autocracy after this election can thus not be overemphasised. Prophetically, it did not take more than two years before this coalition of convenience disintegrated and every politician scampered back to their ethnic cocoons as the new Kibaki regime marshalled a new kind of autocracy. The politics of exclusion of non Gikuyu, Embu and Meru communities (GEMA) is what informed the collapse of the NARC coalition.⁷⁶

The 2007 general elections and the associated violence were yet another reflection of how ethnicity has eroded the social and political fabric of the Kenyan society. Although social and economic inequalities may have played a role in this violence, the role played by ethnic differences was most dominant. An independent observer has analysed this incident:⁷⁷

In the slums of Nairobi, Kisumu, Eldoret and Mombasa protests and confrontations with the police rapidly turned into revenge killings targeting the representatives of the political opponent's ethnic base. Kikuyu, Embu and Meru were violently evicted from Luo and Luhya dominated areas, while Luo, Luhya and Kalenjin were chased from Kikuyu dominated settlements.

Despite it being referred to as a government of national unity, ethnicity remains a key factor to almost every political decision made by the government.⁷⁸ A member of cabinet once commented:⁷⁹

For a long time we have laboured under the delusion that we are nationalists who think as Kenyans. We pretend that we participate in politics purely on the basis of issues, principles and national interest. But we act on the basis of our tribal and personal interests.

This comment summarises and posits the political context. Kenya's political life has been and still remains masked behind the façade of ethnicity. The political significance of elections has diminished. Since independence, politics has only exacerbated ethnic loyalties while constitutionalism, the rule of law, respect for human rights and national integration – which features are central to any political democracy – have been relegated to the periphery. The country has expended much of its moral reserve of 46 years of independence enduring abominable abuses of human rights informed by ethnic considerations. Worse, former regimes have not done much in terms of dealing with the past ills.

Clearly, Kenya needs a respite. It is, however, still unclear as to whether it will get it. The emotionally-based desire for revenge, the need to shun current political opponents, the urge to secure key

⁷⁶ Musila (n 61 above) 63-64.

⁷⁷ International Crisis Group, Africa Report 137, 21 February 2008 cited by B Ongaro & O Ambani 'Constitutionalism as a panacea to ethnic divisions in Kenya: A post-2007 election crisis perspective' in Mukundi (n 61 above) 24.

⁷⁸ Report on the Skewed Government Appointments in Kenya' presented to the 9th Parliament in June 2007.

⁷⁹ K Murungi *The East African Standard* 22 November 1998 cited in F Jonyo 'The centrality of ethnicity in Kenya's political transition' in Oyugi *et al* (n 51 above) 159.

political positions that safeguard political survival in the next general elections of 2012, and the quest to protect political sycophants, can be said to be stronger than the desire to carry out impartial justice. Conceivably, therefore, the question that one needs to interrogate is whether the government has any legal obligation under national and international law to begin the process of transitional justice. This might just be the trigger that catapults transitional justice.

4 Kenya's legal obligations under national and international law to institute a transitional justice process

While experts agree that new democracies emerging from conflict, mass violence or past human rights violations should adhere to established rules of international law, they fail to point out precisely what the law requires.⁸⁰ Although there is clarity on some of the basic rules relating to international crimes and state responsibility to provide remedies for human rights abuses, there has been a lack of clarity as to which remedies should be used. Even as international human rights law bestows a discretion upon states as regards the measures to be undertaken in protecting human rights in the domestic sphere,⁸¹ for its part, international criminal law limits the jurisdiction of international criminal tribunals to five crimes deemed to be of an international nature.⁸² These crimes do not, however, protect the victims of past human rights violations. For example, past crimes which inform the objectives of the transitional process in Kenya are not confined to acts of a criminal nature but take a myriad forms of detestable gross human rights violations.⁸³ Some of these acts are neither recognised by the international criminal justice system nor mentioned by conventional or international customary law.

However, as Dinstein observes:⁸⁴

When international law defines an act as an offence, the upshot is that the decision whether or not to prosecute offenders is not left to the unfettered discretion of the state, which [is] subjected to international obligations in the matter.

⁸⁰ D Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 2551.

⁸¹ Art 1 African Charter, art 2 ICCPR, art 2 ICESCR and art 2 CEDAW. It is noteworthy that Kenya has ratified all these conventions.

⁸² Art 5 of the Rome Statute defines these crimes as genocide, crimes against humanity, and war crimes.

⁸³ nn 41-51 above.

⁸⁴ Y Dinstein *International criminal law* (1985) 225 as cited in Orentlicher (n 80 above) 2552.

According to Aldana-Pindell, the right of access to justice, the right to a fair trial and the right to an effective remedy oblige states to prosecute.⁸⁵ Similar sentiments have indeed been echoed in the interpretation of international human rights treaties by various international oversight bodies.⁸⁶

Where the investigations ... reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognised as criminal under either domestic or international law.

While the obligation to prosecute under international human rights treaties is implied, Kenya has an express mandate under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁸⁷ and the Rome Statute of the International Criminal Court (Rome Statute)⁸⁸ to undertake prosecution with respect to conduct prohibited under respective treaties. Under the 'principle of complementarity'⁸⁹ enshrined in the latter, national courts have a primary obligation to undertake prosecutions and the jurisdiction of the International Criminal Court (ICC) is only triggered when the state is either 'unwilling'⁹⁰ or 'unable'⁹¹ to do so.

Though scholars have disagreed on the range of human rights protected by international customary law, there is general agreement that customary law prohibits torture, genocide, extra-judicial executions and disappearances.⁹² It can, therefore, be argued that these prohibitions import a duty on the state to prosecute such violations whenever they occur and also to offer appropriate remedies to the victims.

Besides, the Constitution of Kenya guarantees its citizens the protection of their fundamental rights and freedoms.⁹³ Thus, Kenya has a legal obligation, emanating from her national law, international

⁸⁵ R Aldana-Pindell 'In vindication of justiciable victims' rights to truth and justice for state-sponsored crimes' (2002) 35 *Vanderbilt Journal of Transnational Law* 1405, as cited in G Musila 'Whistling past the graveyard: Amnesty and the right to an effective remedy under the African Charter: The case of South Africa and Mozambique' unpublished LLM dissertation, University of Pretoria, 2004 17.

⁸⁶ General Comment 31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant, para 18. See also *Velasquez Rodriguez* case para 174.

⁸⁷ CAT was ratified by Kenya on 8 March 1996. Art 4 calls upon member states to ensure that torture or attempt to commit torture are offences punishable by appropriate penalties under criminal law.

⁸⁸ Ratified and domesticated by Kenya via the International Crimes Act Cap 16 of 2008.

⁸⁹ Preamble para 6 and art 1 Rome Statute.

⁹⁰ Defined under art 17(2)(a) of the Rome Statute.

⁹¹ Art 17(3) of the Rome Statute establishes a specific criterion of determining inability.

⁹² T Meron *Human rights and humanitarian norms as customary law* (1989) 210 as cited by Orentlicher (n 80 above) 2582.

⁹³ Secs 70-86 Constitution of Kenya.

customary law and treaty law, to undertake the prosecution of wrongdoers as well as to guarantee a remedy to the victims of human rights violations.

5 Case for prosecution

Teitel acknowledges that:⁹⁴

Trials are commonly thought to play the leading foundational role in the transformation to a more liberal political order. Only trials are thought to draw a bright line demarcating the normative shift from illegitimate to legitimate rule.

Indeed, many scholars agree with this school of thought. Orentlicher notes that laying bare the truth about past violations and condemning them through prosecution deter potential law breakers and inoculate the public against future temptation to be complicit in state-sponsored violence.⁹⁵ She further observes that societies scourged by lawlessness need only look at their past to discover the roots of impunity.⁹⁶ According to Osiel, the staging of the human drama of mass atrocities in a courtroom can have a cathartic effect on society.⁹⁷ Certainly, Van Zyl shares similar sentiments when he argues that 'prosecution can serve to deter future crimes, be a source of comfort to victims, reflect a new set of social norms and begin the process of reforming and rebuilding trust in government institutions'.⁹⁸

The consolidation of a young democracy, writes Huysse, is yet another cardinal role played by prosecutions.⁹⁹ The enforcement of the law through prosecution not only legitimises the new government, but also fosters respect of democratic institutions.¹⁰⁰ Taking their cue from this, CIPEV was convinced that the instrumental role played by trials was indispensable for Kenya's democratic transition. This is echoed in its recommendations that underscore the need for the establishment of a special tribunal to eradicate impunity.¹⁰¹

The importance of fighting impunity in any nascent democracy like Kenya cannot be underestimated. As correctly pointed out by the UN,

⁹⁴ Teitel (n 59 above).

⁹⁵ Orentlicher (n 80 above) 2542.

⁹⁶ As above.

⁹⁷ M Osiel *Mass atrocity, collective memory and the law* 15-22 as cited by J Rowen 'Social realities and philosophical ideals in transitional justice' (2008) 7 *Cardozo Public Law, Policy and Ethics Journal* 98.

⁹⁸ Van Zyl (n 4 above) 210.

⁹⁹ L Huysse 'Justice after transition: On the choices successor elites make in dealing with the past' (1995) 20 *Law and Social Inquiry* 55.

¹⁰⁰ Orentlicher (n 80 above) 2543.

¹⁰¹ n 34 above, 472.

impunity is one of the most important ingredients of future genocide.¹⁰² It is, therefore, important that Kenya deals with its past now or prepare for grimmer days in the future. Yet, prosecution efforts have thus far proved to be quite controversial in Kenya's transition. They have often threatened to politically divide GNU factions amidst reported attempts by PNU to 'own' and 'shape' the transitional process, especially the prosecution.¹⁰³ Besides, while there is general consent among Kenyans that justice through prosecutions is needed, this has often taken on an ethnic dimension whenever alleged perpetrators are mentioned. These perpetrators, who frequently are politicians and business people, scuttle back to their ethnic backyards for support against the 'witch-hunting' prosecution of their ethnic communities.

Prosecution efforts, therefore, have been muddled with the politics of ethnicity and the suspicion of political opponents amidst outrageous proposals by government to have the TJRC undertake prosecution.¹⁰⁴ Nevertheless, the fundamental role that a prosecution is bound to play in Kenya's transition process cannot be underestimated. Not only would it lessen the deep-rooted culture of impunity, but it could potentially eliminate the reigning sense of betrayal and illegitimacy of the current government and its institutions.

5.1 Prosecution through the International Criminal Court

Failure to enact the statute enabling the operations of the special tribunal or, in the event that the tribunal was established, subversion of its operations, CIPEV recommended the referral of the names of the alleged perpetrators to the ICC.¹⁰⁵ Indeed, following failed attempts at passing the law, Anan referred an 'envelope' containing a list of ostensible perpetrators to the prosecutor of the ICC on 9 July 2009.¹⁰⁶ This step excited the Kenyan population.¹⁰⁷ Understandably, this euphoria was informed by previous quests to rid the state of the deep-rooted culture of impunity and the fear of possible manipulation of the special tribunal, given the apparent ethnic and political tensions. For the most part, this euphoria was largely misinformed on the legal consequences of Annan's submission. With local newspaper carrying sensational titles such as 'Ocampo takes over Kenya's cases',¹⁰⁸ the majority of the

¹⁰² Office of the Special Adviser of the UN Secretary-General on the Prevention of Genocide: Analysis framework <http://www.un.org/preventgenocide/adviser> (accessed 23 November 2010).

¹⁰³ G Musila 'Options for transitional justice in Kenya: Autonomy and the challenge of external prescriptions' (2009) *International Journal of Transitional Justice* 40.

¹⁰⁴ K Some 'Raila breaks ranks with cabinet over The Hague trials' *Daily Standard* 26 September 2009.

¹⁰⁵ n 34 above, 473.

¹⁰⁶ 'Panic as Kenya poll chaos case handed to ICC' *Daily Nation* 9 July 2009.

¹⁰⁷ 'It's The Hague, Kenyans tell violence suspects' *Daily Nation* 18 July 2009.

¹⁰⁸ 'Deadline expires, Ocampo takes over Kenya's case' *Daily Standard* 1 October 2009.

Kenyan population was misled into believing that the ICC was soon instituting prosecution of those mentioned. Three cardinal questions emerge from this discourse: Does the referral by Annan trigger the jurisdiction of the ICC? Was the ICC option a feasible idea? Is the ICC, therefore, of any relevance to Kenya's transitional process?

The jurisdiction of the ICC is triggered in three ways: by a referral by a state party;¹⁰⁹ referrals by the UN Security Council;¹¹⁰ and on the prosecutor's own initiative.¹¹¹ Evidently, the transmission by Annan of the 'envelope' does not fall within any of these criteria. At best, therefore, Annan's submission may be classified as part of the information upon which the prosecutor may initiate investigations and subsequent prosecutions. Indeed, on 26 November 2009, the prosecutor filed a request for authorisation of an investigation into the situation in Kenya pursuant to article 15 of the Rome Statute.

Even though the prosecutor has taken up the matter and indictments are soon to be issued, the hurdle of a 'lack of sufficient evidence' must, nonetheless, be surmounted. The CIPEV report had already acknowledged that the evidence collected may indeed not meet the standards required of international crimes.¹¹² This was further noted by the Pre-Trial Chamber of the ICC when it sought additional information from the prosecutor.¹¹³ This was in relation to the state and/or organisational policy under article 7(2)(a) of the Rome Statute and the issue of admissibility within the context of the situation in Kenya.¹¹⁴ Even though the Pre-Trial Chamber eventually authorised the prosecutor to commence investigations into the Kenyan situation on 31 March 2010,¹¹⁵ Judge Hans-Peter Kaul, in a dissenting opinion, underscored the insufficiency of evidence in the matter.¹¹⁶ Besides, with the passing of the new Constitution, calls from the government for the ICC to quit the Kenyan probe and to allow the new judicial structures created under the new Constitution to deal with it are burgeoning.¹¹⁷ The ICC prosecutor must therefore address the issue.

It is instructive to further note failed attempts at establishing a local tribunal to conduct prosecution as well as efforts to prosecute through national courts. As regards the special tribunal, the Special Tribunal for

¹⁰⁹ Art 14 Rome Statute.

¹¹⁰ Art 13 Rome Statute.

¹¹¹ Art 15 Rome Statute.

¹¹² n 34 above, 17.

¹¹³ ICC Pre-Trial Chamber II, Decision on the Situation in Kenya; Public decision requesting clarification and additional information, ICC-01/09-15

n 113 above, 4

¹¹⁵ Pre-Trial Chamber II Decision on the Situation in Kenya; decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Kenya

¹¹⁶ n 115 above, 10; Hans-Peter Kaul J's dissenting opinion

¹¹⁷ L Barasa *Sunday Nation* 19 September 2010.

Kenya Bill 2009 (Government Bill) was duly drafted by the Ministry of Justice and Constitutional Affairs and forwarded to the legislature for enactment. On two successive attempts, however, this Bill was shot down by Parliament.¹¹⁸ These efforts finally came to naught. In a bid to secure a functional prosecutorial outfit in Kenya's transitional process, civil society organisations (CSOs) drafted yet another Bill (CSOs Bill). The latter bill was never tabled in Parliament.

Even though the 'principle of complementarity' underscores the primacy of national courts in conducting prosecutions, Kenya's national courts, under the old constitutional dispensation, had never been perceived as ideal for domestic trials of the crimes committed in the 2007 election violence. Courts belong to a dysfunctional national justice system. As recounted by CIPEV, Kenya's judiciary has 'acquired the notoriety of losing the confidence and trust of those it must serve because of the perception that it is not independent as an institution'.¹¹⁹ The diminished confidence in the judiciary was shown when the ODM presidential candidate, Raila Odinga, publicly declined to have the disputed elections of 2007 resolved by local courts.¹²⁰ This sentiment was further vindicated by CIPEV's finding that local courts are not a tenable alternative. Instead, CIPEV recommended comprehensive institutional reforms aimed, *inter alia*, at restoring confidence and trust in the judiciary.¹²¹

On 30 July 2009, for the first time, cabinet contemplated the option of ordinary courts to prosecute in the transitional process.¹²² This move could only be read with disdain and suspicion as there is hardly any example of successful transitional prosecution through national courts on the continent. Existing experience is mostly about how not to use this forum. For example, in the South African *locus classicus*, the TRC instituted charges of contempt of court against former president PW Botha.¹²³ The trial court found Botha in contempt for refusing to testify and sentenced him to one year in prison or a fine of \$1 600.¹²⁴ However, despite the coherent and lucid arguments put forward by the Commission on appeal, Botha was released on technical grounds.¹²⁵ Similarly, attempts to prosecute the former Minister of Defence, Magnus Malan, for murder faltered when the local court found him

¹¹⁸ On 12 February 2009 and in March 2009.

¹¹⁹ n 34 above, 460.

¹²⁰ 'Breaking Kenya's impasse: Chaos or courts? Africa policy brief' Africa Policy Institute 3, as cited in Ongaro & Ambani (n 130 above) 29.

¹²¹ n 34 above, 461.

¹²² 'President Kibaki's statement' *The Standard* 30 July 2009.

¹²³ Truth and Reconciliation Commission of South Africa Report Vol 1 ch 7: Legal challenges.

¹²⁴ As above.

¹²⁵ As above.

and all his 15 co-defendants not guilty.¹²⁶ This caused relief to many who refused to apply for amnesty despite the possibility of national prosecution.¹²⁷

In Rwanda, where transitional prosecution was initially confined to the ordinary justice system, there were problems. The prosecutions conducted by ordinary courts have been criticised as having offered selective justice.¹²⁸ The atrocities committed by the Rwandan Patriotic Front (RPF)¹²⁹ soldiers during and after the 1994 genocide have been cushioned from the justice system. According to Ingelaere, the difficult relationship between the RPF-led Rwandan government and the International Criminal Tribunal of Rwanda (ICTR) is informed, in part, by the possibility that the ICTR might also investigate war crimes committed by RPF soldiers and their commanders.¹³⁰ Attempts to deal with impunity stemming from the complexities of using domestic courts are manifested by the utilisation of 'universal jurisdiction laws' in prosecuting former RPF commanders. For example, on 6 February 2008, a Spanish court issued arrest warrants for 40 RPF soldiers.¹³¹ This included Joseph Nzabamwita, the Rwandan Minister of Foreign Affairs. Similarly, France issued an indictment against Rose Kabuye, an RPF member and current Chief of State Protocol. Kabuye was duly arrested during one of her official travels in Germany and is in detention awaiting trial in France.

The transitional government of Ethiopia, which has so far charged 5 000 individuals of the previous repressive regime under Mengistu Haile-Mariam, has been characterised by abuses of due process.¹³² For instance, detainees are held without trial for long periods. Although most detainees were arrested by 1991, it was not until December 1994 that trials began.¹³³ Besides, several defendants have been tried and sentenced to death penalties in their absence.¹³⁴ All this happened amidst concerns about the competence and impartiality of the judiciary and the fact that Ethiopian criminal procedure does not conform to international standards.¹³⁵

¹²⁶ C Sriram *Confronting past human rights violations: Justice vs peace in times of transition* (2004) 158.

¹²⁷ P Hayner *Unspeakable truths; Facing the challenge of truth commissions* (2001) 43.

¹²⁸ B Ingelaere *The Gacaca courts in Rwanda: Traditional justice and reconciliation after violent conflict: Learning from African experiences* (2008) 45.

¹²⁹ A Tutsi-dominated force exiled in Uganda but later defeated the government forces in 1994 and established the current government.

¹³⁰ Ingelaere (n 126 above) 45.

¹³¹ <http://static.rnw.nl/migratie/www.radionetherlands.nl/currentaffairs/080208-Rwanda-indictment-redirected> (accessed 6 October 2009).

¹³² S Ratner *et al Accountability for human rights atrocities in international law: Beyond the Nuremberg legacy* (2009) 193.

¹³³ As above.

¹³⁴ AI Ethiopia 'Accountability past and present: Human rights in transition' 4 (April 1995).

¹³⁵ Ratner *et al* (n 132 above) 194.

6 Case against prosecution

Analysts of the Kenyan transitional processes have often criticised attempts at prosecution on two grounds. In the first place, it is argued that Kenya is ethnically polarised and unstable, hence the already fragile social fabric may be fractured further by prosecution of past violations.¹³⁶ In the second place, prosecution is at odds with the political realities in two cardinal ways. One, the political elites responsible for Kenya's transition seem to be less enthusiastic about the process. They themselves are likely perpetrators.¹³⁷

State officials have already committed tremendous usurpation ranging from grand corruption now and in the past, to horrendous human rights violations. They, themselves, are now proper candidates for any sound transitional dispensation.

In addition, the political class seems to be preoccupied with a fierce power struggle as the 2012 general elections advance, rather than seeking transitional justice. Competing notions within the political class are apparent. While some politicians perceive prosecution as a mechanism to rid them of their political and ethnic opponents, the majority are not ready to sacrifice their political sycophants given the cardinal role they are bound to play in the next general elections. It follows that, despite a general agreement on the need to deal with past atrocities, the political class is suffocating prosecution efforts.

7 Case for a Truth, Justice and Reconciliation Commission

Given that prosecution can only be a partial response to past human rights violations, there is a need for supplementary mechanisms such as TRCs. The fundamental role played by TRCs in any transitional society undergoing democratic transformation cannot be overstated. Not only do they lay bare the violations of the past, but they also give an opportunity to the government, citizens and perpetrators to acknowledge the wrongfulness of these actions.¹³⁸ TRCs, writes Mutua, play a large role to cleanse the past and effect moral reconstruction and reconciliation after truth and justice.¹³⁹

Given the less controversial nature of the TJRC in the Kenyan context, there seems to be little divergence of opinion as to its institution. Unlike prosecution, there has been a general agreement among the political class, the civil society and the general public as to the need for a

¹³⁶ Ambani (n 38 above) 10.

¹³⁷ As above.

¹³⁸ Van Zyl (n 4 above) 211.

¹³⁹ Mutua (n 18 above) 29.

functional TJRC.¹⁴⁰ This goodwill informed the establishment of a TJRC on 22 July 2009. While the TJRC remains a widely accepted idea, some controversial issues emerged from this discourse, in respect of the TJRC's relationship with the prosecuting outfit, the capacity of the TJRC to realise its objectives, its independence, efficiency and impartiality.

7.1 Critique of the Truth, Justice and Reconciliation Act

7.1.1 Positive aspects of the Act

The TJR Act¹⁴¹ is a product of the the KNDRC deliberations. This piece of legislation establishes a TJRC with a vast mandate: to investigate and establish a historical record of gross economic crimes and violations of human rights for the period between 12 December 1963 and 28 February 2008; to identify the victims of these violations and make appropriate recommendation for redress; to identify alleged perpetrators and recommend their prosecution; to inquire into the irregular and illegal acquisition of public land; to inquire into the causes of ethnic tensions; and to promote healing, reconciliation and co-existence among ethnic communities.¹⁴²

A number of provisions embodied in the Act are encouraging in so far as foretelling an effective TJRC is concerned.¹⁴³ First, gender equity is apparent in the appointment of commissioners.¹⁴⁴ Second, the enormous powers of the Commission guarantee its independence. It is bestowed with 'all powers necessary for the execution of its functions'.¹⁴⁵ These include investigatory powers, issuance of summonses, and requests for the assistance of the police, making recommendations on reparation policies, and other policy reform areas.¹⁴⁶

Third are provisions on budgetary control. The Act establishes a TJRC Fund to be administered by the Secretary.¹⁴⁷ These monies are appropriated from the consolidated fund, grants, gifts or donations.¹⁴⁸ All payments in respect of the expenses incurred are made out of this fund.¹⁴⁹ These provisions minimise the chances of political influence as would have been the case were the Commission's budgetary control under central government.

¹⁴⁰ G Musila 'A preliminary assessment of the Kenyan Truth, Justice and Reconciliation Commission Bill 2008' (2008) 5 *African Renaissance* 3.

¹⁴¹ Act 6 of 2008.

¹⁴² Secs 5 & 6, TJR Act.

¹⁴³ AI 'Truth, justice and reparation: Establishing an effective truth commission' 11 June 2007.

¹⁴⁴ Sec 10.3 & first schedule sec 7.

¹⁴⁵ Sec 7 TJR Act.

¹⁴⁶ Secs 7(1) & (2) 6l TJR Act.

¹⁴⁷ Sec 44(1) TJR Act.

¹⁴⁸ Sec 44(2) TJR Act.

¹⁴⁹ Sec 44(3) TJR Act.

Fourth, the Act guarantees the implementation of the Commission's recommendations in relation to its institutional arrangement, mechanisms and frameworks necessary for the implementation of its decisions.¹⁵⁰ Upon the publication of the TJRC's report, the Minister of Justice and Constitutional Affairs is required to 'operationalise' the implementation mechanism as will have been proposed by the TJRC within six months.¹⁵¹ The implementation committee is bestowed with supervisory powers over the implementation process.¹⁵² This is a break from local tradition where recommendations of related commissions were not implemented. The proscription by the Act of amnesty for genocide, crimes against humanity, and gross violations of human rights, including extra-judicial executions, enforced disappearances, rape and torture is yet another provision that ensures adherence to international standards.¹⁵³

7.1.2 Negative aspects of the Act

Five distinct aspects of the Act raise concerns:

Lack of clarity as to the relationship with prosecution mechanisms

Certain provisions of the Act are self-contradictory. For instance, the relationship between the TJRC and the prosecuting outfit is not clear. While the Commission is expected to investigate and make recommendations for the prosecution of those responsible for human rights and economic rights violations,¹⁵⁴ the Act guarantees absolute confidentiality of information received by it in form of evidence,¹⁵⁵ confessions or admissions.¹⁵⁶ One cannot but wonder how the Commission will recommend prosecution if all the information it receives is absolutely confidential.

Although proposals have been made for the Commission to forward its findings on confidential basis to the prosecuting authorities for further investigation,¹⁵⁷ this in itself can defeat the mandate of the Commission. It can deter alleged perpetrators from co-operating with the Commission for fear of giving self-incriminating evidence, which evidence is vital if the Commission is to live up to its objectives.

Related to this is a situation where the defence may seek to rely on the evidence adduced before the TJRC to attack the credibility of a particular witness before the adopted tribunal. The question that arises

¹⁵⁰ Sec 48(2) TJR Act.

¹⁵¹ Sec 49 TJR Act.

¹⁵² As above.

¹⁵³ Sec 34(3) TJR Act.

¹⁵⁴ Secs 6(f) & (k)(ii) TJR Act.

¹⁵⁵ Sec 24(3) TJR Act.

¹⁵⁶ Sec 36(9)(c) TJR Act.

¹⁵⁷ *AI Kenya Concerns about the TJRC Bill (2008)* 6.

is whether the prosecuting authority will be compelled to rely on the evidence adduced before the TJRC, especially where a witness before the adopted tribunal makes a contradictory statement to that made before the TJRC.

Defective selection process

Of greater concern is the manner in which the six commissioners to the TJRC were appointed. Preceding their appointment by the President, the commissioners were selected and recommended to the National Assembly by a selection panel comprised of various religious groups, professional bodies and civil society.¹⁵⁸ However, the manner in which most of these organisations were chosen onto the selection panel has been lamented.¹⁵⁹ This procedure, according to Amnesty International (AI), does not guarantee independence, impartiality and competence.¹⁶⁰ This is due to a lack of a broad-based consultation forum, not only with all the civil society organisations but also the victims, human rights defenders and concerned Kenyans.¹⁶¹

Indeed, upon their appointment, numerous concerns with respect to the impartiality and competence of some of the individuals have come to the fore. For example, the Chairperson of the Commission has been criticised for having been an obedient senior civil servant of the Moi regime which perpetrated horrendous human rights violations.¹⁶² This demonstrates a lack of public confidence in the Commission, hence unclenching its public credibility. The likelihood of these compromising the effective functioning of the Commission is not remote.

Witness protection

The Act lacks a long-term witness protection mechanism. Witness protection under the Act is limited to holding proceedings *in camera* and non disclosure.¹⁶³ Even though the Witness Protection Act (WPA)¹⁶⁴ provides for long term witness protection mechanisms – such as the establishment of a new identity, relocation, accommodation, transportation, financial assistance, counselling and vocational training of the witness¹⁶⁵ – the fact that the Attorney-General has the sole discretion of deciding who to include in the programme and what protection

¹⁵⁸ Sec 9 TJR Act.

¹⁵⁹ AI (n 157 above) 7.

¹⁶⁰ AI (n 157 above) 6.

¹⁶¹ As above.

¹⁶² M Mutua 'An open letter to the vice-chair Betty Murungi' *Daily Nation* 8 August 2009.

¹⁶³ Sec 25 TJR Act.

¹⁶⁴ Act 16 of 2006 TJR Act.

¹⁶⁵ Sec 4 TJR Act.

measures to be undertaken,¹⁶⁶ leaves the success of such a programme questionable, especially where the protection of witnesses against the government is desired. According to Ndubi, this arrangement lacks credibility and independence as ‘those who are supposed to protect the witnesses are the ones the witnesses are likely to testify against’.¹⁶⁷

Although the government may have decided to use the WPA at the TJRC,¹⁶⁸ the possibility remains that the TJRC can develop an internal mechanism as did the South African Truth and Reconciliation Commission. This raises questions as to whether the TJRC is ready to surmount the requirement of expertise and costs that are related to this arrangement. It is, however, instructive that the WPA is currently being updated by Parliament to have it removed from the Attorney-General’s office and to create an independent Witness Protection Agency.¹⁶⁹

Too broad a mandate

The mandate of the TJRC covers the time period between 1963 and February 2008. This is an extremely broad mandate that cannot be realised within the lifespan of the TJRC which is stipulated to be two years.¹⁷⁰ This broad mandate is to a large extent a duplication of the mandate of previous investigatory commissions whose reports have never been implemented.¹⁷¹ Similar fears have been expressed by the UN:¹⁷²

The mandate of the TJRC needs to be comprehensive but narrow enough to be manageable in time and scope. The Commission’s investigative responsibility in relation to corruption, land distribution and other ‘historical injustices’ must be realistic and commensurate with resources and time assigned to the Commission.

This large mandate is entrusted to just nine commissioners. It follows that Kenya’s TJRC is bound to fall victim to the challenge faced by Nigeria’s TRC. Initially, the mandate of the Nigerian Commission extended to labour disputes. A few weeks into its work, the Nigerian Commission was compelled to review its mandate by pruning the labour disputes after realising that 9 000 out of 10 000 complaints received were based on labour complaints.¹⁷³

¹⁶⁶ Secs 4 & 5 TJRC Act.

¹⁶⁷ ‘Will witness protection law work?’ *The Standard* 26 July 2009.

¹⁶⁸ ‘Witness protection law to be used in post-poll trials’ *The Standard* 25 September 2009.

¹⁶⁹ ‘House to amend witness Act’ *Daily Nation* 18 October 2009.

¹⁷⁰ Sec 20 TJRC Act.

¹⁷¹ Musila (n 140 above) 42-43.

¹⁷² Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008 17 <http://www.responsibilitytoprotect.org/files/OHCHR%20Kenya%20Report.pdf> (accessed 10 October 2009).

¹⁷³ Hayner (n 127 above) 69.

To avoid such an eventuality, the TJRC should ensure that it focuses on the most pertinent human rights themes. Like the South African Commission, Kenya could have a committee on human rights violations, an amnesty committee and a reparation and rehabilitation committee.¹⁷⁴ Although the TJR Act is open to this possibility, it is not certain that Kenya's TJRC will adopt the same internal structure as did the South African one which had a leaner mandate covering a shorter period of 33 years with 17 commissioners supported by a staff of 300 professionals.¹⁷⁵ Given that the Kenyan process is still unfolding, it is important that the TJRC learns from good examples abroad for its internal structure. Whatever structure is adopted, the TJRC should work towards efficiency recognising the limited timeframe within which it can realise its broad mandate.

Challenge of apportioning criminal liability

Borrowing from South African legislation, the TJR Act bestows unto the TJRC the function of 'identifying the wrongdoers'.¹⁷⁶ While this is a laudable provision in establishing the truth, it has to be approached cautiously. According to Zalaquett, not only does naming infringe on the due process of law, but also risks apportioning criminal guilt on wrongdoers.¹⁷⁷ Consequently, this may contradict the very spirit of transitional justice – which is the rule of law and human rights. In fact, in a country that is ethnically polarised and politically strained like Kenya, such naming is most likely to have a damaging effect.

As a *caveat*, procedural safeguards such as those adopted by the South African TRC must be guaranteed. First is the requirement to notify beforehand those bound to be mentioned by the report to show cause why they should not be mentioned.¹⁷⁸ Hayner, however, points out that such a process ought to be less rigorous than that of a criminal trial.¹⁷⁹ Second is the need to interpret the intent of the language in the mandate.¹⁸⁰ Given that the TJR Act guarantees legal representation to those who appear before it,¹⁸¹ one would assume that human rights issues have been contemplated under the Act.

¹⁷⁴ Chs 3, 4 & 5 Promotion of National Unity and Reconciliation Act 34 of 1995, Republic of South Africa.

¹⁷⁵ Hayner (n 127 above) 41.

¹⁷⁶ Sec 6(b) TJR Act; sec 4(a)(iii) of the Promotion of National Unity and Reconciliation Act 34 of 1995,

¹⁷⁷ J Zalaquett *Report of the Chilean National Commission on Truth and Reconciliation* xxxii.

¹⁷⁸ Hayner (n 127 above) 123.

¹⁷⁹ Hayner (n 127 above) 129.

¹⁸⁰ Hayner (n 127 above) 123.

¹⁸¹ Sec 28 TJR Act.

7.2 Foreseen challenges to the Truth, Justice and Reconciliation Commission

It is premature to assess the TJRC's challenges. One can only engage in a projection of possible challenges with the hope that the TJRC will be responsive to them whenever they arise. The first possible challenge is in relation to the mandate of the TJRC which covers a time period of 45 years. In terms of evidence, there is a good likelihood of documentary evidence being altered, the death of vital witnesses and memory loss.

Moreover, given the current volatile political context in Kenya, the second probable challenge might arise if the whole transitional process becomes ethnicised. This implies that the TJRC may not receive co-operation, not only from civil society but also from some ethnic groups who may perceive themselves as being victimised by the transitional process. Certainly, this will run counter to the Commission's objectives. Besides, beyond the ethnic question, the broad political context seems to be focused on the next general elections and hence not enthusiastic about the mandate of the TJRC. For example, given the possibility of the TJRC banning those adversely mentioned from vying for political office in the next general elections and the undisputed fact that many politicians do not want the truth to be known beforehand, the TJRC is certainly going to be devoid of political support.

Co-operation of alleged wrongdoers with the TJRC process is dependent upon the manner in which the TJRC deals with the controversial issue of sharing information and proposing prosecutions to the probable prosecuting outfit. The TJRC process runs the risk of poor participation by alleged wrongdoers if it fails to clarify these two aspects.

Fourth, the TJRC is bound to face the challenges posed by the Indemnity Act.¹⁸² The latter Act proscribes indemnity or compensation with respect to offences committed between 25 December 1963 and 27 December 1967 by public officers or members of the armed forces.¹⁸³ This is defeating of the TJRC's mandate according to which investigations into gross human rights violations extend to the period of time protected by the said law. These possible contestations do not, nonetheless, downplay the importance attached to the TJRC in Kenya's transitional process.

7.3 Reparations

Reparation for victims of past human rights violations have been categorised into five forms: restitution, compensation, rehabilitation, satisfaction and guarantee for non-repetition.¹⁸⁴ Restitution is the restoration of an individual to the position held before the human rights

¹⁸² Cap 34 Laws of Kenya.

¹⁸³ Sec 3 Indemnity Act.

¹⁸⁴ AI (n 143 above) 3.

abuses. This is most effective where the wrongdoers who occasioned harm can be identified. The harm occasioned should, however, be capable of being quantified in monetary terms. From Kenya's viewpoint, this would play at least two instrumental roles. First and foremost, is in relation to the land question that has haunted Kenya since independence. Second is the restoration of properties that were destroyed, stolen or burnt during the 2007 post-election violence.

Where the perpetrators cannot be identified, the government has a legal obligation to compensate the victims involved.¹⁸⁵ This compensation should be proportionate to the harm suffered.¹⁸⁶ Likewise, rehabilitative measures such as medical care, respect for and non-discrimination against victims must be guaranteed by the government.¹⁸⁷ According to Armstrong and Ntegeye, reparations can also include symbolic measures like apologies, monuments and days of commemorations.¹⁸⁸

In order to enable the TJRC to make viable recommendations on reparations, the TJRC ought to engage in an extensive collection of views.¹⁸⁹ These views should then inform the TJRC's recommendations. However, the TJR Act provides for only two instances when the TJRC may recommend reparation: after recommending amnesty and after an individual victim has submitted an application for reparation.¹⁹⁰ Clearly, the individualisation of this process denies the Kenyan TJRC the opportunity to engage in an extensive collection of views from the victims on reparations as well as making expansive recommendations that may be beneficial to the society at large. Moreover, although section 42 of the TJR Act insinuates the existence of a fund to cater for reparations, this possibility is remote.

In addition, the entire process of reparation is likely to be even more problematic. The difficulties inherent in differentiating between perpetrators and victims cannot be underestimated. For instance, there is a likelihood of the victims under the Kenyatta regime to have been the perpetrators under the Moi regime and yet again the victims of the Kibaki regime. It can, however, be argued that identifying a victim does not necessarily correspond to the duty to identify corresponding perpetrators. Besides, some categories of victims can easily be identified, like those physically disfigured and the internally displaced persons (IDPs) currently in camps, while others may not be recognisable.

¹⁸⁵ See discussion on state obligation in part 2.

¹⁸⁶ AI (n 143 above) 10.

¹⁸⁷ Sec 25(7) TJR Act.

¹⁸⁸ A Armstrong & G Ntegeye 'The devil is in the details: The challenges of transitional justice' (2006) 6 *African Human Rights Law Journal* 16.

¹⁸⁹ AI (n 143 above) 38.

¹⁹⁰ Secs 41 & 42.

7.4 Reconciliation

Reconciliation aims at promoting harmony between the victims and the wrongdoers as well as the public as a whole. It is a process of moral reconstruction in which a country takes stock of its morality in politics, governance, cultural values and revises its moral code.¹⁹¹ Given the fact that a large extent of the Kenyan victims and wrongdoers can be defined along ethnic lines, the Kenyan reconciliatory process should take the form of promoting ethnic harmony as correctly envisaged by the TJR Act.¹⁹² Public hearings stipulated under the Act are designed to provide victims and perpetrators with a forum for reconciling with each other.¹⁹³ Both victims and perpetrators are, therefore, extremely essential for any TRC to achieve reconciliation. However, in light of the voluntariness of this procedure and the uncertainty in the relationship between the Kenyan TJRC and probable prosecuting outfit, it is not for certain that the alleged perpetrators will avail their co-operation to the TJRC as expected.

Besides, some victims of the post-election violence are still in IDP camps. Here, they live in deplorable conditions. Their daily endurance of the abject poverty evident in these camps remains a constant reminder of the suffering they went through. It remains doubtful whether this category of victim is willing to undergo a reconciliatory process. Their suffering must be relieved first for there to be an effective reconciliation process. As correctly diagnosed in Sierra Leone, reparations are a pertinent prerequisite of reconciliation.¹⁹⁴ Thus, with specific reference to a 'guarantee of non-repetition' as a form of reparation, the TJRC needs to assure the victims that they will not fall victim again of similar atrocities in future. The TJRC, therefore, needs to work towards promoting institutional and constitutional reform mechanisms.¹⁹⁵ Only with such reparatory assurances will the TJRC be able to achieve effective reconciliation.

7.5 Truth seeking

Human rights bodies have held repeatedly that victims, their families as well as the general public have a right to know the whole truth about past human rights violations.¹⁹⁶ This right has been presented by the Inter-American Court on Human Rights (Inter-American Court) as a free-standing remedy in itself (besides reparations and prosecutions

¹⁹¹ Mutua (n 18 above) 24.

¹⁹² Sec 6(s) TJR Act.

¹⁹³ Secs 5(g), (h) & (i) TJR Act.

¹⁹⁴ Sierra Leone TRC Report Vol 1 10.

¹⁹⁵ AI (n 143 above) 12.

¹⁹⁶ IACHR *Ellacuria v El Salvador* Case 10488 of 1999 (*Ellacuria case*). See also HRC *Elena Quinteros Almeida and Maria del Carmen Almeida de Quinteros v Uruguay* (Communication 107/1981) para 14.

of at least the most serious crimes).¹⁹⁷ It entails information as to the causes, reasons, the condition and circumstances of the violations and the identification of the wrongdoers,¹⁹⁸ and the whereabouts of loved ones who have disappeared.¹⁹⁹

This has multi-faceted goals. According to Tutu, the truth forms a basis for reconciliation.²⁰⁰ It may also be used to sanction the wrongdoers for prosecution or for political and moral reconstruction of the state.²⁰¹ Truth, writes Henken, has a deterrent effect on the perpetrators.²⁰² To achieve these objectives, it is important that any TRC is independent, impartial and effective. Perhaps the Kenyan TJRC can learn from the South African TRC. The latter Commission has been criticised for establishing selective truths or succumbing to political pressures. As Hayner notes:²⁰³

To avoid upsetting various parties, the commission delayed or decided not to issue subpoena or such orders against several key individuals or institutions, among them the headquarters of the South African Defence Force and the ANC ... The Commission was also strongly criticised by human rights organisations for not issuing a subpoena against the minister of Home Affairs and Inkatha Freedom Party President Mangosuthu Buthelezi for fear of possible violence.

Mamdani has further criticised the South African TRC for producing a 'diminished truth'.²⁰⁴ Basically, the criticism is that by adopting a narrow view of the truth – limiting human rights violations to a few thousand people who were able to gain access to the South African TRC – the Commission obscured the systematic and deeply pernicious effects of apartheid. The TJRC must, therefore, not only insulate itself against political pressure and ethnic bias but must establish as much 'full truth' as possible. This can be achieved in two ways: first, by having procedures that promote the widest possible access and, secondly, by inquiring into the 'systemic' and structural causes of violations for instance constitutional, institutional, and economic, social and cultural. Failure to do so will certainly compromise its ability to create a holistic account of the truth and will violate 'the right to truth' of the victims, their families and the society at large.

¹⁹⁷ *Ellacuria* case (n 196 above).

¹⁹⁸ AI (n 143 above) 6.

¹⁹⁹ Art 32, Additional Protocol I to the 1949 Geneva Conventions.

²⁰⁰ Truth and Reconciliation Report of SA (1999) 17.

²⁰¹ Mutua (n 18 above) 24.

²⁰² A Henkin 'State crimes: Punishment or pardon' in NJ Kritz (ed) *Transitional justice* (1995) 184 186, as cited by J Sarkin & E Daly 'Too many questions, too few answers: Reconciliation in transitional societies' (2003) 35 *Columbia Human Rights Law Review* 666-667.

²⁰³ Hayner (n 127 above) 42.

²⁰⁴ M Mamhood 'A diminished truth' in W James & L van de Vijver (eds) *After the TRC: Reflections on truth and reconciliation in South Africa* (2001) 58.

8 The constitutional review process

As noted above, the KNDRC, in agenda 4, agreed on the need for comprehensive constitutional reforms as an inevitable transitional measure. Given the contentious nature of prosecution and the political uncertainty over the TJRC, constitutional reforms appear to have won the most political support of all the transitional mechanisms. This goodwill first saw the enactment of two critical Acts: the Constitution of Kenya Review Act (2008) and the Constitution of Kenya (Amendment) Act (2008). While the latter sought to entrench the political agreements arrived at in the KNDRC in the Constitution, the former sought to facilitate the completion of the constitutional review process. The Constitution of Kenya Review Act, 2008,²⁰⁵ provided the legal framework through which Kenya recently attained her new Constitution.

With the draft Constitution attaining landslide approval in the 4 August 2010 referendum, followed by the official promulgation of the new law on 27 August 2010, Kenya ushered in a new constitutional dispensation. The enactment of the new Constitution will definitely inform numerous other transformation processes. To begin with, the Constitution embodies institutional reforms. It revitalises key institutions of state so that, in the end, Kenya may boast an independent judiciary,²⁰⁶ an accountable police service,²⁰⁷ a more participatory government structure exemplified by devolved governance²⁰⁸ and a vibrant Bill of Rights containing, amongst others, socio-economic rights over and above the traditional civil and political rights.²⁰⁹ Provision is also made for minority groups such as women, children and persons with disabilities and older members of society.²¹⁰ The Constitution entrenches a national human rights institution – the Kenya National Human Rights and Equality Commission.²¹¹ An attempt is further made to constitutionally entrench the rule of law as well as separate government functions together with a system of checks and balances. Checks on the executive were conspicuously lacking under the old order.

9 Conclusion

This contribution assessed the various transitional justice initiatives in Kenya as keys for democratic transformation. It was pointed out that fragile ethnic and political tensions characterising Kenya continue

²⁰⁵ Ch 9 Laws of Kenya.

²⁰⁶ Arts 159-162 Constitution of Kenya.

²⁰⁷ Arts 243-247 Constitution of Kenya.

²⁰⁸ Ch 11 Constitution of Kenya.

²⁰⁹ Art 43 Constitution of Kenya.

²¹⁰ Arts 53-57 Constitution of Kenya.

²¹¹ Art 59 Constitution of Kenya.

to undermine prosecution efforts and that impunity remains a core problem.

It was pointed out that the legal framework upon which the probable prosecutorial outfit and the TJRC are structured has certain in-built weaknesses. Besides, the credibility of the TJRC has gradually weakened due to unanswered questions of transparency, independence and competence.

Transitional justice has proved indispensable for countries emerging from past human rights violations and autocracies or conflict and which are struggling towards democracy. Kenya is a country in transition. The government has a legal duty arising from her obligations under treaty law, customary international law and national laws to deal with past human rights violations. Such obligations involve the deployment of mechanisms that guarantee the prosecution of wrongdoers and redress for victims.

The government has been responsive and has since adopted numerous transitional initiatives. Key among these are the TJRC and various attempts at prosecution. The question that arises is whether these mechanisms measure up to the stipulated threshold. In order for Kenya to live up to her dreams of an effective transitional process, these mechanisms must embody certain normative standards.

Prosecution as one of the mechanisms adopted by Kenya has been hampered by ethnic politics. Even though the matter has been taken over by the prosecutor of the ICC, the focus on the forthcoming elections of 2012 has robbed the prosecution mechanism of the much-needed political will to drive the transitional process. Moreover, granted that some of the alleged perpetrators are the very architects of Kenya's transitional process and they still occupy crucial government positions, it is not certain that the government will offer the much-needed co-operation to the prosecutor of the ICC in facilitating his subsequent investigations.

