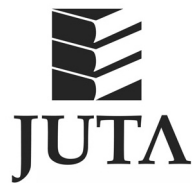


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South Africa

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CONTENTS

Editorial	v
Articles	
Benign accommodation? <i>Ukuthwala</i> , ‘forced marriage’ and the South African Children’s Act <i>by Lea Mwambene and Julia Sloth-Nielsen</i>	1
Revisiting corporate violations of human rights in Nigeria’s Niger Delta region: Canvassing the potential role of the International Criminal Court <i>by Martin-Joe Ezeudu</i>	23
Disentangling illness, crime and morality: Towards a rights-based approach to HIV prevention in Africa <i>by Marius Pieterse</i>	57
The penalty of life imprisonment under international criminal law <i>by Esther Gumboh</i>	75
Social protection for Malawian migrants in Johannesburg: Access, exclusion and survival strategies <i>by Redson Edward Kapindu</i>	93
The utility of environmental rights to sustainable development in Zimbabwe: A contribution to the constitutional reform debate <i>by Tumai Murombo</i>	120
Local government and human rights: Building institutional links for the effective protection and realisation of human rights in Africa <i>by Conrad Mugoya Bosire</i>	147
Realising the right to primary education in Cameroon <i>by Sergey Alain Djoyou Kamga</i>	171
The Inter-American human rights protection system: Structure, functioning and effectiveness in Brazilian law <i>by Valerio de Oliveira Mazzuoli</i>	194
Recent developments	
Human rights developments in African sub-regional economic communities during 2010 <i>by Solomon T Ebobrah</i>	216

Developments in international criminal justice in Africa during 2010	
<i>by Wambui Mwangi</i>	251
The right to water in Botswana: A review of the <i>Matsipane Mosetlhanyane</i> case	
<i>by Bonolo Ramadi Dinokopila</i>	282
Making sense of the Rwandan Law Relating to Serving Life Imprisonment with Special Provisions	
<i>by Jamil Ddamulira Mujuzi</i>	296

Editorial

This is a year of significant celebration for human rights on the African landscape: It is 30 years since the adoption of the African Charter on Human and Peoples' Rights on 27 June 1981, and 25 years have passed since its entry into force on 21 October 1986. A conference on 'Thirty years of the Charter: Looking forward while looking back' is held on 11 July 2011 in Pretoria, hosted by the Centre for Human Rights, University of Pretoria, and the African Commission on Human and Peoples' Rights (African Commission), as part of the annual African Human Rights Moot Court Competition. It is envisaged that a selection of conference papers will be published in the November 2011 issue of the *Journal*.

Since its first issue in 2001, the *Journal* has focused on the accomplishments and challenges of the African human rights system. Although the system has by no means reached perfection, there is much to celebrate, including the progressive interpretation of the African Charter adopted by the African Commission, the establishment and the accomplishments of various special mechanisms, as well as the procedural improvements in the examination of state reports and in their follow-up, as reflected in the Commission's new Rules of Procedure (adopted in 2010). As well, the potential benefit of the supplementary role of the African Court has recently been illustrated when the Court, responding to a referral by the Commission, ordered provisional measures against Libya.

One of the weaknesses in the system has been the neglect of the African Commission's Secretariat. Over the years the Secretariat has acquired a reputation of inefficiency, due mainly to it being underfunded and understaffed. The Secretariat remains terminally understaffed, with the vacancies of two legal officers remaining unfilled. In the post-celebration period, improvements to the Secretariat should therefore be one of the priorities of the African Union organs, including the AU Commission, and the African Commission.

In this issue, a number of contemporary human rights issues are covered, including HIV, forced migration, the right to primary education and the right to water of indigenous communities. Issues related to broader concerns that may be termed 'democratisation' are also included, such as the importance of local government. As has become customary, this first of the *Journal's* two annual issues provides an over-

view of developments during 2010 in international criminal justice and human rights at the sub-regional level.

We acknowledge with appreciation and sincerely thank the independent reviewers who gave their time and talents to ensure the consistent quality of the *Journal*: Atangcho Akonumbo, Abiola Ayinla, Bernard Bekink, Christo Botha, Liz Coyne, Lee Anne de la Hunt, John Dugard, Loreta Feris, Idi Gaparayi, Waruguru Kaguongo, Cecilia Nilsson Kleffner, Berita Kopolu, Remember Miamingi, Jamil Mujuzi, Chacha Bhoke Murungu, Chinedu Nwagu, Enyinna Nwauche, Benson Olugbuo, Steve Ouma, Emmanuel Quansah, Werner Scholtz, Ann Skelton, Melodie Slabbert, Olufemi Soyaju, Bret Thiele, Karin van Marle and Dunia Prince Zongwe.

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Benign accommodation? *Ukuthwala*, ‘forced marriage’ and the South African Children’s Act

*Lea Mwambene**

Lecturer, Faculty of Law, University of the Western Cape, South Africa

*Julia Sloth-Nielsen***

Dean, Faculty of Law, University of the Western Cape, South Africa

Summary

In this article, the authors evaluate the implications of the Children’s Act 38 of 2005 for ukuthwala. Ukuthwala is a practice whereby, as a preliminary procedure to a customary marriage, a young man forcibly takes a girl to his home. In recent times, the practice has taken on other dimensions, including very young girls being married to older men and charges of abduction being laid. Questions arise relating to the impact of constitutional principles upon this customary law and practice. It is suggested that, instead of adopting an a priori prohibitionist stance towards customs that seem to violate human rights norms, benign accommodation that promotes the positive aspects of culture should be sought. This approach leads to a conclusion that South African law should recognise those forms of ukuthwala where the requirement of the consent of the ‘bride’ is met. The implications of the prohibition on social and cultural practices detrimental to child well-being in the Children’s Act 38 of 2005 are framed in this context.

* LLB (Hons) (Malawi), LLM, LLD (Western Cape); lmwambene@uwc.ac.za

** BA LLB (Stellenbosch), LLM (Cape Town), LLD (Western Cape); jsloth-nielsen@uwc.ac.za. The authors co-presented an earlier version of this article at a conference on ‘Relocation, forced marriage and international child abduction’ at London Metropolitan University, Centre for Family Law Practice on 30 June 2010.

1 Introduction

The practice of *ukuthwala* in South Africa has received negative publicity recently, with numerous complaints being recorded. In the first and second quarter of 2009, the media reported that 'more than 20 Eastern Cape girls are forced to drop out of school every month to follow the traditional custom of *ukuthwala* (forced marriage)'.¹ Girls as young as 12 years are forced to marry older men, in some cases with the consent of their parents or guardians. Commenting on the matter, the Chairperson of the Congress of Traditional Leaders of South Africa (CONTRALESA), Chief Mwelo Nokonyana, said *ukuthwala* was 'an old custom that was now being wrongly practised in several parts of the Eastern Transkei'.² Dr Nokuzola Mdende of the Camagwini Institute also stated that 'abducting a girl of 12 or 13 is not the cultural practice we know. This is not *ukuthwala*, this is child abuse. At 12, the child is not ready to be a wife.'³ At the SA Law Reform Commission Roundtable Discussion on the Practice of *Ukuthwala*⁴ it was observed that *ukuthwala*, like many other customary institutions, has changed radically. The practice has now taken on other dimensions, including young girls being married forcibly to older men, relatives of the girl kidnapping and taking the girls themselves as wives, and abductions not being reported to the traditional authorities.⁵

These changed practices around *ukuthwala* potentially increase the risk of children's rights violations. The aim of this article is to evaluate the implications of the Children's Act 38 of 2005 (Act) for *ukuthwala*. In the second part of this article, we trace the history of *ukuthwala*, the traditional reasons for its use, and different forms of *ukuthwala*. We further discuss the procedure of *ukuthwala* and the legal position of the practice under customary law. In the third part, we contextualise debates around *ukuthwala* within the constitutional framework and against the backdrop of the international rights to culture and to equality. In the fourth part, we proceed by looking at the framework for the consideration of culture and custom in the Children's Act 38 of 2005 before discussing the implications of the Act for *ukuthwala*. Concluding that *ukuthwala* is not equivalent to a 'forced marriage', the article

¹ *The Herald* 6 April 2009; *Sunday Times* 31 May 2009.

² *The Herald* (n 1 above). See, too, 'The community of KwaCele, near Lusikisiki, has promised to end the practice of *ukuthwala*' *Media 24.com* 24 March 2011.

³ *The Herald* (n 1 above).

⁴ This was convened on 30 November 2009 as part of its preliminary investigation to determine whether the proposal should be included in the Commission's law reform programme and in an effort to gather information on the subject. Dr Mwambene attended this forum and short notes of the papers presented are on file.

⁵ D Ntsebeza 'Background to the investigation of *ukuthwala*' presented at the SA Law Reform Commission (n 4 above).

proposes that the positive attributes of the practice be recognised and advocates against blanket criminalisation.

2 *Ukuthwala*

2.1 What is *ukuthwala*?

In South Africa, the custom originated from the Xhosas.⁶ However, although the custom is predominantly practised among Xhosa-speaking tribes,⁷ the practice has expanded into different ethnic groups. For example, the Mpondo clan has adopted *ukuthwala* from Xhosa clans, such as the Mfengus.⁸ Young Sotho men, through contact with other tribes, have also adopted the practice which was otherwise foreign to them.⁹ *Ukuthwala* in South Africa enjoys popular support in the areas where it is still practised.¹⁰ According to a newspaper report, one chief (a woman) in the region where *ukuthwala* is practised said that the young girls who escape from the houses where they are detained whilst awaiting marriage were 'embarrassing our village'.¹¹

The word *ukuthwala* means 'to carry'.¹² It is a culturally-legitimated abduction of a woman whereby, preliminary to a customary marriage,¹³ a young man will forcibly take a girl to his home.¹⁴ Some authors have described *ukuthwala* as the act of 'stealing the bride'.¹⁵ *Ukuthwala* has also been described as a mock abduction or irregular proposal¹⁶ aimed at achieving a customary marriage.¹⁷ From these definitions, we see that *ukuthwala* is in itself not a customary marriage or an engagement.

⁶ M Ngcobo Presentation to the Portfolio Committee on the role of the Department of Social Development on *ukuthwala*, 15 September 2009 <http://www.pmg.org.za/files/docs/090915ukuthwala.ppt> (accessed 9 June 2010).

⁷ JC Bekker *et al* *Introduction to legal pluralism in South Africa* (2006) 31.

⁸ Ngcobo (n 6 above).

⁹ JC Bekker *Customary law in Southern Africa* (1989) 98.

¹⁰ The prevalence of the custom nowadays can be depicted from what DS Koyana & JC Bekker 'The indomitable *ukuthwala* custom' (2007) *De Jure* 139 note: 'From enquiries that we made and on the basis of our own observations we are assured that the *thwala* custom is still widely practised in Nguni communities.'

¹¹ This was a response to a report in *Sunday Times* 31 May 2009 3 that the current practice of *ukuthwala* also takes the form of detaining these girls against their will in guarded huts and forcing them to have sex with their 'husbands'. They allegedly get beaten and humiliated should they try to escape.

¹² DS Koyana *Customary law in a changing society* (1980) 1.

¹³ A customary marriage is a relationship which concerns not only the husband and wife, but also the family groups to which they belonged before the marriage. It is also defined as a marriage which is validly concluded by a *lobolo* agreement.

¹⁴ Koyana (n 12 above).

¹⁵ E Curran & E Bonthuys 'Customary law and domestic violence in rural South African communities' (2005) 21 *South African Journal on Human Rights* 607 615.

¹⁶ It should be noted that 'irregular' did not mean 'unlawful'.

¹⁷ TW Bennett *Customary law in South Africa* (2004) 212.

The main aim of *ukuthwala* is to force the girl's family to *enter into negotiations* for the conclusion of a customary marriage.¹⁸

The procedure for *ukuthwala* is as follows: The intending bridegroom, with the help of one or two friends, will waylay the intended bride in the neighbourhood of her own home, quite often late in the day.¹⁹ They will then 'forcibly' take her to the young man's home. Sometimes the girl is caught unawares, but in many instances she is caught according to a prior plan and agreement. In either case, the girl will put up a show of resistance to suggest to onlookers that it is against her will when, in fact, it is seldom so. As Bekker explains: 'The girl, to appear unwilling and to preserve her maidenly dignity, will usually put up strenuous but pretended resistance, for, more often than not, she is a willing party.'²⁰ Once the girl has been taken to the man's village, her guardian or his messenger will then follow up on the same day or the next day and possibly take her back if one or more cattle are not handed to him as an earnest promise for a future marriage.²¹ Consequently, if the guardian does not follow her up to take her back, tacit consent to the marriage at customary law can be assumed.

After the girl has been carried to the man's family hearth, negotiations for *lobolo* between the families of the bride and the groom would then follow. If the families cannot reach an agreement, the girl will return to her parental home, while the man's family will be liable for damages.²²

As noted, the main aim of *ukuthwala* is to force the girl's family to enter into negotiations for the conclusion of a customary marriage. It follows, therefore, that if a man abducts a girl but fails to offer marriage, or if he does offer marriage but is deemed by the girl's guardian to be unacceptable as a suitor, a fine of one beast is payable to the girl's guardian²³ who, with his daughter, is said to have been insulted by the *thwala* without a consequent offer of a marriage, or having been *thwala'd* by an undesirable suitor.²⁴

¹⁸ Bekker *et al* (n 7 above) 31 (our emphasis). It should, however, be observed that *ukuthwala* can be distinguished from the common law abduction. At common law, the crime of abduction has been described as the unlawful removal of a minor from the control of her guardian with the intention of violating the guardian's *potestas* and of enabling somebody to marry her or have sexual intercourse with her. On the other hand, *ukuthwala* is lawful in the society that designed it; there is no *ukuthwala* of males; and lastly, the purpose of *ukuthwala* is to negotiate a marriage, not conclude it, and sexual intercourse is customarily not the intention.

¹⁹ Bekker (n 9 above) 98; Koyana & Bekker (n 10 above) 139.

²⁰ Bekker (n 9 above) 98.

²¹ As above.

²² Curran & Bonthuys (n 15 above) 615.

²³ Mostly, among the *Pondo*, the *Fengu* and the *Bhaca*, and possibly other Cape communities.

²⁴ Bekker (n 9 above) 98.

It is important to note that during the process of *ukuthwala*, it is contrary to custom to seduce a girl.²⁵ By custom, the suitor, after forcibly taking the girl to his home village, is required to report the *thwala* to his family head. The family head thereupon gives the girl into the care of the women of his family home, and sends a report to the girl's guardian. A man who seduces a *thwala'd* girl is required to pay a seduction beast in addition to the number of *lobolo* cattle agreed upon and in addition to the *thwala* beast where no marriage has been proposed.²⁶ Other safeguards that were put in place for the protection of the *thwala* and the girl involved were that the parents of the girl were immediately notified after the *thwala* had occurred; if the *thwala* had not worked, a beast was supposed to be paid; and finally if a girl fell pregnant consequent upon her seduction, then further additional penalties were also supposed to be paid.²⁷

Numerous reasons exist for the practice of *ukuthwala*, some of which are arguably cogent and weighty. These include to force the father of the girl to give his consent;²⁸ to avoid the expense of the wedding; to hasten matters if the woman is pregnant; to persuade the woman of the seriousness of the suitor's intent; and to avoid the need to pay an immediate *lobolo* where the suitor and his or her family were unable to afford the bride wealth. From these reasons, it is apparent that *uku-thwala* can serve important cultural purposes in those South African communities who live their lives according to cultural norms.

Where the *thwala* takes place with the foreknowledge and consent of the girl, she is exercising her right to participate and express a choice. (This will be addressed more fully in the conclusions.) However, equally, there is good reason to conclude that, in some cases, the girl or the unmarried woman is *thwala'd* without her consent. This provides the link to forced marriage, which then calls into play constitutional and human rights standards. In addition, in so far as the girl who is *thwala'd* may be aged below 18, issues related to child marriage and early marriage arise, which in turn calls for a consideration of some provisions of the Children's Act 38 of 2005.

²⁵ As above.

²⁶ Koyana & Bekker (n 10 above) 141.

²⁷ F Mdumbe 'International and domestic legal frameworks impacting on *ukuthwala*' presented at the SA Law Reform Commission Roundtable (n 4 above).

²⁸ It should be observed that before the Recognition of Customary Marriages Act 1998, consent of the girl's father was essential to the validity of the customary marriage. It is, moreover, argued that this requirement may still be necessary because sec 3(b) of the Recognition of Customary Marriages Act provides that 'the marriage must be negotiated ... in accordance with customary law'. Unless the last phrase is read as referring *only* to ceremonial aspects of customary law, and the payment of *lobola*, the requirement of parental consent (as at customary law) is also a requirement for a valid customary marriage under the Act. See further n 37 below.

2.2 Forms of *ukuthwala*

It is generally accepted that the traditional custom of *ukuthwala* is often carried out with the knowledge and consent of the girl or her guardian. This obviously suggests that *ukuthwala* is not necessarily effected against her will, or that of her guardian.²⁹ In the past, courts have held that *ukuthwala* should not be used as a cloak for forcing unwelcome attentions on a patently unwilling girl.³⁰ Courts have also held that abduction by way of *ukuthwala* is unlawful.³¹ On the other hand, courts have suggested that if there is a belief by the abductor that the custom is lawful and that the parents or guardians consented to the taking, it would not be abduction because abduction is a crime against parental authority.³²

We briefly look in this section at what we propose to be three forms of *ukuthwala*,³³ first, the practice that occurs where a girl is aware of the intended abduction and there is collusion between the parties,³⁴ that is, where the girl or woman being abducted conspires with her suitor. The 'force' used in the act of abduction is therefore for the sake of appearances only. For that reason, *ukuthwala* in this model could be suggested to be equivalent to elopement.³⁵ In this type of *ukuthwala*, the girl gives her consent.³⁶ The issue of consent is additionally important because, as observed earlier, *ukuthwala* is a preliminary procedure to a customary marriage and not a marriage in itself. The consent to *ukuthwala* presumably carries through the negotiations, to provide the basis for the validity of the (customary) marriage which is eventually concluded. If after the *ukuthwala* has taken place, the girl's parents refuse to give their consent, there cannot be a valid ensuing customary marriage.³⁷

²⁹ Curran & Bonthuis (n 15 above) 615.

³⁰ *Nkupeni v Numunguny* 1938 NAC (C&O) 77, as cited by Bennett (n 17 above) 213.

³¹ *R v Swartbooi* 1916 EDL 170; *R v Sita* 1954 4 SA 20 (E), as cited by D McQuoid-Mason 'The practice of *ukuthwala*: The Constitution and the Criminal Offences and Related Matters Act' (2009) 30 *Obiter* 716.

³² *R v Sita* (n 31 above). In the constitutional era, however, the common law crime of abduction might be unconstitutionally suspect, in that it focuses on a violation of parental authority and ignores the views and wishes of the child.

³³ Bekker *et al* (n 7 above) 31.

³⁴ LAWSA *Indigenous law* 32 (2009) para 89.

³⁵ As above.

³⁶ M Herbst & W Du Plessis 'Customary law v common law marriages: A hybrid approach in South Africa' (2008) 12 *Electronic Journal of Comparative Law* 6.

³⁷ The 1998 Recognition of Customary Marriages Act does not make provision for *ukuthwala*. It has, however, put beyond doubt the necessity for the consent of the bride to a customary marriage. In terms of sec 3(1) of the Recognition of Customary Marriages Act, the consent of both spouses is necessary for the validity of a customary marriage. (The consent of the guardian is discussed in n 28 above).

Second, *ukuthwala* also takes the form of where families would agree on the union, but the girl is unaware of such an agreement.³⁸ It has been observed that this type of *ukuthwala* often happened in cases where the girl might not otherwise agree to her parent's choice. It also happens in situations where a girl happens to be of high rank but, for various reasons, attracts no suitors.³⁹ After the girl has been *thwala'd* and both families' desire and consent to the union established, the girl is watched until she gets used to the idea of the marriage.⁴⁰ Consent, as understood in Western terms (that is, the consent of the bride and bridegroom only) might be more difficult to argue here.

The third version is where the custom occurs against the will of the bride. In this form of *ukuthwala*, there is no initial consent from either the girl or her parents or guardian. Under this form, a girl is taken to the family home of the young man by force. Emissaries are then sent to her family to open marriage negotiations. The family of the girl may refuse negotiations, in which case a beast is payable⁴¹ and the girl is taken back to her family. In addition, in its most abusive form, the forced abduction can expose the girl to rape by her 'husband' and to actual or threatened violence in order to keep her in the relationship.⁴² In this form of *ukuthwala*, we see that the bride is unwilling and therefore the intended marriage would, arguably, be a forced marriage. Other human rights violations are obvious, including the infringement of freedom and security of the person, violation of bodily integrity, dignity and various provisions which prohibit forms of slavery, to name a few.

As a general proposition, it can be concluded that some forms of *ukuthwala* do violate women's and children's rights. At the same time, there are also some legitimate cultural goals attendant on the practice and which arguably do not overstep the mark. The issue is how to address the objectionable forms of the practice of *ukuthwala*, for instance, through criminalisation or prohibition, without losing the culturally-beneficial aspects of the practice. On the one hand, there is the abiding interest in improving the position of women and children affected by traditional customary practices which can be harmful or detrimental, by proscribing them altogether. However, on the other hand, for many supporters of *ukuthwala*, the practice serves to promote legitimate cultural goals, at least one of which is to force the father of the girl to start marriage negotiations. For this group, criminalisation or prohibition would abrogate a cultural practice with considerable legitimacy, and impair the right to culture.

³⁸ Bekker *et al* (n 7 above) 31.

³⁹ Bennett (n 17 above) 212.

⁴⁰ K Woods 'Contextualising group rape in post-apartheid South Africa' (2005) 7 *Culture, Health and Sexuality* 303 313.

⁴¹ LAWSA (n 34 above) para 89; Bekker (n 9 above) 98.

⁴² Curran & Bonthuis (n 15 above) 616.

3 Contextualising *ukuthwala* within constitutional and international human rights paradigms

From the above discussion, several conclusions with constitutional implications can be drawn from the practice of *ukuthwala*. First, it is clear that only unmarried women and girls, and not unmarried men and boys, are subjected to the practice of *ukuthwala*. As a customary practice applicable only to girls, gender equality is called into play. Second, the discussion has also shown that with some forms of *ukuthwala*, girls are *thwala'd* without their consent. This violates their bodily integrity and freedom, security of the person, their right to make choices or, for children, their right to participate in decisions made about them. Third, the reported incidents of the current practice of *ukuthwala* show that the practice has taken the form of a 'forced marriage' and is no longer merely a preliminary process undertaken in the lead-up to a customary marriage. Fourth, we see that current trends related to *ukuthwala* may lead to 'child marriages'. Fifth, reports show that *ukuthwala* is proving to be a serious contributing factor leading to violence against women and children.

3.1 *Ukuthwala* and the right to equality

Both the South African Constitution, in section 9, as well as international human rights standards prohibit discrimination based on sex and recognise the equality of both sexes.⁴³ The significance of this principle where women's rights are concerned cannot be overemphasised. Indeed, as Cook points out, in the international sphere at more or less the same time as the South African Constitution was adopted:⁴⁴

The reasons for this general failure to enforce women's rights are complex and vary from country to country. They include lack of understanding of the systemic nature of the subordination of women, failure to recognise the need to characterise the subordination as a human rights violation, and lack of state practice to condemn discrimination against women.

To this end, she observes that the legal obligation to eliminate all forms of discrimination against women is a fundamental tenet of international human rights law.⁴⁵

In South Africa, the Constitutional Court has consistently affirmed the fact that the principle of equality and non-discrimination is recognised, and its value conceded even in the contest of competing claims

⁴³ Art 1 UN Charter; art 2 Universal Declaration; art 2 ICESCR; art 2(1) ICCPR; art 2 CEDAW; arts 2 & 3 African Charter.

⁴⁴ RJ Cook 'Women's international human rights law: The way forward' in RJ Cook (ed) *Human rights of women: National and international perspectives* (1994) 3.

⁴⁵ Cook (n 44 above). See, eg, art 18 of the African Charter; art 1 of CEDAW; and art 24(3) of CRC.

of the right to equality and the right to culture. In the *Bhe* case,⁴⁶ for example, Langa DCJ noted:

The rights to equality ... are of the most valuable of rights in an open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender.

At the point of entering into a marriage, several international human rights standards require that there should be equality of both spouses. For example, article 16(1) of the Universal Declaration of Human Rights, 1948 (Universal Declaration) provides that '[m]en and women of full age ... have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.' Article 16(2) of the Universal Declaration provides that '[m]arriage shall be entered into only with the free and full consent of the intending parties'. In addition to the Universal Declaration, article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964, provides that '[n]o marriage shall be legally entered into without the full and free consent of both parties'.

Furthermore, article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides:

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

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

CEDAW applies to girls under 18 years of age. Article 16(2) of CEDAW provides that the betrothal and marriage of a child shall have no legal effect and that all necessary action, including legislative action, shall be taken by states to specify a minimum age of marriage, and to make registration of marriage in an official registry compulsory. In addition, in 1994, a General Recommendation on Equality and Family Relations, the CEDAW Committee recommended that the minimum age for marriage for both boys and girls should be 18.⁴⁷

At the regional level, the African Charter on the Rights and Welfare of the Child (African Children's Charter)⁴⁸ sets the framework to eliminate gender discriminatory practices. The African Children's Charter prohibits discrimination against children in any form and guarantees all children the right to enjoy the rights and freedoms recognised in the Children's Charter 'irrespective of the child's or his or her parents' or legal guardians' race, ethnic group, colour, sex ... birth or other status'.

⁴⁶ *Bhe & Others v Magistrate Khayelitsha (Commissioner for Gender Equality as Amicus Curiae)* 2005 1 BCLR 1 (CC); 2005 1 SA 580 (CC).

⁴⁷ General Recommendation 21 (13th session, 1994) <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed 20 August 2010).

⁴⁸ South Africa became a party to the African Children's Charter on 7 January 2000.

Member states to the African Children's Charter have the obligation to adopt legislative or other measures as may be necessary to give effect to the provisions of the African Children's Charter.⁴⁹

Further, the African Children's Charter defines a child as 'every human being below the age of 18 years'.⁵⁰ This definition highlights the significance of addressing discrimination in African societies in a number of ways.⁵¹ First, according to this definition, the African Children's Charter applies to every child under the age of 18 in ratifying countries, irrespective of sex. Secondly, the African Children's Charter unequivocally prohibits child marriages by boys and girls under the age of 18. To that end, Mezmur observes that the African Children's Charter provides greater protection than the Convention on the Rights of the Child (CRC), and avoids any discrepancy between the minimum age of marriage for boys and girls, which is consistently lower for girls in many countries.⁵²

Further protection of women and children affected by discriminatory cultural practices in Africa is provided under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).⁵³ The Women's Protocol provides that state parties shall enact appropriate national legislative measures to guarantee, *inter alia*, free and full consent of both parties to a marriage.⁵⁴ The Women's Protocol has also set the minimum age for girls and boys contemplating a marriage at 18.⁵⁵

From the above discussion, we see that the practice of *ukuthwala* has a strong potential to violate international human rights standards, especially where a forced marriage is the result of such practice. Equality norms make it clear that men and women are to have equal rights at the point of entry into marriage. Some forms of *ukuthwala* are clearly in violation of this right. Moreover, the right to free and full consent to a marriage, as recognised in international human rights standards,

⁴⁹ Art 1(1) African Children's Charter.

⁵⁰ Art 2 African Children's Charter.

⁵¹ This significance is appreciated when the definition of a child under the African Children's Charter is contrasted with the definition of a child provided by CRC. CRC defines a child as 'every human being below the age of 18 years unless, under the laws applicable to the child, majority is attained earlier'. Marriage would typically result in majority status being attained.

⁵² B Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *South African Public Law* 20.

⁵³ The Protocol, which entered into force on 25 November 2005, is the first specialised gender-neutral instrument for the protection of women's rights in Africa. It was adopted by the Assembly of the Heads of State and Government of the African Union at its 2nd ordinary session, on 11th July 2003 in Maputo, Mozambique. It was promulgated out of concern by the AU that women in Africa continue to be victims of discrimination and harmful practices (see Preamble to the African Women's Protocol).

⁵⁴ Art 6(a) African Women's Protocol.