The TJRC, on the other hand, which seems to have received unanimous political approval, is gradually losing public credibility. The public has lamented the political hand in the appointment of its commissioners. Moreover, the guiding legal framework portrays numerous aspects of concern. These are a lack of effective witness protection mechanisms, a lack of clarity on the relationship between the TJRC and the probable prosecuting outfit, an extremely broad mandate for the Commission and the naming of perpetrators. A failure to address these issues will cripple the TJRC process.

Towards more liberal standing rules to enforce constitutional rights in Ethiopia

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Summary

This article analyses the legal regime governing standing to enforce constitutional rights in Ethiopia. It reiterates the direct link between standing rules and the right of access to justice. It observes that, although the laws of several states still require a personal interest in the action one wants to litigate, there is a developing trend towards the liberalisation of standing rules, particularly regarding human rights issues. It considers the activism of the Indian judiciary and the innovative changes introduced by the South African Constitution, recognising public interest litigation. With regard to Ethiopia, the article considers the rules governing standing in ordinary courts, the House of Federation and the Council of Constitutional Inquiry, the Human Rights Commission and the institution of the Ombudsman. It concludes that the current standing law regime is too restrictive as it requires the actual violation of personal rights and interests in a particular claim. The issue of standing is still governed by archaic rules which do not take into account the interest at stake and the individual circumstances of the victims. It recommends the liberalisation of standing rules to ensure that the constitutional guarantees can be enforced via, amongst others, public interest litigants.

1 Introduction

The Ethiopian Constitution recognises a fairly broad catalogue of human rights. For instance, it is the only African constitution which

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incorporates the right to self-determination, including the right to secede, of ethnic groups (referred to as 'nations, nationalities and peoples' in whose power sovereignty resides).¹ It also recognises the right to development and to a clean and healthy environment. It further widens the scope of human rights by requiring compliance with international instruments adopted by Ethiopia while interpreting the rights in the Constitution (article 13(2)). These constitutional commitments to human rights are, however, nothing but 'printed futility'² unless enforced through institutions established for that purpose, particularly those empowered to interpret the Constitution.³ A strategy to ensure the enforcement of human rights is litigation. The first aspect that determines the enforcement of constitutionally-entrenched human rights through courts and other judicial bodies, however, is the *locus standi* (standing) of the applicant. Standing determines whether an individual or group of individuals or an entity has the right to claim redress on a justiciable matter before a tribunal authorised to grant the redress sought. Standing is a preliminary issue, the lack of which precludes any form of determination over the merits of the case.

The issue of standing is inextricably intertwined with the right of access to justice. Effective access to justice is considered as the most basic requirement of a system which purports to guarantee legal rights.⁴ Access to justice is indeed the conscience of any human rights instrument.⁵ Nevertheless, access to justice will be greatly impeded if the applicable standing rules insulate potential applicants from approaching the relevant judicial bodies. Obviously, the issue of standing significantly determines the reach of constitutional justice.⁶ Hence, while liberal standing rules may enhance an active enforcement of human rights,⁷ prohibitively strict rules, on the other hand, stultify the opportunity of review for constitutionality, and hence condone much unconstitutional behaviour.⁸ Obiagwu and Odinkalu have, for

¹ See C Heyns & W Kagoungo 'Constitutional human rights law in Africa' (2006) 22 *South African Journal on Human Rights* 673 678; art 39(5) Federal Democratic Republic of Ethiopia Constitution (FDRE): Note that the Constitution conflates the definition for 'nations', 'nationalities' and 'peoples'. As such no clear-cut distinction may be drawn.

² See VRK Iyer *Justice at the crossroads* (1992) 59.

³ NJ Udombana 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5 *African Human Rights Law Journal* 47 55.

⁴ M Cappelletti *The judicial process in comparative perspective* (1989) 36.

⁵ Iyer (n 2 above) 59.

⁶ RS Kay 'Standing to raise constitutional issues: Comparative perspectives' in SR Kay (ed) *Standing to raise constitutional issues: Comparative perspectives* (2005) 1.

⁷ Liberal standing rules, eg, have ensured an active role of the Constitutional Court of Benin. See A Rotman 'Benin's Constitutional Court: An institutional model for guaranteeing human rights' (2004) 17 *Harvard Human Rights Journal* 81.

⁸ Kay (n 6 above) 29.

instance, identified strict rules of standing as the major legal constraint to the protection of human rights in Nigeria.⁹

In private matters, the general rule is that a complainant needs to show a personal interest in the case he or she is instituting. However, similar rules generally apply in most jurisdictions, even in cases where the broader public interest is involved. Activist courts and legislatures in some states have, quite innovatively, contoured a distinct standing procedure that determines who might bring an action depending on the nature and scope of the interest at stake as well as the circumstances of the case and the alleged victims.¹⁰

The standing law regime in Ethiopia generally requires a personal vested interest in a particular action. This is true both in ordinary courts as well as in the House of Federation (House) and the Council of Constitutional Inquiry (Council), the two organs entitled to interpret the Constitution. Liberal rules, however, govern standing in the Human Rights Commission (Commission) and the Ombudsman and regarding the right to a clean environment.

It should, however, be noted that the mere fact that the standing rules are relaxed may not lead to a spawning of human rights litigation and, ultimately, constitutionalism. There are a whole set of factors that may compound the process. Socio-economic, political as well as cultural circumstances may affect rights litigation in sundry ways. A major factor could be whether there is a strong tradition of public interest lawyering in a particular state.¹¹ Prempeh, for instance, notes:¹²

Lacking an organised public interest or human rights bar or a tradition of *pro bono* representation, Africa's common law lawyers have generally not seized upon the liberalisation of constitutional standing to seek judicial enforcement of the constitution.

This, Prempeh posits, has created 'a substantive deficit of demand for judicial review'. In fact, an active and relentless engagement of courts and other judicial bodies may result in the abdication or at least the relaxation of an otherwise strict standing rule. Particularly considering the Ethiopian situation, the masses are unfamiliar with the concept of suing the government. The old Ethiopian adage *Semay ayitares, mengist ayikesus* ('You cannot plough the sky, nor sue the government') still rings in the heads of most Ethiopians. Civil society, human rights

⁹ See C Obiagwu & CA Odinkalu 'Combating legacies of colonialism and militarism' in AA An-Na'im 'Human rights in African constitutions: Realising the promise for ourselves' (2003) 233.

¹⁰ For a summary of the advantages and disadvantages of pursuing a more restrictive or liberal approach and the difficulty to distinguish between private and public interest in certain cases, see Sir K Schiemann '*Locus standi*' (1990) *Public Law* 342; and for the reasons why states adopt different standing rules, see Kay (n 6 above).

¹¹ CE Welch *Protecting human rights in Africa: Roles and strategies of non-governmental organisations* (1995) 202-204.

¹² HK Prempeh '*Marbury* in Africa: Judicial review and the challenges of constitutionalism in contemporary Africa' (2005-2006) 80 *Tulane Law Review* 1239 1297.

non-governmental organisations (NGOs), as well as opposition political parties have also generally been reticent to resort to the judiciary and the constitutional review procedure in the Ethiopian Constitution.¹³ Hence, although this article looks at standing rules and calls for its relaxation, it does not conclude, even thinly, that changing standing rules will decipher the perplexing problems that entangle judicial review in general and human rights litigation in particular. The article may be viewed as addressing a drop in an ocean of problems.

With this in mind, the article considers the international trend regarding standing rules to enforce constitutional rights. It looks at traditional, more restrictive standing rules as well as the newly-developing procedure of public interest litigation, considering examples from around the world. It then examines the primary sources of the rules governing standing to enforce constitutional rights in ordinary courts, the House and the Council, as well as the Commission and the Ombudsman. It further looks into the rules governing *amicus curiae* intervention and the possibility of obtaining consultative service from the House or the Council. The article further considers the separate standing law regime for the right to self-determination and the right to a clean and healthy environment.

2 The traditional standing rule – personal interest requirement

Traditionally, only those whose rights allegedly have been violated or are threatened with violation may be granted standing to enforce their rights.¹⁴ Interest represents loss or gain, often of a material nature, out of the proceedings. A decision of the Australian High Court provides an eloquent summary of the requirements of the traditional position. The Court held that interest¹⁵

does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or lose some advantage, other than a sense of grievance or a debt of costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law should be

¹³ It is, eg, puzzling as to why NGOs involved in human rights and democracy issues have not challenged the constitutionality of the new civil society law (2009) which has effectively crippled their functions. One possible reason for their reluctance could be the very low prospect of success given the political (hence not independent) nature of the House and the Council.

¹⁴ C Okpaluba 'Justiciability and standing to challenge legislation in the commonwealth: A tale of the traditionalist and judicial activist approaches' (2003) 36 *The Comparative and International Law Journal of Southern Africa* 25 26. For a summary of the international trends on traditional and liberal standing rules, see Kay (n 6 above).

¹⁵ *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493.

observed, or that a conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*.

The obvious impact of this interest requirement is that the law 'regards it preferable that an illegality should continue than the person excluded should have access to courts'.¹⁶ These exclusionary rules are justified by, among others, the idea that judicial action is only necessary to prevent or compensate for a real injury.¹⁷

The traditional approach to standing has been applied and is still sanctioned in several jurisdictions. In South Africa, for instance, prior to the adoption of the Interim Constitution, the standing rules did not recognise everyone's interest to freely challenge the validity of certain acts of the administration particularly those impacting largely on the public interest.¹⁸ As such, there was a need to show a sustained loss or damage (interest which is 'personal, sufficient and direct') as a result of the impugned provision despite the wide public interest that might be at stake. Similarly, in Germany, a complainant will only sustain his claim if she or he can show that their personal rights have been violated or threatened with violation, and hence, one may not act as proxy to others or the public interest at large.¹⁹ In the United States as well, a claimant should generally assert a 'private right' of personal interest in the action he or she institutes.²⁰

This traditional approach is considered an impediment to justice. According to a previous Indian Chief Justice, Bhagwati, the traditional rule is 'highly individualistic, concerned with an atomistic justice, incapable of responding to the claims and demands of the collectivity, and resistant to change'.²¹ The traditional approach may also exclude the majority, particularly the poor and the ignorant, who are often the helpless victims of violations, from accessing judicial bodies. Yet, courts should not become 'an arena of quibbling for men with long

¹⁶ Schiemann (n 10 above) 342.

¹⁷ Kay (n 6 above) 5.

¹⁸ GE Devinesh 'Locus standi revisited: Its historical evolution and present status in terms of section 38 of the South African Constitution' (2006) 38 *De Jure* 28 31; see also C Loots 'Locus standi to claim relief in the public interest in matters involving the enforcement of legislation' (1987) 104 *South African Law Journal* 131 132. Loots notes that there were some exceptions to the general sufficient interest requirement in certain cases.

¹⁹ RA Lorz 'Standing to raise constitutional issues in Germany' in Kay (n 6 above) 174 175.

²⁰ See, generally, HP Monaghan 'Constitutional adjudication: The who and the when' (1973) 82 *Yale Law Journal* 1363; see also JC Reitz 'Standing to raise constitutional issues as a reflection of political economy' in Kay (n 6 above) 261; LL Jaffe 'Standing to secure judicial review: Public actions' (1961) 74 *Harvard Law Review* 1265. The only notable exception to the personal injury requirement has been freedom of expression as it is believed that laws affecting freedom of expression may have a 'chilling effect' on everyone; see Kay (n 6 above) 29.

²¹ PN Bhagwati 'Judicial activism and public interest litigation' (1984-1985) 23 *Colombia Journal of Transnational Law* 561 570.

purses’;²² they should rather be a ‘last resort for the oppressed and the bewildered’.²³ This calls for more robust and inclusive standing rules. Strict standing rules threaten to exclude individuals and groups who might not be aware of their rights, or who might not be able to vindicate their rights for a myriad of reasons.

3 Public interest litigation

A more liberal approach has therefore been developed, especially in cases where the rights of vulnerable groups, who are often disenfranchised primarily as a result of the violation of their rights, are involved and generally when the interests of the larger public are concerned. This liberal approach is particularly called for when the dispute relates to a constitutionally-entrenched right as every citizen is believed to have interest in requiring their government and other constitutionally-bound actors to behave constitutionally.²⁴ Hence, it is suggested that procedural rules should be crafted to be flexible enough to permit adjustments in the face of substantive concerns while at the same time ensuring the regularity and predictability necessary for the integrity of the system.²⁵ Although procedural rules may have relevance in ensuring efficiency and avoiding unnecessary delay, they should not be unduly strict to ‘harden the arteries’ and blunt the judicial consideration of legitimate interests.²⁶

The Indian Supreme Court has been particularly exemplary in incessantly accepting, and even encouraging, complaints from public interest litigants. Public interest litigation in India has created a fascinating jurisprudence, from admitting mere letters as complaints (called epistolary jurisdiction) and adopting flexible standing rules to establishing *ad hoc* commissions, often for investigational purposes and for considering possible appropriate and legitimate decisions and the enforcement of several socio-economic rights.²⁷

A succinct summary of the concept of public interest litigation was provided by the Supreme Court in the *Judges* case where the Court held:²⁸

²² *Keshvananda Bharati v State of Kerala*, 1973 A IR 1461, 1485 (SC) cited in Bhagwati (n 21 above) 567.

²³ U Baxi ‘Taking suffering seriously: Social action litigation in the Supreme Court of India’ (1982) 29 *Review of the International Commission of Jurists* 37.

²⁴ Kay (n 6 above) 28.

²⁵ M Minow ‘Politics and procedure’ in D Kairys (ed) *The politics of law: A progressive critique* (1998) 86.

²⁶ C Theophilopoulos *Fundamental principles of civil procedure* (2006) 181.

²⁷ See AH Desai & S Muralidhar ‘Public interest litigation: Potentials and problems’ in BN Kirpal *et al* (eds) *Supreme but not infallible – Essays in honour of the Supreme Court of India* (2000).

²⁸ *SP Gupta v Union of India* (1981) SCC 87 210.

Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or legal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under article 26 [of the Constitution of India] and in case of any fundamental right of such person or class of persons, in this Court under article 32 [of the Constitution of India] seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.

Moreover, the Indian Supreme Court generally considers challenges to legislation to be in the public interest. Hence, anyone genuinely interested in the case under consideration may bring ‘the case to the attention of the Court’.²⁹

This remarkable modification of the rules governing standing with regard to public wrongs or injuries has entitled *bona fide* applicants to seek redress on behalf of individuals and groups who for several reasons are unable to seek redress themselves. The Indian Supreme Court has at the same time been cautious to preclude frivolous and gold-seeking litigation and to discourage the pursuit of ‘private, political or publicity’ interest litigation under the guise of public interest litigation and has rejected mere busybodies or interlopers.³⁰ Liberal standing rules have been particularly exploited to ensure the enforcement of social rights, as a result of which the practice has been more prominently referred to as social action litigation in India.

In South Africa, on the other hand, the liberalisation of the rules of standing is a result of their explicit recognition in the Constitution rather than a creation of a progressively activist judiciary. Section 38 of the 1996 (final) Constitution has innovatively expanded the list of individuals and entities that may access the courts, including the Constitutional Court, for appropriate relief if they believe that their rights have been infringed or threatened.³¹ Of particular importance to this study is section 38(d) which grants standing to ‘anyone acting in the public interest’. This has provided an opportunity to burgeoning human rights litigation by members of civil society, particularly

²⁹ Okpaluba (n 14 above).

³⁰ Justice KG Balakrishnan (2008) ‘Growth of public interest litigation in India’ address at the Singapore Academy of Law, 15th Annual Lecture, http://www.supremecourtsofindia.nic.in/speeches/speeches_2008/8%5B1%5D.10.08_SINGAPORE_-_Growth_of_Public_Interest_Litigation.pdf (accessed 7 June 2010). This is achieved through the procedure of preliminary screening of public interest cases and a strict analysis of *bona fide* public interest as well as conflicting interests. Justice Balakrishnan has also identified several public interest cases rejected by the Supreme Court that involved policy choices (disguised political litigation).

³¹ See sec 38 of the Constitution of the Republic of South Africa.

human rights NGOs. The scope of this section obviously depends on the meaning to be subscribed to what constitutes a 'public interest'.³²

While elucidating on section 7(4)(v) of the interim South African Constitution, which was largely similar to section 38(d) of the final Constitution, O'Regan J interpreted this provision as requiring that the person must be 'genuinely acting in the public interest'.³³ She expounded:³⁴

Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.

This is similar to the approach of the Indian Supreme Court to ensure the genuineness of the applicants' motives by stifling cases brought for personal or publicity or political reasons under the guise of the public interest.

In Nigeria too, until the recent change, standing was only available to those who show some kind of grievance as a sequel of the action or omission complained of. The most prominent case in this regard is the *Adesanya* case,³⁵ where it was held that 'standing will only be accorded to the 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'.³⁶ This requirement has been disparaged and scholars have incisively recommended the adoption of a more liberal approach to standing that takes into account the circumstances of each case, especially when the public interest is at stake.³⁷ Unfortunately, the 1999 Nigerian Constitution (which is similar to article 6(6)(b) of the 1979 Constitution) has elevated and codified the unduly restrictive precedence set by the *Adesanya* case. Section 46(1) of the Constitution provides:

³² C Loots 'Standing, ripeness and mootness' in S Woolman *et al Constitutional law of South Africa* (student ed) (2007) 7-11.

³³ *Ferreira v Levin NO & Others* 1996 1 SA 984 (CC) para 233.

³⁴ *Ferreira v Levin* (n 33 above) para 234.

³⁵ *Adesanya v President of the Federal Republic of Nigeria & Another* [1981] 1 All NLR 1. This case is considered as the *locus classicus* on standing to sue in Nigeria. See T Ogowewo 'The problem with standing to sue in Nigeria' (1995) 39 *Journal of African Law* 1

³⁶ *Adesanya* (n 35 above) para 39.

³⁷ Eg, Ogowewo recommends the abdication of 'one test' for standing that 'applies in all contexts regardless of the cause of action or the remedy sought'; see Ogowewo (n 35 above) 1.

Any person who alleges that any of the provisions of this Chapter [Chapter IV] has been or is being or likely to be contravened in any state *in relation to him* may apply to a High Court in that state.

The traditional approach to standing has, however, been abandoned in cases that involve the adjudication and enforcement of human rights in the public interest after stern scholarly criticism of the prevailing narrowly-tailored rules.³⁸ The new enforcement rules adopted by the Chief Justice in 2009 provide:³⁹

3(e) The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates, or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

....
(iv) Anyone acting in the public interest.

This essentially replicates the standing rules in the South African Constitution. It might even be considered to be establishing broader standing rules as it prohibits the dismissal or striking down of a human rights case solely for want of standing.

Article 15 of the Constitution of Malawi similarly entitles those having 'sufficient interest' to institute constitutional complaints. Article 2 of the Ghanaian Constitution enshrines even broader standing rules as it entitles anyone to challenge allegedly unconstitutional acts and omissions.⁴⁰ The Supreme Court of The Gambia has ruled that every citizen of The Gambia has the standing to challenge an allegedly unconstitutional act or omission.⁴¹

4 Standing in Ethiopia

The standing law regime in Ethiopia generally requires a vested/personal interest in the case under consideration. As pointed out above, there are certain exceptions regarding the operation of the Human Rights Commission and the Ombudsman and concerning the right to a clean and healthy environment. There are also certain laws that

³⁸ See, eg, EA Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision' (2009) 9 *African Human Rights Law Journal* 546; JA Yakubu *Constitutional law in Nigeria* (2003) 445-474; Ogowewo (n 35 above).

³⁹ Preamble sec 3(e) Nigerian Fundamental Rights (Enforcement Procedure) Rules, 2009 <http://www.accesstojustice-ng.org/articles/New%20FREP%20Rules%20.pdf> (accessed 7 June 2010).

⁴⁰ The Supreme Court of Ghana has endorsed this view in *Tuffuor v Attorney-General* (1980) GLR 637.

⁴¹ *United Democratic Party (UDP) & Others v Attorney-General of The Gambia* (unreported Suit SCCS 3/2000).

anticipate *amicus curiae* involvement in constitutional adjudication. Below is a detailed discussion of all these procedures.

4.1 Standing under the Civil Procedure Code

The Ethiopian Civil Procedure Code exacts a 'vested interest' to stand as plaintiff.⁴² This is understood as requiring a personal loss or gain in the outcome of the case. This may be logical since the Civil Procedure Code is primarily meant to govern cases arising out of private civil relationships and interactions. In any case, courts accept only complaints in which the applicant may prove a vested interest beyond and above others. Complaints involving the enforcement of constitutional or statutory rights in ordinary courts are therefore governed by the 'vested interest' requirement.

4.2 Right of access to justice and standing rules under the Constitution

The Ethiopian Constitution guarantees the right of access to justice under article 37. This article is a broad provision that applies to all actions, whether based on the Constitution or any other legal instrument, and whether the case is a human rights case or not. Article 37(1) provides:

Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by a court of law or any other competent body with judicial power.

Hence, *everyone* may access courts or any other competent body with judicial power (including the Council and House) to obtain a decision or judgment over a *justiciable* matter.⁴³ Apparently, the Constitution gives everyone the widest possible right to seek redress in any issue irrespective of their personal interest in the particular case. Some scholars have understood this literally as referring not just to those interested, but also to everyone else, and hence as an entry point for, *inter alia*, human rights NGOs interested to employ litigation as a strategy for achieving their objects.⁴⁴ Obviously, this conflicts with the narrow 'vested interest' stipulation in the Civil Procedure Code. As such, the

⁴² Art 33(2) Ethiopian Civil Procedure Code (1965).

⁴³ The Constitution does not, however, define, or provide criteria for defining, what a 'justiciable matter' is. Some scholars have concluded that all human rights, including socio-economic rights and the right to development, are justiciable in courts. SA Yeshanew 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (2008) 8 *African Human Rights Law Journal* 273.

⁴⁴ YM Badwaza 'Public interest litigation as practised by South African NGOs: Any lessons for Ethiopia?' unpublished LLM thesis, University of Pretoria, 2005 40; G Kassa 'Mechanisms of constitutional control: A preliminary observation of the Ethiopian system' (2007) 20 *Africa Focus* 75 86.

latter rule should be void as incongruent with the supremacy clause of the Constitution (article 9(1)) to the extent of inconsistency.

It has also been suggested that the rest of article 37 of the Constitution further complements this broad understanding of article 37(1).⁴⁵ Article 37(2) grants standing to:

- (a) any association representing the collective or individual interest of its members; or
- (b) any group or person who is a member of, or represents a group with similar interests.

It is, however, debatable if article 37(2) indeed supports the standing rules as formulated under article 37(1). It may, quite to the contrary, be argued that, had article 37(1) not been referring to entities having an interest in a case, article 37(2) would have been redundant. If the first article is wide enough to include individuals and entities without any kind of attachment to the case, then certainly an association or a group or members of a group referred to in article 37(2) necessarily fall within its ambit (in fact, these are entities which arguably fulfill the interest requirement). As such, it can equally strongly be submitted that any attempt to save article 37(2) from becoming superfluous requires a narrow understanding of article 37(1).

Moreover, it is not wise to argue that anyone can bring complaints regarding any cause of action, even purely private ones. There might, therefore, be a tendency towards a narrower understanding of this right of access to justice provision, which also incidentally deals with issues of *locus standi* (presumably in recognition of the inextricable link between access to justice and the governing standing law regime alluded to earlier).

4.3 Standing to enforce rights enshrined in the Constitution

There are more specific provisions in the Constitution and other domestic legislation that govern issues of standing to sue in cases involving the interpretation and enforcement of the Constitution.

The Ethiopian Constitution grants the power of interpreting the Constitution to the House, an entity composed of representatives of ethnic groups.⁴⁶ Since the members of this House are not required to have knowledge of the law, including the Constitution, the Constitution also establishes the Council, composed largely of legal experts

⁴⁵ Badwaza (n 44 above) 41.

⁴⁶ Arts 62 & 83 FDRE Constitution. For a discussion of the power of interpretation of the Ethiopian Constitution, see YT Fisseha 'Judicial review and democracy: A normative discourse on the (novel) Ethiopian approach to constitutional review' (2006) 14 *African Journal of International and Comparative Law* 53; A Fiseha 'Federalism and the adjudication of constitutional issues: The Ethiopian experience' (2005) 52 *Netherlands International Law Review* 1.

to provide recommendations to the House.⁴⁷ Any complaint allegedly requiring constitutional interpretation has to first be directed to the Council which will then either reject the case, if it concludes that there is no need for constitutional interpretation, or submit recommendations to the House for a final decision if there is a need for constitutional interpretation. If the Council holds that constitutional interpretation is not necessary, the applicant may appeal to the House (article 84(3)). It is, however, not clear whether an appeal is allowed to the House if the case is rejected for want of standing, since the question of whether there is a need for constitutional interpretation, which unavoidably involves some sort of analysis of the merits, is obviously different from the question of whether the complainant has the standing to request redress in a particular case.

The main constitutional provision that addresses issues concerning standing to enforce constitutional rights in the Council and the House is article 84(2) which provides:

Where any federal or state law is contested as being unconstitutional and such a dispute is submitted to it [the Council] by *any court or interested party*, the Council shall consider the matter and submit it to the House of the Federation for a final decision.

This provision incidentally answers the question as to who might initiate a case before the Council. Hence, 'any court' has the standing to set the Council in motion. The provision assumes that a case before a court of law may not be resolved without first determining the constitutionality of the applicable law. A court may refer a case to the Council either of its own motion, or at the insistence of one or both of the litigants. It is, however, not clear what 'court' stands for. Obviously, it includes those courts that the Constitution establishes or authorises the House of Peoples' Representatives to establish as necessary (see article 78(2)), namely, Federal First Instance, High and Supreme Court, and State First Instance, High and Supreme Courts. Does it also include Shari'a or customary courts, administrative tribunals, the Labour Board and other similar entities with judicial power? It is debatable whether these latter entities may also initiate cases before the Council if they feel there is a need for constitutional interpretation at any stage of their proceedings.

As considered earlier, the right of access to justice enshrined under article 37 refers to courts of law or other competent bodies with judicial power. This might imply that 'courts' under article 84 include other entities beyond the federal and state hierarchical courts, as long as they

⁴⁷ The Council has 11 members. It is composed of three representatives from the House, the President and Vice-Presidents of the Federal Supreme Court of Ethiopia (who serve as Chairperson and Vice-Chairperson, respectively, of the Council), and six legal experts appointed by the President of the Republic on recommendation from the House of Peoples' Representatives (the law-making body composed of elected representatives).

exercise judicial power. However, the Council so far has not received any case referred by such other entities.

The Constitution entitles ‘interested parties’ to lodge complaints before the Council. ‘Interested parties’ may be understood to refer to the litigants in a case pending before a court of law. It can also refer to anyone interested in the particular case he or she is complaining about, whether or not the case is pending before a court. The latter interpretation should generally be preferred as constitutional disputes may, and often do, arise out of court. This interpretation is supported by the practice of the Council as it has entertained claims of the unconstitutionality of legislative acts outside the context of courts.⁴⁸

It should, however, be noted that this provision applies to challenges against ‘federal or state law’ only. Again, the Constitution does not define as to what ‘law’ stands for (see below for further discussion). The proclamations adopted to give effect to the Constitutional provision on constitutional interpretation have better elaborated on the issue of standing, as discussed below.

4.4 Standing under the Proclamations for the consolidation of the Council and the House

To further elaborate on the general provisions of the Constitution on standing in the Council, and generally to facilitate the proper discharging of the constitutional mandate and responsibility of these institutions, two Proclamations have been adopted.⁴⁹ The Council has also adopted its Rules of Procedure as mandated under the Constitution. The Council’s Proclamation anticipates two sets of constitutional complaints: one regarding cases pending before courts of law, and those human rights cases that arise outside of the context of courts (direct access, referred to as ‘constitutional complaint’). The individuals and entities entitled to institute cases differ accordingly.⁵⁰

In cases where the constitutional challenge relates to a pending case, the court or one or both of the parties to the case may approach the Council for constitutional determination.⁵¹ The court may decide to submit the case to the Council of its own volition or upon being requested by the parties. However, the court can refer the case ‘only if it believes that there is a need for constitutional interpretation in

⁴⁸ I Idris ‘Constitutional adjudication under the 1994 FDRE (Federal Democratic Republic of Ethiopia) Constitution’ (2002) 1 *Ethiopian Law Review* 63 84.

⁴⁹ Council of Constitutional Inquiry Proclamation 250/2001; Consolidation of the House of Federation and Definition of Powers and Responsibilities Proclamation 251/2001.

⁵⁰ Arts 21-23 Council Proclamation.

⁵¹ Arts 21 & 22 Council Proclamation.

deciding the case'.⁵² Mere qualms over the constitutionality of the impugned law or a possibility of unconstitutional legislation do not suffice. Hence, the court should obviously be engaged in a preliminary interpretation of the Constitution to determine whether there is a case for constitutional determination. It is, however, not clear if the court would have to explain, in the submission to the Council, why it believes that there is a need for constitutional interpretation. It is submitted that such a requirement is implicit in the Proclamation. The principle of constitutional avoidance, as implied in the requirement that the referring court should believe that there is a constitutional issue, similarly dictates that the Constitution should be interpreted only when necessary, further reinforcing the duty of the referring court to explain why it believes that constitutional interpretation is indeed imperative. This gives courts an opportunity to safeguard the Constitution as required. The duty to explain may also serve as a filter to preclude possible ill-considered and inappropriate submissions, as well as avoidance of cases. Moreover, the Council will benefit considerably from the discussions of the issue at hand by the court in arriving at an appropriate decision.⁵³ That is why the Council's proclamation requires complaints to be in an 'elaborate writing'.⁵⁴ 'Elaborate writing' should be understood to require courts, and any person or entity approaching the Council, to explain why they believe the Council should be seized of the case.

The parties to a court case may also initiate a complaint to the Council.⁵⁵ It is likely that most cases to be referred to the Council will be at the initiation of the parties to the case rather than initiated by courts. However, the parties to a case pending before a court may only refer a complaint to the Council through that court. Hence, the party or parties will have to first apply to the court, which then has to be convinced that there is a need for constitutional interpretation before transferring the case to the Council. This procedure may serve to streamline frivolous complaints, maliciously intended to distract or filibuster court proceedings. If there is no case for constitutional inter-

⁵² Art 21(2) Council Proclamation. This is in line with the approach of the German Constitutional Court, which requires the courts to be 'convinced' that there is doubt as to the constitutionality of laws, compared to the Italian Constitutional Court, which only requires referral if the courts have the 'slightest doubt' about the constitutionality of the impugned legislation. See F Ferejohn & P Pasquino 'Constitutional adjudication: Lessons from Europe' (2003-2004) *Texas Law Review* 1671 1688.

⁵³ The South African Constitutional Court has similarly held, in relation to direct access, that '[i]t is ordinarily not in the interest of justice for it to sit as court of first and last instance and that direct access should only be granted in exceptional circumstances'. *Van Vuren v Minister of Justice and Constitutional Development and Minister of Correctional Services* (CCT 15/07); *S v Zuma* 1995 2 SA 642 (CC) para 11. One of the reasons for such reluctance to grant direct access is to benefit from the legal analysis of lower courts.

⁵⁴ Art 24 Council Proclamation.

⁵⁵ See art 22 Council Proclamation.

pretation, the court will reject the invitation to refer. The decision of the court is, nevertheless, not final. The party or parties may launch his or her or their complaint to the Council. If the referral is accepted, the Council may invite the parties for a hearing. But this procedure is purely discretionary and there is no duty to hold an oral hearing in the Council or the House.

In both instances, if the complaint reaches the Council, the case before the court will be stayed until the Council decides on the complaint. It is provided that 'it is only the legal issue necessary for constitutional interpretation that the court forwards to the Council of Inquiry'. More specifically, the Council will only determine whether the challenged law is constitutional or not generally and not necessarily regarding its applicability to the case pending before the court. Constitutional interpretation is therefore essentially incidental to the determination of the case pending before the court.⁵⁶ However, the requirement that the court may only refer the constitutional issue so long as it is necessary to resolve the dispute at hand concretises the incidental and largely abstract nature of the constitutional determination.

Unlike the Constitution, the Council's Proclamation establishes separate procedures for the enforcement of human rights provisions in the Constitution in cases arising outside the context of the courts. It provides:⁵⁷

Any person who alleges that *his fundamental rights and freedoms have been violated* by the final decision of any government institution or official may present his case to the Council of Inquiry for constitutional interpretation.

We can clearly observe that this provision upholds the traditional standing rule which only allows those whose rights have been violated to have the *locus standi* to apply for constitutional interpretation. This standing rule also does not distinguish between the sources of violation, ie whether or not the challenge is against legislation or any other action or inaction. The mere fact that a person is adversely affected, directly or indirectly, by a particular act or omission does not suffice unless he or she can show that they have a constitutional right which has been violated. Moreover, this provision only anticipates cases where a right has actually been violated and does not include cases of threats of violation. As such, individuals and entities would have to face the risk of violation and suffering the consequences, which might be dire, before asserting their constitutional rights. For instance, in the Ethiopian anti-terrorism legislation, there is a provision which

⁵⁶ See A Mulatu 'Who is "the interested party" to initiate a challenge to the constitutionality of laws in Ethiopia (under the 1994 FDRE Constitution)' (1999) *The Law Student Bulletin* 2 3 4.

⁵⁷ Art 23(1) Council Proclamation (my emphasis).

criminalises publishing anything *likely* to encourage terrorism.⁵⁸ This provision potentially unreasonably restricts freedom of expression and press freedom and hence might be challenged as unconstitutional. Yet, under the current procedure, only those who have already been charged or convicted under the provision may challenge the law. Individuals or publishers may not dispute the constitutionality of this provision without subjecting themselves to a potential criminal prosecution. This unreasonably restricts access to the Council and hence access to justice. The view taken by the Constitutional Court of South Africa which has noted, regarding a case instituted by the Centre for Child Law against a minimum sentencing regime as applied to children aged 16-17, should have been adopted:⁵⁹

To have required the Centre to augment its standing by waiting for a child to be sentenced under the new provisions would, in my view, have been an exercise in needless formalism.

The procedure does not, moreover, grant interested entities, such as human rights NGOs who work in the area under consideration, other than the victim of a violation standing before the Council. The Council has, for instance, rejected a case submitted by the Islamic Affairs Supreme Council on whether final decisions of Islamic Shari'a courts are appealable to ordinary courts under the Constitution.⁶⁰ The Council ruled that only the parties to the case have standing to refer the case to it. Also, since this provision specifically applies to allegations of violations of human rights provisions of the Constitution, the 'interested party' requirement, which could possibly have been construed widely, may not apply.

The adoption of restrictive standing rules regarding constitutional complaints may have been motivated by the need to screen the flow of cases to the Council which is an *ad hoc* institution. The Council meets only quarterly and may also hold extraordinary sessions. This makes the Council incapable of addressing a large case load when it meets. Given that constitutional complaints have constituted a significant majority of cases involving judicial review, it would have been unwise to adopt a relaxed standing rule which will add to the inherent inefficiency of the Council. However, it would have been better to reconstitute the Council as a regular organ than limit standing rules in view of its *ad*

⁵⁸ Art 6 Ethiopian Anti-terrorism Proclamation No 652/2009, which provides that the crime of terrorism is committed by anyone who 'publishes or causes the publication of a statement that is *likely* to be understood by those addressed as a direct or indirect encouragement or other inducement for the commission or preparation or instigation of an act of terrorism'.

⁵⁹ Para 12 *Centre for Child Law v Minister for Constitutional Development & Others* Case CCT 98/08 [2009] ZACC 18.

⁶⁰ The case was submitted to the Council in October 1999 and the Council delivered its decision on 17 January 2001. See Fiseha (n 46 above) 26-27.

hoc status. Restrictive standing rules should not be adopted to address a self-created limitation—the *ad hoc* status of the Council.

It should be noted that neither the Constitution nor the enabling statutes anticipate and explicitly address the possibility where a constitutional issue was not raised during the court proceedings, but one of the parties wants to challenge the final decision of a court as unconstitutional. It does not appear from the proclamations whether the Council or the House will receive complaints after a case has been resolved by the courts without the parties raising a constitutional issue during the proceedings. It is not clear as to whether the failure to raise a constitutional issue during the court proceedings should preclude the parties from raising it in the Council or House if they realise that the final decision of the court was unconstitutional because the law on which the decision was based is incompatible with the Constitution.⁶¹ There is, however, no justification for insulating judicial decisions from constitutional scrutiny as even courts are bound to observe and ensure compliance with the Constitution, especially the human rights provisions therein.

The Council is, nonetheless, a forum of last resort concerning cases arising outside the context of courts. Hence, the party invoking the Constitution should first have attempted to exhaust all available remedies in the ‘the government institution having the power with due hierarchy to consider it’.⁶²

Another important novelty in the Council’s Proclamation is the definition provided for ‘law’ and ‘courts’. Earlier in the article, it was indicated that the Constitution does not define ‘law’ or ‘courts’ as such. This Proclamation clears up the confusion by defining law to mean ‘Proclamations and Regulations issued by the Federal Government or the states as well as international agreements which Ethiopia has endorsed and accepted’.⁶³ This provides a very robust definition of ‘law’ and apparently contradicts the Constitution, especially the Amharic version which limits laws, the constitutionality of which may only be challenged in the Council and the House, to proclamations of the state and federal legislative bodies. Some scholars are adamant that this definition itself is unconstitutional and takes away the implied residual power of ordinary courts to determine the constitutionality of regulations and directives issued by the

⁶¹ Note, however, that there is a procedure to the Cassation Division of the Federal Supreme Court where one can complain against a final decision of courts on questions of law, once appeal on the issue has been perfected. This still raises questions as the constitutionality of the interpretation of the Cassation Division may itself be challenged. Since the Cassation Division decides on a particular interpretation of laws, and not the constitutionality of that interpretation, the decision of the Cassation Division cannot be a substitute for decisions of constitutionality by the House or the Council. There is therefore no clear mechanism of challenging decisions of judicial bodies unless the constitutionality issue has been raised during the proceedings.

⁶² Art 23 Council Proclamation.

⁶³ Art 2(5) Council Proclamation.

executive.⁶⁴ Quite interestingly, the proclamation enacted to consolidate and provide for the powers and responsibilities of the House extends the definition of law to include directives issued by government institutions, which might include codes of conduct and guidelines or standards.⁶⁵

On the contrary, the Proclamation defines a 'court' very narrowly. Accordingly, 'court' refers to 'federal or state courts at any level'. This excludes Shari'a courts as well as other entities with judicial power from referring cases to the Council in cases where they are convinced that a pending case raises the constitutionality of an applicable law.

Just like the Constitution, the Council's Proclamation does not provide a clear answer as to whether a person may appeal against a decision of the Council to reject a case for want of standing.⁶⁶ This Proclamation provides for the right to appeal against the decision of the Council to dismiss a case for lack of a need for constitutional interpretation.⁶⁷ As mentioned earlier, this does not include the right to appeal in cases where a case is refused for want of standing. The House's Proclamation, however, establishes a right to appeal to any 'party dissatisfied with the decision of the Council of Constitutional Inquiry of rejection of case relating to review of constitutional interpretation'.⁶⁸ The phrase 'rejection of a case relating to review' is wide enough to cater for decisions to discard a case for lack of standing to sue.

4.4.1 Standing to enforce the right to self-determination

The Proclamation providing for the powers and duties of the House establishes separate procedures for the enforcement of the right to self-determination of nations, nationalities and peoples (ethnic groups) in Ethiopia as entrenched under article 39 of the Constitution. The Proclamation provides:⁶⁹

Any nation, nationality or people who believes that its self-identities are denied, its right of self-administration is infringed, promotion of its culture, language and history are not respected, in general its rights enshrined in the Constitution are not respected or, violated for any reason, may present its application to the House through the proper channel.

This provision is an extension of the traditional rule that authorises only those whose rights have been infringed to approach the relevant entities for enforcement of their rights. As such, it is only ethnic groups whose rights allegedly have been violated who may institute action in the House. This contradicts the opinion of the House regarding the resolution of questions of identity where it observed that 'anyone' can

⁶⁴ See, eg, Fiseha (n 46 above) 1.

⁶⁵ Art 2(2) House Proclamation.

⁶⁶ Mulatu (n 56 above) 12.

⁶⁷ Art 18 Council Proclamation.

⁶⁸ Art 5(2) House Proclamation.

⁶⁹ Art 19 House Proclamation.

raise this question as long as it complies with the definition of ‘nations, nationalities and peoples’.⁷⁰ According to the law, neither the federal government nor regional states may institute action on behalf of ethnic groups. In any case, applications to the House for the exercise of the right to self-determination, including secession, may only be admitted if a genuine attempt to exhaust available solutions within the regional state in which the concerned ethnic group is situated has been made.

4.5 Standing to seek ‘consultancy service’

The Ethiopian Constitution does not establish any procedure for seeking a consultative opinion, whether before or after the enactment of a law. Article 84(2) nevertheless refers to ‘laws’, portending that the Constitution only anticipates challenges after the enactment of laws. However, the jurisdiction of the House is not limited to disputes over the constitutionality of legislation and extends to other constitutional issues. The Constitution empowers the House to ‘interpret the Constitution’ and to adjudicate upon ‘all constitutional disputes’ with the support of the Council.

The House’s Proclamation provides that ‘the House shall not be obliged to render a consultancy service on constitutional interpretation’.⁷¹ The opposite reading of this provision seemingly implies that the House may, when it so wishes, provide an advisory or consultative opinion, though no entity has the right to demand a consultative service on any constitutional issue. This means that the House has the right to choose in which cases it may give an advisory or consultative opinion. The issue of standing in such cases will also be determined by the House itself on a case-by-case basis as part of its discretionary assessment. The House may also decide to give an opinion on legislation before or after its enactment.⁷² This procedure will enable the Council and the House to consider the constitutionality of a law by considering all the possible consequences of the impugned provision and not necessarily regarding the constitutionality of the provision as applicable to a specific case and party. Due to the broad impact and politically-intrusive nature of consultative or advisory opinions, the entities that may apply for the review of a bill should be limited.⁷³ The Council and the House have

⁷⁰ Decision of the House of Federation regarding Claims of Identity (April 2001). It is not clear whether the decision is only referring to anyone claiming to be a member of the concerned ethnic group.

⁷¹ Art 4(2) House Proclamation.

⁷² Eg, the House gave its opinion on whether the federal government may enact a federal family code (as this is expressly granted to the regional states) upon request of the office of the Prime Minister (see constitutional inquiry raised regarding the promulgation of a federal family code (House of Federation, April 2000)).

⁷³ In the case of South Africa, eg, only the President of the Republic (against federal bills) and the premiers of the provinces (against provincial bills) have the standing in prior control (to challenge a bill for constitutionality).

an absolute discretion to decide who has standing and in relation to which issues.

The Council's Proclamation, moreover, provides that cases which may not be handled by the courts and which require constitutional interpretation may be submitted to the Council by at least one-third of the members of the federal or state legislative councils, or the federal or regional state executive bodies (article 23(4)). This provision, besides anticipating the existence of disputes which may not be handled by courts (hence non-justiciable), opens a vista of opportunities for the Council to engage in abstract or advisory review.⁷⁴ This is so because there is no clear requirement that the dispute be based on legislation or regulation which is in force, or be a concrete dispute. Hence, the entities listed in the provision may possibly even take a bill to the Council for constitutional determination before the bill is enacted. This provision allows the submission of cases on the constitutionality of policies and practices which have not been expressly catered for in other provisions as well.⁷⁵

4.6 Standing under the Rules of Procedure of the Council

The Council adopted Rules of Procedure in 1996 upon their approval by the House as required under 84(4) of the Constitution. The Rules (article 7) provide that (a) the House, (b) federal and state legislative and executive bodies, (c) courts of any level regarding pending cases, and (d) an interested party or body, have standing before the Council.

The fact that Rule (d) grants standing to interested parties and bodies clearly signifies that the entities listed from (a) to (c) do not need to show an interest in the case concerned. It is as if these entities are granted free access to the Council. The fact that the House is also mentioned as a potential entity that may institute action in the Council is a paradox given that the House is the final umpire of constitutional disputes upon the recommendation of the Council. Moreover, the granting of standing to all legislative and executive bodies establishes the widest possible standing rules. Apparently, the Rules of Procedure widen the scope of entities entitled to set the Council in motion compared to both the Constitution and the Proclamations of the House and the Council. Some scholars have argued that this expansion is illegitimate and hence susceptible to constitutional challenge.⁷⁶ However, this argument is overstated, given that the Ethiopian Constitution

⁷⁴ There is, however, no indication as to what kind of cases may not be handled by courts. This provision might as well be creating its own version of the political question doctrine as developed by the US Supreme Court. Cases concerning, eg, policies or foreign relations may fall in this category.

⁷⁵ The House has, eg, developed guidelines on who may raise a claim regarding identity and who may decide on the questions for the right to self-determination. See Decision of the House of Federation regarding Claims of Identity (April 2001).

⁷⁶ Mulatu (n 56 above) 8.

recognises the right of access to justice, which is related to the issue of standing. Moreover, the Constitution merely establishes the minimum standards and building upon such standards is not necessarily illegitimate or unconstitutional.

The rules do not clarify whether the reference to interested parties or bodies relates to parties in a court case or even to cases outside court. Hence, the proposed constructions of similar provisions under the previous sections apply *mutatis mutandis* to our understanding of these rules. Hence, particularly concerning human rights cases (constitutional complaints), an interested party or body is one whose ‘fundamental rights and freedoms have been violated’ as required under the Council’s proclamation. One must therefore assert entitlement to a particular right which allegedly has been violated to have standing to sue.

4.7 The procedure of *amicus curiae* and standing to be *amicus*

The Constitution does not include a provision dealing with the possibility of joining a case as *amicus* or addressing *amicus curiae* submissions. The two proclamations providing for the House and the Council, however, anticipate procedures whereby the Council or the House may be engaged in ‘gathering professional opinions’ on the issue under determination. The Council or the House may therefore ‘call upon pertinent institutions, professionals and contending parties to give their opinions’ on the issue(s) under consideration.⁷⁷ A pertinent federal or state government institution, particularly the institutions which consult the government in adopting laws, may also be required to explain controversies over relevant issues.⁷⁸ As such, we can observe that oral hearings are not mandatory and may only be conducted when the Council or the House decides to hold them.