⁵⁵ Art 6(b) African Women's Protocol.

cannot be achieved when one of the parties involved is not sufficiently mature to make an informed decision. This position applies to cases of *ukuthwala* where, as reported, girls as young as 12 years are abducted. Furthermore, where consent is obtained through force, this is also a clear violation of the international standards that require that there should be free and full consent from both parties.⁵⁶

3.2 *Ukuthwala* and the right to culture

South Africa's Constitution expressly recognises the practice of one's culture, provided that persons exercising cultural rights may not do so in a manner that is inconsistent with any other provisions of the Bill of Rights.⁵⁷ Based on the constitutional recognition of the right to culture, proponents of *ukuthwala* would argue that everyone, including the state, is prohibited from interfering with their right to practise *ukuthwala*. As argued by Bennett:⁵⁸

The recognition of culturally-defined systems of law has become a constitutional right, vesting in groups and individuals, with the implication that the state has a duty to allow people to participate in the culture of their choice, including a duty to uphold the institutions on which that culture is based.

Devenish⁵⁹ has also argued that 'the right to practise one's culture allows members of communities to freely engage in the practice of their culture without intervention from the state or any other source'.

Sections 30 and 31 of the Constitution appear to be similar in wording to several international standards. An obvious example is article 27 of the Universal Declaration.⁶⁰ Other examples of the recognition of the right to culture in international law are article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), article 27 of the International Convention on Civil and Political Rights (ICCPR) and article 29 of CRC. At the regional level, the rights to culture were first declared in article 17 of the African Charter on Human and Peoples' Rights (African Charter).⁶¹

⁵⁶ L Mwambene 'The impact of the Bill of Rights on African customary family laws: A study of women's rights in Malawi with some reference to developments in South Africa' unpublished LLD thesis, University of the Western Cape, 2009 165.

⁵⁷ Secs 30 & 31 Constitution of the Republic of South Africa 1996.

⁵⁸ TW Bennett 'Conflict of laws' in Bekker *et al* (n 7 above) 18.

⁵⁹ G Devenish *A commentary on the South African Bill of Rights* (1999) 421.

⁶⁰ Art 27 of the Universal Declaration states: '(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' The right to culture is also an integral part of other fundamental rights enunciated in the Universal Declaration, such as freedom of conscience, expression and religion.

⁶¹ South Africa ratified this treaty in July 1996.

From the above discussion, we see that both international human rights law and the South African Constitution recognise the right to culture. This notwithstanding, cultural rights are not regarded as providing a basis on which other protections may be abridged.⁶² Rather than protecting culture at the expense of human rights, international documents reveal that culture necessarily must cede to universal standards.⁶³ Indeed, it is suggested that culture is protected so that it may enhance human rights development and, in turn, not lead to the derogation or diminishing of rights.⁶⁴

International treaty law exemplifies the approach that places the preservation of human rights as the most fundamental universal principle, even when human rights protection challenges cultural practices. Article 5 of CEDAW requires state parties to take all appropriate measures to⁶⁵

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

CRC also confronts the possibility of misuse of culture as a pretext to violate children's rights in so far as article 24(3) provides that 'States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'. Furthermore, CRC clearly places the focus on the child's best interests,⁶⁶ the child's evolving capacities,⁶⁷ the principle of non-discrimination⁶⁸ and respect for the child's evolving capacities,⁶⁹ all of which situate the focus of human rights on children and require placing children's best interests before those of potentially abusive cultural practices.

⁶² JR Levesque *Culture and family violence: Fostering change through human rights law* (2001) 95-96.

⁶³ R Cook 'State accountability under the Convention on the Elimination of All Forms of Discrimination Against Women' in Cook (n 44 above) 228 234-235.

⁶⁴ J Sloth-Nielsen & B Mezmur 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7 *African Human Rights Law Journal* 330 335-336 observe that '[h]uman rights documents continually recognise that culture is an area that must be protected. However, culture should be harnessed for the advancement of children's rights. But when it appears that children are disadvantaged or disproportionately burdened by cultural practice, the benefits of the cultural practice and the harm of the human rights violation must be weighed against each other. How to strike a necessary balance between culture and children's rights is an issue that should continue to engage the minds of scholars.'

⁶⁵ See also art 2 of CEDAW, which requires '[s]tate parties ... by all appropriate means and without delay ... [to] undertake ... (f) ... appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'.

⁶⁶ Arts 3, 9, 20, 21 & 40 CRC.

⁶⁷ Arts 5, 12, 14 & 40 CRC.

⁶⁸ Art 2 & Preamble CRC.

⁶⁹ Arts 21, 28, 39, 40 & Preamble CRC.

Furthermore, at the regional level, the African Children's Charter is unequivocal with regard to the relationship between culture and children's rights. It explicitly asserts its supremacy over any custom, tradition, cultural or religious practice inconsistent with the rights and obligations guaranteed under it.⁷⁰ The African Women's Protocol also contains provisions relating to the elimination of harmful practices, including the prohibition, through legislative measures backed by sanctions, of all forms of harmful cultural practices.⁷¹ Harmful practices have been regarded as receiving 'the most' attention in the Women's Protocol.⁷²

Some scholars argue that, instead of abolishing customary laws that appear to be inimical to human rights, we should closely look at local cultures and see which aspects we can best retain to achieve the aspirations of human rights.⁷³ This approach would militate against the view that *ukuthwala* should be proscribed in its entirety.

Specifically addressing himself to this view, Ibhawoh states that⁷⁴

[i]t is not enough to identify the cultural barriers and limitations to modern domestic and international human rights standards. It is even more important to understand the social basis of these cultural traditions and how they may be adapted to or reintegrated with national legislation to promote human rights. Such adaptation and integration must be done in a way that does not compromise the cultural integrity of peoples. In this way, the legal and policy provisions of national human rights can derive their legitimacy not only from the state authority, but also from the force of cultural traditions.

These insights may be important to the analysis of the implications of the Act for *ukuthwala* in South Africa. Thus, it may be necessary to distinguish between the practice of *ukuthwala* in forms which are inimical to human rights and may lead to human rights abuses, and those dimensions of the practice that advantage human rights, and promote the right to culture. In the light of the fact that the right to practise *ukuthwala* in South Africa continues to be asserted by people who are in opposition to change the custom, it may arguably be preferable to explore options which retain the positive features of the custom, rather

⁷⁰ Art 1(3) African Children's Charter.

⁷¹ Art 5 African Women's Protocol.

⁷² F Banda 'Building on a global movement: Violence against women in the African context' (2008) 8 *African Human Rights Law Journal* 1 16.

⁷³ C Nyamu-Musembi 'Are local norms and practices fences or pathways? The example of women's property rights', as cited by F Banda *Women, law and human rights: An African perspective* (2005) 256.

⁷⁴ B Ibhawoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *Human Rights Quarterly* 838 839.

than advocating an abolitionist/prohibitionist stance which denies any value in the customary version of *ukuthwala*.⁷⁵

However, the idea of developing customary laws so that they are consistent with human rights comes into direct confrontation with debates about the protection of women and children against discrimination and their protection against violence. Whilst the development or adaptation of customary law is considered to be a viable approach to achieving international human rights aspirations because of the cultural legitimacy that it achieves,⁷⁶ feminist scholars and children's rights advocates alike might question whether this can be done at all without sacrificing the protection of women and children on the altar of custom.⁷⁷ In the case of *Christian Education of South Africa v Minister of Education*,⁷⁸ the Constitutional Court affirmed that the rights of members of communities that associate on the basis of language, culture and religion cannot be used to shield practices which offend the Bill of Rights.⁷⁹ In this case, it was instructive to note that, for the discussion related to the practice of *ukuthwala*, children's rights to protection from violence trumped claims based on religion. By analogy, it could be predicted that courts may not uphold the practice of *ukuthwala* if it has the mere potential of infringing other constitutional rights.

Fear of opening the door to trenchant violations of the physical security of South African women and children might blur and diminish arguments which advocate a more sensitive and nuanced treatment of the custom through which the positive aspects can be retained. We return to this in the conclusion.

⁷⁵ At the discussion forum convened by the SA Law Reform Commission (n 4 above), most people were of the view that there was nothing wrong with *ukuthwala* as it was originally practised and that, despite the recent distortions of the practice, the custom should not be outlawed.

⁷⁶ AA An-Na'im 'State responsibility under the international human rights law to change religious and customary laws' in Cook (n 44 above) 167 173-175 argues that, unless international human rights have sufficient legitimacy within particular cultures and traditions, their implementation will be thwarted, particularly at the domestic level, but also at the regional and international levels. Without such legitimacy, it will be nearly impossible to improve the status of women through the law or other agents of social change.

⁷⁷ E Grant 'Human rights, cultural diversity and customary law in South Africa' (2006) 50 *Journal of African Law* 2 reflects on the difficulties of legal pluralism in relation to the *Bhe* case: 'As the judgment shows, on one level, reconciling equality and culture is simply a matter of identifying those aspects of customary laws which offend the constitutional guarantee of equality, and striking them down. On the other level, it required the striking down of the male primogeniture rule in customary laws as incompatible with the right to gender equality. What to put in its place is a far more complicated matter. It is complicated not merely because of practical problems which preoccupied the majority of the court in *Bhe* case, but because of potentially contradictory demands of equality and the maintenance of legal dualism.'

⁷⁸ *Christian Education of South Africa v Minister of Education* 2000 4 SA 757 (SCA) 711 para 26.

⁷⁹ See also T Maseko 'The constitutionality of the state's intervention with the practice of male traditional circumcision in South Africa' (2008) *Obiter* 192.

4 Exploring the impact of the Children's Act 38 of 2005 on *ukuthwala*

4.1 Culture and religion in the Children's Act

The authors would assert that the Act is consciously sensitive to culture. A number of provisions support this claim, including both direct and indirect references to the importance of culture in child rearing and legal approaches thereto. For instance, the 'best interest of the child' principle outlined in section 7 requires consideration to be had, where relevant, to the child's 'intellectual, emotional, social and *cultural* development' (section 7(1)(h)), and mentions the need for children to maintain a connection with (*inter alia*) 'the extended family, *culture* and tradition' (section 7(1)(f)(ii)) as a consideration conducing to the child's best interests.⁸⁰

As far as placing the child in alternative care is concerned, there are various provisions emphasising the importance of culture. Foster care, for example, requires the placing of a child after consideration of a report of a designated social worker about 'the cultural, religious and linguistic background of the child' (section 186(1)(a)), and this cultural matching is reinforced further by the permissive provision to place a child from a different cultural, religious and linguistic background with foster parents whose characteristics are different to that of the child '*but only if ... there is an existing bond between that person and the child*' (section 186(2)(a)) or if no suitable person with a similar background can be found available to provide foster care to the child' (section 186(2)(b)). The Norms and Standards for Foster Care (Part 111(6)(g)) require foster care services, supervision and arrangements around such supervision to 'be sensitive to the religious, cultural and linguistic background of the child'.

In the assessment of the suitability of a prospective adoptive parent, the social workers effecting the assessment 'may take the cultural and community diversity of the adoptable child and the prospective adoptive parent into consideration' (section 231(3)), and the Regulations to the Act affirm that in an inter-country adoption process, the report on the would-be adoptive parents must include information on the applicant's ethnic, religious and cultural background (regulation 111(e)).

Additionally, culturally-appropriate values and principles surface periodically throughout the Act: The legislative provision (in section 16) for the responsibilities of children, as provided for article 31 of the African Children's Charter,⁸¹ is a case in point.

In addition to the positive way in which culture emerges as a general consideration in the Act, culture and social practice derived therefrom

⁸⁰ Our emphasis.

⁸¹ See J Sloth-Nielsen & B Mezmur 'A dutiful child: The implications of article 31 of the African Children's Charter' (2008) 52 *Journal of African Law* 159.

form the basis of a dedicated section of the Act, namely, section 12 (titled 'social, cultural and religious practices'). The section regulates in detail two customary practices, namely, male circumcision (sections 12(8)-(10)) and virginity testing (sections 12(4)-(7)).⁸² Female genital mutilation is also prohibited (section 12(3)).

Ukuthwala, it is worth noting at the outset, is not mentioned by name as a customary practice in this section, a fact which might become relevant were the effects of the Act upon the practice to be considered. It might, for instance, be inferred that the legislature knew about the social practice as evidenced by prior writing⁸³ and research on the practice and, by choosing not to refer to *ukuthwala*, signalled that the custom did not require regulation. An *a priori* stance that the practice had no constitutional ramifications and did not necessitate legislative intervention could therefore be argued.

This does not mean that *ukuthwala* is in any way immune from future legal scrutiny. We suggest that, should the constitutional or legislative validity of the practice be put in issue, it is possible that the impact of the remainder of section 12's provisions upon *ukuthwala* as a customary practice might be called into question in so far as the practice has a bearing upon the girl child.

Additionally, it is important to place on record the strong value accorded to child participation throughout the Act. Section 10 of the Act is illustrative of this:⁸⁴

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

The fact that, in some instances, the practice of *ukuthwala* is an expression of the child's choice and constitutes an indirect expression of her views is relevant to the following discussion.

⁸² See secs 12(4), (5), (6) & (7) in respect of virginity testing, and secs 12(8), (9) & (10) in respect of male circumcision. Regulations 3-6 elaborate these provisions further. A detailed consideration is beyond the scope of this article. Suffice it to mention that the provisions on virginity testing were particularly contested during parliamentary hearings, and led to a compromise provision which sees prohibitions in place for the practice where the child to be subjected to the practice is below the age of 16 years, accompanied by the enactment of regulations prescribing how virginity testing is to be performed to comply with the Act where the child is over 16 years and furnishes her consent. One of the authors of this article was a member of the team which drafted the regulations submitted to the Department of Social Development outlining the further requirements for the practice to be conducted in conformity with the Act.

⁸³ See, eg, the prior work of Koyana & Bekker (n 10 above); Bennett (n 17 above).

⁸⁴ See also art 12 of CRC.

4.2 Section 12(1) and the overarching prohibition on detrimental cultural practices

Section 12(1) contains the overarching right of every child 'not to be subjected to social, cultural and religious practices which are detrimental to his or her wellbeing'. This section, cast as a right of the child, is not hit by the offences created by section 305.⁸⁵ Hence, were *ukuthwala* to be characterised as a social practice which either in general or in a specific situation violated section 12(1) as a practice 'detrimental to the child's wellbeing', the remedy would not automatically lie in the penal sphere.⁸⁶ The potential for delictual damages remains for any infringement of rights under this section, though, as do other potential remedies for infringements such as injunctions, declaratory orders and interdicts, or preventive measures.