The power to choose which institutions or professionals may give their views over a disputed constitutional issue lies solely with the Council and the House. Hence, there is no right to stand as *amicus curiae* before the Council or the House. The laws are not clear on whether the institutions or professionals may apply (or take the initiative) to stand as *amicus* in a particular case. No procedure exists to this effect though, implying that it is possible only when the House or the Council of its own motion approaches a relevant professional or institution. This understanding may, however, narrow down the opportunities for the House to benefit from the expertise of individual professionals and institutions, particularly regarding issues of human rights. Hence, these provisions should be understood as allowing professionals and institutions to apply to be joined in a case that relates to their expertise

⁷⁷ Art 27 Council Proclamation; art 10 House Proclamation. The House has collected views of experts on some occasions.

⁷⁸ Art 26 Council Proclamation; arts 9(2) & (3) House Proclamation.

as *amicus curiae*. This is important as these professionals and institutions are better suited to determine the relevance of their expertise to a particular case. This does not, however, exclude the possibility of the House or the Council making general calls for contributions.

4.8 Standing before the Human Rights Commission and the Ombudsman

To further enhance the proper enforcement and realisation of the human rights recognised therein, the Constitution establishes the Human Rights Commission and the Ombudsman.⁷⁹ Accordingly, the House of Peoples' Representatives has enacted enabling proclamations to establish these institutions.⁸⁰ The Commission is established with the objective 'to educate the public [to] be aware of human rights, see to it that human rights are protected, respected and fully enforced as well as to have the necessary measure taken where they are found to have been violated'.⁸¹ The Ombudsman is established with the aim 'to see to bringing about good governance that is of high quality, efficient and transparent, and [...] based on the rule of law, by way of ensuring that citizens' rights and benefits provided for by law are respected by organs of the executive'.⁸² Essentially, the Commission has a broader mandate, relating to all government institutions. On the other hand, the Ombudsman has the power to investigate cases concerning the action and omissions of the executive only.

The rules of standing before these institutions are more liberal than those before ordinary courts or the Council and the House, and understandably so. Hence, 'a complaint may be lodged by a person claiming that his rights are violated or by his spouse, family member, representative or by a third party' to the Commission.⁸³ This establishes the most extensive standing rules as 'third party' includes 'a deputy, an association or an NGO representing an individual or a group'.⁸⁴ The Commission may even accept anonymous complaints depending on the seriousness of the alleged violations.⁸⁵

Similarly, the right to lodge complaints to the Ombudsman accrues to a wide range of individuals and entities. There is no special interest requirement as such. Hence, 'a complaint may be lodged by a person claiming to have suffered from maladministration, or by his

⁷⁹ Art 55 of the Constitution requires the House of Peoples' Representatives to enact enabling laws for the establishment of the Ethiopian Human Rights Commission and the institution of the Ombudsman.

⁸⁰ Human Rights Commission Establishment Proclamation 210/2000 and the Institution of the Ombudsman Establishment Proclamation 211/2000.

⁸¹ Art 5 Commission Establishment Proclamation.

⁸² Art 5 Ombudsman Establishment Proclamation.

⁸³ Art 22(1) Commission Establishment Proclamation.

⁸⁴ Art 2(9) Commission Establishment Proclamation.

⁸⁵ Art 22(2) Commission Establishment Proclamation.

spouse, family member, his representative or by a third party'.⁸⁶ This proclamation does, however, not define 'third party'. Nonetheless, considering the fact that the two proclamations were adopted on the same day, we can safely borrow the definition provided in the proclamation establishing the Commission. Hence, it may include human rights NGOs and other entities. The Ombudsman may also accept anonymous complaints considering the gravity of the impugned maladministration.⁸⁷

The two enabling proclamations are silent on whether the Commission or the Ombudsperson may investigate cases *suo moto*. However, it appears that the empowerment to consider anonymous complaints may be widely interpreted to legitimise instances where the Commission or the Ombudsperson investigates cases of its own volition based on information from, for instance, the media.

4.9 Standing to enforce the right to a clean environment

Article 44(1) of the Ethiopian Constitution establishes the right to a clean and healthy environment. The Constitution also reiterates the right in the section dealing with National Policy Principles and Objectives (article 92). The environmental policy objective requires that the implementation of programmes and projects do not destroy or damage the environment. Moreover, it establishes the right of all people to 'full consultation and to the expression of views in the planning and implementation of environmental policies and projects that affect them directly'.

To give effect to this constitutional guarantee, several laws have been enacted. The main such law establishing the general framework for environmental standards is the Environmental Pollution Control Proclamation 300/2002. The Proclamation establishes several environmental standards to ensure that socio-economic development activities may not become counter-productive by inflicting irreversible and disproportionate harm on the environment.⁸⁸ It further enjoins everyone to refrain from polluting the environment by bypassing the relevant environmental standards.⁸⁹

In order to ensure the effective enforcement of environmental standards and in recognition of the broad, indiscriminate and boundless impact of environmental pollution on everyone, the proclamation establishes a separate standing regime. It sanctions the right of 'any person' to lodge a complaint at the Environmental Protection Authority (Authority) 'against any person allegedly causing actual or potential damage to the environment' 'without the need to show any vested

⁸⁶ Art 22(1) Ombudsman Establishment Proclamation.

⁸⁷ Art 22(2) Ombudsman Establishment Proclamation.

⁸⁸ Para 1; art 6 Preamble.

⁸⁹ Art 4.

interest'.⁹⁰ A similar broad standing right exists to access the courts 'when the Authority or regional environmental agency fails to give a decision within thirty days or when the person who has lodged the complaint is dissatisfied with the decision [of the Authority]'.⁹¹ The right to a clean and healthy environment therefore stands as a notable exception to the recognition of public interest litigation in Ethiopia.⁹² This wide standing rule is, however, only applicable to courts and the Environmental Protection Authority (EPA), and there is no similar generous right to access the Council or the House concerning the enforcement of the right to a clean and healthy environment as recognised in the Constitution. Note, however, that courts and the EPA may engage in incidental constitutional interpretation in ensuring compliance with the pollution laws. Hence, only those who have a direct interest in a case may, for instance, challenge the constitutionality of a law for alleged incompatibility with the right to a clean and healthy environment enshrined in the Constitution.

5 Concluding remarks

Rules of standing are intimately connected to, and can profoundly impede or facilitate access to justice. The courts and legislatures of several states are moving away from the traditional exclusionary standing rules to more liberal and even inviting rules that prioritise the enforcement of human rights. This is particularly so in the case of constitutional rights, the enforcement of which everyone may be said to have an interest in. The activism of the Indian Supreme Court, the progressive Constitution of South Africa and the inspirational move of the Chief Justice of the Nigerian Supreme Court, have all effectively inaugurated a new liberal model of standing in human rights cases involving the public interest. This approach is in line with and reinforces the supremacy clauses of the respective constitutions. In this regard, the Canadian Supreme Court ruled that standing may at times be granted to any person to enforce 'the right of the citizenry to constitutional behaviour

⁹⁰ Art 11(1).

⁹¹ Art 11(2). The appeal may, however, be brought only within 60 days from the date a decision was given or the deadline for a decision has elapsed.

⁹² Action Professionals' Association for the People (APAP) instituted the first public interest litigation based on this provision against the Environmental Protection Authority. The issue was whether the EPA could be sued based on art 11. The court held that art 11 of the Environmental Pollution Control Proclamation does not grant standing for suits against the EPA (the law only allows action against polluters and potential polluters which the EPA was established to control). See *Action Professionals' Association (APAP) v Ethiopian Environmental Authority* Case 64902, Federal First Instance Court, 31 October 2006.

by parliament where the issue in such behaviour is justiciable as a legal question'.⁹³

However, except for the right to a clean environment and only in ordinary courts, and except for the Commission and the Ombudsman, the traditional standing rules are applied in enforcing the Constitution as well as ordinary laws in Ethiopia. The fact that clear rules exist in instances when the legislature wants to provide for broader standing, while similar provisions abandoning the traditional rule in the Constitution are absent, reaffirms restrictive traditional standing rules.

The procedure currently available does not allow human rights NGOs and other entities to challenge laws or government action or inaction in discharging their constitutional duties. These restrictive rules have partly contributed to the very low frequency of constitutional human rights litigation. When seen in light of the fact that most Ethiopians are not aware of their rights, even less so about the existence and procedures of the Council or the House, a more liberal approach to standing would be justifiable. The experience of other countries indicates that constitutional human rights litigation is often spearheaded by public interest groups and human rights NGOs. Hence, procedures to create access to such entities must be crafted through, amongst others, more liberal standing rules. The procedure is further complicated by the fact that both the Council and the House are located only in Addis Ababa, too remote and inaccessible for most Ethiopians. There is therefore a need for broader standing rules concerning human rights cases involving the public interest, including cases where legislation is challenged. Such broader standing rules will be more in line with the supremacy clause of the Ethiopian Constitution. More specifically, Ethiopia should adopt the standing rules currently in operation in India, South Africa and Nigeria, at least regarding the enforcement of human rights provisions in the Constitution.

Admissibility also should not be limited to cases where there are actual violations. As it stands now, it is only complaints that allege actual violations that are admitted. Applications that allege threats of violation of a constitutional right should also be entertained. The Council and the House should further provide for clear procedures for *amicus curiae* submissions and should allow applications from NGOs and other professionals to be joined as *amicus curiae* even when the Council and the House have not called upon pertinent institutions and professionals for such a purpose.

⁹³ *Thorson v Attorney-General of Canada* [1975] 1 SCR 138 162 163.

The right to demonstrate in a democracy: An evaluation of public order policing in Nigeria

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Summary

Demonstrations or civil protests personify the popular right to freedom of expression as well as the right to freedom of peaceful assembly and association, all guaranteed under the Universal Declaration of Human Rights, regional instruments on human rights as well as the constitutions of many states. It is widely accepted that the expression of dissent through demonstrations or public processions is an acceptable democratic practice; provided that it is exercised in accordance with the law. In Nigeria, however, the predominance of military regimes in the country's political history has produced a culture of intolerance to any exertion of this democratic right. The country's return to civil rule in 1999, however, witnessed a resurgence of civil protests which were expectedly met with state repression. This article examines the legality of the right to demonstrations and civil protests in Nigeria, the nature of the police's response to the exercise of this right as well as the factors that underpin the nature of state response. It argues that the right of demonstrations and civil protests is a genuine democratic right guaranteed under international law as well as Nigeria's municipal law. It is further contended that derogations or restrictions to the exercise of this right must be in tandem with fundamental rights and freedoms which allow democracy to run its course while enforcing law and order and protecting the rights of others. The article concludes by proffering recommendations for the effective and harmonious policing of demonstrations in a democratic Nigeria.

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1 Introduction

All over the world, public order policing¹ is a major challenge for the state.² The contradiction between the maintenance of peace and order (for which the police are mandated) and the expression of citizens' democratic right to dissent, through demonstrations or protests against negative decisions by the state, often leave the police in the dilemma of choosing between failing in their responsibilities and attracting criticism from the populace. Most often, however, the police have chosen to risk criticism rather than praise; as the consequences attached to the policing of demonstrations almost always present human rights concerns.

Even in advanced democracies, demonstrations have not been policed without human rights abuses. Confronting demonstrators ultimately leads to a confrontation between the police and the demonstrators; most often resulting to physical injuries to some demonstrators and or the death of others. Recently, police authorities in the United Kingdom were left battling allegations of causing the death of Ian Tomlinson, who was alleged to have been battered by the police while policing the G-20 Protest in London.³ Similarly, in December 2008, the cradle of democracy was rocked by a five-day protest over the killing of a 16 year-old boy by Greek police, resulting in further accusations of police brutality during the ensuing protests. In the face of fierce and persistent rioting by over 40 000 students and workers; police were forced to attack demonstrators with teargas, smoke and percussion grenades, forcing people to disperse.⁴ In the aftermath of the municipal elections in Russia, the Russian riot police clashed with demonstrators in Moscow after the protesters staged what was referred to by the police as an

¹ This paper adopts De Lint's definition of public order policing as 'the use of police authority and capacity to establish a legitimate equilibrium between governmental and societal collective and individual rights and interests in a mass demonstration of grievance'. See W de Lint 'Public order policing: A tough act to follow?' (2005) 33 *International Journal of the Sociology of Law* 179.

² For a survey of literature on the universality of challenges associated with public order policing, see among others P Waddington *Liberty and order: Policing public order* (1994); M King & N Brearley *Public order policing: Contemporary perspectives on strategy and tactics* (1996); M King 'Policing and public order issues in Canada: Trends for change' (1997) 8 *Policing and Society* 47–76; D della Porta & H Reiter (eds) *Policing protest: The control of mass demonstrations in Western democracies* (1998) and M Button *et al* 'New challenges in public order policing: The professionalisation of environmental protest and the emergence of the militant environmental activist' (2002) 30 *International Journal of the Sociology of Law* 17–32.

³ P Lewis 'Ian Tomlinson's death: Guardian video reveals police attack on man who died at G20 protest' (2009) <http://www.guardian.co.uk/uk/2009/apr/07/ian-tomlinson-g20-death-video> (accessed 13 October 2009).

⁴ P Garganas 'Greek mass movement rises up against the state: Athens was rocked by mass protests on Sunday against the killing of Alexandros Grigoropoulos' *Socialist Worker Online* 9 December 2008 <http://www.socialistworker.co.uk/art.php?id=16684> (accessed 13 October 2009).

'unauthorised rally'.⁵ In Iran, the police cracked down on post-election protesters who protested the outcome of the 2009 presidential elections in that country.⁶ The list is endless.

In spite of Nigeria's multi-faceted political development, the history of policing demonstrations has been consistently 'anti-people'. Whereas some scholars concede that (even) liberal democracies cannot boast of attaining a 'fully integrated' police with liberal rights accommodation, there has nonetheless been a relative reduction in violence and an increase in the level of responsiveness to democratised legal norms and technological modernisation in their approach to public order policing.⁷ Little of these virtues can, however, belong to the Nigerian police. Until recently, the Nigerian police had no tolerance for protests and demonstrations, consistent with other liberal democratic traditions; their contemporary exhibition of pseudo-tolerance to civil protests is laden with political undercurrents, manifesting in their religious enforcement of the Public Order Act. In view of such a culture of intolerance for the exercise of the democratic right of demonstrations and civil protests under Nigeria's evolving democracy, the article engages doctrinal and non-doctrinal approaches to interrogate the lawfulness of the right to demonstrate in Nigeria. It examines the existing legal framework for the regulation of this right and situates police response within the context of this legal regime. While police intolerance to mass demonstrations is founded on claims to the maintenance of law and order as authorised by the Public Order Act, the article interrogates the constitutionality of the Act by reviewing judicial attitude to the limitation of mass protests. The article recommends measures for achieving democratic policing of civil protests without compromising order.

2 Understanding police attitude to demonstrations as a clash of two security concerns

A way of understanding the attitude of security agencies (especially the police) to demonstrations and protests is to explore the age-long perception of the concept of 'national security' by the state and the contemporary divergent view of security held by communal and human rights activists. The orthodox/traditional perception of security which prevailed prior to and during the bi-polar era privileges the regime or state as the primary reference point for security, while the neo-liberal security conception gives primacy to the individual and the community as the essence of security. An understanding of these

⁵ 'Russian riot police clamp down on protesters' <http://www.presstv.ir/detail.aspx?id=108528§ionid=351020602> (accessed 13 October 2009).

⁶ 'Iran clamps down on protests' *CBS News Online* (2009) <http://www.cbsnews.com/stories/2009/06/14/world/main5087285.shtml> (accessed 13 October 2009).

⁷ De Lint (n 1 above) 189.

two divergent security conceptions is therefore instructive to an understanding of police response to demonstrations and civil protest.

In ordinary parlance, the term 'security' denotes protection from an invasion or threat of it, but the term becomes less certain upon critical analysis.⁸ Before the end of the Cold War, reference to security in policy and scholarly debate was narrowed down to the protection of the state from an invasion or threat to its existence. After the Cold War, however, security analysis burgeoned beyond the parochial strategic calculation prominent during the bi-polar era, extending the object of protection to the *community* and the *individual*.⁹ This therefore created a dual-pronged security thinking with some analysts advocating adherence to the traditional model (classical view), while others argue in favour of the expansion or liberalisation of security (liberal view). In the traditional sense, security is seen as the defence, *policing* and intelligence functions of states, and the management of threats to and breaches of the peace through multilateral and bilateral process.¹⁰ Traditionalist security proponents of traditional security equate it with peace and the prevention of conflict by military means such as deterrence policies and non-offensive defence through public policy and law.¹¹ According to one of the principal exponents of traditional security, Lipman:¹²

A nation is secure to the extent that it is not in the danger of having to sacrifice core values, if it wishes to avoid war, and is able, if challenged, to maintain them by victory in such war.

In their treatise, Burzon *et al* attribute security in the traditional military-political context to when an issue is presented as posing an existential threat to a designated referent object (traditionally, but not necessarily, the state) incorporating government, territory and society.¹³ This classical world view is also held by Wolfers, who argues that the common usage of the term 'national security' implies that 'security rises and falls with the ability of a nation to deter an attack'.¹⁴ For traditional security adherents, therefore, once a nation or regime is able to preserve her physical and territorial integrity from any recognised threat, and to protect its institutions and governance from disruption by any force, whether internal or external, that nation is secure. From this traditional perspective, the state or the regime is perceived as the reference point

⁸ IT Sampson 'The paradox of resource wealth and human insecurity: Reflections on the Niger-Delta area of Nigeria' (2008) 38 *Africa Insight* 64.

⁹ As above.

¹⁰ E Osita & J Hettmann *Security sector governance in West Africa: Case study of Benin, Côte d'Ivoire, Ghana, Mali, Nigeria and Senegal* (2005) 2.

¹¹ S Tarry 'Widening and deepening: An analysis of security definitions in the 1990s' <http://www.stratnet.ualgary.ca/journal/article3.htm> (accessed 13 February 2009).

¹² W Lipman *US foreign policy: Shield of the republic* (1943) 123.

¹³ B Burzon *et al Security: A new framework for analysis* (1998) 21.

¹⁴ A Wolfers *Discord and collaboration: Essays on international politics* (1962) 150.

of security. Once the territorial borders of a state and its regime are protected from attacks or any threat to its existence, the state or the regime is perceived to be secured.

This state-centred security thinking was taken to an alarming dimension during the military interregnum that disturbed Nigeria's democratic development for over three decades. Under this dispensation, national security meant territorial integrity of the nation, including safety from external aggression, military might and prowess, security of life and property of the dictator and his family, security of life and property of the dictator's lieutenants, security of tenure for life for the dictator, absence of rebellion in the military ranks and among the people; and absence of opposition to the rule of the dictator.¹⁵ In this sense, protection of the regime, the personal safety and comfort of the dictator, his family and lieutenants became synonymous with national security. This would appear to be the exact opposite of the concept of national security as national human security.¹⁶

A challenge to the traditional security thinking initially emerged after World War II, when some scholars and security pundits began to analyse state security *vis-à-vis* the individual who is supposed to be the ultimate beneficiary of security. The thinking then emerged that the accumulation of military hardware, nuclear technology and excellent intelligence did not necessarily provide security to individual safety within the so-called 'secured state'. The argument is that, in spite of the pseudo-stability that may exist due to the enforcement of traditional security in a state and the protection of its regime, citizens of such states may not necessarily be safe. They may not be killed by nuclear attacks or missiles, but may nonetheless be subject to environmental disasters, poverty, hunger, violence and human rights abuses.

The human dimension to security made inroads into global policy analysis in 1994 when the United Nations Development Programme (UNDP) Human Development Report dwelt on human security and human development. The report contended that security has for far too long been interpreted narrowly – as security of territory or as protection of national interests or as global security from the threat of nuclear holocaust – and that it neglected the legitimate concerns of ordinary people who sought security in their daily lives. For many ordinary people, security symbolised protection from the threat of disease, hunger, unemployment, crime, social conflict, political repression and environmental hazards.¹⁷ Human security is thus classified into two aspects: safety from chronic threats such as hunger, disease and repression and protection from sudden and hurtful disruptions in the

¹⁵ M Sani (ed) *Civilian and security agencies relationship: Role of the police in building an equitable and democratic society* (2006) 21-22

¹⁶ As above.

¹⁷ United Nations Development Programme *Human Development Report* (1994) 22-23.

patterns of daily life, whether in homes, in jobs or in communities.¹⁸ Seven components of human security were therefore identified by the UNDP, namely, economic, food, health, environmental, personal, community and political security.

The UNDP Report triggered an avalanche of scholarly research and concept definitions of human security. Hubert defines the concept as safety from both violent and non-violent threats.¹⁹ He contends that 'human security is a condition or state of being characterised by freedom from pervasive threats to people's rights, their safety or even their lives'.²⁰ Hence any invasion or threatened invasion of individual or communal human rights, safety and life exposes them to insecurity and guarantees their demand for state protection from such threats. Human security, therefore, represents a paradigm shift from the traditional security thinking where the state and its actors were the focus of security policy, to a human-centred security approach where humans (who ought to be the ultimate beneficiary of state policy) receive greater attention and protection.²¹

In her treatise, Thomas sees human security as 'a condition of existence in which basic material needs are met and in which human dignity, including meaningful participation in the life of the community, can be realised'.²² This perspective imposes an obligation on the state to take positive measures to guarantee individuals' personal needs, hence the theoretical convergence of human security and socio-economic rights which mandate the state to guarantee the right to food security, health, shelter and education for every individual.

The human security viewpoint therefore identifies the fact that, if the individual person or community is threatened by the myriad of ominous events such as hunger, poverty, environmental degradation, communal conflict, disease, threat to livelihoods, state repression and a general milieu of human rights violations, then the protection of the geographical integrity of the state, its boundaries and regime from existential threats is cosmetic and of no benefit.²³ This security analysis has its foundation in democracy, which advocates the citizens' ownership of government processes and institutions. In congruence with this perception of security, therefore, the very object of national security in a democratic society should be to protect democratic institutions,

¹⁸ FC Onuoha 'Is this yet another false start? The West African gas pipeline project and the host communities in the Niger Delta region' (2008) 7 *Human Security Journal* 92.

¹⁹ D Hubert 'Human security: Safety for people in a changing world' in RA Akindele & A Basse (eds) *Beyond conflict resolution: Managing African security in the 21st century* (2001) 162.

²⁰ As above.

²¹ Sampson (n 8 above) 66.

²² C Thomas 'Introduction' in C Thomas & P Wilkin (eds) *Globalisation, human security and the African experience* (1999) 5.

²³ Sampson (n 8 above).

human rights and the rule of law and not to undermine them in the guise of state or regime security.²⁴ Nigeria's approach to national security should therefore be in tandem with the universal principles of democracy, the rule of law, respect for human rights and political pluralism. Sadly, however,²⁵

the concrete roles played by the police are defined by law and the conception of order in accordance with the political and economic interests of the dominant or ruling groups in society.

The police in every society acts in furtherance of the socio-economic and political interests of the dominant class (that is the political and economic elite); this is the underlying argument that belies radical political economy and social conflict paradigms on police and policing.²⁶ Alemika and Chukwuma identified three different but mutually-reinforcing political economy models in analysing the role of the Nigerian police as a barrier to change. These are that (1) there are intricate links between political and economic structures of society; (2) the political and economic structures of a society determine its general values, cultures and norms as well as the direction and practice of governance; and (3) a more robust analysis of society is provided by an understanding of the links between the economy and polity and their dialectical interrelations with other structures and social institutions.²⁷ In relation to the roles of the police, therefore, these theoretical extrapolations suggest that:²⁸

[t]he problems of order, law and lawlessness are to be understood as the reflections or products of the way the society organises its economy, especially the dominant interests that drive it. Criminal law enforcement constitutes the rationale for the establishment and sustenance of police and judicial institutions, contains rules prohibiting the behaviours and activities deemed detrimental to the dominant economic and political interests of society ... Classes and groups with dominant economic power control political decision making, including the enactment of criminal law by the legislature, its enforcement and interpretation by the police and judiciary respectively.

Social conflict theorists, on the other hand, argue that the main function of the police is to protect the property and wellbeing of those who benefit most from an economy based on the extraction of private profit.²⁹ They argue further that the police were created primarily in

²⁴ J-L Roy 'Bridging human rights and security' http://www.ichrdd.ca/site/_PDF/publications/intHRadvocacy/bridgingrightsandsecurity.pdf (accessed 12 October 2009).

²⁵ EEO Alemika & IC Chukwuma 'Analysis of police and policing in Nigeria. A desk study on the role of policing as a barrier to change or driver of change in Nigeria' prepared for the Department for International Development <http://www.cleen.org/policing.%20driver%20of%20change.pdf> (accessed 14 October 2009).

²⁶ As above.

²⁷ As above.

²⁸ As above.

²⁹ As above.

response to rioting and disorder directed against oppressive working and living conditions.³⁰ Relying on a Marxist model of political economy and social conflict theory in relation to police and policing, therefore, Alemika and Chukwuma argue:³¹

The police are agents of the state, established for the maintenance of order and enforcement of law. Therefore, like the state, the character, roles and priority of police forces are determined by the political and economic structures of their nations ... The tasks of police are dictated by the contradictions and conflict of interests among groups and classes in society which if not regulated can threaten the preservation of the prevailing social order or *status quo* police violence must be seen as the product of interaction among political, economic, legal, institutional and personality factors.

The above analysis underscores the logic of the police's inclination to state aspirations and their propensity to violent opposition to civil expression of dissent in any confrontation between the state and its people.³² One can therefore argue that the police are organised to protect and secure the interests of the state and its regime in congruence with the traditional security conception, while the security of *society* is put at cross-purposes with state or regime security. In reality, however, the police's mandate in contemporary society resonates protection for the state and the socio-political and economic interest of the dominant class or even the legal order. The communal mandates and prospects of security – for which the police play a dominant role – have burgeoned beyond the state and the polity.³³ The community has an ample stake in characterising its security needs, which includes the protection of human rights and fundamental freedoms. Unfortunately, any demand for these real security needs by members of society is often viewed as a challenge to the established order, and, therefore, repressed by the police.

Although there are contending views that tend to (re)construct the police as agents of the public good,³⁴ the predominant view – supported in this paper – is that the police have always leaned towards the political and economic interests of the ruling class rather than the common or popular wishes of the public. The policing of demonstrations and protests by the Nigerian police is, therefore, inextricably tied to the political economy or the nature and character of the Nigerian state as represented by the dominant ruling class.

³⁰ Institute for the Study of Labour and Economic Crises (1982) in Alemika & Chukwuma (n 25 above) 5.

³¹ Alemika & Chukwuma (n 25 above) 4 5.

³² N Suleiman 'The police and civil society in Nigeria' in MM Gidado *et al* (eds) *Nigeria beyond 1999: Stabilising the polity through constitutional re-engineering* (2004) 255.

³³ De Lint (n 1 above) 184.

³⁴ On this perspective, see I Loader & N Walker 'Policing as a public good: Reconstituting the connections between policing and the state' (2001) 5 *Theoretical Criminology* 9-25.

Herein lies the contradictions in security perception *vis-à-vis* the role of the police in managing protests and demonstrations against acts or omissions of the state and/or its agencies, undermining the security of the population.

The pertinent question is whether Nigeria is a democratic and free or an authoritarian state. The Constitution of the Federal Republic of Nigeria of 1999 declares that '[t]he Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice'.³⁵ It states further that sovereignty belongs to the people of Nigeria from whom government shall through the Constitution derive all its powers and authority. The security and welfare of the people are declared to be the primary purpose of government.³⁶ Although the part of the Nigerian Constitution that expresses these novel ideals is declared non-justiciable³⁷ to the extent that the provisions therein constitute mere ideals towards which the states are expected to aspire,³⁸ there is a convergence of opinions that the rights encapsulated in this part are necessary and desirable;³⁹ hence my view that Nigeria is indeed a democratic and free society. It is argued plausibly that⁴⁰

[i]n a totalitarian society, the police role will be more to defend the *status quo* of political oppression and economic injustice. In contrast, in a democratic society the police are more likely to provide services that will enhance development and democracy.

I argue that since Nigeria is a democratic society, its government and institutions must ensure the protection of 'people's security' as opposed to state or regime security. This would ensure the development of an effective, democratic state based on the constitutionally-declared principles of democracy and social justice.

³⁵ Sec 14 Nigerian Constitution 1999.

³⁶ Sec 14(3) Nigerian Constitution.

³⁷ See sec 6(6)(c) of the Nigerian Constitution which ousts the jurisdiction of the Nigerian courts from enquiring into any matter arising from the provision of these provisions. See also A Nwafor 'Enforcing fundamental rights in Nigerian courts. Processes and challenges' 4 *African Journal of Legal Studies* <http://www.africalawinstitute.org/ajls/vol3/no1/Nwafor.pdf> (accessed 13 September 2010) 4-5.

³⁸ See *Okojie & Others v A-G Lagos State* (1981) NCLR 218.

³⁹ See among others DM Jemibewon *The military, law and society: Reflections of a general* (1998) 109; I Trispiotis 'Socio-economic rights: Legally enforceable or just aspirational?' *Opticon* 1826 Issue 8 (2010) http://www.ucl.ac.uk/opticon1826/currentissue/articles/Article_Laws_Ilias_Social_equality_Publish_pdf (accessed 17 September 2010); JN Aduba *et al* <http://dspace.unijos.edu.ng/bitstream/10485/180/1/15%20THE%20DYNAMICS%20OF%20SOCIAL%20AND%20ECONOMIC%20RIGHTS.pdf> (accessed on 17 September 2010).

⁴⁰ EE Alemika 'Colonialism, state and policing in Nigeria' (1993) 20 *Crime, Law and Social Change* 189-219.

3 Police response to civil protest and demonstrations in Nigeria: An overview

For purposes of clarity and logic, the policing of demonstrations and civil protests in Nigeria will be classified into four periods, namely, the colonial era (1861-1903); the pre-unification era (1930-1966); the post-unification dispensation (1966-1999); and the present dispensation (1999-2009). This classification will enable us to analyse the transitional development of the police's response to demonstrations and civil protests, with a view to exploring advances in attitudes towards transformation, if any.

3.1 Policing of demonstrations and protests in Nigeria under the colonial administration

For a proper understanding of police response to demonstrations and civil protests in Nigeria, one must necessarily start with an *expos e* of the political economy of colonialism in the country. The colonial organisation and governance of the various ethnic nationalities that form Nigeria were predicated on maximising the interest of the colonialists and the furtherance of their economic and political interests. Political, administrative, legal and institutional regimes were configured to tame the colonial subjects and allow socio-economic exploitation by the colonialists.

The power of the colonial state was not only absolute but also arbitrary.⁴¹ Such absolutism required the use of force, not only to coerce compliance and tame rebellion by the colonised people but, most importantly, to guarantee the security of their lives and possessions. This eloquently testifies to the fact that the Nigerian state's conception of security in fact originated from the unjust colonial order. Colonialism had total disregard for legitimacy or authority since compliance was obtained by coercion rather than authority. These asymmetrical power relations led to intermittent rebellions and strikes from the colonised (including the colonised labour force) with militant and repressive responses from the colonisers via their instruments of coercion, the police. As captured by Alemika and Chukwuma:⁴²

Police forces under various names were established and employed as instruments of violence and oppression against the indigenous population; given the character of colonial rule, police forces were instruments used to sustain the alien domination.

The social and economic configuration of colonialism therefore influenced the character of the colonial police, particularly their response to demonstrations and civil protests.

⁴¹ C Ake *Democracy and development in Africa* (2001).

⁴² Alemika & Chukwuma (n 25 above) 8.

Consequent upon the establishment of police forces in line with the colonial objective, therefore, the police in different parts of Nigeria were used to suppress anti-colonial protests, strikes and demonstrations. There is documented evidence of the deployment of police to violently suppress the communal riots in Tiv land between 1959 and 1960, Kano in 1953, the women's anti-tax riot between 1929 and 1930 and the workers' strikes in 1945, 1947 and 1949,⁴³ with severe consequences, including the loss of lives and property. The oppressive spectacle of the colonial police is also captured by Onoge, who states that⁴⁴

[t]hrough the enforcement of unpopular direct taxation, the raiding of labour camps and the violent suppression of strikes, the police ensured the creation, supply and discipline of the proletarian labour force required by colonial capitalism.

The nature and character of police response to civil protests unfortunately survived the colonial era.

3.2 Policing demonstrations and protests in Nigeria during the pre-unification period (1930-1966)

Prior to 1930, there was no national police force in Nigeria with universal jurisdiction over the entire territory called Nigeria. The Native Authority Ordinance 4 of 1916 (as expanded later by the Protectorate Laws (Enforcement) Ordinance 15 of 1924), ceded the responsibility of maintaining law and order to the native authorities. Accordingly, the native authorities could employ any person to assist in carrying out police functions.⁴⁵

By virtue of these ordinances, therefore, local authorities and native authorities in Southern and Northern Nigeria, respectively, established and administered their police units independently. In 1930, however, the Nigerian police force was established with national jurisdiction over the entire Nigerian territory. Between 1930 and 1966, the Nigerian police force (created in 1930 with national jurisdiction) coexisted with local administration police forces in local government areas in Western Nigeria and the native authorities in Northern Nigeria.⁴⁶ Notwithstanding the creation of the Nigerian police, the local police were deployed by the local governments and native authorities for various negative ends. This trend was exacerbated with the introduction of partisan politics in the 1950s, when the local authorities deployed the local police as tools for political oppression and intimidation.

⁴³ TN Tamuno *The police in modern Nigeria: 1861-1965* (1970) ch 9.

⁴⁴ OF Onoge 'Social conflict and crime control in colonial Nigeria' in TN Tamuno *et al* (eds) *Policing Nigeria* (1993).

⁴⁵ Tamuno (n 43 above) 90.

⁴⁶ Alemika & Chukwuma (n 25 above) 9.

The use of the local police forces in the northern and southern parts of Nigeria for the suppression of political pluralism and dissent is well documented in the literature. According to Ohonbamu,⁴⁷

[i]n the western region, there was mass recruitment into the local forces of party thugs and stalwarts – people against whom the police were supposed to be giving protection to the law-abiding citizens ... Political opponents were arrested by native authority police for holding private meetings to discuss political issues, handcuffed or chained and marched through the streets as an ocular demonstration of what fate awaited those who sought to exercise their fundamental right.

A similar account of the use of local forces by northern politicians is provided by Ahire,⁴⁸ who states:

The fiercest criticisms of the native authority police system relate to its handling of opposition politicians in the 1950s when party politics started in Nigeria. It is on record that NA police forces earned notoriety by using undue coercion and intimidation to enlist support for the ruling party; deny opposition parties permits for rallies; disrupt meetings of opposition parties and generally enforced the obnoxious ‘unlawful assembly’ laws against opposition politicians. The excesses of NA police forces in support of the ruling party in Northern Nigeria prompted a loud outcry which eventually led to their extinction.

These accounts have shown a consistent pattern of behaviour on the part of police, as they protected the political and economic interest of the political elite and violently repressed any exertion of dissent against the established order by way of protest, demonstrations, strikes or even political association and competition. These same characteristics survived the post-unification dispensation.

3.3 Policing demonstrations and protests in Nigeria under the post-unification period (1966-1999)

As stated earlier, the litany of ills associated with the local police forces led to their dissolution in 1966 shortly after independence and early into the first phase of the military incursion into politics. It is important to note that the characteristics of the police elicited above remained unchanged after the attainment of political independence in 1960. The police remained instruments in the hands of politicians in the suppression of rights and pluralism. In conformity with the prevailing political economy in the country, the police remained an instrument of coercion in the hands of the ruling elite. As aptly depicted by Ake:

Although political independence brought a change to the composition of the managers, the character of the state remained much as it was in the colonial era. It continued to be totalistic in scope, constituting a statist

⁴⁷ O Ohonbamu ‘The dilemma of police organisation under a federal system: The Nigerian example’ (1972) 6 *The Nigerian Law Journal* 73-87.

⁴⁸ PT Ahire ‘Native authority police in Northern Nigeria: End of an era’ in Tamuno *et al* (n 44 above) 257.

economy. It presented itself as an apparatus of violence, had a narrow social base, and relied for compliance on coercion rather than authority.

Granted that police repression had been institutionalised since colonial rule, it, however, became increasingly intensified under the successive military regimes after 1966.⁴⁹ In spite of the use of the armed forces in the performance of police functions under the military, the police were nonetheless involved in some measure of violence in the suppression of civil protests and demonstrations. In 1971, the police violently suppressed a student protest at the University of Ibadan when they fired live bullets at the students, resulting in the death of one Kunle Adepeju.⁵⁰ Similarly, in April 1978, the police and army units killed six students and seriously wounded at least 20, when the National Union of Nigerian Students (NUNS) instigated or participated in nationwide campus protests against increased university fees.⁵¹ In May 1986, the police also killed more than a dozen Ahmadu Bello University students who were protesting the disciplinary action against student leaders observing 'Ali Must Go' Day (referring to the then Minister of Education), in memory of students killed in the 1978 demonstration.⁵²

Although the first Ogoni civil demonstration of 1993 had no record of police repression, the first use of major military/police force against the protests was witnessed in April 2003. On 30 April 2003, 10 000 Ogoni people protested at Nonwa against the construction of a pipeline by the American contracting firm, Willbros, on behalf of Shell. They were fired on by Nigerian security operatives, which wounded 10 people.⁵³ In fact, the persistence of minority rights demonstrators under that military regime prompted the promulgation of the Treason and Treasonable Offences Decree of 1993, which criminalised any protests or demonstrations in the country having the potential of causing civil unrest and destabilising the regime. The decree legitimised the use of absolute violence as a means of controlling minority groups' rebellion.⁵⁴ Generally, however, all military regimes were intolerant to demonstrations that adversely affected the regime's interest. As we shall see later, however, the same military regimes would tacitly organise and sponsor demonstrations to advance their own interests while

⁴⁹ Alemika & Chukwuma (n 25 above) 13.

⁵⁰ SG Ehindero *The Nigerian police and human rights* (1988) 140.

⁵¹ EEO Alemika & IC Chukwuma (eds) 'Civilian oversight and accountability of police in Nigeria' <http://www.cleen.org/POLICE%20ACCOUNTABILITY%20BOOK1.pdf> (accessed 9 September 2010)

⁵² As above.

⁵³ Factsheet on the Ogoni Struggle <http://www.ratical.org/corporations/OgoniFactS.html> (accessed 12 October 2009).

⁵⁴ FO Adeola 'Environmental injustice and human rights abuse: The states, MNCs, and repression of minority groups in the world system' (2000) 8 *Human Ecology Review* 52.

denying other legitimate requests or attempts to demonstrate against their policies and actions.

3.4 Policing demonstrations and protests in Nigeria under the present dispensation (1999-2009)

With the return to civil rule in 1999, there was a semblance of tolerance towards demonstrations and civil protests by the Obasanjo administration. The then President, Chief Olusegun Obasanjo, admitted in one of his Independence Day broadcasts that the right of Nigerians to hold public meetings or protest peacefully against the government over the increase of the prices of petroleum products, was legitimate.⁵⁵ However, as the 2003 elections drew near, an intolerance to opposition that characterised past Nigerian regimes resurfaced, and the police unreasonably refused to grant permits for political rallies. In Makurdi, for instance, after a refusal to make available the Aper Aku Stadium to the rival All Nigeria Peoples Party (ANPP) by the ruling People's Democratic Party (PDP)-led government in the state, the police told the ANPP that they could not guarantee the safety of the ANPP presidential aspirant, General Muhammadu Buhari, while the latter was already on his way to Makurdi. Consequently, the police authorities in the state asked the party and its presidential candidate not to land for purposes of the rally.

After the 2003 presidential elections, a rally organised by the ANPP in Kaduna to protest the outcome of the election was stopped by the police, purportedly for lack of a permit which indeed had been sought earlier but refused. This led to the judicial challenge of the provisions of the Public Order Act which require the issuance of a permit for the holding of rallies and processions by the ANPP. As we shall see later, the case eventually led to the declaration of these provisions of the Act as unconstitutional by the Court of Appeal. Confusion now reigns as the police insisted on disrupting any rally, procession or protest embarked upon without the requisite permit despite the court's decision quashing these provisions.

From the chronological analysis of the police's response to demonstrations and civil protests in Nigeria, a consistent pattern becomes evident. This is that the police response has always been 'anti-people', confirming the validity of my assertion that the police further the interests of the dominant political and economic class in society.

4 The legality or otherwise of civil protests and demonstrations in Nigeria: An overview

In view of the polices' attitude to civil protests and demonstrations in Nigeria demonstrated above, it is imperative that one interrogates

⁵⁵ *Guardian* 2 October 2005 1 4.

the lawfulness or otherwise of these activities under the Nigerian legal milieu. Two pillars support the legality of protests and demonstrations in Nigeria. First, the right to protest is deeply entrenched in international human rights instruments to which Nigeria is a party,⁵⁶ as well as in Nigeria's municipal legal regime. Secondly, the right to protest is widely accepted as a fundamental norm in all democratic societies.

Nigeria is party to several international instruments which embody these rights. Among these international instruments, the Universal Declaration of Human Rights (Universal Declaration) and the African Charter on Human and Peoples' Rights (African Charter) are significant. Nigeria has not only signed and ratified the African Charter, but it has domesticated it by enacting it as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap 10, Laws of the Federation of Nigeria 1990. In *Abacha v Fawehinmi*,⁵⁷ the Supreme Court held that the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, being municipal law, is enforceable by all courts in Nigeria. The Court of Appeal reinforced this position when it held that the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act was a statute with international flavour. That being the case, in the case of a conflict between it and another statute, its provisions shall prevail over those of the other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation.⁵⁸

Most importantly, however, the Constitution of the Federal Republic of Nigeria (CFRN) 1990 sufficiently guarantees the right to protest and demonstration. Section 39 of the Constitution provides that 'every person shall be entitled to freedom of expression; every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions'. Similarly, section 40 of the Constitution provides:

Every person shall be entitled to assemble freely and associate with other persons, and in particular, he may form or belong to any political party, trade union or any other association for the protection of his interests.

Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent Electoral Commission with respect to political parties to which that Commission does not accord recognition.

On the other hand, the right to express dissent with policies and decisions of government or its agencies is one of the cardinal principles of democracy. This fact has also been given judicial approval by the Nigerian courts as they have held that:⁵⁹

⁵⁶ Arts 19 & 20 Universal Declaration; arts 9, 10 & 11 African Charter.

⁵⁷ (2000) 6 NWLR (Pt 660) 228.

⁵⁸ *Inspector-General of Police v All Nigeria Peoples Party & Others* (2007) 18 NWLR 469 500 paras B-C.

⁵⁹ n 58 above, 471 501 paras G-H.

[a] rally or placard carrying demonstration has become a form of expression of views on current issues affecting government and the governed in a sovereign state. It is a trend recognised and deeply entrenched in the system of governance in civilised countries. It will not only be primitive but also retrogressive if Nigeria continues to require a pass to hold a rally. We must borrow a leaf from those who have trekked the rugged path of democracy and are now reaping the dividends of their experience.

This sentiment was echoed by Muhammad JCA when he emphasises that

certainly, in a democracy, it is the right of citizens to conduct peaceful processions, rallies or demonstrations without seeking or obtaining permission from anybody. It is a right guaranteed by the 1999 Constitution and any law that attempts to curtail that right is null and void and of no consequence.

In his judgment, Adekeye JCA cites with approval the comments of President Obasanjo that

democracy admits of dissent, protests, marches, rallies and demonstrations. True democracy ensures that these are done responsibly without violence, destruction or even unduly disturbing any citizen and with the guidance and control of law enforcement agencies. Peaceful rallies are replacing strikes and violent demonstrations of the past.

In spite of the above, however, it is important to note that the right to hold rallies, processions and demonstrations does not go without recognised derogations or restrictions. These restrictions follow almost every legal instrument that guarantees such rights. Section 45 of the 1999 Constitution provides that:

Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is *reasonably justifiable*⁶⁰ in a democratic society –

- (a) in the interest of defence, public safety, public order, public morality or public health; or
- (b) for the purpose of protecting the rights and freedom of other persons.⁶¹

Historically, though, Nigeria's Public Order Act (now Cap 382 LFN 1990) is a colonial piece of legislation; it is currently an Act of the National Assembly, deriving its powers from section 45(1) of the 1999 Constitution and is considered to be an existing law by virtue of section 315 of the Constitution.⁶² The Public Order Act (which prescribes conditions to be fulfilled before a procession, demonstration or protest could be carried out lawfully) therefore effects the derogation anticipated by section 45(1) of the 1999 Constitution. However, as seen in my earlier analysis, the police in Nigeria have deployed the Public Order Act to unjustifiably deny people and groups the right to carry out processions or demonstrations, most often for the political aims of the ruling

⁶⁰ My emphasis.

⁶¹ See similar derogations under art 29 of the Universal Declaration and art 11 of the African Charter.

⁶² n 58 above, 472.

class. It is expected that permissible derogations to these rights in a democratic society should be enacted within the context of the rule of law, within the parameters of legality, necessity, proportionality, temporality and non-discrimination,⁶³ rather than for political reasons as is usually the case in Nigeria. No wonder, therefore, that the people had to challenge the constitutionality of the exercise of these derogations in the form exercised by the police. This brings us to the thorny issue of the constitutionality or otherwise of the Public Order Act and its judicial construction by Nigerian courts in the light of the limitations imposed by the law on exercising the right to demonstrate.

5 The constitutionality or otherwise of the Public Order Act

From our discussion on the police's response to demonstrations and civil protests above, one can infer that the denial of the right to protest by the Nigerian police post-dates the country's return to democratic governance in 1999. The authority to deny this democratic right is anchored on the Public Order Act (POA) and premised on the likelihood of an eventual breakdown of law and order. The persistence of this attitude by the Nigerian police led to the challenge of the POA by some citizens in the courts. Two cases are the reference points in respect of the constitutionality of the POA. These cases are *Dr Lewis Chukwuma and 2 Others v Commissioner of Police*⁶⁴ and *Inspector-General of Police v All Nigeria Peoples Party and 11 Others*.⁶⁵ In *Chukwuma*, the issues for determination were (1) whether the appellants required a police permit to hold a meeting of their association; and (2) whether the police were justified to disrupt the appellants' meeting and seal off the venue.

The appellants, a socio-cultural association of all Igbo-speaking people in Northern Nigeria, were scheduled to host a meeting of its members at a hotel in Ilorin, Kwara State. On the day scheduled for the meeting, the officers, men and agents of the respondents (the Nigerian police) came to the venue and forcefully dispersed the appellants and their members and sealed off the venue. Being aggrieved by the action of the respondents, the appellants instituted an action at the Federal High Court, seeking a declaration that the action of the respondents was a violation of their constitutional right of association, freedom of movement and assembly and therefore claimed damages against them. The trial court dismissed the action on the ground that the actions of the police were justified. The appellants appealed to the Court of Appeal.

⁶³ Roy (n 24 above) 18.

⁶⁴ (2006) All FWLR 177.

⁶⁵ As above.

It was the case for the appellants that their meeting was not a public meeting, neither was it held in a public place in terms of the provisions of the Public Order Act, for which a permit was required. For a clear understanding of the contentions of the parties to this case, however, it is imperative to quote the relevant provisions of the POA. Sections 1(1), (2), (3) and (4), 2 and 3 of the POA provide as follows:

- 1 (1) For the purpose of the proper and peaceful conduct of public assemblies, meetings and processions, and subject to section 11 of this Act, the governor of each state is hereby empowered to direct the conduct of all assemblies, meetings and processions on the public roads or places of public resort in the state and prescribe the route by which and the times at which any procession may pass.
- (2) Any person who is desirous of convening or collecting any assembly or meeting or of forming any procession in any assembly or meeting or of forming any procession in any public road or place of public resort shall, unless such assembly, meeting or procession is permitted by a general license granted under subsection (3) of this section, first make application for a licence to the governor not less than 48 hours thereto, and if such governor is satisfied that assembly, meeting or procession is not likely to cause a breach of the peace, he shall direct any superior police officer to issue a license, not less than 24 hours thereto, specifying the name of the licensee and defining the conditions on which the assembly, meeting or procession is permitted to take place; and if he is not so satisfied, he shall convey his refusal in like manner to the applicant within the time hereinbefore stipulated.
- (3) The governor may authorise the issue of a licence by any superior police officer, setting out the conditions under which and by whom and the place where any particular any particular kind of description of assembly, meeting or procession may be convened, collected or formed.
- (4) The governor may delegate his powers under this section, in relation to the whole state or part thereof, to the Commissioner of Police or any superior police officer of a rank not below that of a Chief Superintendent of police ...
- 2 Any police officer of a rank of Inspector or above may stop assembly, meeting or procession for which no license has been issued or which violates any conditions of the license issued under section 1 of this Act, and may order any such assembly, meeting or procession which has been prohibited or which violates any such conditions as aforesaid to disperse immediately.
- 3 Any assembly, meeting or procession which takes place without a licence issued under section 1 of this Act or violates any condition of any licence granted or neglects to obey any order given under section 2 of this Act shall be deemed to be unlawful assembly and all persons taking part in such assembly shall be guilty of an offence ...

Section 12(1) of the POA defines a *place of public resort* as

any highway, public park or garden, any sea, beach and any public bridge, road, lane, footway or pathway, square, court, alley or passage, whether a thoroughfare or not, and includes any open space or any building or other structure to which, for the time being, the public have or are permitted to have access, whether on payment or otherwise;

while a *public meeting* is defined in the same section to include

any assembly in a place of public resort and any assembly which the public or any section thereof is permitted to attend, whether on payment or otherwise, including any assembly in a place of public resort for the propagation of any religion or belief whatsoever, of a religious or anti-religious nature.

Counsel for the appellants argued that a licence would only be required if such assembly or procession will be held in a public road or place of public resort; and that Yebumot Hotel being a private place, did not come under section 12(1) of the POA to require a permit. The Court of Appeal, however, reasoned that⁶⁶

the meeting of the appellants was for all the Igbo's in the entire northern states of Nigeria. The contents of exhibit 1 leave no one in doubt that though the meeting was to be held in a private place, for all intents and purposes, same was a public meeting. The question to be asked is this: Can the meeting of the appellants be described as an assembly? The answer to the question is provided by section 12(1). By the definition of assembly stated above, the meeting of the appellants to which all the Igbos in the northern states were invited was a public assembly.

In determining whether the appellants required a police permit to hold a meeting of their association, or whether the police was justified in disrupting the appellants' meeting held without the requisite permit in the earlier case, the Court of Appeal affirmed the judgment of the Federal High Court and held that the POA constituted a lawful derogation of the right to freedom of assembly and association; secondly, the meeting of the appellants, being a public assembly, required a permit and 'since the appellants did not obtain any licence for the assembly or the meeting at Yebumot Hotel, Ilorin, the action of the respondent (police) in frustrating the meeting was justifiable'.⁶⁷

A seemingly conflicting decision, however, emerged later from the same Court of Appeal – the Abuja Division – in the case of *JGP v ANPP and 11 Others*.⁶⁸ Here, the respondents, a registered political party in Nigeria, sought a police permit from the appellant (the Nigeria police) for its members to protest the alleged rigging of the 2003 general election; a request the appellant refused. Notwithstanding the refusal by the appellant, the respondents went ahead with the rally in Kano on 22 September 2003, which the appellants violently disrupted. The respondents instituted an action before the Federal High Court, raising the following issues for determination:

- (a) whether a police permit or any authority is required for holding a rally or procession in any part of the Federal Republic of Nigeria;
- (b) whether the provisions of the POA which prohibits the holding of rallies or processions without a police permit are not illegal and

⁶⁶ Per Abdulahi JCA in *Chukwuma* (n 64 above) 186 paras A-C.

⁶⁷ *Chukwuma* (n 64 above) 189 paras A-B.

⁶⁸ (2007) 18 NWLR (Pt 1066).

unconstitutional having regard to section 40 of the 1999 Constitution and article 11 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10.

Therefore the respondents sought a declaration that the requirements of a police permit or other authority for holding rallies or processions in Nigeria; as well as the provisions of the POA which require such permits, were all illegal and unconstitutional, as they contravened the provisions of section 40 of the Nigerian Constitution 1999 and article 7 of the African Charter.

Whereas the lower court granted the relief sought by the plaintiffs/respondents, the defendants/appellants raised the following issues for determination:

- (a) whether it is *ultra vires* the trial court to declare the entire POA unconstitutional when it only considered sections 1(2), (3), (4), (5) and (6) and sections 2, 3 and 4 of the Act, alleged to be inconsistent with the Nigerian Constitution 1999;
- (b) whether the appellant was competent under the POA or any other law to stop the holding of any assembly, procession or rally without a permit or licence.

In determining the appeal, the Court of Appeal considered the provisions of sections 40 and 45 of the Nigerian Constitution as well as sections 1(2), (3), (4), (5) and (6) and sections 2, 3 and 4 of the POA. Whereas the relevant sections of the POA are mentioned above, section 40 of the Nigerian Constitution guarantees freedom of association and assembly while section 45 thereof subjects such guarantees to some permissible derogation in the interest of defence, public safety, public order, public morality or public health and for the purpose of protecting the rights and freedom of other persons.

In dismissing the appeal, the Court of Appeal held that:⁶⁹

[T]he Constitution should be interpreted in such a manner as to satisfy the yearnings of the Nigerian society. The 1999 Constitution is superior to other legislation in the country and any legislation which is inconsistent with the Constitution would be rendered inoperative to the extent of such inconsistency. *Section 1(2), (3), (4), (5) and (6) and sections 2, 3 and 4 of the POA are inconsistent with the constitution – they are null and void to the extent of their inconsistency.*

The Court further emphasised that⁷⁰

[t]he power given to the governor of a state to issue a permit under the POA cannot be used to attain the unconstitutional result of the deprivation of the right to freedom of speech and freedom of assembly. The constitutional power given to the legislature to make laws cannot be used by way of a condition to attain unconstitutional result.

⁶⁹ *Per Adekeye JCA 499-500 paras F-G (my emphasis).*

⁷⁰ 499 paras B-C.

In the face of these conflicts in the decisions of the Court of Appeal, the police resorted to an assumption (erroneously) that they were at liberty to choose whichever decision to follow since the decisions were both of the same court. It is, however, my view that *Chukwuma*⁷¹ can be distinguished from *IGP v ANPP*.⁷² These decisions are distinguishable in the following respects: First, unlike the *ANPP* case, there was a likelihood of a breach of order in the *Chukwuma* case due to the contentious circumstances in the latter case. Exhibit 6, which was a complaint lodged by the leadership of the Igbo's in Kwara State against the police, alerted the police about what they called 'a security risk' if the planned meeting was allowed.⁷³ The Court of Appeal in this case observed that⁷⁴

[I]n the instant case, the police was justified to disrupt the appellants' meeting and seal off the venue of the meeting in view of the fact that there were two rival groups in the tussle for the headship of the Igbo community in Kwara State and that the other group has manifested their displeasure over the holding of the appellants' meeting.

Second, the contention of the appellants in the *Chukwuma* case was not premised on the constitutionality or otherwise of the POA; rather, their contention was that their meeting was not a public assembly as defined by section 12(1) of the POA, hence the police was wrong in disrupting a private meeting held in a private place. On the contrary, the respondents in *IGP v ANPP* challenged the constitutionality of the enumerated provisions of the POA which required the consent or licence of the governor and/or police before holding rallies, processions and assemblies.

Thirdly, assuming, without conceding that the same issues were raised and determined differently by the two divisions of the Court of Appeal, the position of the law on this matter is settled by the Supreme Court in the case of *Mkpadem v Edem*,⁷⁵ in which the Supreme Court held that 'where there are two conflicting decisions of the same or co-ordinate courts, the latter decision of the court constitutes a bar on or against the other'. Accordingly, therefore, the latter decision, which has declared those sections of the POA void, would stand as the authoritative decision. It is my submission, therefore, that the decision of the Court of Appeal in *IGP v ANPP* (which was not appealed) is the current law on the constitutionality of these provisions of the POA.

From the analysis above, I argue that, while demonstrations and public protests are unfettered rights guaranteed under international and municipal law, the POA which sought to impose limitations on its

⁷¹ n 64 above.

⁷² n 68 above.

⁷³ *Chukwuma* (n 64 above) 188 paras A-F.

⁷⁴ *Chukwuma* (n 64 above).

⁷⁵ (2000) 9 NWLR (Pt 672) 631 644.

exercise (to the extent of requiring a pass or licence before proceeding on such an exercise), is void. The question, therefore, is why the police insist on enforcing these limitations in spite of the government professing to be democratic and the decision in *IGP v ANPP*. The answer to this question is unconnected with the nature and character of Nigerian politics and the political economy of policing earlier discussed. The extreme quest for power for social and economic gain and the fear of losing it to rival factions are squarely responsible for this.⁷⁶ This drive for power is responsible for the attitude of the ruling elite in using the police force to intimidate and repress rival factions who seek to wrestle political power from them.

Consequently, therefore, the right to demonstrate and/or protest has been politicised in Nigeria. There is no objectivity in the exercise of the powers conferred on the governors and the police in limiting and moderating the exercise of these rights. Once the interests of the ruling party or regime are threatened by a rally, protest or procession, the authority of the governor or the police will be exercised negatively. On the other hand, where the interest of the regime or its image stands to be enhanced by a rally, procession or protest, such authority is not only given but police protection is enlisted for the participants. This has been a consistent attitude by Nigerian regimes, both military and civil. In 1976 the Nigerian government allowed protests and demonstrations against the Israeli bombing of the international airport at Entebbe, Uganda, and received letters of protest from various groups in the country. Similarly, in 1996, the Abacha military regime did not only allow an excessively publicised 'one million man march', but it also gave monetary compensation to thousands of youths all over the country to demonstrate in support of the dictator, General Abacha, when the same regime repressed the Ogoni civil protests with massive police and military brutality.

Even under this dispensation, where there seems to be a half-hearted approval to isolated labour protests, governors of the ruling party have always dissociated themselves from protesters by staying away from them. This claim was confirmed by the President of the Nigerian Labour Congress (NLC) in his response to the absence of the governor of Oyo State, when the labour protesters came to deliver their letter of protest.⁷⁷ The labour leader remarked that 'this has been the practice of all governors who are members of the ruling party (PDP), as governors who are members of opposition parties have always waited in their offices to receive us'.⁷⁸ This disingenuous attitude to public protest led to a general perception of demonstration as 'rioting', since the

⁷⁶ See Ake (n 41 above) 1-12 where this claim finds support.

⁷⁷ HT Soweto 'Labour and civil society coalition rally in Ibadan: Call for change gain an echo among working class masses and youths' <http://www.socialistnigeria.org/page.php?article=1512> (accessed 14 September 2010).

⁷⁸ As above.

legitimate request to exercise the right to protest is most often turned down, forcing the people to turn their despair against the state by resorting to rioting rather than peaceful demonstration. Had the right been allowed to develop over time, the people, even the uneducated, would have realised that demonstrations are not necessarily riotous or violent.

The final issue to be considered is which steps may be taken by all organs of government to ensure a responsible exercise of the right to demonstrate under our democracy.

6 The way forward

From the foregoing analysis, we have found that demonstrations and protest are lawful in a democratic society such as ours. However, an unbridled exercise of this right would result to a greater violation of the rights of others. The imposition of reasonable conditions for the orderly exercise of this right is therefore imperative, as such is the practice in advanced democracies. Unfortunately, however, the POA, which sought to impose such conditions has been decimated by the declaration of some of its provisions as incompatible with the 1999 Constitution. This, therefore, requires urgent legislative measures to prevent the occurrence of what I call a time bomb. As rightly suggested by the Court of Appeal, 'the POA should be promulgated to complement sections 39 and 40 of the 1999 Constitution in context and not to cripple or stifle it'.⁷⁹ In view of the forthcoming 2011 general elections in Nigeria, the National Assembly should therefore enact a reasonable and balanced public protest law that will allow democracy to run its course while enforcing law and order and protecting the rights of others. An urgent amendment of the POA in line with the Constitution and democratic tenets is therefore a critical starting point.

Second, developments in public order policing in established democracies show that intelligence policing has become one of the most important strategies of the police in managing protests.⁸⁰ The strategy enables the police to estimate the intent of the protesters, the number of protesters turning up to a protest site, the exact location or areas to be covered, the possibility or likelihood of transformation into violence and the media mobilisation strategies of the protesters, and such. This clearly has important implications for the accurate and effective deployment of police resources.⁸¹ The Nigerian police should

⁷⁹ *IGP v ANPP* (n 68 above) *per* Muhammad JCA 501 paras G-H.

⁸⁰ See among others M Maguire & T John 'Intelligence, surveillance, and informants: Integrated approaches' *Police Research Group Crime and Prevention Series*, Paper 64, Home Office, London; Button *et al* (n 2 above) 29; De Lint (n 1 above) 184.

⁸¹ Button *et al* (n 2 above).

therefore improve its technological deficiencies and gather intelligence during the build-up to protests.⁸²

In view of their lack of capacity, both in terms of personnel and equipment, the Nigerian police may also adopt what Hoogenbloom⁸³ calls 'grey policing' to complement their inadequacies. In this respect, therefore, the expertise, information, personnel and equipment at the disposal of other agencies such as the Nigerian armed forces, the para-military agencies, private security outfits, private investigators, the intelligence agencies and so on could be harnessed in the policing of public protests. This is because a resort to firearms is usually had when the police are overwhelmed.

We must not lose sight of the importance of civic education on the right of demonstrations and civil protests as well as the means of exercising these rights responsibly. Most often, we are quick to blame the police for refusing to allow protests, processions and so on, while forgetting the likelihood or real threat of a breach of order that is inherent in the exercise of this right. As stated earlier, demonstrations are often mistaken for riots in Nigeria because of the peculiarities of our political history. In view of the police's attitudes and responses to peaceful demonstrations, therefore, public reaction to perceived wrongs often takes the form of rioting rather than peaceful protests. This is understandably so because of the presumption that legitimate requests for responsible expression of dissent would be denied by the authorities. Consequently, many rallies originally conceived as peaceful are eventually hijacked by hoodlums and turned into riots. There is, therefore, a compelling need for civil society organisations and government to educate the population on the right to peaceful demonstrations and ways in which to exercise it. Similarly, government, through security agencies, should allow the legitimate exercise of these rights so as to encourage the development of this democratic norm.

Third, the crowd control capacity of the police must be improved. This is because people are emotional during protests. The point is that there is a likelihood of violence or disorder in any protest. The police, therefore, need modern crowd control technologies to cope with any violence or disorder when policing demonstrations or processions. The Nigerian police unfortunately grapple with obsolete and inadequate crowd control equipment (tear gas). A move away from these obsolete and inhuman crowd control measures towards new technologies used elsewhere will aid the exercise of the right to protest in Nigeria.

⁸² As above.

⁸³ B Hoogenbloom 'Grey policing: A theoretical framework' (1991) 2 *Policing and Society* 17-30. Hoogenbloom describes 'grey policing' as those forms of informal cooperation between the state police, regulatory agencies and the private sector that include practices such as the use of each other's powers, exchange of information and sharing of technological gadgets.

There is also a need to introduce a human rights component in the curricula of all police colleges in the country. The mistake that is often made by the police and the armed forces is that such training is usually exclusive to officers, whereas 95 per cent of the human rights abuses that are committed by the police and other agents of security forces are perpetrated by the lower ranks. This stresses the recommendation to prescribe a minimum bar of Ordinary National Diploma (OND) for recruitment into the Nigerian police force.

Finally, I recommend continued professional development in the form of compulsory and regular in-service training, conferences and workshops for the police force and other security forces. Only then will the personnel appreciate or keep tabs of current best practices in policing in a democracy. The present situation, where police spend decades without any form of professional development, does not augur well for policing in a civilised society.

The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities

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Summary

The article examines the right to inclusive education in Nigeria. It asserts that the essence of the right to education is that it should be provided to all and without discrimination. It posits that, under Nigerian law, children with disabilities suffer many prejudices, including seclusion and discrimination in terms of education. It argues that such practices amount to a violation of the Nigerian commitments and obligations under international law to provide education for all and without discrimination. The article calls on the Nigerian government to put in place adequate laws and policies advancing the right of children with disabilities within its territory.

1 Introduction

Diversity, integration and inclusion are the means and methods of developing a public education system that is fair.¹

Children are a particularly vulnerable group.² On account of their tender age, they are generally not in a position to effectively articulate and enforce their rights.³ Human rights challenges confronting children

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¹ CV Willie 'Brown v Board of Education: A restoration of equity in public education' in CJ Russo *et al* (eds) *Equal educational opportunities: Comparative perspectives in education law* (2005) 79.

² In terms of sec 277 of the Child's Rights Act, 2003 (Nigeria), a child means a person under the age of 18.

³ KD Beiter *The protection of the right to education by international law* (2006) 113-114.

are many and varied. They include torture, ill-treatment and appalling conditions of detention on every continent.⁴ Challenges confronting children are as severe as death sentences and the killing of thousands in armed conflicts.⁵ Millions of children are forced by poverty to live on the street, while millions more work hazardous jobs or are the victims of child trafficking and prostitution.⁶ Discriminatory attitudes and practices cause girl children to suffer gender-specific abuse, such as female genital mutilation and other forms of abuse, including rape.⁷ General Comments and a UN Fact Sheet have described labour-related challenges confronting children as 'contemporary forms of slavery'.⁸ According to the United Nations Children's Fund (UNICEF)'s estimates there are about 246 million children engaged in exploitative child labour; 140 million children who have never been to school; and 300 000 child soldiers, some as young as eight years of age.⁹ The picture is a grave one that challenges the humanity of governments, organisations and individuals.

Children with disabilities are even more vulnerable, suffering many more prejudices on account of their disabilities. According to the United Nations (UN), 10 per cent of the world's population – or 650 million people – live with one disability or another.¹⁰ Rieser states that at least 10 per cent of the world's people have a significant, long-term, physical or mental impairment which prevents them from taking part in the usual educational, social and economic activities of their communities.¹¹ This is due to barriers in societal attitudes regarding disabilities, the built environment, and the way society is organised preventing the disabled from participating on an equal level with others.¹² It is an established fact that people with disabilities and children, in particular, are especially vulnerable to exploitation, abuse, exclusion and margin-

⁴ 'Fight poverty: Children right issues' <http://www.fightpoverty.mmbrico.com/cr/issues.html> (accessed 21 September 2010).

⁵ As above.

⁶ As above.

⁷ As above.

⁸ Fact Sheet 4, Contemporary Forms of Slavery <http://www.humanrights.is/the-human-rights-rproject/humanrightscasesandmaterials/generalcomments/unfactsheets/No14contemporaryformofslave/> (accessed 21 September 2010).

⁹ UNICEF Reports.

¹⁰ <http://www.un.org/disabilities/default.asp?id=18> (accessed 21 September 2010).

¹¹ See R Rieser 'Disability equality – Confronting the oppression of the past' in M Cole (ed) *Education, equality and human rights: Issues of gender, race, sexuality, disability and social class* (2006) 118. Degener submits that more than 600 million people in the world are disabled as a consequence of mental, physical or sensory impairment, out of which two-thirds live in developing countries. See T Degener 'International disability law: A new legal subject on the rise: The interregional experts' meeting in Hong Kong, December 13-17, 1999' (2000) 18 *Berkeley Journal of International Law* 180 187; see also AM Cotter *This ability: An international legal analysis of disability discrimination* (2007) 15.

¹² Rieser (n 11 above).

alisation all over the world.¹³ They are at more risk of having their rights violated and denied.¹⁴

In the education sector, for instance, discrimination against the disabled varies from an outright denial of educational opportunities to more subtle forms of discrimination, such as isolation and segregation imposed in the forms of physical and social barriers.¹⁵ For instance, according to the United Nations Educational, Scientific and Cultural Organisation (UNESCO), 90 per cent of children with disabilities in developing countries do not attend school.¹⁶ In this context, Bekink and Bekink submit that the effects of disability-based discrimination have been particularly severe in the field of education due to, in part, the 'relative invisibility of persons with disabilities'.¹⁷ Because of this, millions of children and adults in all parts of the world are faced with a life that is segregated and debased.¹⁸ It should be noted that the systematic way in which society discriminates against persons with disabilities amounts to oppression.¹⁹ It is oppressive to discriminate against, and exclude, people with disabilities from the mainstream of society merely on the basis of disability. For instance, a denial of access to education by placing physical barriers – such as staircases – to classrooms, or a failure to make educational materials available to all in forms that are accessible to them, is discriminatory and oppressive. It is therefore submitted that people with disabilities should be accorded the same rights and opportunities as other persons.²⁰

Given the nature of children and the prejudices they suffer, the UN has attempted to work out the particularities of the application of human rights to children. It adopted the Declaration on the Rights of the Child, 1959, and the Convention on the Rights of the Child (CRC), 1989, to cater for the interests of children. Both the Declaration and the Convention contain provisions on the rights and welfare of children. In addition to recognising the specific rights of the child such as the right to education,²¹ CRC also contains specific provisions on the rights of

¹³ B Bekink & M Bekink 'Children with disabilities and their right to education: A call for action' (2005) 1 *Stellenbosch Law Review* 125-126.

¹⁴ Bekink & Bekink (n 13 above) 126-127.

¹⁵ See Report of the United Nations High Commissioner for Human Rights to Economic and Social Council: Social and Human Rights Questions: Human Rights UN Doc E/2001/64 (18 May 2001) para 48.

¹⁶ UN Web Services Section, Department of Public Information, United Nations 2006; 'Factsheet on persons with disabilities' <http://www.un.org/disabilities/default.asp?id=18> (accessed 21 September 2010).

¹⁷ Bekink & Bekink (n 13 above) 127.

¹⁸ AM Cotter *This ability: An international legal analysis of disability discrimination* (2007) 15.

¹⁹ Rieser (n 11 above).

²⁰ Cotter (n 18 above) 15.

²¹ See arts 28 & 29 of CRC which guarantee the right of the child to education.

children with disabilities.²² Apart from the Declaration and CRC, the right to education has been given recognition in a number of important international and regional human rights instruments.²³ In the context of discrimination in education, a number of human rights instruments have equally been put in place to fortify the right of persons with disabilities.²⁴ These instruments include the Declaration on the Rights of Disabled Persons, 1975,²⁵ the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, 1993,²⁶ and, most importantly, the recent Convention on the Rights of Persons with Disabilities, 2006 (Disability Convention).²⁷ These instruments are examined in detail shortly. Particular emphasis is placed on the provisions of the Disability Convention with regards to persons with disabilities and CRC pertaining to the rights of the child generally.

This article attempts to examine the right of children with disabilities in Nigeria with a particular focus on equal educational opportunities for all. It also analyses the existing national and international human rights instruments on the rights of the child with the aim of determining whether those instruments adequately guarantee the rights of children with disabilities in terms of education. If it should find those instruments inadequate, the article will suggest ways in which the rights of this category of persons may be effectively guaranteed. The article is divided into seven parts. Following this introduction, I examine the two major concepts used in this paper. Part three examines the protection and recognition of the right to education. It dwells on international and national instruments in which the right to education is protected. Part four is devoted to examining the protection of children with disabilities, while part five examines the exclusion of children with disabilities from education. Part six dwells on disabilities and inclusive education in Nigeria. It also assesses all the relevant laws and policies on disabilities in that country. The conclusion makes recommendations on how to ensure inclusive education in Nigeria.

The terms 'disability' and 'inclusive education' feature prominently in the article and it is necessary at the outset to place these terms in proper perspective. In the article, disability is defined in relation to persons with

²² Art 23(3) of CRC obligates state parties to the Convention to ensure that the disabled child has effective access to education and training.

²³ See art 10 of the Convention on the Elimination of Discrimination Against Women (CEDAW) 1979; arts 23, 28 & 29 of CRC; art 17 of the African Charter on Human and Peoples' Rights; art 11 of the African Charter on the Rights and Welfare of the Child; the UNESCO Convention Against Discrimination in Education 1960; the World Declaration on Education for All – Meeting Basic Learning Needs, adopted by the World Conference on Education for All on 9 March 1990; the European Convention 1953; the American Declaration of the Rights and Duties of Man 1948, amongst others.

²⁴ See, generally, D Hodgson *The human right to education* (1998) 155-168.

²⁵ UN General Assembly Resolution 3447 (XXX) of 9 December 1975.

²⁶ UN General Assembly Resolution A/RES/48/96 of 20 December 1993.

²⁷ UN General Assembly Resolution A/RES/61/106 of 24 January 2007.

disabilities (PWDs). The Disability Convention states that PWDs include 'those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on equal basis with others'.²⁸ The Disability Convention's definition shifted the emphasis/reason for disability from the individual to their 'interaction with various barriers which may hinder' her or him. Older models of disability have defined the concept from the medical perspective and have therefore typically defined the term in a stereotypic manner as 'the inability [of a person] to perform expected social role because of chronic medical pathology'.²⁹ In such a context, persons with disabilities are, therefore, referred to as a 'group of people who are experiencing a significant level of physical, sensory or mental incapacity which affects their daily life in some way'.³⁰ Such a model of disability has been overtaken by more recent perspectives, which view the experience of disability in terms of factors outside 'the disabled person', emphasising 'the environment which is disabling'. The Standard Rules on the Equalisation of Opportunities for Disabled People is based on the older perspective on disability.³¹ It states: 'People may be disabled by physical, intellectual or sensory impairment, medical condition or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature.'³²

This definition clearly omits environmental factors involved in people's experience of disability. However, the Disability Convention defines disability in its Preamble in a manner that radically changes the emphasis from the individual to the environment. It states:³³

[r]ecognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

The term 'disabled' as used in the article covers people with physical impairments, sensory impairments; chronic illness or health issues; all degrees of learning difficulties, including specific learning difficulties such as dyslexia and speech and language impairments; and impairment based on emotional and behavioural difficulties.³⁴ It should be

²⁸ Art 1 Disability Convention.

²⁹ PK Longmore 'Disability policy and politics: Considering consumer influences' (2000) 11 *Journal of Disability Policy Studies* 36; PK Longmore 'Disability policy and politics: Considering consumer influences' in P Blanck (ed) *Disability rights* (2005) 53.

³⁰ T Shakespeare 'What is a disabled person?' in M Jones & LAB Marks (eds) *Disability, divers-ability and legal change* (1999) 26.

³¹ See Standard Rules on the Equalisation of Opportunities for Disabled People, annexed to General Assembly Resolution A/RES/48/96 (1993) para 17.

³² As above.

³³ Para (e), Preamble to the Disability Convention.

³⁴ Rieser (n 11 above) 158.

noted that, while disabilities and ill-health are not necessarily the same, nonetheless, many children who are disabled have health problems which impact on their education.³⁵

Inclusive education, on the other hand, refers to the practice of including every learner, irrespective of talent, disability, socio-economic background or cultural origin, in supportive mainstream schools and classrooms, and meeting all his or her particular needs.³⁶ It is a system of education that is responsive to the diverse needs of learners.³⁷ The term is used to describe educational policies and practices that support the right of learners with disabilities to belong and learn in mainstream schools.³⁸ One of the fundamental elements of the right to education is that it be provided in a non-discriminatory manner to all.³⁹ CRC, therefore, explicitly imposes obligations on states to take measures that ensure that disabled children have effective access to and receive education.⁴⁰ In this regard, the CRC Committee recommends the establishment of special education programmes for children with disabilities and, where feasible, integrate them into mainstream schools.⁴¹ Given the focus of the article, the next section examines the legal guarantees and importance of education generally.

2 The protection and recognition of the right to education

The right to education has been given recognition in a number of important international human rights instruments. The levels of such recognition will be discussed in two sections, namely, instruments at

³⁵ See L Lundy 'Schoolchildren and health: The role of international human rights law' in N Harris & P Meredith (eds) *Children, education and health (International perspectives on law and policy)* (2005) 11.

³⁶ See J Stainback & L Stainback *Inclusion: A guide for educators* (2002) 3.

³⁷ S Naicker *Curriculum 2005: A space for all – An introduction to inclusive education* (1999) 53.

³⁸ P Engelbrecht & L Green *Promoting learner development* (2001) 6.

³⁹ See art 28(1) of CRC.

⁴⁰ See art 23(3) of CRC which recognises the special needs of the disabled child and ensures that the disabled child 'has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development'.

⁴¹ See, amongst others, CRC Committee, Concluding Observations: Azerbaijan (UN Doc CRC/C/66, 1997) para 296; CRC Committee, Concluding Observations: United Kingdom of Great Britain and Northern Ireland-Isle of Man (UN Doc CRC/C/100, 2000), para 195; CRC Committee, Concluding Observations: Niger (UN Doc CRC/C/118, 2002) paras 179-180; CRC Committee, Concluding Observations: New Zealand (UN Doc CRC/C/133, 2004), para 152; CRC Committee, General Comment 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child (UN Doc CRC/GC/2003/4, 2003) para 19.

the international and national levels. At the international level, the UN has generally adopted instruments while, at the regional level, instruments have notably also been adopted in the European, American and African contexts.⁴² In this article, the term 'instrument' includes treaties, which, as international agreements, legally bind state parties thereto, as well as 'soft law' documents, such as resolutions, declarations and standard rules.

2.1 Instruments at the international level

At the international level, the right to education was first given recognition in a series of treaties concluded after World War I under the auspices of the League of Nations. However, with the formation of the UN, a good number of instruments protecting the right to education have further been adopted. These instruments include the Universal Declaration of Human Rights (Universal Declaration), 1948; the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; the International Covenant on Civil and Political Rights (ICCPR), 1966; the UNESCO Convention Against Discrimination in Education, 1960; the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1966; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979; the Convention on the Rights of the Child (CRC), 1989; the International Labour Organisation Convention, 1989; the World Declaration on Education for All – Meeting Basic Learning Needs, 1990; the African Charter on Human and Peoples' Rights (African Charter), 1981; and the African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter).⁴³

The Universal Declaration, for instance, provides for the right to education, emphasising that education must be free, at least at the elementary and fundamental stages.⁴⁴ In terms of this provision, everyone has the right to education. Elementary and fundamental education must be free and compulsory. While elementary education refers to formal schooling for children of primary school age, fundamental education means education which is offered outside the regular primary education system for children, youth and adults, who did not have the opportunity to undergo or complete primary education.⁴⁵ Similarly,

⁴² Beiter (n 3 above) 85.

⁴³ Nigeria has ratified some of these conventions. It ratified ICESCR and ICCPR on 29 July 1993; the African Charter on 22 June 1983; the African Children's Charter on 23 July 2001; CEDAW on 23 April 1984; ICERD on 16 October 1967; CRC on 19 April 1991. See, generally, EA Taiwo 'The implementation of the right to education in South Africa and Nigeria' seminar presented at the Faculty of Law, University of Ibadan, Nigeria, 15 February 2010 1-2.

⁴⁴ See art 26 which provides for the right of everyone to education.

⁴⁵ Beiter (n 3 above) 90.

article 13(1) of ICESCR guarantees the right to education in the following terms:⁴⁶

The State Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and further the activities of the United Nations for the maintenance of peace.

It provides further that primary education shall be compulsory and available free to all; secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means and, in particular, by the progressive introduction of free education; higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means and, in particular, by the progressive introduction of free education; and fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of primary education.⁴⁷

In the same vein, CRC also contains a comprehensive set of legally-enforceable commitments concerning the right to education.⁴⁸ CRC reaffirms the right of every child to free and compulsory primary schooling, and states further that higher levels of education must be made accessible to all on the basis of capacity and without discrimination of any kind. More fundamental is the provision of article 23 of CRC, which obliges state parties to ensure that the disabled child has effective access to education and training.⁴⁹

⁴⁶ The provision proceeds to set out the aims of education. It repeats a similar provision as contained in art 26(2) of the Universal Declaration with some modifications.

⁴⁷ Arts 13(2)(a)-(d).

⁴⁸ See arts 28, 29, 30 & 31 of CRC. Art 28(1), eg, states: 'States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular (a) make primary education compulsory and available free to all; (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures ...' See also D Fottrell (ed) *Revisiting children's rights: 10 years of the UN Convention on the Rights of the Child* (2000) 1.

⁴⁹ The article provides recognition for the right of (1) the mentally and physically disabled child to enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community; and (2) the disabled child to special care and encouragement to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development. See also principle 6 of the UN GA Declaration on the Rights of Disabled Persons adopted on 9 December 1975, which provides for the right to 'medical, psychological and functional treatment, including prosthetic and orthetic

2.2 Instruments at the African regional level

The right to education is recognised also in regional human rights instruments. Article 17(1) of the African Charter, for instance, states that ‘every individual shall have a right to education’. Similarly, article 11 of the African Children’s Charter provides for every child’s right to education.⁵⁰ The Children’s Charter sets out the purposes and the duties of state parties with regard to achieving the full realisation of the child’s right to education. It states that education of the child shall be directed towards the promotion and development of the child’s personality, talents and mental and physical abilities to their full potential.⁵¹ State parties are also obliged to take special measures in respect of female, gifted and disadvantaged children.⁵² It is submitted that Nigeria, having ratified ICESCR⁵³ and the African Charter,⁵⁴ has obligations under international human rights law to provide education for its citizens.⁵⁵

Article 13 of the African Children’s Charter deals with handicapped children, while article 20 deals with parental responsibilities. Article 13(2) states:

State parties ... shall ensure that the disabled child has effective access to training ... in a manner conducive to the child’s achieving the fullest possible social integration, individual development and his cultural and moral development.

Article 20(2)(a) provides that state parties have the obligation in accordance with their means and national conditions to take all appropriate measures ‘to assist parents ... and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing’. These are all fundamental provisions on the protection of the child’s right to education on the

appliances, to medical and social rehabilitation, education, vocational training and rehabilitation, aid, counselling, placement services and skills to the maximum and will hasten the processes of their social integration or reintegration’. See UNGA Resolution 3447 (XXX) of 9 December 1975. See also principle 2 of the Declaration on the Rights of Mentally-Retarded Persons, adopted by the UNGA Resolution 2856 (XXVI) of 20 December 1971, which also provides for the right of the mentally-retarded person to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.

⁵⁰ It has similar provisions to arts 28 & 29 of CRC.

⁵¹ Art 11 African Children’s Charter.

⁵² Art 11(3)(e) African Children’s Charter.

⁵³ Ratified on 29 October 1993.

⁵⁴ See Ratification and Enforcement Act of 17 March 1983.

⁵⁵ See generally Taiwo (n 43 above) 9.

African continent. Apart from the African system, other regional human rights instruments also guarantee the right to education.⁵⁶

To strengthen the effective implementation of the right to education as provided for in the various African regional instruments, the African Union (AU) has put in place mechanisms for monitoring the rights of the child in the region. These monitoring mechanisms include the African Commission on Human and Peoples' Rights (African Commission), the African Committee of Experts on the Rights and Welfare of the Child and the African Court on Human and Peoples' Rights (African Court).⁵⁷ The African Commission was established by the African Charter and the Charter obliges all state parties to accept supervision and monitoring of all rights enshrined in the Charter. This includes the monitoring of the right to education as provided for in the African Charter.⁵⁸ It is notable that all 53 member states of the AU are parties to the African Charter, including Nigeria. The African Court was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.⁵⁹ The African Committee of Experts on the Rights and Welfare of the Child on its part was established by the African Children's Charter. The African Children's Charter empowers the Committee of Experts to consider individual communications.⁶⁰ There is no record yet of any complaint examined by the Committee.⁶¹

2.3 Instruments at the Nigerian national level

In Nigeria, the right to education is provided for in the form of directive policy. The Constitution states that government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.⁶² The section states further that government shall strive to eradicate illiteracy and shall, as when practicable, provide free education at all levels.⁶³ In furtherance of these constitutional mandates, the government re-launched the Universal Basic Education (UBE) Programme in 2000.⁶⁴ Similarly, the Child's Rights Act (CRA),

⁵⁶ See, however, art 2 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), 1952, which states that no person shall be denied the right to education; art 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol), 1988 also guarantees the right to education.

⁵⁷ <http://www.crin.org/resources/infoDetail.asp?ID=18055&flag=report> (accessed 21 September 2010).

⁵⁸ As above.

⁵⁹ The Protocol to the African Charter entered into force in 2006.

⁶⁰ See art 44 of the African Children's Charter.

⁶¹ As above.

⁶² Sec 18(1) Nigerian Constitution 1999.

⁶³ Sec 18(3) Nigerian Constitution 1999.

⁶⁴ The UBE was backed in 2004 by the UBE Act.

2003, provides for the right to education. In terms of this Act, every child has the right to free, compulsory and universal basic education, which shall be the duty of the government to provide.⁶⁵ It is important to mention that the Fundamental Objectives and Directive Principles of State Policy, according to section 6(6)(c) of the Constitution, are non-justiciable.⁶⁶ For instance, in the much-cited case of *Uzoukwu v Ezeonu II*,⁶⁷ the Nigerian Court of Appeal said:⁶⁸

There are other rights which may pertain to a person which are neither fundamental nor justiciable in the court. These may include rights given by the constitution under the Fundamental Objectives and Directive Principles of State Policy under Chapter 2 of the Constitution.

It is my contention that, with the enactment of the Child's Rights Act in 2003, the right to education was raised from a non-justiciable entitlement to a new legal imperative. The Child's Rights Act and the Universal Basic Education Act have brought into Nigerian socio-economic rights jurisprudence a new dispensation which equates the right to education in the country with international standards. This recognition thus paved the way for the recognition of children (both able and disabled), as bearers of a right which may be enforced against parents, other individuals and the state.⁶⁹ This position is supported by the recent judgment of the Economic Community of West African States (ECOWAS) Court which affirmed the right of every Nigerian to education.⁷⁰ The Nigerian court demonstrated this change in *Adebiyi*

⁶⁵ See sec 15(1) of the Act.

⁶⁶ Sec 6(6)(c) of the Constitution provides: 'The judicial powers vested in accordance with the forgoing provisions of this section shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.'

⁶⁷ [1991] 6 NWLR (pt 200) 708 761-762.

⁶⁸ See also D Olowu 'Human rights and the avoidance of domestic implementation: The phenomenon of non-justiciable constitutional guarantees' (2006) 69 *Saskatchewan Law Review* 39 41.

⁶⁹ See secs 15(1) & (2) of the Child Rights Act which oblige the government of Nigeria, parents and guardians to ensure that their children and wards attend schools up to, at least, junior secondary school.

⁷⁰ *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission* (Suit ECW/CCJ/App/0808) delivered on 27 October 2009. The court held at para 19: 'It is trite law that this court is empowered to apply the provisions of the African Charter on Human and Peoples' Rights and article 17 thereof guarantees the right to education. It is well established that the rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before this court. Therefore, since the plaintiff's application was in pursuance of a right guaranteed by the provisions of the African Charter, the contention of second defendant that the right to education is not justiciable as it falls within the directive principles of state policy cannot hold.' See also *Attorney-General, Ondo State v Attorney-General, Federation of Nigeria* [2002] 9 NWLR (pt 772) 222.

Olafisoye v Federal Republic of Nigeria, where the Supreme Court held that the non-justiciability of section 6(6)(c) of the Constitution is not sacrosanct, as the section provides a headway by the use of the words 'except as otherwise provided by the Constitution'.⁷¹

Having discussed those instruments that recognise the right to education, the next section discusses specifically the protection and guarantees of the right of persons with disabilities.

3 The protection of children with disabilities

A number of international instruments and national laws address the right to education as it accrues to disabled persons. It is observed that in many countries of the world, the issue of disability as a subject of law has commonly been included in social security and welfare legislation, health law or guardianship law.⁷² Thus, disabled persons have been depicted not as subjects of legal rights, but as objects of welfare, health and charity programmes.⁷³ The underlying policy has been to segregate and exclude people with disabilities from mainstream society, sometimes accommodating them in special schools, sheltered workshops, special housing and transportation.⁷⁴ It is observed that the idea of excluding people with disabilities from the mainstream is born out of the erroneous belief that disabled persons are incapable of coping with society at large and most life activities.⁷⁵ The inability of people with disabilities to operate in the same way as people without disabilities within the societal framework has led to this assumption. However, had the framework of society been cast on the basis of a universal design of equality, then everyone would have been able to cope with society and most life activities.

In modern times, attempts to open employment, education, housing and goods and services to persons regardless of their disabilities have changed the understanding of disability from a medical to a social category.⁷⁶ A key element of this new concept is the recognition that the exclusion and segregation of people with disabilities do not logically follow from their impairments, but rather from political choices based on false assumptions about disability.⁷⁷ With the paradigm shift from the medical to the social model of disability, disability was reclassified as a human rights issue. This has led to attempts to provide equal opportunities for disabled people and to combat their segregation,

⁷¹ [2004] 4 NWLR (pt 864) 580 659.

⁷² *Degener* (n 11 above) 180.

⁷³ As above.

⁷⁴ As above.

⁷⁵ As above.

⁷⁶ As above.

⁷⁷ As above.

institutionalisation and exclusion as typical forms of disability-based discrimination.⁷⁸ This shift of paradigm constitutes a major milestone on the path towards the recognition of the human rights of disabled people.

Breakthroughs in this regard are the recognition of the equality principle as well as freedom from discrimination in most national constitutions and other domestic and international human rights instruments. Protection has been provided for people with disabilities in a number of international instruments. In 1971, the UN General Assembly adopted a Resolution entitled Declaration on the Rights of Mentally-Retarded Persons.⁷⁹ Significantly, this Resolution provides that disabled persons enjoy the same human rights as other human beings.⁸⁰ It itemises rights that are of special importance to persons with disabilities, including education, training and rehabilitation. Also, in 1975 the UN General Assembly adopted the Declaration on the Rights of Disabled Persons.⁸¹ This Declaration states that persons with disabilities have the same civil and political rights as other human beings.⁸² It provides further that such persons are entitled to 'measures designed to enable them to become as self-reliant as possible'.⁸³ The Declaration identifies a number of economic and social rights that are of obvious importance for the development of capacities and social integration.⁸⁴ It contains many fundamental provisions on the right of disabled persons.⁸⁵

In 2006, the UN adopted the Disability Convention.⁸⁶ Article 24 of the Disability Convention makes provision for the right to education for persons with disabilities and this includes children with disabilities. The Disability Convention provides that state parties recognise the right of persons with disabilities to education and in order to realise this right, without discrimination and on the basis of equality of opportunity, governments should ensure an inclusive education system at all levels.⁸⁷ This provision is directed to the full development of

⁷⁸ Degener (n 11 above) 181.

⁷⁹ General Assembly Resolution 2856 (XXVI) of 20 December 1971.

⁸⁰ Art 1.

⁸¹ General Assembly Resolution 3447 (XXX) of 9 December 1975.

⁸² Para 4.

⁸³ Para 5.

⁸⁴ Para 6.

⁸⁵ Para 8, which requires that their special needs be taken into consideration at all stages of economic and social planning; para 10 on the right to protection against exploitation and treatment of an abusive or degrading nature; and para 12 which states the right of an organisation of persons with disabilities to be 'usefully consulted in all matters regarding the rights of disabled persons'. See also the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities adopted by the United Nations General Assembly by Resolution 48/96 of 20 December 1993.

⁸⁶ Adopted on 13 December 2006.

⁸⁷ Art 24(1).

potential and human dignity and strengthening a respect for human rights; fundamental freedoms and human rights; human diversity; the development by children with disabilities to their fullest potential; and enabling children with disabilities to participate effectively in a free society.⁸⁸

The right to education without discrimination is guaranteed at all levels in the Disability Convention. While this provision covers all persons with disabilities, the Disability Convention recognises the special need of children for qualitative education and the need to prepare children for productive adult lives. The Convention specifically provides that governments must ensure that children with disabilities are not excluded from the education system, or from primary or secondary education on account of their disability. State parties are also obliged to ensure access, inclusive, quality and free primary and secondary education on an equal basis with others in the communities in which they live. States are also to ensure the provision of reasonable accommodation, that disabled people receive the support measures they need to facilitate their effective education, and provide them with individualised support measures in environments that maximise academic and social development, consistent with the goal of full inclusion.⁸⁹ It is in recognition of the importance of having teachers who have been trained specially and equipped for teaching children with disabilities that the Disability Convention provides thus:⁹⁰

In order to help ensure the realisation of this right, state parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

It is commendable that the Disability Convention specifically provides for the use of experts who have disabilities themselves for meeting the manpower needs of teaching persons with disabilities. This will serve several advantages, including providing inspiration and mentorship for children with disabilities as well as providing employment opportunities for trained people with disabilities. It is regrettable to note that Nigeria is yet to ratify the Disability Convention. It is submitted that these provisions should be ratified and domesticated to make them applicable in Nigeria.

⁸⁸ Arts 24(1)(a)-(c).

⁸⁹ Arts 24(2)(a)-(e).

⁹⁰ Art 24(4).