The debate about whether *ukuthwala* contravenes section 12(1) in any event (in the absence of any concrete sanction being attached) requires an assessment as to whether the practice is in fact a social and cultural practice which is detrimental to the child's wellbeing. Our answer to this must be context-dependent: The abduction and rape of a child without her consent fall undeniably to be outlawed as a harmful cultural practice, *albeit* that the sanctions of conventional criminal law might also be brought to bear. However, equally, we are convinced that not all forms of *ukuthwala* can be labelled as objectionable, harmful or detrimental, as outlined above in previous sections of this article. Any consideration of the implications of section 12 is speculative, as the determination as to whether the practice is detrimental will inevitably be related to the actual circumstances which are laid before the court for adjudication.

4.3 Section 12(2)(a) and early marriage

Section 12(2)(a) of the Children's Act is potentially of direct relevance to determining the legal status of *ukuthwala*. In fact, in ordinary parlance, this section would probably be described as the 'forced marriage' prohibition of the Act (as is required by the African Children's Charter, amongst other human rights documents).⁸⁷

The first part, 12(2)(a), prohibits the 'giving out' in either marriage or engagement 'of a child below the minimum age set by law for a valid marriage'. Several comments may arise here. 'Giving out' (seemingly an old-fashioned terminological rendering of the marriage pact between families) limits the usefulness of this article in accommodating some versions of *ukuthwala* in so far as the child 'victim' is concerned:

⁸⁵ Sec 305 is the overarching penalties clause of the Act.

⁸⁶ As far as contravening the Act is concerned, there may well be criminal sanctions derived from other common law or statutory offences, however.

⁸⁷ Art 21(2) of the African Children's Charter prohibiting both child marriage and betrothal.

a child who is *thwala'd*, as described above, is definitely not in any conventional sense of the word 'given', let alone 'given out'. In fact, a more suitable English rendition would be achieved by the substitution of 'given' with 'taken'!

A tentative conclusion is that this prohibition was not drafted to target *ukuthwala* as conventionally understood. It seems primarily to target *early marriage*, and the family-to-family negotiations that may precede it.

Second, there are obvious and intractable difficulties occasioned by the phrase 'of a child below the minimum age set by law for a valid marriage' in section 12(2)(a). Not the least of these problems relates to the variety of *minima* set by law for valid marriages under different legal regimes in South Africa.⁸⁸ Mention has been made of the minimum set for the recognition of a valid customary marriage — 18 years — in terms of the Recognition of Customary Marriages Act.⁸⁹ But is the minimum 'set by law' also a minimum under 'unwritten' customary law which has also been recognised as 'law' for some purposes?⁹⁰ Assuming a much lower age as the minimum under most customary systems — for instance around the age of puberty or shortly thereafter — this provision could potentially be of little practical effect in the protection of children against early marriage (an explicit requirement of the African Children's Charter as well as a number of other instruments relevant to South Africa).

However, such an interpretation would render the provision practically devoid of value, and would also raise questions about the value of the Recognition of Customary Marriages Act on setting a minimum age of 18 at all. Further, applying unwritten customary ages of marriage would run counter to the overall legislative intent that the Act applies to all children below the age of 18 years.⁹¹ It is suggested, therefore, that the 'law' setting a minimum age of marriage referred to in section 12(1)(a) must refer to statutory law.

This does not assist in resolving the additional problem that the Marriage Act of 1961 nevertheless continues to contain a lower minimum age of marriage than 18 years, descending to 15 years or even lower

⁸⁸ Which in turn raises the potentially (indirectly) discriminatory application of this provision, since questions might arise as to which children are protected by which set of laws setting a minimum age for marriage.

⁸⁹ Act 120 of 1998.

⁹⁰ See the discussion of South African 'law' as including customary law in LAWSA (n 34 above).

⁹¹ Sec 17 of the Act.

with ministerial consent,⁹² and moreover is one that discriminates between boys and girls as regards the statutory *minima set*.⁹³

As 'pure' civil law, this Act might not, it is submitted, be of any relevance to explicating the legal status of *ukuthwala* as a customary practice. Nevertheless, in establishing the benchmark criterion of 15 years for girls as the minimum age for marriage, it would be difficult to argue that, *in law*, any offensive practice regarding engagement, promise of marriage or marriage itself is restricted solely to persons above the age of 18 years, when the Marriage Act itself so plainly provides otherwise. It follows, therefore, that *ukuthwala* (when it is deployed consensually as a prelude to marriage in the case of girls below the age of 18 years) can hardly be regarded as being *contra bonos mores* when the legal marriage of girls of that age is permissible under the law of the land.⁹⁴

4.4 Section 12(2)(b) and forced marriage

Section 12(2)(b) of the Act prohibits that a child 'above that minimum age be given out in marriage or in engagement without her consent'. It remains for us to discuss whether section 12(2)(b) is useful as a shield against other forms of *ukuthwala* (forced seduction, for want of a better description) and, if so, how. Section 12(2)(b) can be distinguished from section 12(2)(a) in that it refers, first, only to persons *above* the minimum age of marriage (as already discussed, that is, 15 years of age for girls) and, secondly, to their being given out in marriage or engagement *without their consent*. This position accords more logically with the expectation of a prohibition on *forced marriage*, where the focus is also on absence of consent or upon duress.

Section 12(2)(b) apparently therefore includes *ukuthwala* within its ambit where the abduction is performed without consent. However, the *caveat* is whether *ukuthwala* can be brought within the legislative words 'marriage or engagement' — seduction is not mentioned, nor is it axiomatic that 'seduction with the view to an eventual marriage' bears an equivalent meaning — and, as important, whether the words 'given out' in section 12(2)(b) can be given a clear and precise meaning.

To be blunt, can the 'seducer' or abductor, in the way that *ukuthwala* has been described to take place, be subsumed under the prohibition

⁹² As low as 12 years for girls and 14 years for boys, linked to the presumed age of puberty.

⁹³ P Mahery & P Proudlock 'Legal ages in South African law' (2010) Children's Institute, University of Cape Town. Note that the Civil Unions Act 17 of 2006 sets a minimum age of 18 for the conclusion of a valid civil union.

⁹⁴ The argument that sec 12(2)(a) refers to the minimum age for marriage set in the Marriage Act is reinforced if regard is had to the provisions of sec 12(2)(b) which refers to protections for persons *above* the minimum age of marriage. Since the Act as a whole applies to persons below the age of 18 only, 'persons above the age of marriage' referred to in sec 12(2)(b) must mean some other age, that is, one below the age of 18 years.

on 'giving out' a child in marriage without her consent? This seems to strain the ordinary meaning of the words unduly, as the mischief targeted appears rather to be the act of *offering* the girl for marriage without her consent, and the wrongdoer likely to be a parent or family member, rather than the seducer or abductor. If this interpretation is correct, then *ukuthwala* does not fall foul of the section 12(2)(b) prohibition — it is simply inapplicable to the practice.

On the other hand, it is possible to conceive that the acts of a girl's parents, were they to be complicit in making arrangements with the abductor, without the girl's consent, would render their participation in *ukuthwala* conduct which falls foul of section 12(2)(b). In this regard, it is worth pointing out that section 12(2) is explicitly subject to the penal sanctions of the Act contained in section 305.

The question which then arises is whether section 305 read with section 12(2) renders *ukuthwala* subject to criminal sanction. The preliminary answer to this, based on the analysis above, is no (or not really).

On the wording of both sections 12(2)(a) and (b), the infringement of rights is committed by whoever 'give[s] the child out' in marriage or engagement. That is the first hurdle. The abductor's conduct cannot be brought within the plain meaning of these words. Second, the difficulties with the internal conflict of laws relating to the minimum age of marriage, and the requirement of a guardian's consent to validate a customary marriage⁹⁵ might prove a fatal defence to any prosecution. Which law, one might ask? And what of the *nulla poena sine lege* principle, which at minimum requires certainty as to the conduct to be deemed offensive?

Third, unless *ukuthwala* can be characterised as marriage — which it is not, it is a prelude to marriage negotiations — or engagement — which seems to be stretching a civil/canonical law concept way beyond its common meaning, it is not a practice which is covered by the prohibition at all. It is submitted that entry into marriage negotiations expected in customary law, and embodied in the practice of *ukuthwala*, is not the same as the concept of 'engagement' of civil law.⁹⁶

At first blush, section 12(2)(b) does seem to embody a forced marriage prohibition. But it is directed at only parents or guardians who furnish their consent in circumstances where that of the child is lacking, or where they apply duress. It may well be, therefore, that this conception of forced marriage is in need of better elaboration and, related

⁹⁵ Under customary law, the consent of the father was a *sine qua non*, regardless of the age of the girl. Tacit consent can be inferred from the circumstances. Should the father, eg, accept *lobolo* or allow the couple to live together as man and wife, consent can be inferred.

⁹⁶ Arranged marriages are not mentioned by name; there also the question of consent can be problematised when severe pressure is brought to bear on a would-be child bride, often over a period of time, and she ultimately does in fact furnish consent, but for fear of prejudicing family relationships.

more specifically to the South African cultural context, in the same way as has recently come to pass in the United Kingdom.⁹⁷

Two remaining points require consideration in the context of the Act before the discussion concludes with a consideration of *ukuthwala* as a customary practice with legal dimensions under current South African law.

The first question that may be posed is whether other provisions of the Act may be adduced to condemn or outlaw the practice. The answer to this is necessarily speculative, and rests largely on the approach to section 305(3) which criminalises parental child abuse, read with the various provisions which underscore the child protection system (including section 150 which defines a child in need of care and protection). Again, the abductor potentially is not liable under this approach, which focuses on the part played by parents and guardians.

Alternatively, recourse might be had to the offences contained in the Criminal Law (Sexual Offences) Amendment Act of 2007, or to common law renditions of kidnapping or abduction. When measured against the array of options for the assimilation, accommodation and development of customary law, these latter alternatives can only be considered blunt swords indeed by which to address the nuances of custom and tradition under a constitutional dispensation.

Finally, some consideration must be given to the option of civil liability. Assuming that it is correct that *ukuthwala* does not fall neatly under the provisions of section 12(2), an infringement of the child's rights to wellbeing contained in section 12(1) might conceivably lay the basis for such a claim against the abductor or seducer. This is reinforced by the conceptualisation of custom of *ukuthwala* as a delictual claim *in customary law itself*.⁹⁸

This might seem like an alarming proposition — along the lines of sanctioning the payment of damages for rape. It might, too, be regarded as perpetuating extreme gender inequality and offensive stereotypes which achieve no good in modern-day South Africa (characterised as one of the most violent societies in the world as far as gender-based violence and rape are concerned).

However, it does present the possibility of a more benign accommodation of this particular customary practice, in line with the desired objectives of current constitutional jurisprudence. As well, as demonstrated above, the Act itself is far from a model of clear condemnation of *ukuthwala* as a form of forced marriage.

⁹⁷ See the UK Forced Marriage (Civil Protection) Act 2007 and the Multi-Agency Practice Guidelines Handling Cases of Forced Marriage of June 2009 issued by the Forced Marriage Unit of the Ministry of Justice. See further H Patel & A Guha 'Forced marriage' (2010) 1 *Journal of Family Law and Practice* 41.

⁹⁸ LAWSA (n 34 above) para 138.

5 Conclusion

Forced marriage fails the constitutional compatibility test on any number of grounds, including freedom and security of the person (section 12), dignity rights (section 9), and the best interests of the child (section 28(2)). However, *ukuthwala* is not, in the plain sense of the word, 'forced marriage', although it could lead to this if the negotiations are concluded without the consent of the girl.

Further, though, we have argued that *ukuthwala* cannot be treated as a unitary phenomenon; variants of the practice must be distinguished. In attempting to rescue or divide positive attributes of *ukuthwala* which do not *prima facie* offend human rights, we suggest that current legal terminology, such as that used in the Act, is not sufficiently nuanced to describe and regulate it. An example relates to the inclusion of the words 'giving out' in sections 12(2)(a) and (b), which confines the application of this section unduly.

Sensitivity to various ways in which customary law can be accommodated would lead to a conclusion that South African law should recognise those forms of *ukuthwala* where the requirement of consent of the 'bride' is met, where she colludes in or is aware of the mock abduction. The legal relevance of her participation in these acceptable forms of *ukuthwala* should be acknowledged. Child participation and recognition of the evolving capacities of the child are a basic tenet of the Act, and recognising the role of the girl as an actor in her own interests via *ukuthwala*, thus promotes a fundamental principle of the Act. The benign accommodation approach promotes the positive aspects of culture, and moreover emphasises children's agency. (It is conceded, however, that the 'straight 18' position of the African Children's Charter in relation to child marriage does pose a significant barrier to advocating this position.)

It would further be required that the common law offence of abduction also be addressed. The fact that in the current form the offence focuses only on the violation of parental rights and ignores children's rights is problematic, but a full discussion lies beyond the scope of this article. At minimum, though, the common law could be developed to permit as lawful forms of mock abduction which are legal in customary law and in which consent to being 'carried away' features.

Last, where consent is absent and the abduction is consequently unlawful, we suggest that existing criminal offences are adequate to cover the practice. There is therefore no need for additional legislative intervention in the criminal law sphere.

Revisiting corporate violations of human rights in Nigeria's Niger Delta region: Canvassing the potential role of the International Criminal Court

*Martin-Joe Ezeudu**

Barrister and Solicitor of the Supreme Court of Nigeria; PhD Candidate, Osgoode Hall Law School, York University, Toronto, Canada

Summary

The international community awakened to the bitter reality of the failure of traditional international legal system to anticipate and embrace non-state actors at the early conceptualisation of their norms. This reality relates to the fact that transnational corporations that often wreak havoc in host states appear to be outside the ambit of international law, and therefore beyond its control. However, since the last two decades, governments and international business organisations have attempted to develop initiatives to fill the perceived gap. At the same time, the academic community has engaged in a discourse about the appropriate legal framework that may be deployed to ensure that transnational corporations are confined within a defined scope of international human rights obligations. Focusing on Africa, particularly on the oil-rich Niger Delta region of Nigeria, the article aims to engage in the debate. It takes a nuanced approach to the issue, and argues that an extension of the International Criminal Court's jurisdiction to transnational corporations is imperative. This would be a meaningful way of ensuring respect and compliance with human rights obligations by transnational corporations.