4 Exclusion of children with disabilities from education

Given the importance of education in any society, it would be a great disservice to exclude a segment of society from this benefit. The importance of education cannot be over emphasised. According to Addison:⁹¹

Education is a companion which no misfortune can depress, no crime can destroy, no enemy can alienate, no despotism can enslave. At home [it is] a friend, abroad an introduction, in solitude a solace and in society an ornament. It chastens vice, it guides virtues, [and] it gives at once, grace and government to genius. Without it, what is man? A splendid slave, a reasoning savage.

In the same vein, Devenish submits:⁹²

Education is of seminal importance as far as human rights are concerned, since it liberates people from the bondage of ignorance, superstition and fear. It gives to them dignity and self-confidence and is a basic right, on which the materialisation of many other rights depends.

Education is described as an empowerment right with a multiplying effect in the sense that the enjoyment of a number of other rights, such as freedom of information and the right to vote, depends on a minimum level of education.⁹³ Education enables the individual to think critically about life. It enables him or her to examine seriously possible courses of action and to make rational choices based on such examination.⁹⁴ It is observed that today education is perhaps the most important function of state and the various levels of government.⁹⁵ Education is of cardinal importance for meaningful human existence; it enables a person to fully participate and function in society.⁹⁶ It allows individuals to develop whole and mature personalities, and it empowers them to fulfil a role in the community that is enriching for themselves and is beneficial for the community.⁹⁷ Bekker asserts that the right to vote, freedom of expression, freedom of information, freedom

⁹¹ J Addison, as quoted by O Ikejiani *Nigerian education* (1964) 19.

⁹² GE Devenish 'Aspects of the right to education in the Constitution' (1998) 2 *De Jure* 224-225; see also M Verheyde *Article 28: The right to education* (2006) 7; Bekink & Bekink (n 13 above) 125; Beiter (n 3 above) 28.

⁹³ See Taiwo (n 43 above) 12, citing F Coomans 'Content and scope of the right to education as a human right and obstacles to its realisation' in Y Donders & V Volodin (eds) *Human rights in education, science and culture: Legal developments and challenges* (2007) 183 185.

⁹⁴ See Taiwo (n 43 above) 12; Beiter (n 3 above) 29.

⁹⁵ *Brown v Board of Education of Topeka* 347 US 438 (1954).

⁹⁶ Taiwo (n 43 above) 12.

⁹⁷ See Devenish (n 92 above) 225; Taiwo (n 43 above) 12.

of association, labour rights and the right to participate in the cultural life of one's community are all linked to the right to education.⁹⁸

Children with disabilities are recognised among the categories of children that are likely to be excluded from education.⁹⁹ According to Tomasevski, the following categories of children have been identified as particularly likely to be excluded from education: abandoned children; asylum-seeking children; beggars; child labourers; child mothers; child prostitutes; children born out of wedlock; delinquent children; *disabled children*;¹⁰⁰ displaced children; domestic servants; drug-using children; imprisoned children; homeless children; girls; HIV-infected children; married children; mentally-ill children; migrant children; minority children; nomadic children; orphans; pregnant girls; refugee children; *sans-papier* children (children without identity papers); sexually-exploited children; stateless children; street children; trafficked children; war-affected children; and working children.¹⁰¹ She submits that this calls for both national and international attention.¹⁰²

The Committee on Economic, Social and Cultural Rights (ESCR Committee) asserts as follows in its General Comment 5:¹⁰³

The Covenant [ICESCR] does not refer explicitly to persons with disabilities. Nevertheless, the Universal Declaration of Human Rights recognises that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognised in the Covenants. In addition, in so far as special treatment is necessary, States Parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability.

However, one of the fundamental elements of the right to education is that it should be provided in a non-discriminatory manner to all.¹⁰⁴ There are a number of ways in which discrimination may occur in education. It may occur at the point of admission to an institution or once the student is enrolled. Such discrimination may be direct or indirect. While a failure to provide the necessary access for students with disabilities, or refusing to admit students with disabilities to a particular school, are direct and more obvious acts of discrimination, there are other subtle

⁹⁸ See G Bekker *Compilation of essential documents on the right to education (Part 1)* http://www.chr.up.ac.za/centre_projects/socio/compilation2part1.html (accessed 6 February 2010).

⁹⁹ See K Tomasevski *The right to education* Report of the Special Rapporteur submitted pursuant to Commission on Human Rights Resolution 2002/23, E/CN.4/2003/9.

¹⁰⁰ My emphasis.

¹⁰¹ Tomasevski (n 99 above).

¹⁰² As above.

¹⁰³ ESCR Committee in its General Comment 5: Persons with Disabilities (1994) (UN Doc HRI/GEN/1/Rev 7, 2004) para 6.

¹⁰⁴ Art 28(1) CRC.

ways in which discriminatory treatment may occur. A person may be discriminated against by way of his or her behaviour if that behaviour could be imputed to a disability.¹⁰⁵

Indirect discrimination does not relate to the different treatments of people with disabilities *per se*, but occurs where a person is unfairly excluded from equal participation in society as a result of the imposition of a requirement or condition with which a disproportionate number of people with disabilities will be unable to comply.¹⁰⁶ Disabled people have always suffered from stigma, prejudice and exclusion from society. The able-bodied norm is pervasive and exclusive: from public transport and pavements to working arrangements, to leisure and social facilities. People with disabilities and the concept of disability rights have long been ignored by both developed and developing countries.¹⁰⁷ The reason cannot be divorced from the fact that this group constitutes a minority within the society and that their age-long neglect has relegated them to the background as a voiceless section of society. Disability has only recently gained recognition as a legitimate subject of anti-discriminatory legislation.¹⁰⁸

5 Disabilities and inclusive education in Nigeria

Nigeria recognises the education of children with disabilities as special education. In terms of the Education (Minimum Standards and Establishment of Institutions) Act,¹⁰⁹ special education means:¹¹⁰

Education either in the normal schools or in special institutions established (a) for children and adults who have learning difficulties because of certain

¹⁰⁵ See Australian cases of *Welsh v Commissioner, Soil Conservation Service of NSW* (1991) EOC 92-330; *L v Minister for Education* (1996) EOC 92-787.

¹⁰⁶ LA Basser & M Jones 'Fostering inclusive societal values through law' (2002) 10 *The International Journal of Children's Rights* 390.

¹⁰⁷ As above.

¹⁰⁸ It was only in 1995 that the Discrimination Act finally reached the statute books in Britain. The Act requires that disabled people be afforded genuine equality. The Act established a National Disability Council which was replaced by Disability Rights Commission in April 2000. The Act has been criticised as being dependent on individual enforcement rather than proactive or preventive action, and because of its limited impact. The Act covers only areas, namely employment, the provisions of goods, facilities and services, premises, education, and transport. Discrimination outside of the specified area is not outlawed. Even within these fields there are significant exceptions. See S Fredman *Discrimination law* (2002) 58-59 83. See the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities which came into being on 20 December 1993; the Vocational Rehabilitation and Employment (Disabled Persons) Recommendation (No 159) and Rehabilitation and Employment (Disabled Persons) Recommendation (No 186). The Nigerians With Disabilities Decree came into force in 1993, followed by the Disability Discrimination Act of 2001. The Americans with Disabilities Act is also as recent as 1990.

¹⁰⁹ Cap E3, Laws of the Federation of Nigeria (LFN) 2004.

¹¹⁰ See sec 25 of the Education Act, Cap E3, LFN 2004.

handicaps such as blindness, partial sightedness, deafness, hardness of hearing, mental retardation or other physical or mental handicap including social mal-adjustment due to circumstances of birth, inheritance, social position, mental or physical health pattern or accident in latter life; or (b) in respect of children who are specially gifted.

The Nigerian government has formulated policies aimed at giving children with disabilities adequate education.¹¹¹ These policies are expressed in the 2004 National Policy on Education. The Policy provides that the education of children with special needs must be free at all levels.¹¹² Also, government is obliged to provide all the necessary facilities to ensure easy access to education for children with disabilities.¹¹³ To this end, government must provide inclusive education or ensure the integration of special classes and units into ordinary/public schools; provide regular census and monitoring of people with special needs to ensure adequate educational planning and welfare programmes; provide special education equipments and materials; special education training; special training and re-training of personnel to develop capacity building and to keep abreast of the latest teaching techniques for the various categories of disabilities.¹¹⁴

The Policy states further that the teacher/pupil ratio in special schools must be one to ten,¹¹⁵ and that the architectural design of school buildings must be disability-friendly so that the barriers to free access should be removed. Buildings should take into account the special needs of the handicapped, for example, ramps instead of steps, wider doors for wheel-chairs, and lower toilets should be provided.¹¹⁶ It states that the federal government, state and local governments should jointly fund special education programmes.¹¹⁷ The practical experience in Nigeria, however, shows that persons with disabilities are often neglected and discriminated against in terms of education, health, and social facilities. The few disabled and handicap schools in the country are in a state of neglect and are not adequately funded. Health and social activities do not take special care of their needs. The policies expressed in the

¹¹¹ In terms of the National Policy on Education 2004, the term 'disabled' refers to people with impairments, physical or sensory, and who because of this impairment/disability cannot cope with regular school/class organisation and methods without formal special educational training. In this category are the visually impaired (blind and the partially sighted); hearing impaired (deaf and the partially hearing); physically and health impaired (deformed limbs, asthmatic); mentally retarded (educable, trainable and bed-ridden); emotionally disturbed (hyperactive, hypoactive/the socially maladjusted/behaviour disorder); speech impaired (stutterers); learning disabled (psychological/neurological educational phobia or challenges); and multiply handicapped. See paras 94(i)(a)-(h) of the National Policy on Education 2004.

¹¹² Para 96(b) of the National Policy on Education 2004.

¹¹³ Para 96(c) of the National Policy on Education 2004.

¹¹⁴ Paras 96(c)(i)-(v) of the National Policy on Education 2004.

¹¹⁵ Para 96(c)(vi) of the National Policy on Education 2004.

¹¹⁶ Para 97 of the National Policy on Education 2004.

¹¹⁷ Para 96(d) of the National Policy on Education 2004.

National Policy Act aim at addressing these inadequacies. Though the policies sound good, they would need absolute commitment on the part of government to turn them into reality.

As mentioned above, Nigeria recognises that the education of children with disabilities constitutes special education. One of the greatest challenges is finding ways to reconcile this guarantee with the experience of children with disabilities.¹¹⁸

Despite the basic protection put in place with regard to education for children in terms of the Child's Rights Act, the Universal Basic Education Act and the National Policy on Education, specific concerns have been expressed about the education of disabled children in Nigeria.

The Standard Rules on the Equalisation of Opportunities for Disabled People, which is also applicable in Nigeria, state that '[s]tates should recognise the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings'.¹¹⁹ The UN Special Rapporteur on Disability on the Operation of the Standard Rules has, however, highlighted the fact that many states have no legislation dealing with special educational needs; and in some other countries, schooling for children with special educational needs is still provided predominantly in segregated environments.¹²⁰ Nigeria still has a great deal of segregation in its educational framework as special schools and 'homes for the disabled', such as Cheschire Home and Ile-alaanu Home. Schools for the blind and deaf are common features in the country. The CRC Committee has also drawn attention to instances where disabled children have no access to education or where they are simply institutionalised.¹²¹ In the same vein, ICESCR states that, in order to implement a genuinely inclusive approach to the right of children with disabilities to access to education in regular schools,¹²²

states should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers.

¹¹⁸ See sec 25 of the Education Act Cap E3, LFN 2004.

¹¹⁹ Rule 6.

¹²⁰ See Final Report of the Special Rapporteur of the Commission for Social Development *Monitoring the implementation of the standard rules on the equalisation of opportunities for persons with disabilities* (Geneva: United Nations, 2003) A/52/56 annex.

¹²¹ See, eg, its report on the Solomon Islands: United Nations Committee on the Rights of the Child, *Concluding observations: Solomon Islands* (2003) CRC/C 15/Add 208 para 38(c).

¹²² See CESCR Committee, General Comment 5: Persons with Disabilities (1994) (UN Doc HRI/GEN/1/Rev 7, 2004).

It is submitted that children with disabilities are entitled to education that maximises their potential.¹²³ As earlier canvassed, article 23(3) of CRC imposes obligations on states to take measures that ensure that disabled children have effective access to and receive education.¹²⁴ The CRC Committee recommends the establishment of special education programmes for children with disabilities and, where feasible, to integrate them into mainstream schools.¹²⁵ In this regard it is submitted that the phrase 'in a manner conducive to the child's achieving the fullest possible social integration' in article 23(3) of CRC suggests a preference for an inclusive education.¹²⁶ An inclusive education requires that teachers and schools have to adapt to learners with divergent abilities and needs.¹²⁷

It is surprising that the Nigerian government is yet to develop a clear-cut policy on inclusive education for persons with disabilities. This category of persons are still neglected and discriminated against in terms of education, health, employment and social facilities. The few disabled and handicap schools in the country are in a state of neglect and not properly kept or adequately funded. It is submitted that disabled and handicapped persons have special needs and that they should be granted the benefit of equality notwithstanding their special needs. It is submitted that the Nigerian experience falls far below international standards that advocate equal educational opportunities for all without discrimination. Children with disabilities should be cared for economically, medically and educationally. As such, programmes which focus on the rehabilitation and reintegration of people with disabilities into full social participation and long-term benefit to themselves and for society in general are advocated. To ensure universal basic education for all and without discrimination, there should be a better commitment at the various levels of government on the education of children with disabilities.

¹²³ M Verheyde *A commentary on the United Nations Convention on the Rights of the Child: Article 28: The right to education* (2006) 44.

¹²⁴ Art 23(3) of CRC states: 'Recognising the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.'

¹²⁵ n 41 above.

¹²⁶ K Tomasevski *Right to education primer 3: Human rights obligations: Making education available, accessible, acceptable and adaptable* (2001) 32; see also Rule 6 of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, adopted on 20 December 1993 (UN Doc A/RES/48/96).

¹²⁷ ESCR Committee General Comment 5: Persons with Disabilities 32 para 35.

6 Recommendations and conclusion

The following are suggestions in light of the foregoing. First, it is recommended that the provisions on the rights of children with disabilities, as contained in the various international human rights instruments, should be domesticated and implemented in the country. For instance, Rules 6(1), (7) and (8) of the Standard Rules on the Equalisation of Opportunities for Disabled People recommend special education as an exception where the general school system is inadequate to meet the needs of people with disabilities. In Nigeria, however, children with disabilities have been systematically segregated and accommodated only in special schools separate from their peers who have no disabilities. In other words, secluded education should be discouraged while inclusive education should be implemented in Nigeria without further delay.

Secondly, the right to education is included in the Nigerian Constitution only as part of the Fundamental Objectives and Directive Principles of State Policy. Constitutional reform elevating this right to the status of a fundamental right is therefore imperative. Also in this regard, all the relevant laws and policies on the rights of persons with disabilities should be harmonised and adequately implemented. Thirdly, it is recommended that a specific human rights commission be established to cater for the rights of children with disabilities. In the alternative, an arm of the existing National Human Rights Commission should be given these functions.

To make the right to education meaningful, inclusive and universal, the government cannot afford to ignore the rights of children with disabilities. One of the fundamental elements of the right to education is that it be provided in a non-discriminatory manner to all. Lack of adequate attention to education and welfare of people with disabilities constitutes discrimination in terms of the provisions of CRC. The inevitable conclusion from the discussion in this article is that the protection of the right to education for children with disabilities in Nigeria is inadequate. Policies that can give meaning to the rights of this category of persons call for implementation. This will require a strong commitment on the part of government at every level.

Discipline in Nigerian schools within a human rights framework

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Summary

Educators are agents of change and they have a mandate to change schools and classrooms into places where human rights are respected and taken into consideration when discretionary powers are exercised. Nigerian educators have a mandate to observe and promote human rights, not only because such rights are guaranteed in the Nigerian Constitution as the supreme law of the country, but also because the Nigerian government has committed itself to upholding human rights by ratifying and domesticating various international and regional human rights instruments. In this article the author argues for the suitability of a positive discipline approach as a way in which educators could fulfil their mandate to observe and foster children's rights. The author identifies human rights (with specific emphasis on children's rights) as found in international and regional human rights instruments as well as in domestic law that Nigerian educators must observe when establishing a disciplined classroom. Factors which hamper the implementation of human rights instruments such as the misinterpretation of the Constitution in the domestication of treaties and the respective legislative powers of the federal and state legislatures, the conflict between customary law and statutory law, the rejection of the supremacy of the Constitution by some religious groups, and the rejection of human rights instruments on the grounds of cultural and religious practices and customs, for example the traditional view of children as lesser beings and the view that corporal punishment is in the best interests of the child, are identified.

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1 Introduction

In 2007, the University of South Africa (UNISA) was approached by a delegation to establish collaboration between UNISA and independent schools in Nigeria. This resulted in annual education management workshops being held. My choice of topic was prompted by the people who attended these workshops. They indicated that they felt disempowered by the new human rights culture in Nigeria. Some of the attendees indicated that they were unable to create disciplined schools and classrooms because the learners now had constitutional rights that left principals and educators powerless. It also became apparent that very few of the attendees knew anything about human rights instruments or were mindful of children's rights when managing learner misbehaviour.

In this article, I contend that it is not a human rights culture that leaves the educators feeling helpless, but a lack of knowledge and skills to create a disciplined school or classroom within a human rights framework. This could be attributed to the fact that, in the past, discipline was equated with punishment; the emphasis was on the educator's position of authority and his or her rights, while children were seen as lesser beings.¹ Corporal punishment was viewed as the only effective means of punishment. Educators were in total and unquestionable control. Human rights, instead, put the child on an equal footing with the adult; not equal in authority but equal as humans with equal dignity and equally worthy of respect. Educators' feelings of disempowerment may be ascribed to a flawed and restricted understanding of what human rights mean and of the reciprocal basis of rights.² Educators mistakenly equate the recognition of children's rights with the surrendering of control.

It is important for educators to realise that they remain in control but that their control should be exercised within a human rights framework. One way of doing this is to follow a positive discipline approach. Education, and in particular the management of discipline in schools and classrooms, provides an opportunity for turning theoretical commitment to children's rights into reality. In fact, the Global Initiative to End All Corporal Punishment of Children proposes that the African Commission on Human and Peoples' Rights (African Commission) advises states to support the prohibition on corporal punishment

¹ P Newell 'Legal framework to end all violence against children' speech delivered at the Council of Europe Launch of Platform for Children's Rights, Strasbourg 2 June 2009 <http://www.crin.org/resources/infoDetail.asp?ID=20444> (accessed 15 March 2010).

² C Carter & A Osler 'Human rights, identities and conflict management: A study of school culture as experienced through classroom relationships' (2000) 30 *Cambridge Journal of Education* 350; UNICEF *A human right-based approach to education for all* (2007) 22-25 <http://unesdoc.unesco.org/images/0015/001548/154861e.pdf> (accessed 19 March 2010).

through professional training in positive and non-violent forms of discipline.³

2 Conceptualisation of positive discipline

The first objective of this article is to explain what positive discipline entails. This is done by emphasising the principles underlying a positive discipline approach. From these principles it is evident that a positive discipline approach is an approach well suited to observing and fostering children's rights.

Positive discipline is not a soft approach to discipline, but an approach whereby everyone takes responsibility for his or her actions.⁴ In a positive discipline approach it is believed that children learn more through co-operation and rewards than through conflict and punishment.⁵ Nelsen calls it 'effective discipline that teaches', and Adler and Dreikurs, often referred to as the fathers of positive discipline, referred to it as a 'kind and firm approach to teaching' which is 'democratic'.⁶

A literature review reveals several interrelated principles on which a positive discipline approach is based.⁷ Positive discipline is, first and foremost, based on the notion that discipline should be grounded in human rights. The learner should be respected as a person in his or her own right. In a positive discipline approach, behaviour management is, *inter alia*, used to promote equity, human dignity and tolerance and to prevent discrimination. Positive discipline commands that the empha-

³ P Newell 'Briefing from global initiative to end all corporal punishment of children' (2006) <http://www.endcorporalpunishment.org/pages/pdfs/briefings/African%20Commission%20briefing%20Nov%202006.pdf> (accessed 10 February 2010).

⁴ A Knott-Craig 'Positive about discipline' (2007) <http://capetown.quaker.org/posdis-pubs.htm> (accessed 12 June 2007).

⁵ Save the Children Sweden 'UN study on the violence against children: Ending physical and humiliating punishment of children. Making it happen' Part 1 (2005) 17.

⁶ Positive Discipline Association 'What is positive discipline?' (2009) <http://www.positivediscipline.com/what-is-positive-discipline.html> (accessed 27 July 2010).

⁷ Because these principles are repeated in the referenced sources and are interrelated, the author opted to include them in one reference. See Save the Children Sweden (n 5 above) 17; K Harper *et al* *Ending physical and humiliating punishment of children: Manual for action* (2005); UNESCO *Embracing diversity: Toolkit for creating inclusive, learning-friendly environments. Specialised Booklet 1: Positive discipline in the inclusive, learning-friendly classroom. A guide for teachers and teacher educators* (2006) <http://www2.unescobkk.org/elib/publications/086/> (accessed 16 July 2010); DE Lee 'Cheating in the classroom: Beyond policing' (2009) 1 *The Clearing House* 173 <http://www.highbeam.com/doc/1G1-195083341.html> (accessed 20 August 2009); G Pienaar 'A different approach to classroom discipline problems' (2003) 68 *Koers* 469; M Siers 'RAPCAN's positive discipline programme in schools: An overview' (2007) 3 *Article 19* 3; MC Yaroson & CE Zaria 'Strategies for curbing indiscipline in Nigerian secondary schools' paper delivered at national workshop on developing education: Issues of standard and sustainability in secondary schools in Nigeria 9-11 August 2004; R Rubin 'Building a comprehensive discipline system and strengthening school climate' (2004) 13 *Reclaiming Children and Youth* 168.

sis be placed on treating everyone fairly rather than treating everyone in the same fashion.

Secondly, positive discipline requires educators to lose the 'them-and-us mindset'. This requires that they uphold the principle of mutual respect. A positive discipline approach can only be implemented successfully by an educator with self-respect. An educator who has to shout and threaten learners to establish or maintain a disciplined classroom will struggle to get the learners to respect him or her.

Thirdly, good relationships should be maintained. This means that the educator needs to take an interest in every child in his or her class. The educator should be kind but firm. An educator in promoting good relationships should, fourthly, emphasise participation and co-operation. Educators should invite co-operation rather than demand it. Fifthly, communication and negotiation are needed in order to establish good relationships and to encourage participation and co-operation. Educators should keep open the channels for communication and negotiation. The emphasis is on two-way communication, thereby moving away from the practice where the educator speaks his or her mind and the learner is expected to keep quiet.

Sixthly, learners' self-esteem should be preserved. Unacceptable behaviour should be criticised and defined as wrong, not the person. According to the Dreiker model for discipline, this will allow educators to retain respect for the wrongdoer while addressing the unacceptable behaviour. Educators should see the person beyond the fault and not reduce a learner to his or her perceived faults. This principle also requires that an attempt be made to identify the reason behind the misbehaviour rather than attempting to merely change unacceptable behaviour.

Seventhly, discipline is not aimed at suppressing undesirable behaviour in the short term, but at building responsibility and self-discipline. According to the *Reader's Digest complete word finder*, self-discipline means that a person has the ability to apply and control him- or herself. A learner has self-discipline when he or she does not act on his or her desires or emotions. A learner will behave because he or she believes that it is the correct thing to do and not simply because he or she is forced to do so.

Eighthly, acceptable behaviour is modelled; unacceptable behaviour given as little attention as possible. This does not mean that children should be praised, but rather that they be encouraged to do better. If a child is praised, he or she may become dependent on the praise of others to determine his or her self-worth. The emphasis should once again be on the deed and not the doer. For example, emphasis will be placed on the fact that the learner worked hard and did well and not on the symbol ('A') the learner obtained.

Ninthly, limits and rules are clearly spelt out, framed in a positive manner and consistently enforced. Sanctions should be non-violent and in proportion to the transgression. In line with the principle

of communication and negotiation, rule making is a shared and negotiated process. Discipline should be prospective rather than retrospective. Thus, the emphasis should be on prevention rather than on punishment.

3 A human rights framework for positive discipline

As stated above, a positive discipline approach is grounded in a human rights framework.⁸ The second objective of this article is to identify those children's rights as found in the human rights instruments that Nigerian principals and educators could promote in following a positive discipline approach.

In article 11(2)(b) of the African Charter on the Rights and Welfare of the Child (African Children's Charter) it is stated that education should be directed towards the fostering of respect

for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions.

Educators thus have the mandate to foster respect for human rights and freedoms, but also to make learners aware of their responsibilities in this regard. The New Partnership for Africa's Development (NEPAD) emphasises in its Democracy and Political Governance Initiatives the importance of heightening public awareness of the African Charter on Human and Peoples' Rights (African Charter) in education institutions.⁹ One way to place the emphasis on human rights is to bring them to life in the way in which the educator establishes a disciplined classroom and the manner in which he or she manages learners' misbehaviour.

Emphasis is placed on those human rights instruments that affect discipline in schools and that Nigeria has ratified. Firstly, the international human rights instruments are considered.

3.1 International human rights instruments

International human rights instruments include the International Bill of Human Rights, the United Nations (UN) Convention on the Rights of the Child (CRC) and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

⁸ End All Corporal Punishment 'Interview with the author: Joan E Durrant' <http://www.endcorporalpunishment.org/pages/pdfs/PositiveDisciplineManual-Interview.pdf> (accessed 28 July 2010).

⁹ R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 38-39.

3.1.1 International Bill of Human Rights

The International Bill of Human Rights consists of the UN Charter, the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁰

Because the Universal Declaration is not a treaty, it is often argued that it has no force in law; however, there are also opposing arguments.¹¹ The author agrees with proponents who regard the Universal Declaration as binding under customary international law. According to this theory, some of the provisions of the Universal Declaration, such as the protection against cruel, inhuman or degrading treatment or punishment, have become customary international law. In common law countries such as Nigeria, customary international law applies automatically and need not be enacted into national law.¹²

Nigeria's intent to commit to the Universal Declaration is evident from the fact that it has ratified legally-binding treaties that give expression to the provisions of the Universal Declaration, including the two international covenants and various UN conventions such as CRC and CAT. Nigeria also recognises its obligations under the Universal Declaration in its policies. In its National Action Plan, the Universal Declaration is included in the list of international human rights instruments that guide Nigeria's international obligations.¹³

Articles 1, 2 and 5 of the Universal Declaration support a positive discipline approach. Article 1 reads: 'All human beings are born free and equal in dignity and rights.'¹⁴ An approach which views adults as being in a stronger position to have their rights protected is invalidated by this provision. Article 2 further places children on an equal footing with adults with regard to the right to claim protection of their human rights. This article reads: 'Everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind,

¹⁰ T Buergenthal *et al* *International human rights in a nutshell* (2004) 34. Nigeria ratified the Covenants in 1993; http://www.bayefsky.com/pdf/ccpr_ratif_table.pdf (accessed 16 February 2010).

¹¹ Buergenthal *et al* (n 10 above) 41-43. A discussion of these arguments falls outside the scope of this article. Please see the referenced source for an explanation of these arguments.

¹² See fn 35 in N O'Neal 'Corporal punishment in schools: A call for legal reform' (2008) 8 *African Human Rights Law Journal* 66 for references to proponents of this theory; E Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria' (2007) 51 *Journal of African Law* 276. Also see Buergenthal *et al* (n 10 above) 42.

¹³ Federal Republic of Nigeria *National Action Plan for the promotion and protection of human rights in Nigeria: 2009-2013* (2006) 18 92 http://www2.ohchr.org/english/issues/plan_actions/index.htm (accessed 27 July 2010) (National Action Plan).

¹⁴ Art 1 Universal Declaration of Human Rights, GA Res 217 (III) UN Doc A/810 (10 December 1948).

such as ... or other status ...'¹⁵ 'Other status' could, of course, include age. Article 5 of the Universal Declaration provides protection against torture and cruel, inhuman or degrading treatment or punishment (such as corporal punishment).¹⁶ As already stated, administering corporal punishment and protecting a person's dignity are mutually exclusive. Cruel, degrading and inhuman treatment and punishment are also incompatible with a positive discipline approach. This right is also guaranteed in article 7 of ICCPR. In its interpretation of this article, the UN Human Rights Committee emphasises that the protection guaranteed under article 7 includes protection of children in teaching institutions against corporal punishment.¹⁷

ICCPR gives expression to the Universal Declaration's recognition of the child as a person with rights. These rights are built on and strengthened by CRC.

3.1.2 United Nations Convention on the Rights of the Child

CRC¹⁸ enables children to claim their human rights alongside adults because it gives recognition to the autonomy of the child. Thus, the child is seen as a person in his or her own right and not as a possession of his or her parents or the state. CRC emphasises that children are holders of rights just like adults. The child is recognised as a legal subject rather than a legal object.¹⁹

Van Bueren indicates the effect CRC has had on school discipline. Prior to CRC, parties could only challenge punishment measures if they were grave enough to be classified as torture or cruel, inhuman and degrading punishment. Article 28 of CRC, which deals with children's rights to education, specifically mentions state parties' obligation to 'take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention'.²⁰ This means that punishment must, *inter alia*, give recognition to article 19, CRC's

¹⁵ Art 2 Universal Declaration.

¹⁶ Art 5 Universal Declaration.

¹⁷ Human Rights Committee General Comment 20 UN Doc HRI/GEN/1/Rev 1 30 (1994) <http://www1.umn.edu/humanrts/gencomm/hrcom20.htm> (accessed 17 February 2010). International Covenant on Civil and Political Rights GA Res 2200A (XXI), UN Doc A/6316 (16 December 1966) art 7. Also see O'Neal (n 12 above) for references to proponents of this theory.

¹⁸ United Nations Convention on the Rights of the Child, 28 *International Legal Materials* 1448, 1577 UNTS 3 (20 November 1989). Nigeria ratified CRC in 1991.

¹⁹ Carter & Osler (n 2 above) 336.

²⁰ G van Bueren 'Autonomy and the child: The international educational rights of the child' (1992) 56 *Social Education* 215.

central article on child protection. Article 19 guarantees a child's right to be protected from²¹

all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 19 can be interpreted as guaranteeing children protection while in the care of educators because an educator could be regarded as 'any other person who has care of the child'. A positive discipline approach is that discipline approach most likely to ensure that the child's rights are upheld.

In its General Comment 8, the Committee on the Rights of the Child (CRC Committee), referring to article 28 of CRC, emphasises that this provision prohibits any legalised action that permits violence, such as the use of corporal punishment or any other form of physical or mental violence or punishment that is cruel, inhuman and degrading.²² This prohibition includes any legislation that allows for violent punishment even where it is described as 'reasonable chastisement' or 'moderate correction'.²³ A positive discipline approach is a non-violence approach.

Article 3 of CRC provides that a child's best interests must be a primary concern when decisions are made that may affect him or her.²⁴ This is one of the guiding principles of CRC. When a decision is made concerning a child, consideration should be given to the effect the decision will have on the child.²⁵ A positive discipline approach is an approach well suited to discipline and gives recognition to the best interests of the child.

Another article that affects discipline is article 12, which reads:²⁶

State parties shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

²¹ Art 19 CRC. Also see Van Bueren (n 20 above) 215; S Bennett *et al* 'The need for a General Comment for article 19 of the UN Convention on the Rights of the Child toward enlightenment and progress of child protection' (2009) 33 *Child Abuse and Neglect* 783-790.

²² CRC Committee General Comment 8 UN Doc CRC/C/GC/8 (2006).

²³ Report of the Committee on the Rights of the Child to the General Assembly 64th session UN Doc A/63/41 (2008) 24; EEO Alemika *et al* 'Rights of the Child in Nigeria: Report on the implementation of the Convention on the Rights of the Child prepared for 38th session of the Committee on the Rights of the Child' January 2005 (2004) 15.

²⁴ Art 3 CRC.

²⁵ UNICEF 'The Convention on the Rights of the Child. Guiding principles: General requirements for all rights' http://www.unicef.org/crc/files/Guideing_Principles.pdf (accessed 18 February 2010).

²⁶ Art 12 CRC.

This right further provides that a child be given an opportunity to be heard in administrative proceedings that will affect the child. Disciplinary proceedings are administrative proceedings and a child should therefore be given an opportunity to be heard in disciplinary proceedings. The United Nations Children's Fund (UNICEF) emphasises that this right should not be interpreted to mean that children are now given authority over adults, but rather as a right intended to encourage adults to listen to children's opinions and to involve them in decision making.²⁷ The principles of positive discipline which place the emphasis on negotiation and communication allow for the protection of the learner's right to be heard in administrative proceedings that will affect him or her. This right is also referred to as the child's right to participate, the right to be heard or the right to be consulted.²⁸ According to Lundy, these descriptions provide very limited interpretations of this right. Her model for interpreting article 12 concentrates on four elements of the provision, namely, *space*, which refers to children being given the opportunity to express their views; *voice*, which refers to children being facilitated to express their views; *audience*, referring to children's views being listened to; and *influence*, referring to children's views being acted upon where appropriate.²⁹

The positive discipline approach allows for the implementation of these elements in various ways. A positive, rights-based discipline approach allows for the implementation of the element of *space* because it requires educators to establish an environment conducive to learners' expressing their views without fear of retaliation or reprimand.³⁰ If educators regard learners as equal human beings and do not foster the attitude that 'children must be seen and not heard', learners will feel at liberty to express their views.

The element of *voice* is promoted by a positive discipline approach because it requires educators to create an environment conducive to two-way communication.³¹ Educators should give learners a voice and encourage them to express their opinions. This could be done by making them part of the process of adopting school or classroom rules and by giving them the opportunity to defend themselves in disciplinary proceedings. More often than not, learners will complain that when they try to explain themselves to an educator, they are scolded. This is because, traditionally, any response from a learner is regarded as an

²⁷ UNICEF 'The Convention on the Rights of the Child. Survival and development rights: The basic rights to life, survival and development of one's full potential' http://www.unicef.org/crc/files/Survival_Development.pdf (accessed 18 February 2010).

²⁸ L Lundy "'Voice" is not enough: Conceptualising article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 *British Educational Research Journal* 930.

²⁹ Lundy (n 28 above) 933.

³⁰ Lundy (n 28 above) 934.

³¹ Lundy (n 28 above) 935.

attempt to challenge the educator's authority and a sign of disrespect towards adults. Sometimes learners may need help from others to form or express a view. As already mentioned, the right to representation in administrative matters is expressly provided for in article 12(2) of CRC and this right should be guaranteed in all disciplinary proceedings.

A positive discipline approach requires that good relationships be maintained and that communication and negotiation channels be kept open. This will allow educators to give effect to the learners' views and to really listen to learners and thus promote the implementation of the element of *audience*.³²

To give due weight to learners' views implies that their views will have an impact, thus allowing the implementation of the element of *influence*. Educators should ensure that learners' views are considered because merely humouring learners with tokenistic or decorative participation would amount to a breach of article 12 of CRC. To illustrate to learners that their input is considered, the educator should not only allow learners input on which rules should be included in the classroom rules, but also start the rules with 'We agreed on the following classroom rules'.³³

A positive discipline approach with the emphasis on human rights, mutual respect and healthy relationships will endorse the goals of education as set out in article 29 of CRC. Education should, *inter alia*, encourage children to respect others, their human rights and their own and other cultures.³⁴ In its first General Comment, the CRC Committee emphasised that corporal punishment is incompatible with the aims of education as set out in article 29(1). It stressed that education should be provided in a manner that respects the inherent human dignity of the child and that children should be involved in disciplinary proceedings.³⁵ Both these principles are grounding principles of a positive discipline approach.

Article 24(3) obliges state parties to take all appropriate measures to abolish traditional practices that are prejudicial to the health of children.³⁶ It is clear that CRC intends the substantive rights guaranteed under it to supersede harmful cultural practices. Kaime argues that some cultural practices, such as son-preference, endanger healthy relationships.³⁷ Educators can uphold this right by not using corporal punishment to differentiate between girls and boys in disciplinary practices and by regarding children as persons in their own right.

³² Lundy (n 28 above) 936.

³³ Lundy (n 28 above) 937 938; Positive Discipline Association (n 6 above).

³⁴ UNICEF (n 27 above).

³⁵ CRC Committee General Comment 1 UN Doc CRC/GC/2001/1 (2001).

³⁶ Art 24(3) CRC.

³⁷ 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* 227.

Another convention which is served well by a positive discipline approach is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), discussed below.

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

If one considers the definition of 'torture' in CAT,³⁸ it becomes evident that corporal punishment could constitute torture.³⁹ 'Torture' is defined as⁴⁰

[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as ... punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person ... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Although the author agrees with O'Neal that corporal punishment may not reach the level of severity necessary to constitute torture, Nigerian news reports and the case of *Ekeogu v Aliri* present evidence to the contrary.⁴¹ The *Daily Trust* refers to the wife of the Katsina State Governor, Hajiya Fatima Shema's critique of the severity of corporal punishment used in schools in instances where the offences have not justified corporal punishment as a sanction in the first place. She refers to a case of a girl whose eye was damaged by an educator and to a case where a learner ended up in a coma after being brutally beaten.⁴² Chianu refers to an incident reported in the *Sunday Tribune* in February 1997, where a learner who failed to submit an assignment was so severely beaten on his head, arms and legs that he died of his injuries. He also refers to an incident reported on in the *National Concord* in March 1998 where a learner was literally flogged to death by his educator. This beating took place in the heat of the day and the educator continued until the boy collapsed.

In *Ekeogu v Aliri*, the court found an educator innocent after he had whipped learners indiscriminately when entering his classroom for being late and a learner lost her eye as a result. This educator was not charged or arrested. The child then brought a civil case which she lost. It is clear that the court did not consider the rights of the child at all

³⁸ Nigeria ratified CAT in 2001.

³⁹ See O'Neal (n 12 above) 68.

⁴⁰ Art 1 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46, 39 UN GAOR Supp (No 16) (1984).

⁴¹ See O'Neal (n 12 above) 68; E Chianu 'Two deaths, one blind eye, one imprisonment: Child abuse in the guise of corporal punishment in Nigerian schools' (2000) 24 *Child abuse and neglect* 1005–1009; *Ekeogu v Aliri* (1991) 3 NWLR (Pt 179).

⁴² NAN 'Gov's wife faults corporal punishment in schools' *Daily Trust* 7 May 2009 <http://allafrica.com/stories/200905070909.html> (accessed 24 July 2010).

when it held that the incident was an accident.⁴³ The court explained educators' public duty to discipline learners in terms of the *in loco parentis* principle and referred to section 295(1) of the Criminal Code and section 55 of the Penal Code to explain an educator's authority to inflict corporal punishment.⁴⁴ The statutory provisions the court relied on are also in conflict with CRC 9 (article 19) and ICCPR (article 7).⁴⁵ From the facts of the case, it is evident that the educator did not exercise his authority to discipline with compassion. It was the educator himself who sent the learners out of the class to watch how community members beat a thief. He told the learners to take note of what happens to a thief, thereby indicating that to assault somebody else and take the law into your own hands were acceptable. Then, when the bell rang and the learners returned to the classroom, they were beaten indiscriminately. Although the decision was overturned on appeal, the court *a quo's* decision illustrates how traditional views can impede children's rights.

The Committee against Torture, the UN Human Rights Committee, the World Organisation against Torture (OMCT) and the Centre for Law Enforcement Education (CLEEN) have expressed the view that corporal punishment could indeed amount to torture. The Inter-American Court of Human Rights confirmed this in *Caesar v Trinidad and Tobago*. The Court expressed this as follows:⁴⁶

As such, corporal punishment by flogging constitutes a form of torture and, therefore, is a violation *per se* of the right of any person submitted to such punishment to have his physical, mental and moral integrity respected, as provided in article 5(1) and 5(2), in connection with article 1(1) of the Convention.

To prevent Nigerian children from being subjected to similar abuse in future educators could adopt a positive discipline approach which is, as stated above, a non-violence, rights-based approach where the child is seen as an autonomous human being with the right to be treated with dignity and respect.

⁴³ Chianu (n 41 above) 1005–1009; D Akhilomen 'Addressing child abuse in Southern Nigeria: The role of the church' (2006) 12 *Studies in World Christianity* 239.

⁴⁴ Chianu (n 41 above) 1006.

⁴⁵ Chianu (n 41 above) 1007.

⁴⁶ UN Human Rights Committee Res 1998/38, ESCOR Supp (No 3) UN Doc E/CN.4/1998/38 (1998) 134; Alemika *et al* (n 23 above) compiled the report on *Rights of the child in Nigeria* for the 38th session held in Geneva in January 2005 under the auspices of CLEEN and the OMCT. CLEEN is a non-governmental organisation with the mission of 'promoting public safety, security and accessible justice through the strategies of empirical research, legislative advocacy, demonstration programmes and publications, in partnership with government and civil society See <http://www.cleen.org/about.html>. OMCT is an 'international coalition of NGOs fighting against torture, summary executions, forced disappearances and all other forms of cruel, inhuman or degrading treatment'. See <http://www.omct.org/>. Inter-American Court of Human Rights *Caesar v Trinidad & Tobago* para 73 http://www.corteidh.or.cr/docs/casos/articulos/seriec_123_ing.pdf (accessed 27 July 2010).

Next regional human rights instruments which may be endorsed by positive discipline are discussed.

3.2 Regional human rights instruments

3.2.1 The African Charter on Human and Peoples' Rights

Article 5 of the African Charter guarantees the right to human dignity, recognises every person's (also every child's) legal status and expressly prohibits 'torture, cruel, inhuman or degrading punishment and treatment'.⁴⁷ As already mentioned, a positive discipline approach is a non-violence approach that requires the recognition of the autonomy of children and the protection of children's dignity.

Article 18 refers to the obligation of states to protect the rights of women and children as guaranteed in international declarations and conventions.⁴⁸ Perhaps the most important for African children is the African Charter on the Rights and Welfare of the Child (African Children's Charter).

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

The African Children's Charter reflects an African normative consensus on the rights of children. It not only complements CRC, but attempts to Africanise the children's rights discourse by placing it within the African cultural context.⁴⁹ This is evident from paragraph 6 of the Preamble of the African Children's Charter:⁵⁰

Taking into consideration the virtues of their cultural heritage, historical background and the values of the African civilisation which should inspire and characterise their reflection on the concept of the rights and the welfare of the child.

Mezmur refers to the argument that the African Children's Charter actually supports corporal punishment by parents and in schools. The author agrees with Mezmur that such an argument is flawed; firstly, because such proponents usually rely on articles 11(5) and 20(1)(c) of the African Children's Charter and on closer scrutiny it is evident that both these articles require that discipline and punishment should be exercised with humanity and in a manner that conforms to the Children's Charter and gives recognition to the inherent human dignity of the child.⁵¹ Corporal punishment can never be regarded as humane – corporal punishment and the recognition of human dignity, as

⁴⁷ Art 5 African Charter.

⁴⁸ Art 18 African Charter.

⁴⁹ BD Mezmur 'The African Charter on the Rights and Welfare of the Child and corporal punishment: Spare the rod, spare the child' (2006) 2 *Article* 19 8.

⁵⁰ African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990).

⁵¹ Mezmur (n 49 above) 9.

required by a positive discipline approach, are mutually exclusive.⁵² Secondly, such interpretation of the African Children's Charter is in conflict with the cardinal principles that the best interests of the child must be the primary consideration in all actions concerning the child and the principle that harmful social and cultural practices must be eliminated.

Various other provisions of the African Children's Charter favour a positive discipline approach. Article 3 guarantees the full enjoyment of rights and freedoms without any discrimination.⁵³ The non-exhaustive list of grounds on which discrimination is prohibited includes, as does the Universal Declaration, 'other status' which, as already stated, could include age. To understand the importance of this for discipline, one should keep the traditional view of the child as a lesser being in mind.

Article 4 contains a similar provision to article 12 of CRC, requiring that a child's best interests should be considered by those undertaking actions concerning the child and that a child be given an opportunity to be heard in administrative proceedings that will affect the child.⁵⁴

The way an educator handles conflict can either promote or counter the promotion of human rights. As already mentioned, article 11(2)(b) places an obligation on member states to direct education so as to foster a respect for human rights. A positive discipline approach requires educators to lead by example and to promote human rights.

Article 11(5) places an obligation on state parties to take measures to ensure that discipline at home or in schools is exercised with humanity, respect for the child's dignity and in conformity with the African Children's Charter.⁵⁵

State parties are obliged to take 'specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment ...'⁵⁶ Since corporal punishment is generally regarded as degrading punishment, administering it may constitute an infringement of article 16. O'Neal rightly argues that schools as representatives of their governments cannot simultaneously protect children from degrading and inhuman treatment and then allow corporal punishment and other degrading disciplinary measures.⁵⁷ The African Commission has held in *Doebbler v Sudan* that⁵⁸

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

⁵² As above.

⁵³ Art 3 African Children's Charter.

⁵⁴ Art 4 African Children's Charter.

⁵⁵ Art 11 African Children's Charter.

⁵⁶ Art 16 African Children's Charter.

⁵⁷ O'Neal (n 12 above) 70.

⁵⁸ (2003) AHRLR 153 (ACHPR 2003) para 42; O'Neal (n 12 above) 71.

Reference was made to *Huri-Laws v Nigeria*. In this case, the African Commission stated that⁵⁹

[t]he prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses.

Corporal punishment is regarded as a harmful social practice.⁶⁰ Articles 1(3) and 21(1) of the African Children's Charter assert the supremacy of the Children's Charter over any custom, or cultural or religious practices which are inconsistent with the rights guaranteed under it.⁶¹ Article 1(3) reads as follows:

Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

Article 21(1) reads as follows:

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.

3.2.3 African Youth Charter

Nigeria ratified the African Youth Charter in 2009 and since 'youth' is defined as 'every person between the ages of 15 and 35 years', it applies to a portion of the learners and, I might add, even some educators, in schools.⁶² Once again one can argue that, as in the case of the African Children's Charter, the African Youth Charter reflects an African

⁵⁹ (2000) AHRLR 273 (ACHPR 2000) para 40.

⁶⁰ S Waterhouse *et al* 'Ending corporal and other forms of humiliating punishment of children' presentation to the African Committee of Experts on the Rights and Welfare of the Child, 3 November 2008. http://www.rapcan.org.za/sanchpc/documents/Presentation_to_the_ACERWC.pdf (accessed 28 July 2010).

⁶¹ Kaime (n 37 above) 227.

⁶² The African Youth Charter was adopted by the 7th ordinary session of the Assembly held in Banjul, The Gambia on 2 July 2006. The Charter is described as creating 'a legally binding framework for governments to develop supportive policies and programmes for young people ... It also provides a platform for youth to assert their rights and fulfil their responsibility of contributing to the continent's development.' See HSRC 'African Youth Charter' (2006) 4 *HSRC Review* http://www.hsrc.ac.za/HSRC_Review_Article-34.phtml (accessed 18 March 2010). For more information on the history of the African Youth Charter, see D Mac-Ikemenjima 'Beyond Banjul: It's time to implement the African Youth Charter' (2009) *AfriMAP* <http://www.afriMAP.org/english/images/paper/AfriMAP-AYC-MacIkemenjima-EN.pdf> (accessed 16 July 2010). African Union 'List of countries which have signed, ratified/acceded to the Youth Charter' as on 3 February 2010 <http://www.africa-union.org/root/au/Documents/Treaties/list/Youth%20Charter.pdf> (accessed 18 March 2010). For a definition of 'youth', see the section on definitions in the Youth Charter (2006).

normative consensus on the rights of the youth. It complements CRC and the African Children's Charter and emphasises the African cultural context of youth rights. This is evident from its Preamble, wherein it is stated that the Charter is 'fully attached to the virtues and values of African historical tradition and civilization which form the foundation for our concept of people's rights', and⁶³

[the Charter is] reaffirming the need to take appropriate measures to promote and protect the rights and welfare of children as outlined in the Convention of the Rights of the Child (1989) and through the African Charter on the Rights and Welfare of the Child (1999).

Various youth rights included in the African Youth Charter support a positive discipline approach. For example, article 2 contains a similar non-discrimination clause to the African Children's Charter and article 4 guarantees every young person's right to freedom of expression.⁶⁴ Once again, if one considers the grounding principles of a positive discipline approach, such an approach is the most suited to ensuring the optimal fulfilment of the objectives set for the education and skills development guaranteed in article 13:⁶⁵

- (b) Fostering respect for human rights and fundamental freedoms as set out in the provisions of the various African human and people's rights and international human rights declarations and conventions;
- (c) Preparing young people for reasonable lives in free societies that promote peace, understanding, tolerance, dialogue, mutual respect and friendship among all nations and across all groupings of people ...

3.3 National human rights law and policy

Principal sources of children's rights in Nigerian domestic law and policy include the Constitution, the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act (CAP 10) of 1990, the Child Rights Act 26 of 2003 and the National Action Plan.⁶⁶

Although in conflict with international and regional human rights instruments, as well as federal law, physical punishment is still administered in Nigerian schools in terms of article 55 of the Penal Code (North) and article 295(4) of the Criminal Code (South).⁶⁷

The Constitution guarantees the right to human dignity. Article 34(1) reads:

⁶³ Preamble African Youth Charter.

⁶⁴ Federal Republic of Nigeria (n 13 above).

⁶⁵ Arts 13(3)(b) & (c) African Youth Charter.

⁶⁶ Federal Republic of Nigeria (n 13 above)

⁶⁷ Although federal law should take precedence, state law still prevails in many states. See the discussion below. Alemika *et al* (n 23 above) 19. Also see Committee on the Rights of the Child 'Analysis of progress reports' (2008) <http://www.Endcorporalpunishment.org/pages/progress/reports/Nigeria.html> (accessed 23 February 2010).

Every individual is entitled to respect for dignity of his person, and accordingly

- (a) no person shall be subject to torture or to inhuman and degrading treatment ...

As mentioned previously, a positive discipline approach lends itself to the promotion of this right as well as the right to personal liberty. Article 35(1) of the Constitution reads:

Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and according with a procedure permitted by law ...

- ...
(d) in the case of a person who has not attained the age of eighteen years for the purpose of his education or welfare ...

In *Florence Olusa v Commissioner of Education, Ondo State and Marian Olaniyan*,⁶⁸ the learner's case was dismissed on the ground that the educator's action was protected by section 32(1)(d) of the Constitution, 1979 (section 35(1)(d) of the 1999 Constitution). The court argued that this section empowered educators to deprive learners of their personal liberty in accordance with a procedure permitted by law for the purpose of the child's education. However, if one considers the facts of the case, this interpretation does not make sense. The educator invited the learner to her apartment after school hours to wash dishes and sweep her apartment. When the educator discovered that some money was missing from her home, she flogged the learner and locked her in her (the educator's) apartment for hours as a means of compelling her to acknowledge that she had stolen the money. Clearly, section 32(1)(d) is intended to allow for compulsory school attendance, which was not applicable in this case, and the right was thus incorrectly interpreted. Furthermore, there was no educational purpose attached to the child's presence in the educator's apartment or the flogging and detention.

The Child Rights Act 26 of 2003 does not explicitly indicate that it is a domestication of CRC and the African Children's Charter, but it is commonly accepted that the Act domesticates these treaties, as well as conforming to a large extent to these treaties.⁶⁹ Section 221 of the Child Rights Act, specifically, is of importance to Nigerian educators attempting to establish a positive discipline approach. This section provides that 'no child shall be ordered to be subjected to corporal punishment' and a ministerial note has been sent to all schools informing them that corporal punishment is now prohibited in schools.⁷⁰ The Act also provides for the establishment of child rights committees at national, state and local level to oversee the implementation of children's rights. These committees have to initiate actions to ensure that children's

⁶⁸ *Florence Olusa v Commissioner of Education, Ondo State and Marian Olaniyan* High Court of Nigeria Law Report 1985 (1133); Chianu (n 41 above) 1006.

⁶⁹ Egede (n 12 above) 268.

⁷⁰ Committee on the Rights of the Child (n 68 above).

rights are observed and made known to the general public. Children's rights in this instance refer to those rights provided for in CRC and the African Children's Charter, as well as other international conventions, charters and declarations to which Nigeria is or is to become a signatory. Egede contends that this means that these committees have to observe and advocate all treaties relating to children, even those not ratified by Nigeria.⁷¹ Unfortunately these committees have proven to be ineffective thus far.⁷²

The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act contains only two sections and a schedule containing the provisions of the African Charter itself.⁷³ Section 1 provides that the African Charter has the force of law in Nigeria, and it binds the legislative, executive and judicial powers in the country. The enforceability of the Act was confirmed by the Supreme Court of Nigeria in *Abacha and Others v Fawehinmi*. The Supreme Court confirmed that as soon as a treaty is incorporated into municipal law, it becomes binding on Nigerian courts and the courts are then obliged to uphold such law like any other Nigerian law. The Court, however, argued that, should there be a conflict between the African Charter and any other Act, the African Charter would prevail since it is presumed that the legislature would not intend to breach an international obligation. However, should the treaty legislation be in conflict with the Constitution, the Constitution would prevail because it is the superior law of the country.⁷⁴

In its Action Plan for the Promotion and Protection of Human Rights in Nigeria, the government's objectives are indicated as addressing the abuse of children, fostering a culture of respect for human rights, developing public awareness on the rights of the child (particularly the girl child) and adopting and implementing child's rights laws in all states of the Federation.⁷⁵ The promotion of a positive discipline approach could go a long way in contributing to the fulfilment of these objectives.

Despite the fact that the Nigerian government has ratified the above human rights instruments, educators may find it difficult to promote the rights they guarantee. The factors that hamper the implementation of human rights are discussed next.

⁷¹ Egede (n 12 above) 270.

⁷² African Network for the Prevention and Protection against Child Abuse and Neglect 'Shadow report on the implementation of the African Union Charter on the Rights and Welfare of Children (AUCRWC) in Nigeria' (2010) <http://www.crin.org/resources/infoDetails.asp?ID=21769&flag=legal> (accessed 15 March 2010).

⁷³ Cap 10, commencement date 17 March 1983.

⁷⁴ [2000] 6 NWLR (Part 660) 228; Egede (n 12 above) 251 254 261; *Abacha & Others v Fawehinmi* (2001) AHRLR 172 (NgSC 2000) *per* Ogundare JSC.

⁷⁵ Federal Republic of Nigeria (n 13 above).

4 Factors hampering the implementation of human rights instruments in Nigeria

There is a clear discrepancy between acceding to or ratifying a human rights instrument and actually fulfilling the state's obligations under such an instrument. In various African countries, human rights are still not recognised as a primary societal value that informs social policy.⁷⁶

For treaties to have force in Nigeria, they have to be enacted into law. Article 12 of the Constitution prescribes that no treaty between the Federation and any other country shall have force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.⁷⁷ Where the treaty has been enacted into law, as was done with the African Charter, the treaty becomes enforceable and Nigerian courts *must* give effect to it.⁷⁸

Although the Nigerian government has domesticated some human rights instruments, there is still an inability to get states to adopt state legislation.⁷⁹ It is argued that children's rights are a state responsibility in terms of section 4(7) of the Constitution and that before a Federal Act can become operational in a specific state, it must first be passed into law by such a state. It is further argued that children's rights fall in the Residual Legislative List which is within the sole legislative authority of state legislatures.⁸⁰

The author agrees with Egede that the above arguments are flawed. Although the support of all states will of course affect the implementation of federal law and children's rights specifically, the fact that not all the states have adopted the Child Rights Acts does not affect the enforceability of the Federal Child Rights Act.⁸¹ Firstly, such an argument does not give recognition to the fact that the Constitution is the supreme law of the country and that all law inconsistent with it (such as the Penal Code (North) and the Criminal Code (South) is invalid.⁸² Secondly, in terms of section 12(2) of the Constitution, the

⁷⁶ J Sloth-Nielsen & BN Mezmur 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7 *African Human Rights Law Journal* 332. Also see N Pillay 'Are human rights universal?' (2008) 2/3 *UN Chronicle*; L Lindholt *Questioning the universality of human rights* (1997) 102.

⁷⁷ Constitution of the Federal Republic of Nigeria 24 of 1999.

⁷⁸ C Heyns *Human rights law in Africa* (2004) 1389.

⁷⁹ T Oyesina 'Child Rights Act and problems of implementation' *Nigerian Tribune* 8 March 2010 <http://www.tribune.com.ng/index.php/tribune-law/2242-child-rights-act-and-problem-of-implementation> (accessed 28 July 2010); UNICEF 'Nigerian country programme: Information sheet: The Child Rights Act (2007) <http://www.unicef.org/wcaro/WCARO-Nigeria-Factsheets-CRA.pdf> (accessed 11 February 2010).

⁸⁰ UN Integrated Regional Information Networks 'Nigeria: Cross river passes Child Rights Act' (2009) <http://allafrica.com/stories/printable/200905270587.html> (accessed 11 February 2010); Egede (n 12 above) 271.

⁸¹ Egede (n 12 above) 271.

⁸² Secs 1 & 3 1999 Nigerian Constitution.

National Assembly is empowered to enact legislation for the purpose of domesticating treaties.⁸³ This provision applies to matters in both the exclusive and the concurrent lists. Should the treaty deal with a matter not included in the exclusive list (thus included in the concurrent or residual lists), the bill must be ratified by the majority of all state legislatures, as would be the case with the Child Rights Act.⁸⁴ Based on this requirement, the incorrect view exists that the Federal Child Rights Act cannot be enforced unless the various states have adopted their own Child Rights Acts. Since the Federal Child Rights Act could not have been passed without it being ratified by a majority of all the Houses of Assembly in the Federation (as required by section 12(3) of the Constitution), it is now enforceable law. It is enforceable as valid law in the whole Federation, including the dissenting states.⁸⁵

Thirdly, in terms of section 4(5) of the Constitution, law made by the National Assembly shall prevail over any law enacted by the House of Assembly of a state. Any inconsistent law enacted by a state legislature will be void to the extent of its inconsistency.⁸⁶ The Child Rights Act 26 of 2003 enacted the principles enshrined in CRC and the African Children's Charter in Nigerian law.⁸⁷ As a federal Act, it prevails and supersedes all other legislation that has a bearing on the rights of the child and states are expected to formally adopt and adapt the Act for domestication as state law.⁸⁸ Unfortunately, by December 2009, only 21 of the 36 states had promulgated the Act as state law and legislation inconsistent with the Constitution and the Act has not been amended.⁸⁹

The fact that customary law co-exists with statutory law is also a factor that obstructs the implementation of children's rights in Nigeria.⁹⁰ Once again, however, this problem could be overcome by enforcing the Constitution and federal law. Customary law must pass a constitutional and various statutory tests before it can be applied by a Nigerian court.

⁸³ Sec 12(1) 1999 Nigerian Constitution.

⁸⁴ Egede (n 12 above) 250-251.

⁸⁵ Egede (n 12 above) 272.

⁸⁶ Sec 4(5) 1999 Nigerian Constitution; Egede (n 12 above) 272.

⁸⁷ UNICEF (n 79 above). Also see N Imoukhuende 'Right to protection, stop violence against children' paper presented to mark the 2006 Day of the African Child organised by the Edo state Ministry of Women Affairs on 26 June 2006 <http://www.rufarm.kabissa.org/pressrelease/legalaid-day%20of%20african%20child.htm> (accessed 10 March 2008).

⁸⁸ UNICEF (n 79 above).

⁸⁹ E Alaneme 'Nigeria: UNICEF kicks against non-passage of Child Rights Act' *Daily Champion* 24 November 2009. However, there are also those indicating that already 23 states have adopted the Act. See 'Global initiative to end all corporal punishment of children' *Newsletter* 8 June 2009 <http://www.endcorporalpunishment.org/pages/pdfs/newsletters/Issue08-June2009.pdf> (accessed 11 February 2010); W Ogbobo 'Any hope for the right of a child?' *Leadership Nigeria* 19 November 2009 <http://www.leadershipnigeria.com/index.php/columns/ views/features/ 8644-any-hope-for-the-right-of-a-child> (accessed 11 February 2010).

⁹⁰ Sloth-Nielsen & Mezmur (n 76 above) 349.

The constitutional test can be found in section 3 of the Constitution. Customary law inconsistent with the Constitution is void to the extent of its inconsistency.⁹¹ The first statutory test provides that customary law can only be applied if it is not 'repugnant to natural justice, equity and good conscience'.⁹² This test is a very vague test and courts have interpreted it differently in the past.⁹³ Secondly, in terms of section 14(3) of the Evidence Act, inconsistency between customary law and any law in force in Nigeria will be resolved in favour of the latter. The third test is that customary law must not be contrary to public policy. In *Okonkwo v Okagbue*, the Nigerian Supreme Court held that public policy 'must objectively relate to contemporary mores, aspirations and sensitivities of the people of this country and to the consensus values in the civilised international community, which we share'.⁹⁴ There is thus no legal justification for customary law to override the constitutional guarantees given in chapter 4 of the Constitution or in any of the human rights instruments.⁹⁵ The author agrees with the view that the importance of culture and custom needs to be recognised, but where children's rights are violated or infringed by a cultural practice, the benefits of such practice should be weighed against the extent of it violating children's rights.⁹⁶

The contention that human rights are not universal hampers the implementation of human rights instruments.⁹⁷ Many authors refer to the argument that human rights are of Western origin and thus, given the differences between the West and Africa and the cultural realities in most African countries, irrelevant to Africa.⁹⁸ Sloth-Nielsen and Mezmur argue that the fact that CRC was acceded to by states all over the world and the fact that it is supplemented by the African Children's Charter are indicative of a 'high normative consensus among the various nations of the world (particularly Africa) on the idea and content of children's rights as human rights'.⁹⁹ Kaime emphasises that traditional African value systems recognise the human dignity and integrity of all persons, the intrinsic worth of children and the need for children to

⁹¹ Sec 3 1999 Nigerian Constitution.

⁹² ES Nwauche 'Law, religion and human rights in Nigeria' (2008) 8 *African Human Rights Law Journal* 592.

⁹³ See footnotes 99 and 100 in Nwauche (n 92 above) 592.

⁹⁴ Nwauche (n 92 above) 592.

⁹⁵ Sloth-Nielsen & Mezmur (n 76 above) 349; Nwauche (n 92 above) 575.

⁹⁶ Sloth-Nielsen & Mezmur (n 76 above) 349; Egede (n 12 above) 281.

⁹⁷ Pillay (n 76 above) 5.

⁹⁸ T Bankole 'Africa's charter on children's rights: A normative break with cultural traditionalism' (1992) 41 *International and Comparative Law Quarterly* 432, A Pollis & P Schwab 'Human rights: A Western construct with limited applicability' in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa. A reader* (2006) 93-94. For a detailed exposition of this argument, see Lindholt (n 76 above).

⁹⁹ Sloth-Nielsen & Mezmur (n 76 above) 331.

be protected. If so, then children's rights do indeed have a universal character.¹⁰⁰

Lindholt identifies two major aspects of the universality of human rights: the ideological and empirical aspects. Emphasis on the ideological aspects of universality concentrates on the argument that human rights *ought to be* universal, while an emphasis on the empirical aspects concentrates on the argument that human rights *are* universal. Most scholars incorporate both aspects when arguing the universality of human rights, thus giving recognition to the fact that human rights ought to be universal because there is a need for generally definable standards and principles but that cultural relativism need to be appreciated in the interpretation and application of these standards and principles.¹⁰¹

Pillay states that 'human rights law ... emphasised our human commonality, as well as the indivisible character of rights'.¹⁰² State parties cannot pick and choose which rights to implement and which rights to ignore because that would amount to ignoring the fact that rights are indivisible and interrelated. No one right can be fully enjoyed without recognising other rights. The fact that the essential values and aspirations embodied in human rights instruments are universal is undeniable.¹⁰³ The Vienna Declaration and Programme of Action emphasises the principles of universality, indivisibility, interdependence and interrelatedness of all human rights and by associating itself with the Vienna Declaration, Nigeria illustrated its acceptance of these principles.¹⁰⁴ It is also pertinently stated in the Nigerian Action Plan that the Plan is based on the premise that all human rights are universal, indivisible, interdependent and interrelated.¹⁰⁵

The level of cultural legitimacy accorded to children's rights will affect the effective implementation of human rights instruments. The implementation of regional and universal children's rights in African countries is hampered by practices and values that enjoy cultural legitimacy but which are incompatible with human rights.¹⁰⁶ This is, for example, one factor that hampers the implementation of the Child Rights Act in Nigeria.¹⁰⁷

Another factor that hampers the implementation of children's rights in particular is the traditional view of children as being subordinate

¹⁰⁰ Kaime (n 37 above) 224.

¹⁰¹ Lindholt (n 76 above) 52-53 250. See J Donnelly 'Cultural relativism and universal human rights' in Heyns & Stefiszyn (n 99 above) 96-106 for a discussion of the levels of cultural relativism.

¹⁰² Pillay (n 76 above) 4.

¹⁰³ Pillay (n 76 above) 5.

¹⁰⁴ Federal Republic of Nigeria (n 13 above).

¹⁰⁵ As above.

¹⁰⁶ Kaime (n 37 above) 221.

¹⁰⁷ Egede (n 12 above) 272 282.

to adults. Traditionally, African societies are socially and religiously organised according to age. The older a person, the more deserving of respect and the younger, the more respectful should one be and the more open one is to disadvantaged attitudes, disregard and abuse.¹⁰⁸

In many African traditional societies, the autonomy of the child, as guaranteed by various international and regional human rights instruments, is severely constrained.¹⁰⁹ This can be attributed to the traditional, paternalistic notion that adults always know what is best for children.¹¹⁰ It is clear that a relationship built on these notions is not conducive to the fostering of children's rights or a positive discipline approach. The best interest principle challenges the traditional notion that adults are always capable of deciding what should be regarded as being in the best interests of the child.¹¹¹ This is the reason why an argument that corporal punishment is in the best interest of the child is widely accepted. The Committee on the Rights of the Child, however, emphasises that any interpretation of 'the best interest of the child' should be consistent with the entire CRC, including the provision that children should be protected against all forms of violence.¹¹²

Religious law and convictions negatively affect the implementation of children's rights in Nigeria. The question whether Islamic principles are compatible with the universality of human rights is a historic one which has not yet been answered conclusively.¹¹³ One of these principles is the principle that bodily harm may be inflicted for a reason provided for in Shari'a law. This principle allows for the use of violence and permits cruel, inhuman or degrading punishment and even torture.¹¹⁴ This is contrary to the protection against inhuman and degrading punishment and treatment guaranteed in terms of section 11(b) of the Constitution, article 37(a) of CRC, article 16(1) of the African Children's Charter, article 7 of ICCPR and CAT.¹¹⁵

Resistance to the Child Rights Act can mainly be found in religious convictions and cultural values. Gafasa, speaker of the House of Assembly of Kano State, even described the Act as 'a document against the

¹⁰⁸ Akhilomen (n 43 above) 241; Oyesina (n 79 above).

¹⁰⁹ See discussion above. Kaime (n 37 above) 231.

¹¹⁰ Kaime (n 37 above) 231.

¹¹¹ G van Bueren *International law on the rights of the child* (1995) 47.

¹¹² Global initiative to end all corporal punishment of children 'The Committee on the Rights of the Child' http://www.endcorporalpunishment.org/pages/hrlaw/crc_session.html (accessed 27 August 2009).

¹¹³ M Rishmawi 'The revised Arab Charter on Human Rights: A step forward?' (2005) 5 *Human Rights Law Review* 366-367.

¹¹⁴ Rishmawi (n 113 above) 367.

¹¹⁵ AU Iwobi 'Tiptoeing through a constitutional minefield: The great Shari'a controversy in Nigeria' (2004) 48 *Journal of African Law* 137-138.

interest of the north'.¹¹⁶ The Supreme Council for Shari'a in Nigeria depicts Nigeria's ratification of UN human rights instruments as a campaign against Islam. It describes CAT as 'intended to make illegal most aspects of Shari'a *Hudud* (Islamic punishments) as divinely ordained by Allah ...'¹¹⁷ Muslim followers argue that Shari'a embodies the will of Allah and is thus 'eternally valid, immutable and not susceptible to review by human agency'. This argument implies a rejection of the supremacy of the Constitution and acceptance of the notion that all laws, including the Constitution, must be written in accordance with Shari'a.¹¹⁸

These factors not only impede the implementation of human rights instruments and national law, but also make it very difficult for educators to promote human rights in schools and classrooms.

4 Conclusion

Although the Nigerian government has created a human rights framework which creates the perfect canvas for a positive discipline approach, it seems that this canvas is spoilt by factors hampering the implementation and recognition of children's rights in practice. Even in instances where international and regional human rights instruments have been domesticated, the government seems to be unable to enforce federal law. Factors hampering the implementation of children's rights include the misinterpretation of the Constitution on the legislative powers of the federal legislature with regard to the domestication of treaties, a conflict between customary law and statutory law, the rejection of the supremacy of the Constitution by some religious groups, the rejection of human rights instruments on the grounds of irrelevance and their Western origin, and the traditional view of children as lesser beings which affects the autonomy of children as independent beings.

¹¹⁶ I Shuaibu 'Nigeria: Child Rights Act's anti-north, says Kano speaker' 10 February 2008 *This Day* <http://allafrica.com/stories/200802111065.html> (accessed 15 March 2010).

¹¹⁷ Iwobi (n 115 above) 140.

¹¹⁸ Iwobi (n 115 above) 127. See H Bielefeldt 'Muslim voices in the human rights debate' in Heyns & Stefiszyn (n 99 above) 133-136 for a different view.

The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?

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Summary

This article reviews the Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009 to determine whether it is a suitable response to the numerous problems arising in the course of two decades of the enforcement of fundamental human rights in Nigeria. Such problems include the highly technical and formally procedural nature of the Fundamental Human Rights (Enforcement Procedure) Rules 1979; the requirement of standing to sue; and the distinction between principal and accessory claims. Through a review of the procedural changes made by the 2009 Rules and the overriding objectives in the application of the 2009 Rules the article demonstrates that the 2009 Rules may be regarded as a suitable response if the Nigerian judiciary recognises that utmost flexibility must be the fundamental ordering principle of human rights enforcement.

1 Introduction

The article reviews the Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009 to determine whether they are a fitting response to the problems that have arisen in the course of two decades of the

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enforcement of fundamental human rights in Nigeria. It is demonstrated that the new rules can be a fitting response if the Nigerian judiciary recognises that they must exercise flexibility in the enforcement of human rights.

In the wake of the 1966 military *coup* in Nigeria, the 1963 Constitution of the Federal Republic of Nigeria was suspended, including chapter two on the protection of human rights. Until the return to civil democratic rule in 1979, the protection of human rights was largely ineffective. A contributory factor to this ineffectiveness is the absence of procedural rules as required by section 32 of the 1963 Constitution which empowered the federal legislature to make provision with respect to the practice and procedure of the High Courts to entertain complaints of an infraction of the human rights. Since no rules were made by the federal or regional parliaments, fundamental rights litigation proceeded in a number of ways. In *Aoko v Fagbemi*,¹ it was by way of the application under section 30(1) of the 1960 Constitution of the Federal Republic of Nigeria;² in *Whyte v Commissioner of Police*,³ an action for the protection of the right to a fair hearing commenced by way of an originating motion; in *Akande v Araoye*,⁴ it was by a writ of summons; and in *Akunnia v Attorney-General Anambra State*,⁵ the action was commenced by notice of motion.

After the 1979 Constitution of the Federal Republic of Nigeria came into force on 1 October 1979, the then Chief Justice of Nigeria, A Fatai-Williams, operationalised section 42(3) which empowered the Chief Justice of Nigeria to make rules for the practice and procedure of a High Court towards the exercise of the original jurisdiction vested in the High Court to hear and determine any application for redress made to it by any person who alleges that any of the provisions of chapter three of the Constitution have been, are being or are likely to be contravened in any state. The Fundamental Human Rights (Enforcement Procedure) Rules 1979, made pursuant to section 42(3), came into effect on 1 January 1980. Almost two decades to the day, the Fundamental Rights (Enforcement) Procedure Rules 2009 were made and designated to commence on 1 December 2009.

2 The 1979 Rules

The 1979 Rules were intended to facilitate a speedier and less cumbersome resolution of complaints of human rights abuse because it was felt Nigerian courts were steeped in formalism and technicalities.

¹ (1961) 1 All NLR 400.

² Similar to sec 32 of the 1963 Constitution.

³ (1966) NMLR 215.

⁴ (1968) NMLR 283.

⁵ (1977) 5 SC 161.

Emerging from a military regime, it was also the case that Nigerian courts were not well versed in the enforcement of human rights. Two decades later, the evidence shows clearly that the judicial interpretation of the 1979 Rules has turned it into a highly technical and formal procedural instrument. In addition, new threshold principles, especially the requirement of standing to sue and the distinction between principal and accessory claims, emerged in Nigerian human rights jurisprudence and shut out a significant volume of human rights litigation.

The question of whether the 1979 Rules are mandatory or flexible for the enforcement of human rights is at the core of the technical and formal nature of the Rules. The requirement that the 1979 Rules should be followed strictly because they are mandatory results in a finding that non-compliance causes the proceedings to be void. If, on the other hand, the 1979 Rules are regarded as flexible because they are part of the numerous ways in which human rights protection is to be sought, non-compliance would lead to either a condonable irregularity or just an inconsequential fact. A review of the cases shows that, on the one hand, a number of decisions have held that the 1979 Rules are not the only procedure for the enforcement of human rights. For example, in *Ladejobi v Attorney-General of the Federation*,⁶ the High Court of Lagos dealt extensively with the proper procedure to be adopted in the enforcement of fundamental rights of a Nigerian citizen and held that a citizen can proceed by any procedure, including an originating summons, a general originating summons, a declaration of right by originating summons, a writ of *habeas corpus*, an application for an order of *certiorari*, mandamus or prohibition for the purpose of enforcing his fundamental human right.⁷ In *Obikwelu v Speaker, House of Assembly*,⁸ Araka CJ confirmed the view above and stated the advantages of proceeding under the Rules as the attainment of a speedier relief against a breach of fundamental human rights. When the Supreme Court in *Ogugu v State (Ogugu case)*⁹ held that 'the provision of section 42 of the Constitution for the enforcement of fundamental human rights enshrined in chapter IV of the Constitution is only permissive and does not constitute a monopoly for the enforcement of those rights',¹⁰ it was possible to argue that the controversy as to whether the 1979 Rules are to be followed strictly was over. Relying on this decision, the Supreme Court of Nigeria in *Abacha v Fawehinmi*¹¹ held that an aggrieved person could enforce his rights under the African Charter on Human and Peoples' Rights (African Charter) by way of an action commenced by a writ or by any permissible procedure such as the Fundamental Rights

⁶ (1982) 3 NCLR 563. The applicant came by way of judicial review.

⁷ See also *Nwigwe v Onaguluchi* (1985) 6 NCLR 480.

⁸ (1984) 5 NCLR 757. See also *Adedoyin v Governor of Ondo State* (1983) 4 NCLR 786.

⁹ (1994) 9 NWLR (Pt 366) 1.

¹⁰ *Ogugu case* (n 9 above) 26.

¹¹ (2000) 6 NWLR (Pt 660) 228.

(Enforcement Procedure) Rules 1979. Closely allied to the question of proper procedure for the enforcement of human rights was the issue of the deficiencies in the 1979 Rules. In *Ladejobi*, the High Court of Lagos State held that if the Rules are deficient because they are silent on some issues or they do not go far enough, the rules of the appropriate court would apply instead. Along this line of interpretation, in *Bonnie v Gold*,¹² the Court of Appeal identified the fact that the 1979 Rules were deficient in the procedure to be followed in committal proceedings for contempt and held that the proper thing to do was to resort to the High Court (Civil Procedure) Rules.

Even before the decision of the Supreme Court in 1994 in *Ogugu*, a number of decisions were handed down that the 1979 Rules must be followed strictly in the enforcement of human rights. For example, in *Din v Attorney-General of the Federation (Din case)*,¹³ Nnaemeka Agu JSC said: '[T]he Fundamental Right (Enforcement Procedure) Rules 1979 have prescribed the correct and only procedure for the enforcement of fundamental rights which arise under chapter IV of that Constitution.'¹⁴

After *Ogugu*, several cases – *Udene v Ugwu (Ugwu case)*;¹⁵ *Chukwuogor v Chukwuogor (Chukwuogor case)*;¹⁶ *NUT v COSST*;¹⁷ and *Dongtoe v CSC Plateau State*¹⁸ – have held that the 1979 Rules are the only procedure for the enforcement of fundamental human rights.

In the interpretation of the components of the 1979 Rules the requirement of strict compliance is also evident. The first example is the requirement of leave which is *ex parte*. The 1979 Rules require an applicant¹⁹ who intends to enforce a fundamental human right to seek leave of the High Court to do this.²⁰ In *Ugwu*,²¹ the Court of Appeal held that the requirement for leave is mandatory and cannot be regarded as a mere irregularity. The application is made *ex parte* and must be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by an affidavit verifying the facts relied on. Unfortunately, the grant of leave on the determination of a *prima facie*

¹² (1996) 8 NWLR (Pt 465) 234.

¹³ (1986) 1 NWLR (Pt 17) 471.

¹⁴ *Din case* (n 13 above) 478.

¹⁵ (1997) 3 NWLR (Pt 491) 57.

¹⁶ (2006) 7 NWLR (Pt 979) 302.

¹⁷ (2006) 5 NWLR (Pt 974) 590.

¹⁸ (2001) 9 NWLR (Pt 717) 132.

¹⁹ In *Onyekwuljue v Benue State Government* (2005) 8 NWLR (Pt 928) 614, the Court of Appeal held that the fundamental rights in ch IV of the 1999 Constitution may apply to artificial persons such as companies because companies must act through the instrumentality of human persons.

²⁰ See Order 1 Rule 2(1) of the 1979 Rules.

²¹ *Ugwu case* (n 15 above).

case was at the discretion of the trial court and often this discretion was exercised wrongly, thereby shutting out credible complaints. For example, in *Ushae v COP*,²² a High Court refused applicants detained by the Nigerian police without being charged on allegations of armed robbery for over four months leave to apply for the enforcement of a fundamental human right.²³ Secondly, sections of the 1979 Rules that stipulate time limits for carrying out specific steps in the procedure were strictly enforced. A good example is the requirement that the motion on notice or summons for an order of the court to protect fundamental human rights must be entered for hearing within 14 days after such leave has been granted. In *Ogwuche v Mba*,²⁴ *Ezeadukwa v Maduaka*,²⁵ *Umoh v Nkan*,²⁶ *Chukwuogor*²⁷ and *EFCC v Ekeocha*,²⁸ this requirement was held to be mandatory and non-compliance rendered the subsequent proceedings void. It is of course regrettable that these decisions ignored *Ogugu*. It can be said that the fault is largely that of the Supreme Court because after *Ogugu*, the Court created a threshold principle distinguishing between principal and accessory claims. This distinction was first articulated in *Tukur v Government of Taraba State*²⁹ and followed in a long line of cases – *Borno Radio Television Corporation v Egbonu*,³⁰ *Sea Trucks Ltd v Anigboro*,³¹ *Dongtoe v CSC Plateau State*,³² *Abdulhamid v Akar*³³ and *Agwuocha v Zubeiru*³⁴ – that Nigerian courts will not entertain an action for the enforcement of a fundamental human right contained in the 1979 Rules unless it is the principal claim. In other words, if the action for the enforcement of a fundamental human right is an accessory or subsidiary claim, the action must be started by a writ of summons.³⁵ For example, claims that there was a breach of the right to a fair hearing in the withholding and cancellation of examination results were regarded as a subsidiary claim³⁶ and they could not be commenced under the 1979 Rules. Conversely, the Court

²² (2005) 11 NWLR (Pt 937) 499.

²³ The Court did not apply its mind to the provisions of sec 35(4) of the 1999 Constitution which set time limits for an arrested person suspected of committing a crime.

²⁴ (1994) 4 NWLR (Pt 336) 75.

²⁵ (1997) 8 NWLR (Pt 518) 635.

²⁶ (2001) 3 NWLR (Pt 710) 512.

²⁷ n 16 above.

²⁸ (2008) 14 NWLR (Pt 1106) 161.

²⁹ (1997) 6 NWLR (Pt 510) 549.

³⁰ (1991) 2 NWLR (Pt 171) 81.

³¹ (2001) 2 NWLR (Pt 696) 159.

³² (2001) 9 NWLR (Pt 717) 13.

³³ (2006) All FWLR (Pt 321) 1191.

³⁴ (2002) FWLR (Pt 99) 1129.

³⁵ See ES Nwauche 'The dubious distinction between principal and accessory claims in Nigerian human rights jurisprudence' (2008) 52 *Journal of African Law* 66-88.

³⁶ See *West African Examinations Council v Adeyanju* (2008) 9 NWLR (Pt 1092) 270; *West African Examinations Council v Akinkumi* (2008) 9 NWLR (Pt 1091) 151.

maintained that a principal claim must be commenced under the 1979 Rules. The nature of this principle, like the principle of standing to sue, is fundamental and can be raised at any time including at the level of the Supreme Court. It was therefore difficult for the Supreme Court to continue to maintain that the 1979 Rules were flexible and a way of enforcing human rights. Rather than evaluate claims of abuse of human rights, Nigerian courts became obsessed with distinguishing between principal and accessory claims.

Another threshold principle that severely affected the enforcement of human rights was the requirement of standing to sue. Soon after the 1979 Rules were made, the Nigerian Supreme Court in *Adesanya v President of the Federal Republic of Nigeria*³⁷ recognised the requirement of personal standing as fundamental for any action, including complaints against human rights abuse, on the strength of section 6(6) (b) of the 1979 Constitution.³⁸ The Supreme Court held that standing would 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. With respect to human rights litigation, the Court stated that the relevant person for determining standing was set out by section 42(1) of the 1979 Constitution to be the person whose fundamental human rights are in issue. Following this interpretation, section 46(1) of the 1999 Constitution, which is similar to section 42(1), would accord standing only to the person whose fundamental human rights are at issue. This interpretation was to the detriment of public interest litigation. Numerous attempts were made to ameliorate the harshness of the principle of standing to sue³⁹ and it was not until the case of *Owodunni v Registered Trustees of Celestial Church*⁴⁰ that change became inevitable. In that case, the Supreme Court adopted the opinion of Ayoola JSC in *NNPC v Fawehinmi*,⁴¹ that the majority of the Supreme Court in *Adesanya* did not decide that section 6(6)(b) laid down a requirement of standing.⁴² Recently, in *Fawehinmi v Federal Republic of Nigeria (Fawehinmi case)*,⁴³ the Court of

³⁷ (1981) 1 All NLR 1.

³⁸ Sec 6(6)b of the 1979 Constitution provides that the judicial powers vested by the Constitution on different courts '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'. An identical provision is also present in the 1999 Constitution.

³⁹ In *Fawehinmi v Akilu* (1987) 4 NWLR (Pt 67) 797, the Supreme Court recognised the right of all Nigerians to engage in the private prosecution of criminal cases.

⁴⁰ (2000) 6 SC 60.

⁴¹ (1998) 7 NWLR (Pt 559) 598.

⁴² See T Ogowewo 'Wrecking the law: How article III of the Constitution of the United States led to the discovery of the law of standing to sue in Nigeria' (2000) 26 *Brooklyn Journal of International Law* 527; T Ogowewo 'The problem with standing to sue in Nigeria' (1995) 39 *Journal of African Law* 1.

⁴³ (2008) 23 WRN 65.

Appeal decided that the requirement of *locus standi* was 'unnecessary in constitutional issues as it will merely impede judicial functions'⁴⁴ and that every Nigerian should have access to seek an interpretation of the Constitution. The Court of Appeal recognised the limited impact of its judgment because it suggested future constitutional amendments to 'provide access to court by any Nigerian in order to preserve protect and defend the Constitution'.⁴⁵ It is true that the standing requirement was not part of the 1979 Rules and developed outside, but its effect was draconian as Nigerian courts regarded the principle as fundamental as the requirement of jurisdiction. Accordingly, it could be raised at any time, including at the Supreme Court. Thus, in some cases the question of standing was successfully raised at the Supreme Court many years after the matter had started, often to the disadvantage of the party complaining of a breach of human rights. A natural consequence of a restrictive meaning of standing was that public interest litigation was almost non-existent.

These two threshold principles have laid ambush for many a human rights case, effectively denying access to genuine complaints of human rights abuse. The crucial point is that they were developed outside the framework of the 1979 Constitution. While the principle of standing is based on an interpretation of section 6(6)(b) of the 1979 Constitution, the distinction between principal and accessory claims is a creation of the Nigerian judiciary. It would be wrong to blame the problems with the enforcement of human rights on the two threshold principles because a number of other challenges remain. For example, challenges such as the widespread poverty and illiteracy of Nigerians; the high cost of litigation; the relationship between the African Charter and the Bill of Rights in the Nigerian Constitutions; the relationship between the Economic Community of West African States (ECOWAS) Court of Justice and the Nigerian judiciary as well as the scope and nature of human rights, especially the status of socio economic rights and the enforcement of human rights against private individuals, continue to hamper the enforcement of human rights in Nigeria. To address the issues discussed above, constitutional or legislative reform was necessary. To deal with these issues by means of the 2009 Rules is nothing less than a leap of faith. Perhaps the Chief Justice of Nigeria (who made the 2009 Rules) was encouraged by the decision of the Court of Appeal in *Abia State University v Anyaibe*⁴⁶ to the effect that, since the 1979 Rules were made pursuant to section 42(3) of the 1979 Constitution, they form part of the Constitution and have the same force of law as

⁴⁴ *Fawehinmi* case (n 43 above) 114.

⁴⁵ *Fawehinmi* case (n 43 above) 124.

⁴⁶ (1996) 3 NWLR (Pt 439) 646.

the Constitution.⁴⁷ Whether the intent of the 2009 Rules will materialise will be shown in time.

3 2009 Rules

The 2009 Rules bring a number of procedural and substantive changes to the procedure for the enforcement of human rights in Nigeria. The 2009 Rules abrogate the 1979 Rules but retain the forms in its appendices which may be adopted, adapted and modified as the circumstances indicate.

3.1 The procedural changes made by the 2009 Rules

In general, it may be said that the fundamental procedural change brought about by the 2009 Rules is the move away from the emphasis on procedural requirements in the enforcement of human rights. The general rule is based on Order 9(1) of the 2009 Rules which provides that where at any stage in the course of or in connection with any proceedings there has, by any reason of anything done or left undone, been a failure to comply with the requirement as to time, place or manner or form, the failure shall be treated as an irregularity and may not nullify such proceedings except as they relate to the mode of commencement of the application, whether the subject matter is within chapter four of the 1999 Constitution or the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. While this appears to deal with the significant interpretation of strict compliance with the 1979 Rules, it may have been equally important to expressly declare the 2009 Rules as only one of the means by which a human rights action may be commenced in the Nigerian courts.

The objective of achieving a speedier disposal of complaints of human rights infractions is based on a number of procedures. First, Order II Rule 2 provides that there is no longer a requirement for leave from the court to institute an action. However, the jurisdiction of the court may be challenged by way of a preliminary objection as provided for by Order VIII which will require the court to determine the question of jurisdiction which was the aim of the requirement of leave of the court under the 1979 Rules. The respondent's notice of preliminary objection must be filed with the counter-affidavit to the main application and must be heard on the same day as the main application.

⁴⁷ See also *Zakari v Inspector-General of Police* (2000) 8 NWLR (Pt 670) 666. One of the effects of the constitutional nature of the 1979 Rules was tested by the promulgation of the 1999 Constitution which came into effect on 1 October 1999. It was open to interpretation that the 1979 Rules were repealed by the new Constitution. In *Ugwumadu v UNN* (2001) 3 WRN 181 and *Ibrahim v Industrial Training Fund* (2001) 10 LHCR 80, it was held that the 1979 Rules are existing law saved by sec 315 of the 1999 Constitution.

The manner in which the preliminary objection is to be heard is intended to ensure that it does not become a source of delay in the proceedings.

Secondly, human rights actions may be initiated in a specific way. Thus, Order II Rule 2 provides that an application for the enforcement of a fundamental right may be commenced by any originating process accepted by the court. Every application must be accompanied by a written address which must be a succinct argument in support of the grounds of the application.⁴⁸ It is hoped, as argued above, that the cast of Order II is interpreted to mean that a human rights action may be commenced by any procedure. In this regard, Order XV Rule 4 of the 2009 Rules provides that, where in the course of any human rights proceedings a situation arises for which there is or appears to be no adequate provision in the Rules, the civil procedure rules of the court shall apply. It is therefore interesting to note that a failure to comply with the rules regarding the initiation of an action is not regarded by Order IX of the 2009 Rules as an irregularity. This would suggest that a failure to comply with the requirements of Order II is fatal to the action.

Thirdly, Order IV regulates the general conduct of proceedings after the action is filed in a manner intended to facilitate a quick resolution of the application. Rule 1 of Order IV requires that the application must be fixed for hearing within seven days from the day the application was filed. Where the court is satisfied that exceptional hardship may be caused to an applicant before the service of the application, especially when the life or liberty of the applicant is involved, it may hear the applicant *ex parte* upon such interim relief as the application may demand.⁴⁹

Fourthly, in order to facilitate a speedier hearing of the application, Order XII Rule 1 of the 2009 Rules requires that the hearing must be conducted on parties' written addresses. Rule 2 of the same order provides that oral argument of not more than 20 minutes must be allowed from each party by the court on matters not contained in their written addresses, provided such matters came to the knowledge of the party after he had filed his written address. In order to ensure that the non-attendance of counsel does not delay proceedings, Rule 3 of Order XII provides that when all the parties' written addresses have been filed and come up for adoption and either of the parties is absent, the court must, either on its own motion or upon oral application by the counsel for the party present, order that the addresses be deemed adopted if the court is satisfied that all the parties had notice of the date for adoption. A party shall be deemed to have notice of the date for adoption if, on the previous date last given, the party or his counsel was present in court.

⁴⁸ Order II rule 5.

⁴⁹ Order IV rule 3.

Fifthly, Appendix A to the 2009 Rules fixes the fees to be paid to institute an action, and it is gratifying to note that an application may be successfully prosecuted with the payment of court fees of less than US \$10.⁵⁰ This is important when considering that the average filing fees are about US \$300.

At the hearing of an application, Order XI empowers the court to make such orders, issue such writs, and give such directions as it may consider just or appropriate for the purpose of enforcing or securing the enforcement of any of the fundamental rights provided for in the 1999 Constitution or the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act to which the applicant may be entitled. This is also the tenor of section 46(2) of the 1999 Constitution.

3.2 Overriding objectives in the application of the 2009 Rules – Substantive changes made by the 2009 Rules

The Preamble to the 2009 Rules sets out the overriding objectives of the Rules. It would appear that these are the standards to guide Nigerian courts in the enforcement of human rights. We shall now turn to a more detailed examination of the ramifications of the overriding objectives.

3.2.1 The scope of human rights: Expansive and purposeful interpretation of chapter IV of the 1999 Constitution and the African Charter

Preamble 3(a) of the 2009 Rules enjoins Nigerian courts to expansively and purposely interpret and apply the 1999 Constitution, especially chapter IV, as well as the African Charter, with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them. It is to be remembered that because of section 6(6)(c) of the 1999 Constitution, only the civil and political rights contained in chapter IV of the same Constitution can be enforced in a court of law.⁵¹ This is because section 6(6)(c) declares that the judicial power in Nigeria

shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

The content of the said chapter II represents in some cases some socio-economic and cultural rights. The fundamental issue in this area has been how to reconcile the provisions of the African Charter, which

⁵⁰ An exchange rate of US \$1 to 150 Nigerian Naira is the basis of calculation.

⁵¹ See the cases of *Okogie v Attorney-General of Lagos State* (1981) 2 NCLR 350; *Oronto Douglas v Shell Petroleum Development Company Limited* (1999) 2 NWLR (Pt 591) 466.

protects the socio-economic rights, and the fact that the 1999 Constitution only allows the protection of civil and political rights. Evidence from decided cases in Nigeria supports the following conclusions. First, the tenor of *Abacha v Fawehinmi*⁵² and *Ogugu v State*⁵³ state that the 1999 Constitution is superior to the African Charter. Accordingly, only those rights in chapter IV of the 1999 Constitution which are also in the African Charter are justiciable in Nigeria. Secondly, a number of cases have held that the African Charter is superior to municipal legislation.⁵⁴ In this regard, it appears that the appropriate rights in this regard are limited to the concurrent rights in the African Charter and chapter IV of the 1999 Constitution. It can therefore be stated that Preamble 3(a) is an affirmation of the fact that the African Charter applies in Nigeria. However, the question as to whether socio-economic and cultural rights are justiciable in Nigeria is not clearly dealt with. An expansive and liberal interpretation, on the other hand, should recognise that these rights are enforceable in Nigeria. The latter interpretation is fundamental for the long term developmental interest of Nigeria and it is hoped that Nigerian courts will readily overcome the conceptual obstacle that only chapter IV of the 1999 Constitution is enforceable in Nigeria. Along this line, the recent ruling of the ECOWAS Community Court of Justice in *Socio-Economic Rights Project v Federal Republic of Nigeria*⁵⁵ that Nigerians have a right to education, as provided for by sections 17 and 18 of the 1999 Constitution and well as by article 17(1) of the African Charter, is welcome as part of the new jurisprudence that regards chapters II and IV of the 1999 Constitution as well as the African Charter as enforceable in Nigerian courts.