* LLB (Nnamdi Azikiwe, Nigeria), LLM (Birmingham); Martin-JoeEzeudu@osgoode.yorku.ca. I am grateful to Prof Obiora Chinedu Okafor for his valuable comments on an earlier draft of this article. However, I am solely responsible for any errors that remain.

1 Introduction

Capitalism, globalisation and neo-liberalism have paved the way for the emergence on the international scene of economic colossuses with quasi-legal personality.¹ These modern leviathans wield considerable social and political influence over countries,² in addition to their overwhelming economic leverage.³ This is an apt description of present-day transnational corporations (TNCs). Of course, TNCs, through foreign direct investment in developed and developing countries, create jobs, improve technology and inject capital.⁴ But they equally have a negative impact on the areas where they operate, particularly in poor Third World or developing countries. Frequently, their activities result in human rights violations. The abused human rights are more often than not those that fall within the international definition of economic, social and cultural rights.⁵ I do not mean to suggest that civil and politi-

¹ These actors have full legal personality under the domestic law of the states where they are incorporated. At international law, however, although their existence is acknowledged, they have no legal personality as the traditional international law does not countenance non-state parties. However, to the extent that they can be parties to certain international agreements or treaties, they can be said to be quasi-legal persons. See, generally, P Malanczuk *Akehurst's modern introduction to international law* (1997) 1-7 35-48 75-81 91-108.

² M Ataman 'The impact of non-state actors on world politics: A challenge to nation states' (2003) 2 *Alternatives (Turkish Journal of International Relations)* <http://alternativesjournal.net/volume2/number1/ataman2.htm> (accessed 16 March 2011), arguing that 'MNCs challenge the state sovereignty of the host countries. Host countries may lose control over their economies. They create political and social division and prevent the development of domestic industries in host countries.' Note that MNC, which stands for 'multinational corporation', is just another way of referring to TNC.

³ See, eg, MAL Miller *Third World in global environmental politics* (1995) 35, stating that 'Shell Oil's 1990 gross national income was more than the combined GNPs of Tanzania, Ethiopia, Nepal, Bangladesh, Zaire, Uganda, Nigeria, Kenya and Pakistan – countries that represent almost one-tenth of the World's population'; R McCorquodale 'Feeling the heat of human rights branding: Transnational corporations within the international human rights fence' (2001) 1 *Human Rights and Human Welfare* 1, capturing the economic strength of TNCs by revealing that 'more than half of the top 100 economies are corporations'; S Anderson & J Cavanagh 'Top 200: The rise of global corporate power' (Institute for Policy Studies) <http://www.corpwatch.org/article.php?id=377> (accessed 16 March 2011), stating that '[t]he economic clout of the Top 200 corporations is particularly staggering compared to that of the poorest segment of the world's humanity. The Top 200 corporations' combined sales are 18 times the size of the combined annual income of the 1,2 billion people (24 per cent of the total world population) living in 'severe' poverty.' See also D Kinley & J Tadaki 'From talk to walk: The emergence of human rights responsibilities for corporations at international law' (2004) 44 *Virginia Journal of International Law* 931 933.

⁴ Kinley & Tadaki (n 3 above) 933; see also MT Kamminga 'Holding multinational corporations accountable for the human rights abuses: A challenge for the European Community' in P Alston *et al* (eds) *The EU and human rights* (1999) 533 554.

⁵ See the International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, GA Res 2200 (XXI), UN Doc A/6316 (entered into force 3 January 1976).

cal rights⁶ are not tampered with by the TNCs. There have been several documented instances of TNCs' violations of human rights,⁷ and it is not clear yet when these violations will stop or the obligations thereto responsibly be borne by misbehaving entities.

Since the last two decades, however, the emphasis has been on the adoption of corporate social responsibility initiatives, international and national in origin, to effectively address concerns regarding human rights violations by TNCs. These widely ineffective initiatives include declarations by international organisations, such as the International Labour Organisation (ILO),⁸ the Organisation for Economic Co-oper-

⁶ See the International Covenant on Civil and Political Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (entered into force 23 March 1976).

⁷ Royal Dutch Shell's complicity in environmental degradation, destruction of farmlands, intimidation, torture and murder of Ogoni people in Nigeria had been the subject of litigation. See *Wiwa v Royal Dutch Petroleum Co* 226 F 3d 88 (2000), cert denied, 532 US 941 (2001); *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001). It is also the centre of discussion in different scholarly articles: B Naanen 'Oil-producing minorities and the restructuring of Nigerian federalism: The case of Ogoni people' (1995) 33 *Journal of Commonwealth and Comparative Politics* 46; EE Osaghae 'The Ogoni uprising: Oil politics, minority agitation and the future of the Nigerian state' (1995) 94 *African Affairs* 325; JG Frynas 'Corporate and state responses to anti-oil protests in the Niger Delta' (2001) 100 *African Affairs* 27; JI Dibua 'Citizenship and resource control in Nigeria: The case of minority communities in the Niger Delta' (2005) 39 *African Spectrum* 5; and CI Obi 'Globalisation and local resistance: The case of Ogoni versus Shell' (1997) 2 *New Political Economy* 137. Recently, CNN reported that pollution and environmental adversity from the operations of oil companies in the Niger Delta are creating a 'human rights tragedy' by exposing the local people to harm from poor health and loss of livelihood. See C Purefoy 'Nigeria oil company rejects damning amnesty report' CNN.com 1 July 2009 <http://www.cnn.com/2009/WORLD/africa/07/01/nigeria.amnesty.report/index.html> (accessed 16 March 2011). Again, the case of *Doe v Unocal* 963 F Supp 880 (CD Cal 1997) captures Unocal's involvement in forced labour, torture, murder and rape of villagers in the Tenasserim region of Myanmar, formerly known as Burma. These particular human rights violations are discussed further in the following articles: TA Bridgeford 'Imputing human rights obligations on multinational corporations: The Ninth Circuit strikes again in judicial activism' (2003) 18 *American University International Law Review* 1009; and L Bowersett 'Doe v Unocal: Torturous decision for multinationals doing business in politically unstable environments' (1998) 11 *Pacific McGeorge Global Business and Development Law Journal* 361. In India, Union Carbide Corporation (UCC) of USA is behind the 1984 catastrophic gas leakage in the city of Bhopal, which resulted in about 7 000 deaths and terminal illness in hundreds of thousands of people. See Amnesty International 'Clouds of injustice: Bhopal disaster 20 years on' <http://www.amnesty.org/en/library/info/ASA20/015/2004> (accessed 16 March 2011); and U Baxi & T Paul *Mass disasters and multinational liability: The Bhopal case* (1986). Furthermore, Coca-Cola in Colombia and Phillips-Van Heusen in Guatemala have been reported to be involved in intimidation, torture, kidnapping, unlawful detention and murder of trade union members; and BHP Billiton in Papua New Guinea has also been reported to damage the environment and local people's means of livelihood. See Kinley & Tadaki (n 3 above) 934.

⁸ See the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1978) 17 *International Legal Materials* 422.

ation and Development (OECD)⁹ and the European Union,¹⁰ codes of conduct in national legislation or adopted by individual TNCs,¹¹ initiatives of non-governmental organisations (NGOs),¹² and employer associations.¹³ Other strategies are the recent adoption of the United Nations (UN) Norms,¹⁴ coupled with the resuscitation of the United States' Alien Tort Claims Act (ATCA) through case law.¹⁵ However, the bottom line is that there is no single international regime of human rights law directly applicable to, and governing, transnational operations of corporations.¹⁶ Indeed, as Kinley and Tadaki rightly posit:¹⁷

Despite egregious human rights abuses committed by non-state actors, international law, generally, and human rights law, in particular, is still undergoing the conceptual and structural evolution required to address their accountability.

Thus, while a legal framework to confine TNCs within a defined scope of international human rights obligations is still being developed, the

⁹ See the OECD Guidelines for Multinational Enterprises (1976) 15 *International Legal Materials* 967.

¹⁰ See European Commission Green Paper 'Promoting a European framework for corporate social responsibility' COM (2001) 366 final, 18 July 200.

¹¹ See eg the Australian Corporate Code of Conduct Bill 2000, Parliament of the Commonwealth of Australia, The Senate (Senator Bourne), A Bill for an Act to impose standards for the conduct of Australian corporations which undertake business activities in other countries, and for related purposes; Shell International Petroleum Company 'Statement of general business principles' in *Business and human rights – A management primer* (1999).

¹² See eg Amnesty International *Human rights principles for companies* <http://www.amnesty.org/en/library/info/ACT70/001/1998> (accessed 16 March 2011).

¹³ See eg the Basic Code of Conduct covering Labour Practices adopted by the International Confederation of Free Trade Unions <http://actrav.itsilo.org/actrav-english/telearn/global/ilo/guide/icftuco.htm> (accessed 16 March 2011). For nn 8 to 13, see generally CF Hillemanns 'UN norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (2003) 4 *German Law Journal* 1065.

¹⁴ In August 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights approved Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, by Resolution 2003/16, UN Doc E/CN.4/Sub.2/2003/L.11 <http://www.etan.org/lh/misc/PetRegSub/uncorpnorms.htm> (accessed 16 March 2011). For a detailed analysis of this norm, see D Weissbrodt & M Kruger 'Current development: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 *American Journal of International Law* 901; Hillemanns (n 13 above).

¹⁵ A few examples include *Wiwa v Royal Dutch Petroleum Co* (n 7 above); *Doe v Unocal* (n 7 above); *Filartiga v Pena-Irala* 630 F.2d 886 887 (2d Cir. 1980).

¹⁶ Kinley & Tadaki (n 3 above) 935.

¹⁷ As above.

academic community has continued with discussions on the subject.¹⁸ With the focus on Africa, particularly on the oil-rich Niger Delta region of Nigeria, the article aims to engage in this debate. It takes a different approach to it, arguing that an extension of the International Criminal Court (ICC)'s jurisdiction to TNCs is imperative, and that this is an essentially meaningful way of ensuring respect and compliance to human rights obligations by TNCs. The article begins by exploring, in part II, the activities of the oil-excavating TNCs in Nigeria's Niger Delta region, bringing to the fore the way in which human rights are violated by non-state actors in this region. It proceeds by discussing, in part III, how the current legal regime, national and international alike, has been inefficient and ineffective in checking human rights abuses by TNCs. It also highlights other factors peculiar to Third World countries, and Nigeria in particular, that may have contributed to uncontrollable human rights violations by corporations. Part IV canvasses the urgency of bringing TNCs within the arms of the International Criminal Court (ICC). It discusses the factors that make this initiative possible and appropriate at this time, and shows that much may not need to be changed or amended in the ICC's structure or framework to bring this into effect. Part V concludes the article.

2 Chronicles of transnational corporations in the Niger Delta

The area generally referred to as the Niger Delta region in Nigeria comprises a number of states in the Nigerian federation. These states include Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers.¹⁹ They are also called oil-producing states. The region covers over 20 000 square kilometres of substantial swamp land and most

¹⁸ Kinley & Tadaki (n 3 above); Kamminga (n 4 above); Bridgeford (n 7 above); Hillemanns (n 13 above); Weissbrodt & Kruger (n 14 above); CM Vazquez 'Direct vs indirect obligations of corporations under international law' (2005) 43 *Columbia Journal of Transnational Law* 927; S Joseph 'An overview of the human rights accountability of multinational enterprises' in MT Kamminga & S Zia-Zarifi (eds) *Liability of multinational corporations under international law* (2000) 75; JI Charney 'Transnational corporations and developing public international law' (1983) *Duke Law Journal* 748; R McCorquodale & P Simons 'Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law' (2007) 70 *Modern Law Review* 598.

¹⁹ This is in line with sec 30 of the Niger Delta Development Commission Act, ch N86, Laws of the Federation of Nigeria, 2004, which defines the 'member states' of the Niger Delta region for which the Commission was created.

of Nigeria's coastal boundary,²⁰ and is home to a mosaic of Nigeria's minority ethnic groups, including the Andoni, Edo, Efik, Ibibio, Ijaw, Itsekiri, Ikwere, Kalabari, Ndoki, Okrika, Urhobo and Ogoni, as well as some fragments of the majority Igbo and Yoruba ethnic groups.²¹ However, when the Niger Delta is mentioned with regard to human rights violations and conflicts in the region, reference is usually made to three of the states that host the major reserves of Nigeria's oil wealth and foreign oil TNCs, and which are home to the Ogonis, Ijaws, Itsekiris, Urhobos, Andonis, Okrikas, Ndokis and a segment of the Igbos. The three states are Bayelsa, Delta and Rivers, and are in Southern Nigeria.

Oil in commercially viable quantities was first struck in Nigeria in 1956 at Oloibiri, a community in Bayelsa state, by Shell-BP (now Shell Petroleum Development Company). Commercial exportation of oil started only in 1958.²² As the first company to secure oil exploration and exploitation rights, Shell was able to establish control over the major oil reserves in Nigeria, and consolidated its lead over other oil corporations who arrived later.²³ Currently, Nigeria's oil industry is a playing field for more than a dozen TNCs, the majority of which are European and American companies. Besides Shell (Dutch/British owned), other major participants are Mobil (US); Chevron (US); Agip (Italy); Elf (France); and Texaco (US). Others are Ashland (US); Deminex (Germany); Pan Ocean (Switzerland); British Gas (Britain); Statoil (Norway); as well as Conoil and Dubri (which are Nigerian companies).²⁴ It is to be noted that these TNCs operate as joint ventures with the Nigerian government, represented by the Nigerian National Petroleum Corporation (NNPC) which holds Nigeria's equity stake (about 55 per cent) in most.²⁵ This form of commercial arrangement, as may be shown later in the article, has had a negative impact on the government's ability to coerce TNCs into respecting the human rights of the local people.

²⁰ LA Afinotan & V Ojajorotu 'The Niger Delta crisis: Issues, challenges and prospects' (2009) 3 *African Journal of Political Science and International Relations* 191. Please note that there is contradictory information that the Niger Delta region covers about 50 000 square kilometres in HA Saliu *et al* 'Environmental degradation, rising poverty and conflict: Towards an explanation of the Niger Delta crisis' (2007) 9 *Journal of Sustainable Development in Africa* 275 277. Even Sinden (n 29 below) 3 reports the region as covering 70 000 square kilometres. It is difficult to reconcile these figures.

²¹ Afinotan & Ojajorotu (n 20 above). See also K Maier *This house has fallen: Nigeria in crisis* (2000) 84. However, note that Igbo and Yoruba are two of Nigeria's three major ethnic groups that include the Hausa-Fulani.

²² Obi (n 7 above) 140.

²³ As above.

²⁴ U Idemudia 'Rethinking the role of corporate social responsibility in the Nigerian oil conflict: The limit of CSR' (2009) 21 *Journal of International Development* 1 7-8; U Idemudia 'Assessing corporate-community involvement strategies in the Nigerian oil industry: An empirical analysis' (2009) 34 *Resources Policy* 133 135.

²⁵ S Dolezal 'The systematic failure to interpret article iv of the International Covenant on Civil and Political Rights: Is there a public emergency in Nigeria' (2000) 15 *American University International Law Review* 1163 1191.

It did not take long for the gory consequences of competitive exploitation of oil to take their toll on the socio-economic life of host communities in the region. Shell in Ogoniland²⁶ alone has a network of 96 oil wells connected to five flow stations.²⁷ The consequences of what rightly may be termed 'over-exploitation' of oil in the region are the frequent oil spills which pollute the springs and rivers that provide host communities with drinking water and fish. The spills also destroy agricultural land. According to Watts,²⁸ every year roughly 300 spills occur in the Niger Delta and about 700 000 barrels of oil gush to the ground soil. In the 1970s alone, the spilling was four times more than the much-publicised Exxon Valdez spill in Alaska. Between 1985 and 1994, there were 111 spills in Ogoniland alone,²⁹ and more than 4 800 spills in Nigeria as a whole between 1970 and 2000.³⁰ Indeed, *Yale Environment 360*, a publication of Yale University, has confirmed that the April 2010 Gulf of Mexico oil spill (in Louisiana, USA), which captured the world's attention, is dwarfed by the over five decades of oil pollution in the Niger Delta.³¹

In addition to this, gas is flared throughout the region, round the clock, 24 hours per day, and some flares have burnt continuously for the past 40 years.³² This ecological disaster is better captured in a CNN report that pollution and environmental impacts from the operations of oil-TNCs in the Niger Delta are creating a 'human rights tragedy' by

²⁶ Ogoniland is the homeland of the Ogoni people. This is where Shell has the majority of its facilities in the region. It is in Rivers State and comprises several villages or settlements. It later became the centre of gruesome violations of human rights in the whole region.

²⁷ Maier (n 21 above) 80.

²⁸ M Watts 'Resource curse? Governmentality, oil and power in the Niger Delta, Nigeria' (2004) 9 *Geopolitics* 50 68.

²⁹ Watts (n 28 above). See also A Sinden 'An emerging human right to security from climate change: The case against gas flaring in Nigeria' Social Science Research Network Electronic paper collection <http://ssrn.com/abstract=1280934> 3 (accessed 16 March 2011). This paper is now published as ch 8 in WCG Burns & HM Osofsky (eds) *Adjudicating climate change – State, national and international approaches* (2009).

³⁰ MJ Watts 'Righteous oil? Human rights, the oil complex and corporate social responsibility' (2005) 21 *AR Reviews In Advance* 9 9.16.

³¹ E360 Digest 'Oil fouling the Niger Delta dwarfs the oil spill in the Gulf of Mexico' *Yale Environment* 8 July 2010 360 http://e360.yale.edu/digest/oil_fouling_the_niger_delta_dwarfs_the_oil_spill_in_the_gulf_of_mexico/2496/ (accessed 16 March 2011). See also J Vidal 'The Nigeria's agony dwarfs the Gulf oil spill: The US and Europe ignore it' *The Guardian* 30 May 2010 <http://www.guardian.co.uk/world/2010/may/30/oil-spills-nigeria-niger-delta-shell> (accessed 16 March 2011), arguing that '[t]he Deepwater Horizon disaster caused headlines around the world, yet the people who live in the Niger Delta have had to live with environmental catastrophes for decades'.

³² A Shinsato 'Increasing the accountability of transnational corporations for environmental harm: The petroleum industry in Nigeria' (2005) 4 *Northwestern University Journal of Human Rights* 186 192.

exposing the local people to harm from poor health and loss of their livelihood:³³

People living in the Niger Delta have to drink, cook with and wash in polluted water. They eat fish contaminated with oil and other toxins ... if they are lucky enough to be able to still find fish. The land they farm on is being destroyed.³⁴

The people's lifestyle, which hinges on farming and fishing, can no longer be sustained, and there are neither alternative vocations nor suitable jobs created by the TNCs. The overall effect of these has been poverty and need, culminating in grievances.³⁵

Human rights violations in the region took a turn for the worse since the 1990s when the local communities started group protests against the unchecked activities of TNCs that degrade their environment, causing economic losses and poor health. In 1990, youths in the Umuechem community engaged in a peaceful demonstration against the reckless devastation of their environment by Shell's operations. Shell's response was to request the government to send the state's police to deal with the protesters whom Shell considered to be threatening their staff and hindering their work. Under the guise of protecting Shell's facilities from the protesters, two lorry loads of armed anti-riot (mobile) police turned up at the scene and used tear gas and gunfire to disperse the protesters. The police returned the next day to descend on the village, killed about 80 people and destroyed 495 houses and vital crops.³⁶ Both the government and Shell are said to have admitted to funding the operation.³⁷

Similar trends of human rights violations continued throughout the region in the years that followed. In 1990, a vocal Ogoni leader, a writer and environmentalist, Ken Saro-Wiwa, rallied his people under the Movement for the Survival of Ogoni People (MOSOP) which he

³³ Purefoy (n 7 above).

³⁴ Quoting A Gaughran of Amnesty International, in the CNN report by Purefoy (n 7 above). See also A Tareri 'A rights-based approach to indigenous minorities: Focus on the Urhobo and Ogoni peoples of the Niger Delta in Nigeria' in F Emiri & G Deinduomo (eds) *Law and petroleum industry in Nigeria: Current challenges (Essays in honour of Justice Kate Abiri)* (2009) 265 283.

³⁵ U Idemudia 'The changing phases of the Niger Delta conflict: Implications for conflict escalation and the return of peace' (2009) 9 *Conflict, Security and Development* 307.

³⁶ S Cayford 'The Ogoni uprising: Oil, human rights, and a democratic alternative in Nigeria' (1996) 43 *Africa Today* 183 189. See also JG Frynas 'The oil industry in Nigeria: Conflict between oil companies and local people' in JG Frynas & S Pegg (eds) *Transnational corporations and human rights* (2003) 99 104-105; Human Rights Watch 'The Ogoni crisis: A case study of military repression in Southeastern Nigeria' (1995) 7 *Human Rights Watch Report* (on Nigeria) <http://www.hrw.org/legacy/reports/1995/Nigeria.htm> (accessed 17 March 2011); Boycott Shell Essential Action 'Shell in Nigeria: What are the issues?' <http://www.essentialaction.org/shell/issues.html> (accessed 17 March 2011).

³⁷ Boycott Shell Essential Action (n 36 above).

formed that year in conjunction with other Ogoni leaders.³⁸ MOSOP became a vanguard organisation for the awareness and mobilisation of the Ogoni people. Although at first MOSOP appeared to be concerned solely with environmental protests, it eventually turned into an ethnic organisation that championed the Ogoni cause — economical, political and otherwise. The theme of MOSOP's campaign has been to address the Ogoni people's grievances outlined in their manifesto: the Ogoni Bill of Rights (OBR), which they drew up and made available to federal government and the entire Nigerian public. These include the clean-up of oil spills; the reduction of gas flaring; fair compensation for lost land, income, resources and life; a fair share of profits gained from oil drilled at their expense; and self-determination.³⁹

On 4 January 1993, just at the beginning of the UN Year of Indigenous People, MOSOP held a mass rally at the Ogoni village of Bori. About 300 000 people were in attendance at the rally, out of the estimated half a million Ogoni population.⁴⁰ The demonstrators at the rally demanded what was expressed in the Ogoni Bill of Rights. Leaders of the demonstration were arrested but later on released.⁴¹ The mass protests continued in February and March of the same year, but not without increasing police harassment and arrests. In April, about 10 000 Ogoni engaged in another peaceful demonstration at a construction site (in Biara), where Willbros, an American corporation, bulldozed farmland to lay Shell's pipelines. As usual, government security forces were summoned, this time around the soldiers. They arrived and opened fire on the crowd, wounding 11 people.⁴²

As Ogoni protests continued, MOSOP leadership began to have disagreements regarding the organisational structure and strategies for actualising the objectives of the movement. Fundamental disagreement resulted over a controversial decision by the movement to boycott the Nigerian presidential elections of 12 June 1993, leading to the resignation of Dr Garrick Leton and Chief Edward Kobani as MOSOP's President and Vice-President respectively.⁴³ Ken Saro-Wiwa who, in connection with MOSOP protests, was imprisoned for 31 days

³⁸ Human Rights Watch *The price of oil: Corporate responsibility and human rights violations in Nigeria's oil-producing communities* (1999) 124.

³⁹ Cayford (n 36 above) 189. See also K Saro-Wiwa *Genocide in Nigeria: The Ogoni tragedy* (2005) 93.

⁴⁰ Naanen (n 7 above) 63.

⁴¹ Cayford (n 36 above) 189-190.

⁴² Cayford (n 36 above) 190. See also *Human Rights Watch Report* (n 36 above); S Kretzmann 'Nigeria's "drilling fields": Shell Oil's role in repression' <http://www.assatashakur.org/forum/afrikan-world-news/21226-shell-oil-game-oil-game-nigeria.html> (accessed 17 March 2011); S Pegg 'The cost of doing business: Transnational corporations and violence in Nigeria' (1999) 30 *Security Dialogue* 473-476. Pegg's work indeed presents case-by-case details of the experiences of the Ogoni people at the joint hands of the Nigerian government and Shell.

⁴³ *Human Rights Watch Report* (n 36 above).

on charges of seditious intent and publication and unlawful assembly, was *in absentia* elected President.⁴⁴ Meanwhile, protests against Shell continued, coinciding, however, with the wide-spread lawlessness in the region as a result of the cancellation of the June presidential elections. The government responded with a heavy military crackdown and escalated repression. There were several brutal attacks on Ogoni villages, leaving hundreds of people dead and thousands homeless.⁴⁵ Shell and the Nigerian government blamed the raids on what they framed as ethnic clashes between Ogonis and the neighbouring ethnic groups, including the Andoni, in July 1993, the Okrika in December 1993, and the Ndoki in April 1994.⁴⁶ Professor Claude Ake, who was appointed by government to investigate the July 1993 alleged inter-communal clash, had this to say:⁴⁷

I do not think it was purely ethnic clash, in fact there is really no reason why it should be an ethnic clash and so far as we could determine, there was nothing in dispute in the sense of territory, fishing rights, access rights, discrimination treatment, which are the normal cause of these clashes.

He further explained that '[o]ne could not help getting the impression that there were broader forces which might have been interested in perhaps putting the Ogonis under pressure, probably to derail their agenda'.⁴⁸ Professor Ake's observations were corroborated by a Human Rights Watch reporter's interview with soldiers who painted a clear picture of their participation in the secret military raids on Ogoniland in 1993, designed to appear as inter-ethnic clashes.⁴⁹ The following is an excerpt from what one of the soldiers said:⁵⁰

When we arrived at the assembly point, they suddenly changed the orders. They said we were going across to attack the communities who had been making all the trouble ... I heard people shouting, crying. I fired off about one clip, but after the first shots I heard screaming of civilians, so I aimed my rifle upwards and didn't hit anyone.

Another soldier had been on duty with the Nigerian contingent to the ECOMOG peace-keeping force in Liberia but returned to the Niger Delta when his unit was ordered to return home in order to crush a supposed Cameroonian invasion. He explained that when they arrived in Ogoniland, they were instructed to shoot everyone who crossed their path. He followed this instruction until he realised that those they attacked were Nigerian civilians. This particular soldier further explained that when he entered the bush, he learnt from the Ogoni people that

⁴⁴ As above. See also Civil Liberties Organisation *Ogoni: Trials and travails* (1996) 51.

⁴⁵ Cayford (n 36 above) 190.

⁴⁶ *Human Rights Watch Report* (n 36 above).

⁴⁷ As above. See also Civil Liberties Organisation (n 44 above) 19.

⁴⁸ *Human Rights Watch Report* (n 36 above).

⁴⁹ As above.

⁵⁰ As above.

they believed among themselves that they had been attacked by the Andoni people.⁵¹

In 1994, more fierce violations of human rights were unleashed on the Ogoni people. On 21 May 1994, four prominent Ogoni leaders, including the former Vice-President of MOSOP, Chief Edward Kobani, were attacked by a mob and beaten to death. The murders occurred in a meeting of the Gokana Council of Chiefs and Elders, at the palace of Gbenemene Gokana, a traditional chief in Giokoo, which is an Ogoni village.⁵² Following the earlier-mentioned disagreement in the MOSOP leadership, two opposing factions emerged in the movement. The murdered four men were among those leaders considered to be government collaborators by some members of MOSOP.⁵³ However, the immediate chain of events leading to their murder has been a source of big controversy.⁵⁴ The controversy borders on whether the murder of the four Ogoni leaders was engineered by Ken Saro-Wiwa and his cohorts, or whether their deaths were the aftermath of a spontaneous violent riot that broke out in connection with agitation by a large crowd gathering for a meeting.⁵⁵

However, on 22 May 1994, the day following the four murders, Ken Saro-Wiwa and Ledum Mitee, then President and Vice-President of MOSOP, were arrested and detained. Later that day, the Military Administrator of Rivers State, Colonel Dauda Komo, reinforced and despatched to Ogoniland the Rivers State Internal Security Task Force, created in January that year to quell communal violence.⁵⁶ The soldiers 'then embarked on a series of raids on Ogoni villages in which the whole communities were collectively punished for their real or imputed association with MOSOP. Over the next several months, the Task Force reportedly raided at least 60 towns and villages in Ogoniland.'⁵⁷ According to a Human Rights Watch report, the raids on Ogoni villages became almost a nightly occurrence during the summer of 1994. The soldiers shot indiscriminately, beat up villagers, including children and the elderly, extorted 'settlement fees', and raped women, looted and burnt houses.⁵⁸ They also arrested and detained some of the villagers.⁵⁹

⁵¹ As above.

⁵² As above. See also Civil Liberties Organisation (n 44 above) 64.

⁵³ *Human Rights Watch Report* (n 36 above).

⁵⁴ As above.