3.2.2 Respect for regional and international bills of rights

Preamble 3(b) provides that courts shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the court is aware, including human rights instruments in the African regional human rights system as well as the United Nations (UN) human rights system. It is well to remember that Nigeria is a dualist country and the 1999 Constitution requires treaties to be domesticated before they can have effect in Nigeria. Of all the international human rights treaties, only a few have been domesticated, which include first the African Charter⁵⁶ and secondly the domestication of the UN Convention on the Rights of the Child, 1989,⁵⁷ as well as the

⁵² (2000) 6 NWLR (Pt 660) 228.

⁵³ *Ogugu case* (n 9 above).

⁵⁴ See eg *UAC (NIG) Ltd v Global Transport SA* (1996) 5 NWLR (Pt 448) 291.

⁵⁵ ECW/CCJ/APP/08/08 (ruling delivered 27 October 2009).

⁵⁶ See the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

⁵⁷ Nigeria ratified this Convention in 1991.

African Union Charter on the Rights and Welfare of the Child, 1990,⁵⁸ at federal⁵⁹ and state⁶⁰ levels. Thus, to ask Nigerian courts to respect other international human rights instruments is to require them to consider them of persuasive and not binding authority. This is a practice that Nigerian courts, conversant with the principle of judicial precedent, are already aware of and often resort to. Preamble 3(b) can therefore be regarded as designed to encourage Nigerian courts to accord a greater role to international instruments in the enforcement of human rights.

3.2.3 Public interest litigation and standing to sue

Preamble 3(d) requires a Nigerian court to proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated and the unrepresented. Related to this is the requirement in Preamble 3(e) that a court shall encourage and welcome public interest litigation in the human rights field and no human rights case may be dismissed or struck out for want of standing to sue. In particular, human rights activists, advocates or groups as well as any non-governmental organisation may institute a human rights application on behalf of any potential applicant. Because of the 2009 Rules, the applicant in human rights litigation may include any of the following: anyone acting in his own interest; anyone acting on behalf of another person; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest, and associations acting in the interest of its members or other individuals or groups. The standing rules set out above represent a departure from the position under the 1979 Rules of which enough evidence exists to suggest that the standing principle set out in *Adesanya* was no longer good law. The 2009 Rules therefore capture the correct mode in the country and this may be one of its provisions that will be eagerly and happily embraced.

To sum up this part, attention is drawn to the question whether it is possible for procedural rules to overturn decisions of Nigerian courts, including the Nigerian Supreme Court. As noted above, the two threshold principles discussed above emanate from the Supreme Court and it can be argued that since the 2009 Rules are considered to be of ‘constitutional flavour’ and have been made by the Chief Justice

⁵⁸ Nigeria ratified this Convention in 2000.

⁵⁹ In 2003, the Child Rights Act was promulgated into law.

⁶⁰ The Child Rights Act has been promulgated into a Child Rights Law in at least 24 of the 36 states of Nigeria: Abia, Anambra, Akwa Ibom, Bayelsa, Benue, Cross River, Delta, Ebonyi, Edo, Ekiti, Imo, Jigawa, Kwara, Kogi, Lagos, Nassarawa, Ogun, Ondo, Oshun, Oyo, Plateau, Rivers, Niger and Taraba states. The reason for this legislative procedure is that ‘children’ are under the Residual Legislative List of the Constitution of the Federal Republic of Nigeria 1999 and therefore within the competence of state governments. Many of the Child Rights Laws are similar or identical to the Child Rights Act.

of Nigeria, the threshold principles as well as other appropriate principles of law stultifying human rights litigation have been overruled. On the other hand, it is easy to see how ambitious the 2009 Rules are and that, while they may be commendable, it may need the Supreme Court to expressly affirm the overriding objectives so that the precedential weight of Supreme Court judgments would erase whatever doubts exist of the impact of the 2009 Rules. The Nigerian Supreme Court would do well to comprehensively overturn *Adesanya*⁶¹ and the distinction between principal and accessory claims. Furthermore, it is sad to note that a change in the standing rules is not part of the ongoing amendment of the 1999 Constitution.

4 Concluding remarks

If the record of the Nigerian judiciary in the interpretation of the 1979 Rules is anything to go by, the success of the 2009 Rules lies in their realisation that utmost flexibility must be the fundamental ordering of human rights enforcement. Two decades of human rights enforcement has shown the resilience in Nigerian courts of form over substance characteristic of common law courts. It is fervently hoped that the 2009 Rules heralds a new beginning.

⁶¹ The Court could borrow a leaf from the Ghanaian Supreme Court in *New Patriotic Party v Attorney-General (Ciba case)* (1996-1997) SCGLR 729, where the Court in a majority judgment held that all persons – natural and artificial – have the standing to seek an enforcement of the Constitution in accordance with art 2(1) of the 1992 Ghana Constitution; the Malawian High Court in *PAC v Attorney-General Civil Cause 1861 of 2003* and the Gambian Supreme Court in *Jammeh v Attorney-General* (1997-2001) GR 839.

Customary law and the promotion of gender equality: An appraisal of the *Shilubana* decision

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Summary

This case note examines the South African Constitutional Court's recent decision overturning the customary law rule of male primogeniture in a dispute as to whether a woman could succeed her late father as a tribal chief. The Court overruled the hitherto central doctrine of male primogeniture by upholding a woman's right to equality to become the first female chief to inherit a chieftaincy position since the advent of South Africa's new constitutional dispensation in 1994. The article welcomes the decision as it empowers appropriate traditional authorities to effect incremental developments which are necessary to keep customary law in line with the dynamic and evolving fabric of the South African constitutional state.

1 Introduction

Until the South African Constitutional Court's landmark decision in *Shilubana*,¹ the concept of male primogeniture had been utilised by courts as the overarching defining rule in resolving customary law disputes of intestate succession in South Africa. With the entrenchment of the Bill of Rights in the 1996 Constitution, however, the constitutional validity of male primogeniture persistently has been called

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¹ *Shilubana & Others v Nwamitwa* [2008] ZACC 9. The judgment might serve as a useful precedent in a potential litigation by a woman who aspires to become the tribal chief of the Baphiring near Rustenberg in North West Province (see *The Citizen* 1 July 2009 5).

into question in a number of cases that have come before the courts. Male primogeniture has often been challenged because, arguably, it discriminates unfairly on the grounds of age, birth and, most conspicuously, gender.

Thus far, aspects of gender discrimination which have received judicial attention have largely been confined to the intestate succession of a deceased's estate devolving according to the law of persons or family law. Little attention, either judicial or academic, has been given to the issue of sex discrimination as played out by the customary (constitutional) law rule of patrilineal succession in terms of which women may not ordinarily hold political office in the large majority of traditional African communities in the country.

The purpose of this paper is to examine critically the way in which the courts have attempted to harmonise male primogeniture with gender equality, especially in chieftaincy succession disputes. To this end, I seek to appraise recent judicial decisions in order to provoke critical dialogue over the recent Constitutional Court judgment upholding gender equality in chieftaincy succession and outlawing male primogeniture.

Following the first judicial decision in the *Shilubana* case by the Gauteng North High Court, the Supreme Court of Appeal and the Constitutional Court have taken turns to express their views on the subject. The Supreme Court of Appeal largely affirmed the High Court's judgment. However, the Constitutional Court overturned the decisions of these two courts. In view of the Supreme Court of Appeal concurring with the High Court's judgment, the paper considers the High Court's decision as providing an approach that is representative of the two courts, while the Constitutional Court judgment is treated as a conflicting approach to the subject.

2 The High Court decision

In *Nwamitwa v Phillia*,² the High Court was invited to determine whether a woman could succeed her late father, a chief, to become a tribal chief. The first respondent and the applicant in this case respectively are female and male members of the royal family of the 70 000-member Valoyi community that constitutes part of the Tsonga/Shangaan nation of present-day Limpopo in South Africa. The two

² *Nwamitwa v Phillia* 2005 3 SA 536 (T), judgment by Swart J presiding over the Gauteng North High Court (formerly the Pretoria High Court). On 1 December 2006, the Supreme Court of Appeal unanimously dismissed an appeal against the High Court judgment in this case. For more elaborate commentary on this first case, see O Mireku 'Balancing male primogeniture, gender equality and chieftaincy succession: *Nwamitwa v Philia and Others*' (2007) 21 *Speculum Juris* 266-275. The Supreme Court of Appeal judgment, which largely upheld the reasoning of the High Court, is reported as *Shilubana & Others v Nwamitwa* 2007 2 SA 432 (SCA).

parties are cousins, their fathers having been brothers. For over five generations, the appointment and succession to chieftaincy within the Valoyi community have been strictly patriarchal, as determined by the organising principle of male primogeniture which allows succession from father to firstborn son only. The immediate events culminating in this dispute originated in 1948 when *Hosi* (Chief) Fofeza Nwamitwa was enthroned as chief. He reigned for two decades until 1968 when he died without a male heir. *Hosi* Fofeza was the father of the first respondent.

The first respondent was the only child born of *Hosi* Fofeza's first wife, but it was inconceivable at that time that a woman could become chief. In view of this, when *Hosi* Fofeza died in 1968, his younger brother, Richard, was appointed chief. The applicant is *Hosi* Richard's first-born son from his first wife. It was upon the death of in 2001 *Hosi* Richard, after South Africa's transition to a system of constitutional democracy in 1994, which celebrates gender equality, that the issue arose as to whether the applicant or the first respondent should succeed as chief.

Based on various resolutions adopted by the Valoyi tribal authorities, including the royal family, the provincial government of Limpopo in 2002 appointed the first respondent as chief in 'accordance with the practices and customs of the Valoyi tribe within the meaning of the Constitution of the Republic of South Africa Act 108 of 1996'.³

This appointment did not sit well with *Hosi* Richard's first-born son, Sidwell Nwamitwa, the applicant in this case. According to the applicant, the tribal authorities had no right to alter the primogeniture rule. The High Court ruled in his favour, reasoning that a female successor could not become chief in terms of the customs and traditions of the community.⁴ In other words, as far as the Valoyi people were concerned, there was neither precedent nor evidence of a female having been appointed chief, even if she was the first-born.⁵ Swart J pointed out that:⁶

A most important consideration in the Tsonga/Shangaan and Valoyi custom is that a chief of the tribe must be fathered by a chief. This has always been the practice. If a female is appointed as chief and also marries, her children would not have been fathered by a Valoyi chief, would bear a different name and would not be members of the royal family. This would lead to confusion and uncertainty in the successionship [*sic*].

Swart J attempted to provide justification for the conservative approach adopted by the court for its failure to develop the primogeniture rule. The learned judge was unfortunately carried away by the potential consequences of a married woman becoming chief while she and her children bear the surname of their husband and father who is not from

³ *Nwamitwa* case (n 2 above) 546D.

⁴ *Nwamitwa* case (n 2 above) 539I-J.

⁵ *Nwamitwa* case (n 2 above) 5450E-F.

⁶ *Nwamitwa* case (n 2 above) 545G-H.

the Nwamitwa royal family. As events later showed, this fear was totally misplaced as Mrs Shilubana, on being appointed senior traditional leader, dropped her marital name and assumed the official name of *Hosi TLP Nwamitwa II*.

3 Critique

The *Nwamitwa* decision may be criticised for its failure or refusal to develop the primogeniture rule, so as to promote the spirit, purport and objects of the South African Bill of Rights. Moreover, the decision flies in the face of the transformative agenda of the Traditional Leadership and Governance Framework Act⁷ in two important ways. In the first place, the Preamble of the Act unambiguously stipulates that the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that 'gender equality within the institution of traditional leadership may progressively be advanced'. The High Court decision failed to recognise the statutory obligation imposed on traditional communities to transform and adapt their customary law and customs so as to comply with the Bill of Rights, in particular by 'seeking to progressively advance gender representation in the succession to traditional leadership positions'.⁸

In this respect, the High Court decision impoverished the emerging gender equality jurisprudence and retards the progressive judicial development of customary law, which ought to keep pace with human rights norms. As Lehnert explains, this shortcoming may be due to a 'limited understanding of customary law concepts' among judges, which results in the rigid and mechanical 'application of the principle of male primogeniture without even considering the changed practices in the living [customary] law'.⁹ Himonga similarly criticises this kind of disingenuous judicial approach to customary law by charging that such an¹⁰

uncritical superficial approach of the courts to customary law ... has a serious bearing on the extent to which women living under customary law may

⁷ Act 41 of 2003. In terms of sec 22(1) of Act 41, the national government established the Nhlapo Commission on Traditional Leadership Disputes and Claims in 2004 that submitted its final report in July 2010. Although the Commission had a general mandate to investigate and resolve all claims and disputes relating to any traditional leadership, the focus of its final report was mainly on the rightful incumbents of various kingships. Therefore, the Nhlapo Commission did not investigate and report on the position of senior traditional leadership such as the *Shilubana* dispute is about.

⁸ Sec 2(3)(c) Traditional Leadership and Governance Framework Act 41 of 2003.

⁹ W Lehnert 'The role of the courts in the conflict between African customary law and human rights' (2005) 21 *South African Journal on Human Rights* 241 264 266.

¹⁰ C Himonga 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession' (2005) *Acta Juridica* 82 107.

enjoy human rights under the Constitution and the international human rights instruments that South Africa has ratified.

Male primogeniture, as applied in this case, embodies the blatant injustice arising from the obvious fact that if the applicant were male, she would have succeeded her father as chief of the Valoyi tribe in 1968. At that time, however, customary law classified women as minors and this was why her uncle, *Hosi* Richard, succeeded her late father, and ruled until his death in 2001.

It is submitted that the meaning and relevance of the primogeniture rule should not be ignored in a society where traditional values are continuously changing. If the primogeniture rule is always interpreted with reference to the archaic meaning accorded to it by our ancestors, then contemporary people, especially women, may lose faith in it, and may not respect it because male primogeniture seems to be unjust and unfairly discriminatory towards women. As a matter of fact, indigenous law is a dynamic system of law with values and norms which continue to change and evolve within the context of the Constitution. For this reason it is important for the rule to develop with the changing expectations of those who look to it as the embodiment of the values and aspirations of the customary law community and its citizens.

4 The Constitutional Court decision

These observations and criticisms were reflected in the Constitutional Court's judgment in the same matter, which rejected the conservative approach of the High Court and the Supreme Court of Appeal which in effect upheld the validity of the male primogeniture rule. Speaking for the Court, Van der Westhuizen J held that:¹¹

The conclusions of the High Court and Supreme Court of Appeal that the traditional authorities lacked the power to act as they did were incorrect. They erred in that their focus was too narrow ... They gave insufficient consideration to [the] historical and constitutional context of the decision, more particularly the right of traditional authorities to develop their customary law.

According to the Constitutional Court:¹²

Customary law is living law and will in future inevitably be interpreted, applied and, when necessary, amended or developed by the community itself or by the courts. This will be done in view of existing customs and traditions, previous circumstances and practical needs, and of course the demands of the Constitution as the supreme law.

Ntlama and Ndima have criticised the *Shilubana* judgment because the Court 'abdicated its responsibility to develop customary law, shifting

¹¹ *Shilubana* (n 1 above) para 85.

¹² *Shilubana* (n 1 above) para 81.

it instead to the traditional authority, a party to the case'.¹³ In their critique, Ntlama and Ndima accuse the Court of rejecting customary law principles and values at the expense of Western conceptions of human rights norms.¹⁴ In other words, the Court, by outlawing male primogeniture, disregarded a communal-oriented tenet of customary law in favour of a Western conception of gender equality which promotes individualism.¹⁵ With due respect, their argument seems unjustifiable especially if seen against the reasoning of the unanimous Constitutional Court, the provisions of the Constitution as reinforced by relevant statutory law, as well as pure logic.

Firstly, the Constitutional Court took judicial notice of a transformative initiative by traditional authorities which was later endorsed by the Limpopo provincial government. In the words of the Court:¹⁶

Customary law must be permitted to develop, and the enquiry must be rooted in the contemporary practice of the community in question. Section 211(2) of the Constitution requires this. The legal status of the customary law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail. Development implies some departure from past practice. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society. This result would be contrary to the Constitution and cannot be accepted.

Second, the Constitution in section 2 establishes its supremacy over all law, including customary law, and follows through in section 31(2) by providing that community rights may not be exercised in a manner which is inconsistent with any provision of the Bill of Rights. Besides, courts are enjoined to give effect to the primary responsibility imposed on any traditional community to:¹⁷

transform and adapt customary law and customs relevant to the application of [the Traditional Leadership and Governance Framework Act 41, 2003] so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by –

...

- (c) seeking to progressively advance gender representation in the succession to traditional leadership positions.

¹³ N Ntlama & DD Ndima 'The significance of South Africa's Traditional Courts Bill to the challenge of promoting African traditional justice systems' (2009) 4 *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* 6 15.

¹⁴ As above.

¹⁵ As above.

¹⁶ Shilubana (n 1 above) para 55.

¹⁷ n 9 above.

Lastly, the Ntlama-Ndima argument, based on the supposed imposition of a Western conception of atomistic individualism of human rights contrary to a communitarian emphasis of human rights, misses the point and renders their argument fallacious because of its irrelevant appeal to tradition. Indeed, the patriarchal regulation of intestate succession fulfilled a significant social function as male heirs were *expected* to assume critical social responsibilities by providing care and material support to widows and children left behind by the deceased. Moreover, as long as such traditional practices under patriarchy embody the distilled wisdom of forebears dating from time immemorial, they relieve us from the burden of having to re-invent modern solutions to the problems created by intestate succession.

However, there is also a negative side to male primogeniture and other aspects of patriarchy. Undoubtedly, powerful traditions may perpetuate injustices and preclude the adoption of better ways of doing things. Male primogeniture, for example, regards women as legal minors and unfairly deprives them of equal rights with men to inherit from their deceased fathers or husbands. The question then arises whether such injustices arising from unfair gender discrimination may be permitted to continue in a constitutional democracy where the Constitution expressly enjoins courts, traditional communities, individuals and organs of state to progressively promote and protect women's rights to equality.

Speaking on the role of the Constitutional Court in promoting gender equality, Moseneke poignantly points out:¹⁸

In the terrain of indigenous law, the court has on a good few occasions adapted its rules, tainted by patriarchy, in order to give effect to the gender equality and dignity dictates of the Constitution. Many steeped in the indigenous tradition would not consider the rule that adult male offspring are [exclusively] entitled to all inheritance and status within the family to be offensive. However, mere public clamour for retention of this patriarchal arrangement ought not to weigh heavier than the express dictates of the Constitution to obtain equal worth for all.

Violations of gender equality in a modern egalitarian South African society cannot be rationalised by appeals to an aspect of African traditional value systems based on patriarchal values. Instead, devising a new value system which, while being responsive to the imperatives of the constitutional value of human dignity, equality and freedom underlying South African society, reflects the best traditional thinking about human rights and other values, represents one of the most

¹⁸ D Moseneke 'The burden of history: The legacy of apartheid judiciary; the legitimacy of the present judiciary' public address delivered at the University of Cape Town Summer School, January 2010 <http://www.mg.co.za/moseneke> (accessed 25 March 2010).

profound challenges facing us today. Reilly captures this challenge when she states that:¹⁹

In an age of globalisation, it is imperative to find ways of negotiating the relationship between context and cultural particularity on the one side, and a cosmopolitan commitment to human rights on the other, without invoking crude dichotomies or untenable notions of cultural authenticity. In practice, the value and meaning of human rights ideals have always been and will continue to be the subject of contestation and reinterpretation, across different regions and cultural contexts.

It is submitted that the *Shilubana* decision is not only revolutionary but, more importantly, a quintessentially transformational judgment celebrating gender equality in chieftaincy succession disputes. *Shilubana* is also welcomed because it is consistent with the grand transformative agenda of the Constitution,²⁰ the equality jurisprudence progressively developed by the Constitutional Court since its inception²¹ as well as international law obligations in respect of women that South Africa has undertaken after its transition from apartheid in 1994.²²

Nonetheless, the optimism generated by the creativity of the Constitutional Court in *Shilubana* has to be tampered by circumspection. Since, as Albertyn writes, 'transformatory change' as exemplified in *Shilubana* is ordinarily 'incremental',²³ the 'struggle for gender equality' should not, in the words of Mokgoro, 'be confined to the court rooms. Litigation has its limitations as it tends to be the privilege of the economically empowered.'²⁴

In order to overcome the imperfections of the judiciary as the sole role player in driving social transformation and gender equality, Mokgoro argues for a vibrant civil society which may 'agitate for change and monitor implementation',²⁵ especially in traditional communities in the rural areas. Kok takes the issue even further by advocating the establishment of an 'inter-institutional dialogue' between civil society, on the one hand, as well as the executive, legislative and judicial branches of government on the other.²⁶

¹⁹ N Reilly *Women's human rights* (2009) 37.

²⁰ M O'Sullivan & C Murray 'Brooms sweeping oceans? Women's rights in South Africa's first decade of democracy' (2005) *Acta Juridica* 1-2.

²¹ Eg *Prinsloo v Van der Linde & Another* 1997 3 SA 1012 (CC); 1997 6 BCLR 759 (CC), *President of the Republic of South Africa & Another v Hugo* 1997 4 SA 1 (CC); 1997 BCLR 708 (CC); *Brink v Kitshoff* 1996 6 BCLR 752 (CC); 1996 4 SA 197 (CC).

²² Eg Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

²³ C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253 276.

²⁴ Y Mokgoro 'Constitutional claims for gender equality in South Africa: A judicial response' (2003) 67 *Albany Law Review* 565 573.

²⁵ As above.

²⁶ A Kok 'The promotion of equality and the Promotion of Unfair Discrimination Act of 2000: Court-driven or legislature-driven societal transformation?' (2008) 19 *Stellenbosch Law Review* 122 139.

5 Concluding remarks

Like the *Bhe*²⁷ decision, which rejected the male primogeniture rule in intestate succession in family law, *Shilubana* has again dealt a fatal and decisive blow at the gender-based discrimination. Where a traditional community is confronted with a chieftaincy succession dispute based on gender discrimination, the *Shilubana* judgment of the Constitutional Court serves as an authoritative and binding precedent if similar facts arise. In other words, *Shilubana* empowers appropriate traditional authorities to effect incremental developments which are necessary to keep customary law in line with the dynamic and evolving fabric of an egalitarian society as envisioned by the South African Constitution.

Undoubtedly, the *Shilubana* decision promotes gender equality by recognising the right of a woman to be appointed chief of a traditional community in the same way as the largest ethnic community of the BaLete in Botswana appointed *Kgosigadi* Mosadi Sebolo as the first female paramount chief and president of the national house of chiefs. Indeed, judicial recognition for the appointment of a female chief in any traditional community should be understood within the context of the tremendous socio-economic changes taking place, not only in South Africa, but across the African continent²⁸ and ways in which gender inequality is addressed at all levels of society.

²⁷ *Bhe & Others v Magistrate, Khayelitsha & Others* 2005 1 SA 580 (CC)

²⁸ Besides the Balobedu and Pandomisa ethnic communities in South Africa that have been famous for having female rulers, the African continent has isolated cases of female chiefs, such as among the Amarharbe, Nkoya and Barotse in Zambia, two paramount chiefs in Sierra Leone, the Deji in Nigeria as well as the Appraponso tribe in Ghana.

The treatment of homosexuality in the Malawian justice system: *R v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa*

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Summary

On 26 December 2009, two male Malawian nationals were arrested and charged with participating in a pre-nuptial engagement ceremony while of the same sex. This article is a trial observation by the author using the observational methodology of the United Nations Office of the High Commission for Human Rights. The article seeks to present an independent and impartial factual account of the trial of Steven Monjeza and Tiwonge Chimbalanga and to document the reaction to the trial by members of civil society. The aim is to examine the disjuncture between Malawian criminal law and the protection of human rights afforded by Malawi's Constitution, resulting in procedural and legal errors in the trial and the conviction of the two men.

1 Legal status of homosexual practices in Malawi

The trial was the first of its kind on record in the Malawian justice system. The practice of homosexual acts is, accordingly to the Penal Code,¹ illegal in Malawi:²

A person who has carnal knowledge of any person against the order of nature, or ... permits a male person to have carnal knowledge of him or her against the order of nature, shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.

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¹ Malawi Penal Code of 1930 (as amended) Cap 7:01 Laws of Malawi.

² Penal Code (n 1 above) sec 153.

Section 156 of the Penal Code further states that³

[a]ny male person, who, whether in public or private, commits any act of gross indecency with another male person, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment.

Despite the unclear definition, what is certain is that homosexual acts are criminalised by Malawian law. In contrast, the Malawian Constitution,⁴ as revised in January 2004, contains a number of pertinent clauses prohibiting discrimination and protecting human rights. Section 20 reads 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 ... or other status.

Although this provision does not specifically outlaw discrimination on the grounds of sexual orientation,⁵ it does prohibit discrimination as a general principle by including at the end of the defined list of protected grounds the wording 'other status'. Other relevant constitutional clauses include section 22, which sets out 'the right of all men and women to marry and that no person over the age of 18 shall be prevented from entering into marriage'.

Further, section 44(1)(g) of the Constitution provides that '[t]here shall be no derogation, restrictions or limitations with regard to ... (g) the right to equality and recognition before the law'. Section 19(1) provides that '[t]he dignity of all persons shall be inviolable' and section 19(5) states that '[n]o person shall be subjected to medical or scientific experimentation without his or her consent'.

In addition, section 21 of the Malawian Constitution also affords the citizens of Malawi the right of privacy – 'Every person shall have the right to personal privacy' – and section 18 guarantees that '[e]very person has the right to personal liberty'.

As for international law, the African Charter on Human and Peoples' Rights (African Charter) was ratified by Malawi on 17 November 1989. The African Charter provides in article 1:

Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the

³ Penal Code sec 156.

⁴ Constitution of the Republic of Malawi (adopted 18 May 1995).

⁵ South Africa is the only country on the continent to legislate against discrimination on the grounds of sexual orientation. In 1998, parliament passed the Employment Equity Act. The law protects South Africans from labour discrimination on the basis of sexual orientation, among other categories. In 2000, similar protections were extended to public accommodations and services, with the commencement of the Promotion of Equality and Prevention of Unfair Discrimination Act.

Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2 states:⁶

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

The African Commission on Human and Peoples' Rights (African Commission) has interpreted article 2 of the African Charter as ensuring 'equality of treatment for individuals irrespective of nationality, sex, race or ethnic origin, politics or other opinion, religion or belief ... or age or sexual orientation'.⁷ In addition, article 3 of the African Charter provides for 'every individual to be entitled to equal protection under the law'.⁸

Therefore, it can be seen that there are considerable contradictions within the domestic law of Malawi about the status of homosexuality and homosexual practices. Although the law criminalises such behaviour, the Constitution and the African Charter provide significant non-discrimination clauses, which in the case of the African Charter have been interpreted to include protection from discrimination on the grounds of sexual orientation.⁹

2 Facts of *R v Monjeza and Chimbalanga*

2.1 Arrest and charge

On 26 December 2009, Steven Monjeza and Tiwonge Chimbalanga held an engagement ceremony in a lodge in Blantyre. *The Weekend* newspaper ran an article reporting that the two men were engaged.¹⁰ National television cameras were present at the ceremony; it remains unclear why the television crews were aware of the ceremony.¹¹ The police were alerted to the engagement and, consequently, on 27 December 2009 Steven Monjeza and Tiwonge Chimbalanga were arrested. After their arrest, the suspects were kept in police custody and then charged with three counts: first, carnal knowledge against the

⁶ Taken from the African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5 (entered into force 21 October 1986 and ratified by Malawi on 17 November 1989) art 2.

⁷ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 169.

⁸ Art 3 African Charter.

⁹ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (n 7 above).

¹⁰ *The Weekend Nation*, 27 December 2009.

¹¹ The actual act grounding the basis of the charges was a traditional ceremonial engagement called *chinkhoswe*.

order of nature;¹² second, consenting to have sexual acts like wife and husband;¹³ and third, indecent practices in the alternative.

2.2 The trial

The case was heard in the Blantyre Magistrate's Court. The Chief Resident Magistrate in Blantyre, Nyakwawa Usiwa-Usiwa, presided. Mr Mauya Msukwa represented the defendants and police prosecutor, Barbra Mchenga, represented the state. The defendants first appeared on 11 January 2010. The state requested permission for a two-week extension to complete its investigation, but this was refused. An application for bail was brought by the defendants through their lawyer, Mr Msukwa, who acted *pro bono*. The application was refused on the grounds of the 'safety of the accused, as the case had garnered a large amount of public attention'.¹⁴

On 6 January 2010, the men were taken to Queen Elizabeth Central Hospital, where Chimbanga was forced to undergo an involuntary medical examination, including an anal examination, in order to confirm the charges of sodomy.

On 14 January 2010, the trial commenced and three witnesses were called by the state, namely, the owner of the lodge where the ceremony was said to have taken place and two workers at the lodge. These witnesses gave evidence that they had made Tiwonge Chimbanga undress after the ceremony so that they could ascertain whether he was male or female, as Tiwonge claimed to be female. The accused were jeered by the members of the public watching the trial while this evidence was being led.

The following day the trial continued. As Steven Monjeza had fallen ill the defence lawyer requested an adjournment which was not opposed by the prosecutor. The magistrate required the accused to come to court that afternoon to show proof of being ill. Subsequently, Steven Monjeza reported that, while in detention, he had been given access to medical care and had been diagnosed with malaria.

On 25 January 2010 the case was resumed. However, a constitutional application was filed in the morning by the defendants' lawyer at the High Court. The application was for permission to have the case certified constitutional in nature on the grounds that it involved a matter of interpretation of the Constitution and to be heard before the Constitutional Court. In Malawi, the certification of a case as suitable for hearing in the Constitutional Court is determined by the Chief Justice.

Sections 9(2) and (3) of the Courts Act (Cap 3:02) provide as follows:

- (2) Every proceeding in the High Court and all business arising there out, if it expressly and substantively relates to or concerns the interpretation

¹² Penal Code (n 1 above) sec 153.

¹³ Penal Code (n 1 above) sec 156.

¹⁴ Magistrate Usiwa-Usiwa, Blantyre Magistrate's Court, 11 January 2010.

or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.

- (3) A certification by the Chief Justice that a proceeding is one which comes within the ambit of subsection (2) shall be conclusive evidence of that fact.

Rule 3(1)(b) of the Court (High Court) (Procedure on Interpretation or Application of the Constitution) Rules 2008 provides:

The Chief Justice shall certify proceedings under section 9(3) of the Act if the proceedings involve ... the determination of the constitutionality of an Act of Parliament or part thereof.

In addition, a new bail application was made to the High Court. Judgment was reserved on the application, and the hearing did not proceed in the Magistrate's Court as the defendants' counsel, Mr Msukwa, was not present due to his attendance at the High Court. Upon entering the court, the detainees were again jeered by the crowd.

As well, the defence entered an application for the judicial review of the decision to arrest and prosecute the pair on the basis that there was no evidence of any criminal act, and that the arrest was a discriminatory act and was therefore unconstitutional. The first application was refused on the basis that the constitutional certification still had to be decided and thus there was no jurisdiction to hear a judicial review at that stage. The application for 'certification' as suitable for a hearing by the Constitutional Court was rejected on 29 January 2010. At that stage the defence renewed their application for judicial review, but this was again refused. The pending application for bail in the High Court was refused on 28 January 2010. In giving judgment, Justice Roland Mbvundula said that he was concerned for the applicants' safety.¹⁵

The case in the Magistrate's Court was resumed on 27 January 2010 when the Court heard evidence from two further witnesses. The first was a woman who was part of the same church group as the two detainees and who knew Chimbalanga as a woman. Chimbalanga attended Court dressed as a woman. Evidence was given that Chimbalanga used to do what the women of the village did, that is, go to social events together and sleep together as women. It was only when the news broke and Chimbalanga was challenged that it became clear that he was in fact, in biological terms, male.

Further evidence was heard from the photographer hired to record the engagement party. He told the Court that he had been asked to be the marriage advocate by the pair. This was seen as odd as he did not know them and normally one would expect this role to be filled by a close relative, often an uncle. Photographs of the ceremony were produced as exhibits before the Court. The photographer was asked to identify the defendants in the dock. There were no issues of identity in the case.

¹⁵ Justice Roland Mbvundula, Blantyre High Court, 28 January 2010.

In addition, Dr Makanani, a gynecologist working in Queen Elizabeth Central Hospital, Blantyre, gave expert evidence that he had been asked to investigate two matters; firstly, whether Chimbanga was male and, secondly, whether the pair had had sexual intercourse. The doctor confirmed that he believed Chimbanga to be biologically male. He also testified that he was unable to give an opinion on the second matter as it was outside of his expertise.

The defence objected to his evidence as having been collected through means of torture¹⁶ in that the accused had not consented to the examination and thus the pair had been forced to undergo a medical examination, and that the examination was thus unconstitutional. The state argued that the examination was necessary due to the nature of the case. The Court did not allow the objection, finding that the accused had not been tortured. The Court ruled that evidence should be heard without giving any further reasons.

An application was made by the state to bring a further two witnesses, a doctor specialising in psychiatry, and the investigating police officer. The application was allowed as it was deemed important in the interests of justice to hear the witnesses. This had the effect of prolonging the trial and delaying the hearing, which was again adjourned until 3 February 2010. At that date the hearing was adjourned again due to a change in the rules concerning the licence to practise of the defence counsel. When the trial was resumed, Tiwonge asked to be heard by the Court. His request was granted, whereupon he made a renewed application for bail, explaining that conditions at the prison were deteriorating and that no one was coming to visit him and that he was suffering. He said: 'We cannot run away, we are Malawians, no one can harm us, we are safe.'¹⁷ The Court refused the request on the basis that the High Court had already decided the matter.

On 5 February 2010, the last of the state evidence was heard, namely that of the investigating officer. The prosecution closed their case, after which counsel for the defence made a submission that there was no case to answer. On 22 March 2010, the Court dismissed the submission that there was no case to answer on the basis that '[o]n a balance of probability the state has established a *prima facie* case against the two as charged',¹⁸ and thus there was a charge to be answered. The date of 3 April 2010 was set for the Court to reconvene for the full trial. The Court actually reconvened on 6 April 2010 when the defence was able to make submissions in support of their case before the Court retired to consider its judgment.

¹⁶ The Malawian Constitution (as amended) in art 19(5) guarantees that 'no person shall be subjected to medical or scientific experimentation without his or her consent'.

¹⁷ Tiwonge Chimbanga, Blantyre Magistrate's Court, 3 February 2010.

¹⁸ Reuters <http://www.news24.com/Africa/News/Malawi-gay-couple-has-a-case-20100322> (accessed 30 September 2010).

On 18 May 2010 the Court handed down its judgment, finding the defendants guilty on all three charges. The prosecution asked the magistrate to mete out a harsh punishment because the couple had left a 'scar on morality' in Malawi. 'They showed no remorse, they showed no regret of their action ... they seemed to have been proud of their action.' The defence argued that as they were first offenders, they should not be given a custodial sentence. This was a technical offence and the defence was convinced the convicts had already paid for the offence.¹⁹

On 20 May 2010, the Court reconvened and the two defendants were sentenced to 14 years' hard labour, the maximum sentence allowed. Nyakwawa Usiwa-Usiwa said: 'I will give you a scaring sentence so that the public be protected from people like you, so that we are not tempted to emulate this horrendous example.' He continued: 'To me this case counts as the worst of its kind and carries a sense of shock against the morals of Malawi. Let posterity judge this judgment.'²⁰ As the accused left the courthouse, onlookers shouted 'You got what you deserve!' 'Fourteen years is not enough, they should get 50!' and 'You deserve death!'

On 29 May 2010, the accused were pardoned after President Bingu wa Mutharika met Ban Ki-moon, the United Nations (UN) Secretary-General. However, when announcing the pardon, President Bingu stated: 'These boys committed a crime against our culture, our religion and our laws.'²¹ He said: 'I have done this on humanitarian grounds, but this does not mean that I support this.'²² He added: 'We do not condone marriages of this nature. It is unheard of in Malawi and it is illegal.'²³

After the two accused were released, it emerged that they had separated and that one of the men now allegedly had a female partner. Monjeza, who faced hostility from his family about his relationship with Chimbanga, said that he no longer wanted to be associated with homosexuality. 'I have had enough,' he said. 'I was forced into the whole drama and I regret the whole episode. I want to live a normal life ... not a life where I would be watched by everyone, booed and teased'.²⁴

The accused were held at Chichiri Prison, Blantyre, and reported that they were able to have access to their lawyers when they needed to.²⁵ However, they reported that they had been treated violently by the police when being questioned after arrest and refused police bail, and

¹⁹ Barbra Mchenga and Mauya Msukwa, respectively, Blantyre Magistrate's Court, 18 May 2010.

²⁰ Magistrate Nyakwawa Usiwa Usiwa, Blantyre Magistrate's Court, 20 May 2010.

²¹ President Bingu wa Mutharika, speaking on 29 May 2010 <http://www.malawivoice.com/national-news/bingu-pardons-the-gay-couple> (accessed 30 September 2010).

²² President Bingu wa Mutharika, speaking on 29 May 2010, Reuters <http://www.alertnet.org/thenews/newsdesk/LDE64S0A4.htm> (accessed 30 September 2010).

²³ n 21 above.

²⁴ <http://www.guardian.co.uk/world/2010/jun/08/malawi-steven-monjeza-tiwonge-chimbanga> (accessed 30 September 2010).

²⁵ Reported to Victor Mhango of the Centre for Human Rights Education Assistance and Advice (CHREAA), in an interview at Chichiri Prison, 10 February 2010.

consequently had been transferred to prison.²⁶ It was also reported by the defence that the prosecution had coached their witnesses and the defence had not been allowed access to state witnesses as would be the normal pre-trial procedure.²⁷ This prevented the defence from being able to properly cross-examine and to properly know the state's case against the defendants prior to the trial. However, this matter was not raised before the Court.

3 Debate among members of civil society

The trial fostered considerable debate in Malawi as to the position of homosexual persons within society. The reaction of civil society was played out in the national media. In addition to reporting on the trial, the national press ran numerous opinion pieces and articles reviewing and debating the acceptability of homosexuality. Examples include an article published in *The Nation* on 6 January 2010, which reported on an interview with a senior sociology lecturer from Chancellor College, who argued that Malawians should know that homosexuals are not different from any other people and should have their human rights respected.²⁸ On 8 January 2010 *The Nation* reported that Amnesty International had condemned the detention of the Malawian couple²⁹ and in reaction a government spokesperson responded by stating that 'people of same sex marrying or being involved in sexual exploits is not normal. It is absolutely unacceptable. The Malawi society does not condone this type of behaviour.'³⁰

A further opinion was penned by a legislator under a pseudonym that condemns acts of homosexuality as 'alien cultures from the West', and that 'the Western world has a tendency of imposing its culture upon Africa'.³¹ The article continued: 'God never designed marriage to take that form [same sex] but to be between a man and a woman' and that the pressure to legalise homosexuality 'is coming mostly from the West'.³²

By the end of January 2010, the debate concerning the case culminated in notices appearing on lamp posts in Blantyre city centre stating 'Gay rights are human rights!' By 1 February 2010, these notices had been taken down and the man who was alleged to have put them up, a

²⁶ Reported to the International Secretariat of the World Organisation Against Torture (OMCT); see report at <http://www.omct.org/index.php?id=APP&lang=eng&actualPageNumber=1&articleSet=Appeal&articleId=9190> (accessed 22 September 2010).

²⁷ Interview with Mr Mauya Msukwa, counsel for the defence, 15 February 2010.

²⁸ *The Nation* 6 January 2010.

²⁹ Amnesty International http://www.amnesty.org.uk/actions_details.asp?ActionID=682, as reported in *The Nation* 13 January 2010.

³⁰ *The Nation* 13 January 2010.

³¹ As above.

³² As above.

21 year-old called Peter Sawali, was arrested for a 'breach of the peace'. His arrest took place after a 'tip-off' from the public. He was reported to have said on his arrest that he was fighting for gay rights.³³

The debate within the press had a significant impact on the trial. The most obvious was that the courtroom was full of journalists. The physical presence of the media made everyone intensely aware that each new development was being observed in detail, while openly-hostile sentiments and opinions publicly expressed provided the background against which the trial was played out. This included President Bingu expressing his opinion against homosexuality³⁴ the day before Chimalanga and Monjeza were due to be sentenced. Such fierce and high-profile opposition to homosexuality – both politically and publically articulated – created pressure upon the court to convict the two men.

4 Conclusion

The criminalisation of homosexual acts in Malawi reflects a general trend in Africa where 38 of the continent's 53 states criminalize homosexual acts.³⁵ The prosecution of Chimalanga and Monjeza highlighted the tension within Malawian society regarding homosexual practices. The trial of Chimalanga and Monjeza illustrates that it remains unclear what the position of the law of Malawi is regarding homosexuality. There is an obvious tension between the Penal Code, on the one hand, and the Constitution, which protects citizens from discrimination, on the other.

The public reaction to the trial illustrated that there is overwhelming hostility to those who are openly gay in Malawi, and the arbitrary implementation of the law itself during the trial reflects the strength of this feeling. The case itself was weak; the act upon which the charges were based was the holding of a pre-nuptial engagement ceremony which does not fit easily within the definition of carnal practices as set out under the Penal Code. Although the legal boundaries of the definition of carnal practices are untested, there was never any evidence that the two detainees had had sexual relations. Thus, no charges of sodomy should ever have been proven on the evidence before the Court.

The procedure followed during the trial was arguably also unconstitutional.³⁶ The defence counsel was not afforded the opportunity to speak with the prosecution witnesses prior to the trial; medical evidence obtained without consent was admitted; and the detainees complained about being beaten by police (although not in open

³³ *The Nation* 2 February 2010.

³⁴ http://www.southernafricalitigationcentre.org/news/item/Malawi_Malawi_President_slams_homosexuality (accessed 30 September 2010).

³⁵ See information on website of International Lesbian and Gay Association, <http://www.ilga.org> (accessed 23 September 2010).

³⁶ Sec 42 of the Malawian Constitution guarantees the right to a fair trial.

court). These factors led to the unsafe convictions of the two accused which could have been appealed had a pardon not been granted.

The trial of Chimbalanga and Monjeza and the debate it sparked shed light on the numerous political and social forces which present significant barriers to the acceptance of homosexuality in Malawi. In particular, the reporting of the case indicated that religion,³⁷ identity³⁸ and history³⁹ played prominent roles in rejecting homosexuality. If Malawi is to fulfil the human rights standards it has ratified and codified in its Constitution it will need to amend its Penal Code and to continue to address issues regarding the acceptance homosexuality in public life. It is unfortunate that the constitutionality of the relevant provisions was not addressed due to the failure of the Chief Justice to certify that the matter involved a ‘determination of the constitutionality of an Act of Parliament or a part thereof’.

³⁷ 80% of the population of Malawi are Christian; US Department of State, Malawi, International Religious Freedom Report 2007, Bureau of Democracy, Human Rights and Labour, <http://www.state.gov/g/drl/rls/irf/2007/90107.htm> (accessed 30 September 2010). After the judgment, Malawian cleric Canaan Phiri of the Malawi Council of Churches hailed the court for ‘upholding the law because homosexuality is a sin’. He added: ‘The judgment was within the law ... Malawi has followed the rule of law because having a sexual orientation is not a sin, but practising is sin.’

³⁸ The use of language surrounding the trial and the public reaction suggested that to be homosexual was considered to be ‘un-African’, and a Western practice. The depth of this feeling was reflected in the comments of President Bingu when pardoning the accused: ‘These boys committed a crime against our culture, our religion and our laws’ and this can be seen again in the language used at the sentencing of the accused, where the court, giving judgment, stated that this was not seen as simply a breach of the Penal Code, but termed it as a ‘crime against Malawi’s culture’.

³⁹ The press reporting of this case clearly illustrated that some within Malawian society perceived homosexuality as a Western cultural concept, and the imposition of its acceptance was seen to be an external cultural imposition. The media reporting of the case included considerable interest in the pressure and condemnation the arrest and sentence from the international society and Western nations. Eg, on 1 February 2010, it was reported in *The Nation* that 35 NGOs from African countries, under the banner of the Aids and Rights Alliance for Southern Africa, called for the repeal of secs 153 and 156 of the Penal Code, stating that the trial was undermining the fight against the spread of HIV. The press release from the Alliance quoted a study published in *Lancet* in 2009 that found that ‘political and social hostility were endemic against men having sex with men’ and that ‘the response to (gay) male sex needed rapid and sustained national and international commitment to ... action to reduce structural and social barriers to make these accessible’; <http://www.southernafricalitigationcentre.org/news/Malawi/page/2> (accessed 30 September 2010). It was reported in *The Nation* on 23 March 2010, that the United States State Department commented that it was ‘a step backwards in the protection of human rights’. In addition, press statements on homosexuality reported it as being an ‘unwelcome influence from the West’; *The Nation* 23 March 2010.

Like running on a treadmill? The 14th and 15th sessions of the African Committee of Experts on the Rights and Welfare of the Child

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Summary

The 14th and 15th sessions of the African Committee of Experts on the Rights and Welfare of the Child were held in November 2009 and March 2010 respectively. The Committee has considered more reports and issued its first concluding observations. The continued engagement of the Civil Society Organisations Forum with the African Children's Committee offers an example of positive progress towards supporting the implementation of the African Children's Charter. The development of a relatively well thought-out strategic plan for the African Children's Committee's work for the period 2010 to 2014 (with a better level of participation from stakeholders) also offers an advance in the work of the Committee. Despite these, there remains some room for improvement in order to allow the African Committee to achieve its mandate of the promotion and protection of children's rights in Africa.

1 Introduction

The implementation and monitoring of the African Charter on the Rights and Welfare of the Child (African Children's Charter) is supervised

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by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).¹ The Children's Charter provides for an independent 11-member Committee, appointed by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU)/African Union (AU).² Article 33 of the African Children's Charter maps out the criteria that need to be met for selection on the Committee.