⁵⁵ DL Orage 'The Ogoni question and the role of the international community in Nigeria' in AR Na'Allah (ed) *Ogoni's agonies: Ken Saro-Wiwa and the crisis in Nigeria* (1998) 41; W Boyd 'Death of a writer' in Na'Allah (above) 49 53.

⁵⁶ *Human Rights Watch Report* (n 36 above).

⁵⁷ As above.

⁵⁸ As above.

⁵⁹ As above.

The reality of the mayhem meted out on the Ogoni people is that the Nigerian government, in conjunction with Shell, capitalised on the unfolding tensions in Ogoniland to attempt to stamp out or annihilate a people who were threats to unhindered oil exploitation. This fact is decipherable from the statement of Colonel Paul Okuntimo, then the leader of the Rivers State Internal Security Task Force. According to Okuntimo, 'Shell operations are still impossible unless ruthless military operations are undertaken for smooth economic activities to commence'.⁶⁰ He then recommended that 400 soldiers undertook what he termed 'wasting' operations against the Ogoni people and put pressure on the oil companies for 'prompt' payments to support the cost of the operation.⁶¹ Okuntimo openly described his strategy as 'psychological warfare'.⁶²

Meanwhile, Saro-Wiwa, Ledum Mittee and several other Ogoni leaders and activists arrested during the raids, were held for several months before being charged. In November 1994, a three-man special tribunal, which included an army lieutenant-colonel, was appointed by the Nigerian military government to try them. The tribunal was constituted under the Special Tribunal (Offences Relating to Civil Disturbances) Edict, 1994, as enabled by the Civil Disturbances (Special Tribunal) Decree of 1987.⁶³ This Edict prescribed the death penalty for capital offences committed in connection with civil disturbances. It also prescribed the same death penalty for offences which were previously not punishable by death, including attempted murder. By two separate charges, in February and March 1994, Saro-Wiwa, Mittee and eight other Ogoni leaders were arraigned before the tribunal.

The outcome of the trial, which was condemned by the legal community as a sham and a travesty of justice, was the conviction and sentence to death of Saro-Wiwa and eight of his associates. Mittee was, however, acquitted.⁶⁴ The judgment of this tribunal was not subject

⁶⁰ Cayford (n 36 above) 192.

⁶¹ As above.

⁶² As above. See also I Okonta *When citizens revolt: Nigerian elites, big oil and the Ogoni struggle for self-determination* (2008) 233.

⁶³ *Human Rights Watch Report* (n 36 above).

⁶⁴ As above. For more analysis on the Ogoni trial, see AA Idowu 'Human rights, environmental degradation and oil Multinational companies in Nigeria: The Ogoniland episode' (1999) 17 *Netherlands Quarterly of Human Rights* 161 177-180; OC Okafor 'International law, human rights, and the allegory of the Ogoni question' in EK Quashigah & OC Okafor (eds) *Legitimate governance in Africa: International and domestic legal perspective* (1999) 509. There was another separate trial of 19 other Ogoni activists. For unknown reasons, their trial never received wide media publicity like that of Saro-Wiwa and eight others. To understand in more detail the Ogonis' experience in Nigeria, and the environmental, political and legal dimensions of their struggle, see Okonta (n 62 above) 216-251; and CR Ezetah 'International law of self-determination and the Ogoni question: Mirroring Africa's post-colonial dilemmas' (1996-1997) 19 *Loyola of Los Angeles International and Comparative Law Journal* 811.

to appeal. On 10 November 1995, the nine convicted Ogoni leaders, including Saro-Wiwa, were hanged amidst pleas for clemency from within Nigeria and by the international community.⁶⁵ However, the tyrannical Nigerian regime was not spared from international protests and sanctions. The Commonwealth, strongly influenced by South Africa, took the unprecedented step of suspending Nigeria. Also, the United States and member states of the European Union pulled their ambassadors and envoys from Nigeria.⁶⁶

Shell is the largest oil corporation in the world and, as such, its economic and political influence is huge.⁶⁷ For instance, Shell was a major sanctions breaker during the apartheid years in South Africa.⁶⁸ It is no wonder then that it did not intervene on behalf of the Ogoni leaders, but only passed a comment after their conviction that 'it is not for a commercial organisation to interfere with the legal processes of a sovereign state'.⁶⁹ However, Shell was to recant this statement later on, probably after receiving a barrage of criticism. It stated that it 'would now modify its previous policy of non-interference, despite its earlier refusal to intercede and prevent the Nigerian regime's hanging of Ken Saro-Wiwa'.⁷⁰

The execution of the 'Ogoni Nine', as it is popularly known, did not stop the continuing human rights violations in the region. Instead, it provoked more violent protests by militant youths, not only in Ogoniland but, this time, in the whole of the Niger Delta region. Their *modus operandi* has been the hostage taking of oil workers and the blowing up of oil facilities.⁷¹ An organisation formed by the ethnic Ijaw people and known as the Movement for the Emancipation of Niger Delta (MEND) is typical of present-day protests.⁷² Besides the cases of Shell in Umuechem and Ogoniland, there are several other instances of military repression of oil-related protests at the instance of TNCs in other Niger Delta communities.⁷³

For the sake of space, this article does not intend to elaborate on them all. Suffice it to mention that, like Shell, Chevron regularly uses state security forces that include army, navy and police, supposedly for

⁶⁵ CE Welch 'The Ogoni and self-determination: Increasing violence in Nigeria' (1995) 33 *Journal of Modern African Studies* 635.

⁶⁶ Cayford (n 36 above) 196.

⁶⁷ 'Shell game in Nigeria' *The New York Times* 3 December 1995 <http://www.nytimes.com/1995/12/03/opinion/shell-game-in-nigeria.html> (accessed 18 March 2011).

⁶⁸ As above.

⁶⁹ As above.

⁷⁰ As above. See also C Marecic 'How many wrongs does it take to make a human right?' (1997) 22 *Vermont Law Review* 201 228.

⁷¹ See, eg, 'Nigeria oil militants kidnap Scot' *BBC News* 6 April 2009 <http://news.bbc.co.uk/2/hi/africa/7986202.stm> (accessed 18 March 2011).

⁷² DV Kemedi 'Nero's folly' in E Kashi & M Watts (eds) *Curse of the black gold: 50 years of oil in the Niger Delta* (2008) 190.

⁷³ *Human Rights Watch Report* (n 36 above).

the protection of facilities, but often against civilian protests, and pays them in addition to their government salaries. Chevron personnel have been reported to lead and supervise the security forces in the course of their duties. Chevron equally provides its leased helicopters and boats for the transportation of the armed men, and has the capacity to investigate and order the removal of any misbehaving officer, but rarely exercises this power to check human rights abuses by these officers.⁷⁴

3 Nigeria's inefficient regulatory regime for transnational oil corporations

For the purpose of this discussion, environmental laws, regulations and policies in Nigeria are most relevant. Until 1988,⁷⁵ when the Federal Environmental Protection Agency Act (FEPA Act)⁷⁶ was enacted, there was no distinct environmental regulatory regime in Nigeria. Every minister in the federal government had responsibility for environmental protection and enforcement in his ministry's areas of influence. In a similar fashion, the inspectorate of the Nigerian National Petroleum Corporation took charge of environmental monitoring and enforcement in the nation's petroleum industry as a whole. Under the FEPA Act, the Federal Environmental Protection Agency (FEPA) was established and charged with the responsibility for the protection of the environment in Nigeria, and has the powers, among others, to articulate the national policy for environmental protection and planning. Crucially, the FEPA Act prohib-

⁷⁴ N Bassey 'The oil industry and human rights in the Niger Delta' written testimony before the United States Senate Judiciary Subcommittee on Human Rights and Law (28 September 2008) <http://www.earthrights.org/files/Documents/Nnimotestimony9.24.08.pdf> (accessed 18 March 2011).

⁷⁵ A national environmental emergency situation that occurred in 1988 led to the promulgation of the Environmental Protection legislation. A vessel, MV Baruluk, from Italy, berthed at Koko Port in the then Bendel State (now Delta State) and discharged 561 imported containers of toxic waste product. See E Arubi 'N39 million relief for Koko toxic waste victims 21 years after' *allAfrica.com* 4 April 2008 <http://allafrica.com/stories/200804041094.html> (accessed 18 March 2011). See also SF Liu 'The Koko incident: Developing international norms for the Transboundary Movement of Hazardous Waste' (1992-1993) 8 *Journal of Natural Resources and Environmental Law* 121. In reaction to this incident, the Nigerian federal government promulgated the Harmful Waste (Special Criminal Provisions, etc) Decree 42 of 1988 (now Harmful Waste (Special Criminal Provisions) Act, ch H1, Law of the Federation of Nigeria, 2004) and the Federal Environmental Protection Agency Decree 58 of 1988 (now the Federal Environmental Protection Agency Act, ch F10, Laws of the Federation of Nigeria, 2004).

⁷⁶ Ch F10, Laws of the Federation of Nigeria, 2004.

its the discharge of harmful quantities of any hazardous substance into the air or upon land and waters of Nigeria.⁷⁷

In 1999, however, FEPA was merged with some other relevant federal departments to form the Federal Ministry of Environment, Housing and Urban Development (FME), but without an appropriate enabling law on responsibility issues. Much later, the National Environmental Standards and Regulations Enforcement Agency Act, 2007 (NESREA Act) was enacted.⁷⁸ This Act repealed and replaced the FEPA Act, and in place of FEPA created a new agency, the National Environmental Standards and Regulations Enforcement Agency (NESREA), which became a parastatal under the FME. Subsidiary legislation⁷⁹ made under the FEPA Act is still in force. NESREA, like the former FEPA, is responsible for enforcing environmental laws, regulations and standards towards deterring people, industries and corporate bodies from polluting and degrading the environment. It administers the NESREA Act and, like the repealed FEPA Act, the NESREA Act equally criminalises and increasingly punishes environmental pollution with the imposition of fines not exceeding N1 000 000 (one million Naira) (roughly US \$6 630) and a prison term of five years. In the case of a corporate body, there is an additional fine of N50 000 (fifty thousand Naira) (roughly US \$330) for every day the offence persists.⁸⁰

Other relevant legislation worthy of mention here are the Environmental Impact Assessment Act (EIA Act);⁸¹ the Harmful Waste (Special Criminal Provisions) Act (HWSCP Act);⁸² and the National Oil Spill Detection and Response Agency Act, 2006 (NOSDRA Act). The EIA Act, administered by FME, sets out the procedures and methods for ensuring prior consideration of environmental impact assessments on projects, whether public or private. It prohibits the undertaking or authorisation of any project without prior evaluation of its environmental impact, and it gives FME the authority to monitor and certify the environmental assessment on projects. There is also a legal liability for the breach of any provisions of the Act.⁸³ The HWSCP Act is basically

⁷⁷ See JP Eaton 'The Nigerian tragedy, environmental regulation of transnational corporations, and the human right to a healthy environment' (1997) 15 *Boston University International Law Journal* 261 283- 285, where the provisions of this Act are discussed in more detail.

⁷⁸ For some critical analysis of this legislation, see DK Derri & SE Abila 'A critical examination of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007' in Emiri & Deinduomo (n 34 above) 1.

⁷⁹ These include the National Environmental Protection (Effluent Limitation) Regulations; the National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Waste) Regulations; and the National Environmental Protection (Management of Solid and Hazardous Waste) Regulations.

⁸⁰ See sec 27 of the Act.

⁸¹ Ch E12, Laws of the Federation of Nigeria, 2004.

⁸² Ch H1, Laws of the Federation of Nigeria, 2004.

⁸³ See sec 60.

a penal legislation. It prohibits the carrying, dumping or depositing of harmful waste in the air, land or waters of Nigeria without lawful authority. It prescribes punishment of life imprisonment as well as the forfeiture of land or anything used to commit the offence. Where an offence is committed by a corporate entity, the Act also punishes any conniving, consenting or negligent officer of the corporation. The Act also provides for the civil liability of an offender to a victim from the offending act.⁸⁴ The NOSDRA Act creates the National Oil Spill Detection and Response Agency, which is responsible for the co-ordination and implementation of the National Oil Spill Contingency Plan. The Act provides that an oil spiller is required to clean up affected sites.⁸⁵

On the other hand, although the flaring of gas is generally prohibited, it is nonetheless allowed under section 3 of the Associated Gas Re-Injection Act,⁸⁶ if a ministerial consent certificate has been lawfully issued. Under this legislation, the Minister can issue consent to an oil corporation to flare gas if he is satisfied that the utilisation or re-injection of the gas is inappropriate or unfeasible in a particular field or fields. Where the Minister issues such consent, he would require the corporation to pay a specified amount of money, and further meet specified conditions according to the requirement of section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, 1984.⁸⁷

As far-reaching as these regulations may appear, however, they failed to check the egregious environmental degradation by the oil TNCs in the Niger Delta. They are in fact largely ignored and scarcely enforced.⁸⁸ The reason for this is not difficult to ascertain. The government has pecuniary interests in the TNCs by virtue of their joint venture arrangement. Enforcing an environmental regulatory policy that entails significant spending which would reduce revenue or profit, is not in the least a priority for the partners. This is because expenditure by the corporations is appropriately apportioned to the government as well. This inclination not to reduce profit also explains why the initial pipelines laid by these corporations at the beginning of oil extraction in Nigeria have not been replaced with modern ones. Being weak and dilapidated, these pipelines regularly spill oil. The statement of an

⁸⁴ See secs 6, 7 & 12 of the Act.

⁸⁵ There is other legislation, both federal and state legislation, on environmental protection in Nigeria, but this will not be considered in this article in order not to digress from its main focus. Even the Nigerian Criminal Code (ch C38, Laws of the Federation of Nigeria, 2004) punishes for environmentally-related offences to the extent that it covers offences ranging from water fouling to the use of noxious substances. See particularly secs 245- 248 of this Code. For a more detailed analysis of criminal sanctions on environmental pollutions, see Idowu (n 64 above) 172-177.

⁸⁶ Ch A25, Laws of the Federation of Nigeria, 2004.

⁸⁷ This regulation is made pursuant to the provisions of the Associated Gas Re-Injection Act.