The 14th ordinary session³ of the African Children's Committee was held from 16 to 19 November 2009, and the 15th ordinary session was held from 15 to 19 March 2010, both in Addis Ababa, Ethiopia. Nine and ten Committee members respectively participated in these two sessions of the African Children's Committee.

The 14th session of the African Children's Committee coincided with the tenth anniversary of the entry into force of the African Children's Charter in November 1999. The time to take stock of achievements and challenges arose for deliberation at both the second Civil Society Organisations Forum (CSO Forum) held during the week before the Committee meeting, and the seminar to celebrate the tenth anniversary itself (also held in Addis Ababa on 13 November 2009). The 14th session was more focused on the consideration of state reports.

The 15th meeting, on the other hand, allocated more time for consolidating co-operation platforms and collaborative opportunities with partners and stakeholders. It also facilitated discussion on the 2010-2014 Work Plan. Furthermore, a timely thematic discussion on violence against children took place. Follow-up on the two communications received by the Committee and the consideration and granting of observer status were other issues covered during this meeting.

This article summarises some current developments concerning the African Children's Charter and the work of the African Children's Committee. For instance, it looks at the status of ratifications, the status of state reports and concluding observations, and the award of observer status. In addition, it comments on the significance of the CSO Forum, which seems set to become a permanent feature of an emerging dialogue around the implementation of the African Children's Charter. The Work Plan of the African Children's Committee for the five-year period 2010-2014 is mentioned. Some of the efforts that are underway in order to strengthen co-operation between the African Children's Committee and stakeholders and partners are further discussed.

¹ Art 32(1) African Children's Charter.

² Arts 33-36 African Children's Charter. See also art 11(2) of the Rules of Procedure of the Committee.

³ The words 'session' and 'meeting' are used interchangeably throughout this article.

2 Some preliminary points

Over time, the level of attendance of both the number and type of stakeholders of the meetings of the African Children's Committee has increased. This fact was once again evident during the 14th and 15th meetings. Apart from the regular attendees (such as the African Child Policy Forum, the Institute for Human Rights and Development in Africa (IHRDA), Plan International, Save the Children and the United Nations Children's Fund (UNICEF)), other local civil society organisations (CSOs) were present.⁴ Indeed, if the Children's Committee announces the dates and venue of its meetings well in advance, and also attempts to minimise the number of closed sessions it has been having lately, the attendance level of the meetings of the African Children's Committee will increase even more.

The African Children's Committee seems to be fully aware of the fact that in order to increase its visibility on the African continent, it needs to improve upon its efforts to hold its meetings in African countries other than Ethiopia. The last time a meeting of the Children's Committee was held outside of Addis Ababa was in 2007.⁵ As a result, there were initial efforts to hold the 14th meeting of the Children's Committee in Cairo, Egypt. However, this did not materialise. During the 14th meeting, Mrs Dawlat Hassan, the member of the Committee from Egypt, presented to the Committee the apologies of the Arab Republic of Egypt which, due to financial constraints, was not able to hold the 14th meeting of the Committee as it was initially planned.⁶

During the 15th meeting, it was indicated that the terms of office of six Committee members were coming to an end in June 2010. These members were Martha Koome (Kenya); Seynabou Diakhaté (Senegal); Marie Chantal Koffi (Côte d'Ivoire); Mamosebi Pholo (Lesotho); Boipelo Lucia Seithlamo (Botswana); and Mousa Sissoko (Mali).

It is to be recalled that members of the African Children's Committee are not eligible for re-election by virtue of article 48(1) of the African Children's Charter. As long as either the AU Office of the Legal Counsel or the African Children's Committee itself does not follow up on paragraph 8 of Decision EX/CL/233(VII) of 2005 of the Executive Council of the AU that has requested the AU Commission to study measures to renew the terms of office of Committee members for another term, the terms of office of Committee members continue to expire with no possibility of standing for re-election. There is no intention here to reiterate some of the potential advantages of the possibility of standing for re-election in order to assist the realisation of the mandate of the

⁴ Eg, CONAFE country offices (such as from Mali, Senegal and Niger) are increasingly represented.

⁵ This was the 10th meeting held in Cairo, Egypt.

⁶ On behalf of Ambassador Moushira Khatab of Egypt, who is the minister in charge of children's affairs.

African Children's Committee, as the issue has been covered in previous articles.⁷

As a result of these six vacancies, the African Union Commission (AUC) Legal Counsel had sent out a *note verbale* to member states inviting them to nominate candidates to the Committee. The election of the new Committee members took place during the 15th Summit of the AU Heads of State and Government held in Kampala, Uganda.

As a result of the fact that six members of the Committee were outgoing, and after an extensive discussion of the agenda item relating to the election of the Bureau (comprising the Chairperson and Vice-Chairperson), Committee members decided to postpone the election of the Bureau until the election of the incoming new members. This decision was in part influenced by CSOs who raised concerns about the planned election, arguing that it would be inappropriate as six new Committee members were leaving and six new ones were coming on board beginning from July 2010. Subsequently, it was agreed that the Chairperson, Seynabou Diakhaté, would remain in office up to the end of her term (as Bureau member) at the end of May 2010 and the Vice-Chairperson, Agnès Kaboré, was designated Acting Chairperson. This decision is commendable and constitutes good practice as it paved the way for holding an election of the Bureau once the incoming new Committee members⁸ were already in place.

On a different note, as far as ratification is concerned, the African Union Commission website⁹ confirms the ratification of the African Children's Charter by 45 member states of the AU. However, there are unconfirmed reports that two additional states - namely São Tomé and Príncipe and Djibouti - have ratified. An additional state that is further said to be on course to finalise its ratification process of the Charter is the Democratic Republic of Congo.¹⁰ This is indeed a clear indication that universal ratification of the African Children's Charter is not out of reach in the foreseeable future.

Due to the fact that the Plan of Action had not been translated into both the two working languages, English and French, during the 14th meeting, the African Children's Committee agreed to postpone this agenda item and to have it discussed during a workshop before the

⁷ See, eg, J Sloth-Nielsen & BD Mezmur 'Win some, lose some: The 10th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 211-212.

⁸ It is relevant to note that the incoming Committee members constituted more than half of the Committee membership.

⁹ <http://www.africa-union.org> (accessed 31 October 2010).

¹⁰ The other remaining five countries that have not ratified the Charter are Central African Republic, Sahrawi Arab Democratic Republic, Somalia, Swaziland and Tunisia. A full list of current ratifications can be found at <http://www.africa-union.org> in the section on Documents.

next session.¹¹ Subsequently, the draft Plan of Action was discussed during the 15th meeting of the Children's Committee. Committee members submitted their comments on the draft and the document was sent to the Social Affairs Department of the AUC for adoption.

3 State reporting

The examination of state reports constitutes a core component of the promotional mandate of the African Children's Committee. This is because state reporting is the most basic of all strategies adopted internationally to assess and oversee compliance with international human rights standards. In this regard, article 43(1) of the African Children's Charter states:

Every state party to the present Charter shall undertake to submit to the Committee through the Secretary-General of the Organisation of African Unity reports on the measures they have adopted which give effect to the provisions of this Charter and on the progress made in the enjoyment of these rights:

- (a) within two years of the entry into force of the Charter for the state party concerned; and
- (b) thereafter, every three years.

Article 43(2) further states as follows:

Every report made under this article shall:

- (a) contain sufficient information on the implementation of the present Charter to provide the Committee with comprehensive understanding of the implementation of the Charter in the relevant country; and
- (b) shall indicate factors and difficulties, if any, affecting the fulfilment of the obligations contained in the Charter.

This said on a general note, the following subsections highlight a number of specific issues pertaining to state reporting. These issues include the status of state reporting.

3.1 The status of the submission of state reports

The low level of reporting to the African Children's Committee by state parties is a recurring theme. To date, the Children's Committee has received the state reports of only 13 countries.¹² Out of the 13 state reports, the African Children's Committee has considered 10. The table

¹¹ It was agreed that resources to organise the workshop to consider the draft Plan of Action would be mobilised. However, it was also agreed that, if funds were not made available in time, the draft Plan of Action would be presented during the 15th meeting of the African Children's Committee.

¹² These countries are Burkina Faso, Cameroon, Egypt, Kenya, Mali, Mauritius, Niger, Nigeria, Rwanda, Senegal, Tanzania, Togo and Uganda. The copies of some of these reports are available at <http://www.crin.org/resources/treaties/index.asp> (accessed 30 September 2010). In the second half of 2010, there are indications that the state reports of Libya and Sudan are almost finalised and to be submitted to the AUC.

below shows in detail the extent to which state parties have so far failed in their reporting obligations to the African Children's Committee.

Dates of signature, ratification, and the submission of initial reports on the implementation of the African Children's Charter:¹³

No	Country	Date of signature	Date of ratification/ accession	Due date of initial reports	Due date for first periodic reports
1	Algeria	21/05/1999	08/07/2003	08/07/2005	08/07/2008
2	Angola	-	11/04/1992	29/11/2001	29/11/2004
3	Benin	27/02/1992	17/04/1997	29/11/2001	29/11/2004
4	Botswana	10/07/2001	10/07/2001	10/07/2003	10/07/2006
5	Burkina Faso	27/02/1992	08/06/1992	29/11/2001	29/11/2004
6	Burundi	-	28/06/2004	28/06/2006	28/06/2009
7	Cameroon	16/09/1992	05/09/1997	29/11/2001	29/11/2004
8	Central African Republic	04/02/2003	-	-	-
9	Cape Verde	27/02/1992	20/07/1993	29/11/2001	29/11/2004
10	Chad	06/12/2004	30/03/2000	30/03/2002	30/03/2005
11	Côte d'Ivoire	27/02/2004	01/03/2002	18/06/2007	18/06/2010
12	Comoros	26/02/2004	18/03/2004	18/03/2006	18/03/2009
13	Congo Brazzaville	28/02/1992	08/09/2006	10/10/2006	10/10/2009
14	Djibouti	28/02/1992	-	-	-
15	Democratic Republic of Congo	02/02/2010	-	-	-
16	Egypt	30/06/1999	09/05/2001	09/05/2001	09/05/2004
17	Equatorial Guinea	-	20/12/2002	20/12/2004	20/12/2007
18	Eritrea	-	22/12/1999	12/12/2001	12/12/2004
19	Ethiopia	-	02/10/2002	02/10/2004	02/10/2007
20	Gabon	27/02/1992	18/05/2007	18/05/2009	18/05/2012
21	The Gambia	-	14/12/2000	14/12/2002	14/12/2005

¹³ It is kindly acknowledged that this table is taken *directly* from Save the Children and Plan (F Shehan 'Advancing children's rights: A guide for civil society organisations on how to engage with the African Committee of Experts on the Rights and Welfare of the Child' (2010).

22	Ghana	18/08/1997	10/06/2005	10/06/2007	10/06/2010
23	Guinea Bissau	08/03/2005	19/06/2008	19/06/2010	19/06/2013
24	Guinea	22/05/1998	27/05/1999	29/11/2001	29/11/2004
25	Kenya	-	25/07/2000	25/07/2002	25/07/2005
26	Libya	09/06/1998	23/09/2000	23/09/2002	23/09/2005
27	Lesotho	-	27/09/1999	29/11/2001	29/11/2004
28	Liberia	14/05/1992	15/07/2008	15/07/2010	15/07/2013
29	Madagascar	27/02/1992	30/03/2005	30/03/2007	30/03/2010
30	Mali	28/02/1996	03/06/1998	29/11/2001	29/11/2004
31	Malawi	13/07/1999	16/09/1999	29/11/2001	29/11/2004
32	Mozambique	-	15/07/1998	29/11/2001	29/11/2004
33	Mauritania	-	21/09/2005	21/09/2007	21/09/2010
34	Mauritius	07/11/1991	14/02/1992	29/11/2001	29/11/2004
35	Namibia	13/07/1999	23/07/2004	23/07/2006	23/07/2009
36	Nigeria	13/07/1999	23/07/2001	23/07/2003	23/07/2006
37	Niger	13/07/1999	11/12/1999	11/12/2001	11/12/2004
38	Rwanda	02/10/1991	11/05/2001	11/05/2003	11/05/2006
39	South Africa	10/10/1997	07/01/2000	07/01/2002	07/01/2005
40	Sahrawi Arab Democratic Republic	23/10/1992	-	-	-
41	Senegal	18/05/1992	29/09/1998	29/11/2001	29/11/2004
42	Seychelles	27/02/1992	13/02/1992	29/11/2001	29/11/2004
43	Sierra Leone	14/04/1992	13/05/2002	13/05/2004	13/05/2007
44	Somalia	01/06/1991	-	-	-
45	São Tomé and Príncipe	01/02/2010	-	-	-
46	Sudan	-	18/07/2008	18/07/2010	18/07/2013
47	Swaziland	29/06/1992	-	-	-
48	Tanzania	23/10/1998	16/03/2003	16/03/2005	16/03/2008
49	Togo	27/02/1992	05/05/1998	29/11/2001	29/11/2004
50	Tunisia	16/06/1995	-	-	-

51	Uganda	26/02/1992	17/08/1994	29/11/2001	29/11/2004
52	Zambia	28/02/1992	02/12/2008	02/12/2010	02/12/2013
53	Zimbabwe	-	19/01/1995	29/11/2001	29/11/2004

As the table above shows, the one and only country to date that has reported to the African Children's Committee within the prescribed time frame is Sudan. Sudan ratified the African Children's Charter on 18 July 2008. Pursuant to article 43(1), the initial report of Sudan was due on 18 July 2010. It was indicated by the AU Commission during the second half of 2010 that the initial state report of Sudan had been received.

There are at least 27 state parties whose deadline for the submission of their first periodic report has already passed, despite the fact that they still have not yet submitted their initial reports. These countries are Algeria, Angola, Benin, Botswana, Burundi, Cape Verde, Chad, Côte d'Ivoire, Comoros, Congo Brazzaville, Equatorial Guinea, Eritrea, Ethiopia, The Gambia, Ghana, Guinea, Lesotho, Madagascar, Malawi, Mozambique, Mauritania, Namibia, Seychelles, South Africa, Sierra Leone and Zimbabwe.

Against this background, the African Children's Committee needs to intensify its efforts or adopt new ways in building on a number of strategies that can be pursued in the interest of facilitating the submission of state reports. Three of these strategies are offered below.

Firstly, it might be appropriate for the African Children's Committee to issue a decision that would allow state parties that are encountering problems in complying with the strict time frame for submission of reports established by the Children's Charter in article 43(1), to submit a combined report of their initial and first periodic reports.¹⁴ Such a decision will need to emphasise that these rules apply only on the basis of an exceptional measure taken for one time only by a state party in an attempt to provide an opportunity for them to respect the strict reporting periodicity foreseen in article 43(1) of the African Children's Charter.

¹⁴ It is to be recalled that the CRC Committee has undertaken a similar measure. In addition to its guidelines for reporting (CRC/C/5 and CRC/C/58), the Committee also adopted recommendations that are relevant to state parties' reporting obligations. These recommendations provide guidance to state parties that are encountering problems in complying with the strict time frame for submission of reports established by the Convention in art 44, para 1, or the consideration of whose reports has been delayed. These recommendations apply as an exceptional measure taken for one time only (see CRC/C/139). See CRC Committee 'Working methods' <http://www2.ohchr.org/english/bodies/crc/workingmethods.htm#a2c> (accessed 30 September 2010).

Secondly, writing a letter to state parties that are very late in submitting their reports can be undertaken.¹⁵ Perhaps a good starting point of doing this could be to send letters to countries whose initial state reports were due in 2001 but still have not yet reported to the African Children's Committee.¹⁶ These letters should indicate to the state parties that should they not report within a certain period of time specified by the Children's Committee, the Committee would consider the situation of children's rights in the state in the absence of the initial report as foreseen, at least through interpretation, by Rule 66 of the African Children's Committee's Rules of Procedure.¹⁷

Thirdly, there are a number of African countries that continuously report to the Committee on the Rights of the Child (CRC Committee). For instance, the latest countries that have reported to the CRC Committee include Guinea Bissau, Sudan, Burundi, Egypt, Libya, Liberia, Madagascar, Namibia, São Tomé and Príncipe and Seychelles. It might be a good option for the African Children's Committee to select some of these countries and target them for lobbying and follow-up so that they also submit their reports to the African Children's Committee. As allowed by the Guidelines for State Reporting, these countries will be able to submit to the African Children's Committee a report similar to the one already submitted to the CRC Committee, after highlighting the peculiarities of the African Children's Charter. Not only will this facilitate the work of the Children's Committee in reviewing state reports, but it will also help it to receive information that is not outdated, while at the same time reducing the burden of states in preparing and submitting their reports.

¹⁵ Eg, in June 2003, the CRC Committee sent letters to three state parties whose initial reports were due in 1994 and never submitted. The Committee further decided to inform those state parties in the same letter that should they not report within one year, the Committee would consider the situation of children's rights in the state in the absence of the initial report.

¹⁶ These countries include Angola, Benin, Cape Verde, Eritrea, Guinea, Lesotho, Malawi, Mozambique, Seychelles and Zimbabwe.

¹⁷ Rule 66 of the African Children's Committee's Rules of Procedure, entitled 'Non-submission of reports' provides:

'1 At each session, the Chairperson of the Commission shall inform the Committee of all cases of non-submission of reports or complementary information in conformity with article 43 of the Children's Charter. In such cases, the Committee shall address to the state party concerned, through the Chairperson of the Commission, a reminder regarding the submission of these reports or complementary information and shall undertake any other measures in a spirit of dialogue between the State concerned and the Committee.'

2. If, despite the reminder and other measures referred to in para 1 above, the state party does not submit the required report or complementary information, *the Committee shall consider the situation as it deems necessary* and shall include a reference to this effect in its report to the Assembly of Heads of State and Government (our emphasis).

3.2 The content of state reports

Unfortunately, there is a continued insufficiency (especially in terms of concrete details that particularly highlight the added value of the African Children's Charter) in some of the reports that are being submitted to the African Children's Committee. Again, what was already alluded to while reporting on the 11th session of the African Children's Committee in 2008 bears repeating.¹⁸ It is to be recalled that in recognition of the dual reporting burden that states may need to shoulder, article 24 of the Guidelines provides that:

[a] state party that has already submitted to the UN Committee on the Rights of the Child a report based on the provisions of the CRC may use elements of that report for the report that it submits to the Committee as required by the Children's Charter. The report shall, in particular, highlight the areas of rights that are specific to the Children's Charter.

The effectiveness of the Guidelines as a means to an end is partly dependent on to what extent state parties understand the requirements of the Guidelines. The consideration of state reports during the 14th and 15th sessions of the African Children's Committee has once again reconfirmed that there is an *urgent* need to communicate to state parties through a *note verbale* or memorandum what these 'areas of rights that are specific to the Children's Charter' that need to be highlighted are while reporting to the African Children's Committee.

3.3 Pre-session for the consideration of state reports

The African Children's Committee continues to benefit greatly from alternative reports submitted by CSOs in its information-gathering efforts while considering state reports. To date, generally, the alternative reports submitted to the African Children's Committee are fairly comprehensive, organised, and often have clear recommendations in order to improve the implementation of children's rights in the state parties concerned. It is also commendable that many of these reports are starting to be submitted by a coalition or group of CSOs acting together. A good example of this is the alternative report on Kenya that involved a number of CSOs in its preparation. Experience so far also shows that, generally, the half day the African Children's Committee allocates for the consideration of one alternative report is sufficient.

However, here again, the need to formalise the submission of documents for the pre-session and the eligibility to attend the pre-sessions are issues that need clarification from the African Children's Committee. This can only be effectively done by the adoption of Guidelines on the consideration of alternative or complementary reports during a pre-session. In fact, the process of preparing such a document need not

¹⁸ See, generally, BD Mezmur & J Sloth-Nielsen 'An ice breaker: The 11th ordinary session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 596-616.

're-invent the wheel'. It is recommended that the Committee should take the Guidelines of the CRC Committee used for a similar purpose and adapt it to its needs.

3.4 Constructive dialogue

The presence of state representatives to present and discuss a state report before the African Children's Committee in open and public meetings of the Committee is a critical stage of the state reporting process. The constructive dialogue stage should be able to create the space to analyse progress achieved and factors and difficulties encountered in the implementation of the African Children's Charter.

As the purpose of the whole process is supposed to be constructive, and as is the practice by the CRC Committee, *sufficient time* should be given to discussions about implementation priorities and future goals. However, if past experience is of any guidance, the consideration of the state reports of countries during the 14th session has reconfirmed the concern that the time allocated for the presentation and discussion of a state report (often two hours) is insufficient for a concrete constructive dialogue to take place. This in turn further shows the validity of earlier recommendations that the practice of the AU to allow the African Children's Committee to meet only for three to five days twice a year is indeed insufficient given the mandate and increasing work load of the African Children's Committee.

In order to have a meaningful constructive dialogue, it is important that the representation of the state party is composed of a delegation with significant involvement in strategic decisions relating to the rights of the child. Treaty body practice indicates that, when delegations are headed by someone with governmental responsibility, the discussions are likely to be more fruitful and to have more impact on policy-making and implementation activities.

The calibre, rank and relevant knowledge of state delegates who presented their state reports before the African Children's Committee so far continues to be highly commendable. For instance, during the consideration of the state report of Burkina Faso, representatives of the Ministry of Social Action, the Ministry of Foreign Affairs, the Ministry of Promotion of Human Rights and National Solidarity of Burkina Faso were present. The delegates from Tanzania included representatives from the Ministry of Community Development, Gender and Children, the Ministry of Labour, Youth, Women and Children Development, the Commission for Human Rights and Good Governance and the Registration Insolvency and Trusteeship Agency (RITA). This commendable composition of the delegates of state parties that have presented their reports has helped to make the constructive dialogue between the African Children's Committee and the delegates as smooth and fruitful as possible.

3.5 Concluding observations/recommendations

For a meaningful state reporting exercise, there is a need to provide state parties with clear, comprehensive and concrete concluding observations/recommendations. The inaccessibility and insufficiency of concrete and clear concluding observations also undermines the efforts of civil society to follow up on the implementation of the African Children's Committee's concluding observations by the respective countries.¹⁹

The 12th session was notable for the fact that it principally concerned the consideration of the first two country reports, those of Egypt and Nigeria.²⁰ Reporting on the 13th session, it was lamented that the concluding observations of the Children's Committee had not been produced, resulting in a delay.²¹ A full year after the reports were debated orally, concluding observations were issued shortly before the start of the 14th meeting.²² Even then, it is alleged that the release of the concluding observations to civil society was a result of pressure from civil society, as it was originally planned only to remit these to the state parties concerned.

The net fruits of the effort of the African Children's Committee can only be described as rather limited. Apart from the brevity (five pages and seven pages respectively), the observations are short on concrete insights, and more often that not resort of vague generalities. Further, the African Children's Committee fails to elaborate substantive jurisprudential standards for the interpretation of Charter provisions (failing even to mention those articles governing the particular recommendations and conclusions proffered). It is noticeable that the format and thrust of the two concluding observations differ significantly, leading inevitably to the conclusion that the suggestion that a standard format (or guidelines) for concluding observations might be valuable.²³ There is little original or unexpected detail in regard to the concluding observations, which are predictable as regards the obvious concentration of concern around vulnerable groups, such as child victims of labour and trafficking, harmful cultural practice, child marriage and infant mortality.

¹⁹ The concluding observations made by the African Children's Committee in respect of Egypt and Nigeria show that there is some room for improvement in terms of concretising the Committee's recommendations.

²⁰ This is described fully in Sloth-Nielsen & Mezmur (n 18 above) 342-345.

²¹ Sloth-Nielsen & Mezmur (n 18 above) 346.

²² These concluding observations were widely circulated to CSOs the week before the 14th meeting.

²³ This constitutes one of the recommendations of the 2nd CSO Forum, where it was learnt that the production of concluding observations was the responsibility of the individual rapporteur assigned to the study of a particular country report to produce the initial draft. Until the 15th meeting, it seemed that little effort is made thereafter to ensure consistency in format, tone and level of analysis.

Of greater potential were the five reports which initially fell to be considered at the 14th meeting. These are the initial reports of Burkina Faso, Kenya, Mali, Tanzania and Uganda.²⁴ Fortunately, the concluding observations on these five countries mark progress over the previous two (those of Egypt and Nigeria). The concluding observations on Tanzania, for instance, are 12 pages long and offer more detailed recommendations.²⁵

However, room for improvement still exists. For instance, there are some conspicuously missing points in some of these concluding observations. Except for the one on Tanzania, it is a common limitation of all four concluding observations that they hardly contain any general observations on budgeting for children. All the concluding observations are also thin on both data analysis and drawing conclusions from such an analysis. In the context of Tanzania, save in the context of the definition of a child, some of the challenges that are faced by children as a result of the application of religious law (such as Islamic or Shari'a law) do not get mentioned in the concluding observations. Apart from making a brief mention of and requiring the state party to provide more information in its subsequent reports in relation to child soldiers, the concluding observations on Uganda do not offer any concrete recommendations on the situation of the use of child soldiers in Northern Uganda, and especially the state's duty to protect in this regard. In addition, the same concluding observations do not say anything about the violations of children's rights in the context of inter-country adoptions in the country. The concluding observations on Mali are silent on the need to address discrimination in the context of nationality as current provisions prevent children from deriving nationality from their mothers. As a result of the joint operation of articles 3 and 6 of the African Children's Charter, the state party should have been called to undertake the necessary legislative measures to ensure that the child can derive nationality not only from the father but also from the mother.

Structurally, there are also a number of aspects that call for improvement. For instance, the concluding observations on Mali's, Uganda's and Kenya's state reports provide the general observations of the African Children's Committee in its last three paragraphs but, logically, these would have featured better early in the documents. The numbering of paragraphs of the concluding observations is also recommended as it would enable easier reference to specific issues. Some sensitivity to the use of terminology is also called for. In this respect, despite the fact that article 13 of the African Children's Charter is captioned 'Handicapped

²⁴ The concluding observations on Burkina Faso, Kenya, Mali, Tanzania and Uganda are available at <http://www.crin.org/resources/infodetail.asp?id=23051> (accessed 30 September 2010). It is important to highlight that the Uganda reports were only considered during the 15th session.

²⁵ However, structurally, Tanzania's concluding observations are not strong.

children',²⁶ this terminology has increasingly become inappropriate and the use of the more sensitive terminology 'children with disabilities' is encouraged in the concluding observations.

As such, a general key concern relates to the need to develop jurisprudential depth, similar to what the CRC Committee has achieved in the 21 years of the existence of CRC. To achieve such a level of analysis, an in-depth study related to the textual interpretation of the African Children's Charter is required. One suggestion that has been put to the African Children's Committee to address this would be to draw on legal interns to prepare first drafts of the concluding observations, which the Children's Committee could then elaborate on, synthesise and debate prior to issuing formally. Collaboration with academic institutions is crucial in this regard. This idea is not alien to other treaty bodies at the United Nations (UN) level.

During its 15th session, the African Children's Committee adopted a format for concluding observations to ensure uniformity and consistency in the recommendations sent to state parties after the consideration of the contents of their reports. This is indeed a positive move, even though it remains to be seen the extent to which this format will help to improve consistency, depth and clarity in future concluding observations.

4 Communications (individual complaints) procedure

Article 44 of the African Children's Charter provides:²⁷

The Committee may receive communications from any person, group or non-governmental organisation recognised by the Organization of African Unity, by a member state, or the United Nations relating to any matter covered by this Charter.

Indeed, this is the main mandate that the African Children's Committee has over the mandates of the CRC Committee.²⁸

To date, the Children's Committee has received two communications. As confirmed during the 6th session of the African Children's Committee, the first communication was received in 2005 and relates to the plight of children in Northern Uganda. It highlights the dire situation of the children in the area, the manner in which their rights were being violated as a result of the 20 year-old civil war between the Ugandan government and the Lord's Resistance Army (LRA), and underscores the

²⁶ It is to be noted that the African Children's Charter was adopted in 1990 and at that time, the use of the term 'handicapped children' was considered normal.

²⁷ Art 44(1) African Children's Charter.

²⁸ It is important to mention that there is currently an advanced process to adopt an optional protocol on complaints procedure under CRC.

obligation of the Ugandan government under the African Children's Charter. This communication was submitted by the Centre for Human Rights of the University of Pretoria. The second communication was submitted jointly by IHRDA, Banjul, and the Open Society Justice Initiative and alleges the violation of the rights of Nubian children in Kenya. This communication was received by the African Children's Committee in 2009.

During the 14th session of the African Children's Committee, the Secretariat of the Children's Committee mentioned that correspondence had been dispatched to the authors of the communications requesting them to forward the French version of the documents to be considered, to enable all members of the Committee to look into the applications and be in a better position to decide on the admissibility of the communications. Since the French versions of these documents in question had reportedly not yet been received by the Secretariat at that stage, the Committee decided to postpone discussion on the admissibility of the two communications to its next session.

However, after four months, not much progress was reported in the consideration of these two communications during the 15th session of the African Children's Committee. This meagre level of progress is the main reason why the CSO Forum that preceded the 14th session of the Children's Committee explicitly recommended that the Committee should consider amending

... its guidelines for the consideration of communications to include a time-frame of six weeks for the African Children's Committee to acknowledge receipt of a communication, to make a decision on admissibility and finally to give its decision on the merits of the communication within a reasonable period of time to ensure that victims are not left without redress.

While some might quibble with the prescriptive nature of this recommendation in relation to the six-week time frame, there should be no doubt that communications need to be dealt within a reasonable time. Indeed, the unnecessary delay in the consideration of communications can contribute, amongst other things, to do (irreparable) harm to children. It is now high time that the African Children's Committee makes concrete progress in its consideration of the two communications that it has been seized with.

5 The Day of the African Child

The African Children's Committee has continued to select themes for the celebrations of the Day of the African Child (DAC). It is to be recalled that the DAC has been recognised by the OAU since 1991. It is celebrated every year on 16 June, and has been used as the main advocacy tool by the African Children's Committee. One of the roles of the DAC is not only to popularise the African Charter, but to also draw attention to priority issues affecting children in Africa.

For 2010, the theme 'Planning and budgeting for the welfare of the child: A collective responsibility' was selected. This theme is indeed a timely one. For instance, in the context of realising the Millennium Development Goals, the progress of which was reviewed in 2010, sufficient budgeting for children is a crucial one. The selection of this theme was also intended to highlight that the lack of resources alone does not explain the problems associated with budgeting and planning for the African child. Indeed, as it was alluded to by the Acting Chairperson of the African Children's Committee on 16 June 2010, several factors hinder the design and implementation of programmes geared towards the protection and promotion of the rights and welfare of the child on our continent, both at central and operational levels. These factors include the failure to take proper account of certain aspects of child protection in national programmes, the non-efficient use of resources, the lack of participation of children in planning and budgeting for programmes, the lack of strategic information and statistical data and a reliable target on the situation of children in some areas, the poor co-ordination and programming, and the lack of reliable financial records.

The notion of 'collective responsibility' in the theme of the DAC of 2010 is aimed to highlight the responsibility of all stakeholders such as governments, development partners, CSOs, communities and families in Africa and worldwide. This is in part in recognition of the fact that on a developing continent such as Africa, decision makers on budgeting extend beyond national governments, and also include foreign governments, intergovernmental organisations and CSOs.

During her speech on 16 June 2010, the Acting Chairperson of the African Children's Committee also alluded to the fact that the Committee favourably considered one of the recommendations of the CSO Forum, namely, the need to allow children to participate in the identification of themes of the DAC in the future. It remains to be seen how the Committee will act upon this important recommendation in order to ensure children's participation.

After a number of proposals and lengthy discussions during the 15th session the theme for the 2011 DAC was selected: 'All together for urgent actions in favour of street children'. This theme is expected to address some of the rights and needs of street children in Africa. It is expected that states will try to address both the causes and subsequent impacts of being a street child. It is anticipated that, for the first time, the African Children's Committee will prepare and share a document highlighting why this theme is selected and the various issues states have to address in celebrating the day under this theme.

Member states are obliged to submit reports on how the DAC was celebrated at national and local levels. However, in the past, there has been a significant lack of compliance with this obligation on the part of states and the very few reports submitted did not suffice for a meaningful assessment of the celebration and impact of the DAC. As a result, this remains an area where the African Children's Committee

will have to develop creative ways of encouraging states to report on the celebration of the DAC.

6 Co-operation with civil society organisations, the CRC Committee and other stakeholders

6.1 The consideration and granting of observer status by the African Children's Committee

Despite the fact that international law identifies states as primary duty bearers, including in the promotion and protection of children's rights, other important actors also play a role as duty bearers, such as inter-governmental organisations and international and national non-governmental organisations (NGOs/CSOs). At the African continent level, generally, the role of CSOs on the continent in furthering human rights is significant. This is in accordance with global trends, in national contexts, regional arrangements and institutions of global governance, where the paradigm is consistently shifting toward effective partnerships between governments and civil societal groups.

In conformity with article 42 of the African Children's Charter and Rules 34, 37, 81 and 82 of the Rules of Procedure, the African Children's Committee prepared and adopted the Criteria for Granting Observer Status in the African Committee of Experts on the Rights and Welfare of the Child to Non-Governmental Organisations and Associations, in 2006.²⁹ The role of granting observer status to formally involve NGOs in the work of the African Children's Committee is crucial, whether in the preparation of complementary reports, the submission of communications or undertaking of lobbying and/or investigation missions. It was as early as the 9th session of the Children's Committee that the then Chairperson of the Committee called on partners to submit their requests for observer status by the latest in May 2008.³⁰

One of the recommendations of the second CSO Forum requested the African Children's Committee

[i]n order to facilitate improved interaction between CSOs and the African Children's Committee and in accordance with the African Children's Committee Guidelines on Observer Status, act upon applications submitted to the Committee from NGOs/CSOs seeking observer status and considering the difficulty in qualifying for observer status, consider revising the guidelines ...

²⁹ 'Annexure A: Criteria for granting observer status in the African Committee of Experts on the Rights and Welfare of the Child to non-governmental organisations (NGOs) and associations' (2007) 7 *African Human Rights Law Journal* 559.

³⁰ During the 9th session, hard copies of the final version of Criteria for Granting Observer Status with the African Children's Committee were distributed to all partners.

During the 14th session, following the presentation of the report on the consideration of the observer status applications by the appointed Rapporteur and the ensuing discussions, the African Children's Committee decided to defer deliberation on the applications submitted to the subsequent session of the Committee, and to embark upon amending the Guidelines for granting observer status. There was a clear indication that the practice of the Committee in the year preceding the 14th session has revealed some of the shortcomings of these Guidelines.

One of the commendable moves of the African Children's Committee that emerged from the 15th session was an amended version of these Guidelines. This decision was informed by the need to make the criteria more flexible, thereby enabling a greater number of CSOs to obtain observer status before the Committee. This is indeed one clear example that the Children's Committee takes the recommendations of the CSO Forum seriously, and undertakes measures to act upon them as appropriate. In early 2010, the revised Guidelines of 2010 were shared with partners and stakeholders.

Again marking progress, during the 15th session, the Committee granted observer status to three organisations and rejected or postponed the application of one organisation. As a result, while the African Child Policy Forum was granted observer status without any reservations, Save the Children (Sweden) and IHRDA (based in The Gambia) were granted observer status subject to the submission to the African Children's Committee of sufficient copies of the requisite documents in both French and English.

6.2 The CSO Forum around the work of the African Children's Committee

It was as early as 2004 that the need to establish an NGO Group for the African Children's Charter, similar to the NGO Group for CRC, as a coalition of international, regional and national NGOs which work together to facilitate the implementation of the African Children's Charter was mooted. The idea was for the NGO Group to support participation of the NGOs, particularly national coalitions, in the reporting process to the African Children's Committee as well as other supplementary activities to ensure the implementation of the African Children's Charter.

It has been reported in the past that the first CSO/NGO Forum around the work of the African Children's Committee was held in April 2009.³¹ The Forum intends to bring together CSOs working on children's issues from across Africa. It also provides an opportunity for CSOs to engage with the mechanisms of the African Children's Committee as well as to

³¹ See J Sloth-Nielsen & BD Mezmur 'Out of the starting blocks: The 12th and 13th ordinary sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9 *African Human Rights Law Journal* 347.

discuss issues directly with Committee members who attend the meetings. The added value of this forum as a platform for partnership and networking and its role as a catalyst for advocacy around children's rights in Africa cannot be over-emphasised.

It is promising to witness that the CSO Forum is now being held prior to every session of the African Children's Committee. As a result, in November 2009, the second CSO Forum preceded the 14th session of the Children's Committee. During the presentation of the recommendations from the CSO Forum to the Committee, it was underscored that over 103 NGOs from over 20 countries met in Addis Ababa during the second week of November 2009 for the CSO Forum.

Some of the recommendations from this CSO Forum to the African Children's Committee included the need to make use of all available channels and means, including forging progressive and sustained relationships with relevant AU bodies and all other relevant stakeholders in order to ensure the effective implementation of the African Children's Charter; and the need to amend the Guidelines for state reporting in order to reflect in further detail what the specificities of the African Children's Charter are in order to allow state parties that have submitted reports to the CRC Committee to submit a similar report to the African Children's Committee after highlighting the specificities of the African Children's Charter.³² Other recommendations refer to the need to amend the African Children's Committee's Guidelines for the consideration of communications to include a time frame of six weeks for the African Children's Committee to acknowledge receipt of a communication; to make a decision on admissibility and finally to give its decision on the merits of the communication within a reasonable period of time to ensure that victims are not left without redress; the importance to develop general comments including on the provisions provided in articles 11, 16 and 20 of the African Children's Charter concerning the prohibition of corporal punishment in all settings; and the need to continuously update the African Children's Committee's webpage to facilitate the improved flow of information between the Committee and all relevant stakeholders.

Similarly, the main objectives of the third CSO Forum, which preceded the 15th session of the African Children's Committee in March 2010 were:

- to contribute to proper implementation of the African Children's Charter and the Call for Accelerated Action for an Africa Fit for Children;
- to foster closer collaboration and co-operation among civil society organisations, the Africa Union Commission, its structures and

³² Rules 70 and 71 of the African Children's Committee Rules of Procedure provide that state parties can submit a similar report to the CRC Committee to the African Children's Committee after highlighting the specificities of the African Children's Charter. Furthermore, the Guidelines for State Reporting under art 24 provides for the same rule.

- organs, the African Children's Committee and other stakeholders, for promotion and protection of children's rights and wellbeing in Africa;
- to educate, share and learn from one another on important child rights issues, mechanisms and processes;
- to provide recommendations to the African Children's Committee on various important child rights topics.

During the third CSO Forum, 89 individuals and organisations from 24 countries attended the event, which clearly indicates the increasing continent-wide attention this Forum is drawing.

As a testament to the fact that the CSO Forum's focus on thematic issues that are timely for the situation of the African child, the deliberations of the third CSO Forum centred on relevant issues such as promoting child wellbeing in Africa; the African Children's Charter and its mechanism to monitor children's rights; the Livingstone's Formula: What is it and how can child-focused CSOs engage with it?; the state of infant, child and maternal health and development in Africa: Where are we in achieving MDGs 4 and 5?; and budgeting for children.

It is important for CSOs to continue supporting the work of the CSO Forum. If the CSO Forum is to be a success and achieve its objectives, it needs to be sustainable. Sustainability requires, amongst other things, that the CSO Forum is supported financially and technically by all stakeholders. It is important for CSOs to attend the CSO Forums and actively engage with partners and the African Children's Committee.

6.3 Potential collaboration with the African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (African Commission) in 2009 adopted a resolution on collaboration with the African Children's Committee and that, to this end, Commissioner Soyata Maiga had been appointed as the focal point of the Committee.³³ The possibility of holding back-to-back sessions (which would help the African Children's Committee increase its visibility), as well as the possibility of technical co-operation (for instance, in the area of communications) between the two treaty bodies are two examples that collaboration would strengthen the monitoring and implementation of human rights in general.

During the 14th session, the members of the African Children's Committee welcomed this decision and reaffirmed their readiness to work purposefully to establish fruitful partnership with the African Commission. Meanwhile, it was agreed that the Secretariat of the Committee will continue to serve as the point of contact with the African Commission. However, even though it was decided to establish a working group to elaborate a document to formalise this collaboration, this has

³³ ACHPR/Res144(XXXV)09: Resolution on Co-operation Between the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child in Africa, done in Banjul, The Gambia, 27 May 2009.

not materialised by the end of the 15th session. It is also recommended that the Children's Committee should appoint one of its members as a focal person to work with Commissioner Soyata Maiga.

6.4 Potential collaboration with the CRC Committee

At the beginning of the 14th session, under Item 2 entitled 'Consultation among Committee members', the Children's Committee considered it necessary to put on the agenda an item on partnership with the CRC Committee. During the session, the Chairperson of the African Children's Committee informed the members that she had received correspondence from the Chairperson of the CRC Committee who proposed that a joint working group be established for the two Committees to exchange views and come up with proposals for a collaboration strategy, together with the names of their members that would serve on that working group. Members of the African Children's Committee also welcomed this proposal and appointed the following persons to serve on the working group: Seynabou Diakhaté; Moussa Sissoko; Agnès Kaboré; Cyprien Yanclo; Andrianirainy Rassamoely; and Mamosebi Pholo. As the terms of office of three of the members of this working group were coming to an end in mid-2010, it is hoped that the African Children's Committee will elect additional members to fill the vacancies in the working group.

There are a number of areas on which the two Committees can and should collaborate. Two of these areas that call for immediate collaboration are discussed below.

Firstly, there is an ongoing process to develop an optional protocol for CRC to establish a complaints procedure. This is as a result of the fact that the UN Human Rights Council decided, in its resolution 11/1 of 17 June 2009, to establish an open-ended working group to explore the possibility of elaborating an Optional Protocol to CRC to provide a communications procedure complementary to the reporting procedure under CRC.

This individual complains mechanism will be very similar to the one the African Children's Committee has under the African Children's Charter. Once adopted, it is highly likely that the African Children's Committee will have to work hand in hand with the CRC Committee and other stakeholders in order to promote the signature and ratification of the proposed Optional Protocol by African countries. There will also be other activities that the African Children's Committee will have to undertake to support the impact of this proposed Optional Protocol, including the synergy that will exist with the individual complaints procedure under the African Children's Charter. As a result, it is important that the Children's Committee familiarises itself with the processes unfolding in connection with the proposed Optional Protocol. There is no indication to date that the AU or the African Children's Committee has been involved in this process, and it might be worthwhile to

discuss it with the CRC Committee to identify areas of co-operation and allow the African Children's Committee to give whatever input it can in the whole process.

Secondly, another potential area of immediate collaboration relates to the possibility of the CRC Committee encouraging countries that report to it and that have not ratified the African Children's Charter, to do so, and also to report to the African Children's Committee. The CRC Committee systematically and consistently asks state parties that submit reports to it to ratify and implement various international instruments other than CRC and its two Optional Protocols.³⁴ A good example of this is the Hague Convention on Inter-Country Adoption,³⁵ which the CRC Committee has been recommending to state parties to ratify since 1994. In fact, a trend that shows the level of vigorous effort the CRC Committee has exerted to have as many ratifications as possible of the Hague Convention is evident from the changing tone used in the concluding observations of the CRC Committee.³⁶

It might be worthwhile for the working group established by the African Children's Committee to explore the possibility that the CRC Committee can systematically ask African countries that have not ratified the African Children's Charter to do so when they report to it. In addition, it might also be worthwhile to explore, if at all possible, if the CRC Committee can ask in its concluding observations African countries that report to it, to also submit their reports to the African Children's Committee.

During the 15th session, a meeting between the African Children's Committee and the CRC Committee took place. The CRC Committee was ably represented by Agnes Aidoo (Ghana) who is one of the three Vice-Chairpersons of the Committee. It was mentioned that three members of the African Children's Committee and the Secretary of the Children's Committee will attend the September 2010 session of the CRC Committee in Geneva, and will also have meetings with members of the CRC Committee. This is a move in the right direction to

³⁴ The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted on 25 May 2000 and entered into force on 18 January 2002; and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, adopted on 25 May 2000 and entered into force on 12 February 2002.

³⁵ The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption, adopted on 29 May 1993 and entered into force on 1 May 1995.

³⁶ This shift in emphasis and tone is notable starting from 'the hope that the state party will become a party' (CRC Committee, Concluding Observations: Belarus (February 1994) para 13) to recommending that 'the state party ... [r]atify' (CRC Committee, Concluding Observations: Benin (October 2006) para 45(c)), to 'recommend that the state party ... [s]peedily ratify' (CRC Committee, Concluding Observations: Kazakhstan (June 2007) para 44(a)), to the CRC Committee 'notes with regret that the state party has still not ratified' the Hague Convention (CRC Committee, Concluding Observations: Chad (January 2009) para 51).

strengthen the collaboration between the two Committees that is long overdue.

7 Concluding remarks

In 2009, the African Children's Charter celebrated 10 years since its entry into force. Immediately after the 14th session of the African Children's Committee, a half-day celebration of the Children's Charter was organised by CSOs. Various individuals and organisations took part in the celebration, the main part of which involved a panel discussion on the Charter.³⁷

The African Children's Committee will also turn 10 years in two years' time, perhaps offering a good opportunity to take stock of its achievements and challenges in its existence for a decade. In order to make such a stock-taking exercise a bright and promising one, the African Children's Committee and all stakeholders (such as CSOs, intergovernmental organisations, the AUC and the AU) will need to fast-track their efforts on a number of fronts and issues, some of which are highlighted in this article.

In the context of fast-tracking efforts, there are a number of promising activities being undertaken by various stakeholders. These include the fact that the Permanent Representatives' Committee of the AU approved the possibility of holding a second session of the Committee in 2010; the recruitment of two persons to support the work of the Secretariat of the African Children's Committee which is underway; the fact that Save the Children has committed funds to offer an induction training to the incoming Committee members; that a group of five CSOs have prepared a proposal to be submitted to the Swedish International Development Co-operation Agency (SIDA) in order to support the work of the African Children's Committee; and that UNICEF commissioned a consultant to review the work of the Children's Committee who proposed concrete recommendations. As such, almost all stakeholders seem to be aware that there is no time to slow down but to aggressively build on the momentum created. The work of the African Children's Committee indeed is not and cannot be like running on a treadmill where, if one stops, one moves backward.

³⁷ One of the authors, Prof Sloth-Nielsen, was one of the panellists.

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CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 July 2010

Compiled by: I de Meyer

Source: <http://www.africa-union.org> (accessed 30 September 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	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	53	45	45	25	28	3

* Additional declaration under article 34(6)
Ratifications after 31 December 2009 are indicated in bold