⁸⁸ Eaton (n 77 above) 282. See also K Omeje 'Petrobusiness and security in the Niger Delta, Nigeria' (2006) 54 *Current Sociology* 477 494.

unnamed activist in the Niger Delta interviewed by Kenneth Omeje vividly captures this:⁸⁹

Most of these companies' oil pipelines were laid in the 1960s and 1970s, and our fathers who are in their old age now will tell you (because they participated as labourers in laying them) that they have never seen these pipelines replaced. The pipelines are made of metals which have a maximum lifespan of about 15 years. Yet they have been on our land for 20, 30, 40 years. It is quite natural they will rust. More so, because some of our terrains are swampy, the pipelines could even have a shorter lifespan. The companies do not replace them before expiration, which causes the spillage. I do not say there could not be cases of sabotage. They are quite rare — and the common feature in these cases is that it (*sic*) involves refined products, not raw materials (crude oil).

Even if these environmental regulations as highlighted above are enforced, the sanctions they prescribe are considered a mere pittance to financially-towering oil TNCs.⁹⁰ For instance, the managers of these corporations can easily 'opt to pay the daily fine and defer cleanup to some later undetermined time, instead of defraying cleanup costs at the time of the spill to the detriment of short term profits'.⁹¹ Idemudia has also argued that 'fines for violating the gas flaring legislations are fixed at insignificant rates so that oil MNCs can continue to flare gas and pay a fine, as opposed to adhering to the law'.⁹² The best way to describe the attitude of the oil corporations in the Niger Delta is 'go to Rome and do like Romans'.⁹³ They latched on the virtual non-regulatory Nigerian environment to abuse human rights. Eaton rightly observed that many countries have seen more success in regulating the environmental practices of the same oil TNCs that inflict havoc upon the Niger Delta in Nigeria. He goes further to acknowledge that many of Shell's activities in Nigeria would be illegal if they were to happen in other parts of the world.⁹⁴

There are several initiatives undertaken by TNCs to portray themselves as socially-responsible corporations. These range from building schools, hospitals and boreholes, to road construction, the provision of which often lacked community involvement and a sense of ownership,

⁸⁹ K Omeje 'Oil conflict in Nigeria: Contending issues and perspectives of the local Niger Delta people' (2005) 10 *New Political Economy* 321-327.

⁹⁰ AK Akujobi 'The effectiveness of criminal sanctions under environmental law in Nigeria' in Emiri & Deinduomo (n 34 above 337-346), concluding that 'the penalties for infringement on environmental laws are laughable and grossly inadequate particularly when one thinks of the effect and consequences of the degradation of the environment and huge profits made by the polluters on their business'.

⁹¹ Eaton (n 77 above) 288.

⁹² Idemudia 'Rethinking the role' (n 24 above) 7.

⁹³ What is implied here is that, instead of being exemplar of civility, regulatory compliance and adherence to industry best practices which they uphold in their home states, the TNCs in Nigeria chose to exhibit corporate malfeasance that apparently fits into the political atmosphere, even when it creates grave human rights havoc.

⁹⁴ Eaton (n 77 above) 283.

and which spur inter-community conflict.⁹⁵ In any case, the supposed corporate social responsibility efforts do not and cannot make up for the atrocious human rights violations on their part.

It is interesting to note also that the foregoing human rights violations unfolded even when there are other legal regimes, local and international, that provide for the peoples' individual and collective human rights in all its definitions and ramifications. Apart from the Nigerian Constitution,⁹⁶ the following international legal instruments, to which Nigeria is a state party, recognise and guarantee the human rights of the local people of the Niger Delta: the Universal Declaration of Human Rights (Universal Declaration);⁹⁷ the African Charter on Human and Peoples' Rights (African Charter);⁹⁸ the International Covenant on Civil and Political Rights (ICCPR);⁹⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁰⁰ The rights to development and a healthy environment are essentially provided for in the African Charter¹⁰¹ and ICESCR.¹⁰²

A good analysis of the violations of the rights of the communities of the Niger Delta under the African Charter is made in the ruling of the African Commission on Human and Peoples' Rights (African

⁹⁵ Idemudia 'Rethinking the role' (n 24 above) 9.

⁹⁶ See ch IV generally, but particularly secs 33, 34 and 43 of the Constitution of Federal Republic of Nigeria 1999 (1999 Constitution) relating to rights to life, dignity of the human person and the right to property. Besides making bold provisions for the first generation of human rights in ch IV, the Constitution in sec 20 provides that the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria. The right provided for under this section (the right to a healthy environment derivable from the obligation of the state to protect and improve the environment) is not justiciable by reason of sec 6(6)(C) of the same Constitution, which purports to oust the court's jurisdiction from entertaining any question or matter arising from sec 20. The legal implication of this provision is that no one can successfully bring an action against the Nigerian government by relying on the said constitutional provisions. This perhaps explains why the people of the Niger Delta could not bring an action against the federal government in redress of their environmental damages.

⁹⁷ Adopted by the United Nations General Assembly on 10 December 1948, UN GA Res 217A (III), UN GAOR, 3rd sess UN Doc A/810 (1948).

⁹⁸ This is an African treaty adopted in Nairobi, Kenya, by the Organisation of African Unity (now African Union) Assembly of Heads of State and Government on 27 June 1981 OAU Doc CAB/LEG/67/3 Rev 5; C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29, and came into force on 21 October 1986. It became part of Nigeria's domestic law by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, ch A9, Laws of the Federation of Nigeria, 2004). Art 22 of this Charter, eg, provides that all people shall have the right to economic, social and cultural development. Arts 4, 16 and 24 also make provisions relating to the right to a clean and healthy environment.

⁹⁹ See n 6 above.

¹⁰⁰ See n 5 above.

¹⁰¹ See arts 22 & 24. The rights to life and integrity of the human person, property, the enjoyment of the best attainable state of physical and mental health and the right to family life are also provided for in arts 4, 14, 16 and 18(1) respectively.

¹⁰² See art 12.

Commission)¹⁰³ in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (SERAC case).¹⁰⁴ This communication arose out of the military repression in Ogoniland (highlighted in part II above) around the mid-1990s, and was filed on behalf of the Ogoni people by SERAC and CESR, who are Lagos and New York-based NGOs respectively.

Articles 21 and 24 of the African Charter, particularly, were found by the African Commission to have been violated by the Federal Republic of Nigeria. Article 21 provides for the right of the people to freely dispose of their wealth and natural resources, which right shall also be exercised in the exclusive interest of the people, and the people shall not be deprived of it.¹⁰⁵ It further provides that state parties (Nigeria in this case) shall undertake to eliminate all forms of foreign economic exploitation, particularly that practised by international monopolies, so as to enable their people to fully benefit from the advantages derived from their natural resources. Article 24, on the other hand, provides that all people shall have the right to a generally satisfactory environment favourable to their development.¹⁰⁶

In view of these provisions, the Commission found that the military government of Nigeria failed to protect the Ogoni people from the activities of oil TNCs operating in the Niger Delta. In other words, the government failed to monitor or regulate the operations of oil TNCs and, in doing so, paved the way for the corporations to exploit oil reserves in Ogoniland;¹⁰⁷ furthermore, that the government in its dealings with the corporations did not involve the Ogoni communities in decisions that affected the development of Ogoniland.¹⁰⁸ The African Commission equally observed the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and the safety of the individual, and concluded that living in an environment degraded by pollution was unsatisfactory.¹⁰⁹

Although on technical grounds the oil TNCs were not pursued directly in this case, nonetheless the decision exposed the human rights violations arising from their operations, and the Nigerian government was held responsible for failing to put them under control. Thus, finding that the government of Nigeria violated articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter, the African Commission appealed to the

¹⁰³ This is a quasi-judicial organ of the AU with the responsibility of monitoring, promoting and protecting human rights and collective peoples' rights throughout Africa as well as interpreting the African Charter and considering individual complaints of violations of the Charter.

¹⁰⁴ (2001) AHRLR 60 (ACHPR 2001). This case was decided at the Commission's 30th ordinary session, held in Banjul, The Gambia, from 13 to 27 October 2001.

¹⁰⁵ SERAC decision (n 104 above) para 55.

¹⁰⁶ SERAC decision (n 104 above) para 52.

¹⁰⁷ SERAC decision (n 104 above) paras 56, 57 & 58.

¹⁰⁸ SERAC decision (n 104 above) para 55.

¹⁰⁹ SERAC decision (n 104 above) para 51.

government to ensure the protection of the environment, health and livelihood of the people of Ogoniland by taking several steps, including stopping all attacks on Ogoni communities and leaders by the security forces; ensuring adequate compensation to the victims of human rights violations; undertaking a comprehensive clean-up of lands and rivers damaged by oil operations; ensuring that appropriate environmental and social impact assessments are prepared for any future oil development; and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry.¹¹⁰ Ten years on, and the appeals by the African Commission have not yet been complied with by the Nigerian government, thus underlining the point that Third World host states of the TNCs are incapable of controlling the corporations' activities.

A more recent decision of a domestic court will help to drive home this point: the case of *Mr Jonah Gbemre v Shell Petroleum Development Company, Nigerian National Petroleum Corporation (NNPC) and the Attorney-General of the Federation*¹¹¹ before Justice CV Nwokorie, at the Federal High Court, Benin Division. The applicant in the case had sought the following relief:

- (i) a declaration that the constitutionally-guaranteed fundamental rights to life and dignity of the human person provided for in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999, and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Vol 1, Laws of the Federation of Nigeria, 2004, inevitably include the right to a clean, poison-free and healthy environment;
- (ii) a declaration that the actions of the first and second defendants in continuing to flare gas in the course of their oil explorations and production activities in the applicant's community are a violation of the applicant's fundamental rights to life (including a healthy environment) and dignity of the human person guaranteed by sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement Act, Cap A9, Vol 1, Law of the Federation of Nigeria, 2004;
- (iii) a declaration that the failure of the first and second defendants to carry out an environmental impact assessment in the applicant's community concerning the effects of their gas flaring activities is a violation of section 2(2) of the Environmental Impact Assessment Act, Cap E12, Vol 6, Laws of the Federation of Nigeria, 2004;
- (iv) a declaration that the provisions of sections 3(2)(a) and (b) of the Associated Gas Re-Injection Act, Cap A25, Vol 1, Laws of the Federation of Nigeria, 2004, and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, 1984, under which the continued flaring of gas in Nigeria may be allowed, are inconsistent with the applicant's rights to life and/or dignity of the human person enshrined in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and articles 4, 16 and 24 of the African Charter on

¹¹⁰ SERAC decision (n 104 above) concluding para.

¹¹¹ Suit FHC/CS/B/153/2005 (unreported).

Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Vol 1, Laws of the Federation of Nigeria, 2004, and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution; and

- (v) an order of perpetual injunction restraining the first and second defendants by themselves or by their agents, servants, contractors or workers or otherwise howsoever from further flaring of gas in the applicant's said community.

In its judgment of 14 November 2005, the Court granted the above. In bold and clear terms, it restrained the respondents from further flaring gas in the applicant's community, with an injunction to take immediate steps to do this. The Court specifically ordered the Attorney-General of the Federation to immediately set in motion the necessary processes for a speedy amendment of the Associated Gas Re-injection Act and the Regulations made thereunder in order to quickly bring them in line with the provisions of chapter 4 (covering human rights) of the Constitution.¹¹²

About five years after this judgment, the situation is still much the same in Niger Delta communities. However, the National Assembly in July 2009 passed a new bill, the Gas Flaring (Prohibition and Punishment) Bill, 2009, which sets 31 December 2010 as the final date for stopping gas flaring in Nigeria. Under this Bill, oil corporations that fail to meet the deadline should pay twice the price of gas flared in the international market.¹¹³ Whether the new legislation will be enforced in a manner different from the way other environmental legislation and regulations in Nigeria have been enforced so far is a different matter. Indeed, the law is now in force, yet its impact has not been felt within the affected communities.

4 Transnational corporations and the International Criminal Court

Customary international human rights law developed in order to protect individuals from oppressive and abusive actions of the state. Perhaps a failure to recognise or contemplate *ab initio* that powerful non-state actors such as TNCs could violate human rights may be attributed

¹¹² A full and detailed analysis of this case can be found in the *Oxford Reports on International Law* – ILDC 924 (NG 2005). The full text of the original judgment of the court is also available at <http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf> (accessed 19 March 2011).

¹¹³ See S Ojeifo 'Gas flaring – Senate passes Prohibition Bill' *This Day* 3 July 2009 <http://www.thisdayonline.com/nview.php?id=147722> (accessed 19 March 2011).

to the fact that only states were players in the international arena.¹¹⁴ However, international law leaves states with the obligation to control and restrain within their territories the activities of non-state actors that violate human rights.¹¹⁵ It is not in doubt that several states do not have what it takes to live up to this obligation. Weak Third World countries that see these human rights violations through the extra-territorial activities of foreign corporations within their domain, as in the case of Nigeria highlighted above, do not have the economic and political will to bring TNCs under control.¹¹⁶ The situation is further exacerbated by the systemic corruption often associated with Third World countries, of which Nigeria is not an exception.¹¹⁷

At one time it was thought that where a host state is unwilling or incapable of reacting appropriately to human rights abuses, the home state of the corporation may have a crucial role to play ensuring that corporate abuses do not go unpunished,¹¹⁸ and some home states have attempted to use extra-territorial legislation to achieve this end. Belgium, for instance, had an unsuccessful trial with its 'universal competence' human rights law by which Belgian courts could try cases of alleged violations of human rights by anyone, against anybody and anywhere in the world.¹¹⁹ The United Kingdom also proposed a bill to impose social, environmental and human rights obligations on corporations registered in the UK and their directors, with respect to their activities at home or overseas. However, this did not translate into legislation.¹²⁰

¹¹⁴ AC Cutler 'Critical reflections on the Westphalian assumptions of international law and organisations: A crisis of legitimacy' (2001) 27 *Review of International Studies* 133, arguing that the 'Westphalian-inspired notions of state-centricity, positivist international law, and "public" definitions of authority are incapable of capturing the significance of non-state actors, like transnational corporations and individuals, informal normative structures, and private, economic power in the global political economy'. See also Malanczuk (n 1 above) 1, arguing that 'only states could be subjects of international law, in the sense of enjoying international legal personality and being capable of possessing international rights and duties, including the rights to bring international claims'.

¹¹⁵ McCorquodale & Simons (n 18 above) 598 599.

¹¹⁶ I Fuks 'Sosa v Alvarez-Machain and the future of ACTA litigation: Examining bonded labour claims and corporate liability' (2006) 106 *Columbia Law Review* 112 117 n 37, arguing that developing countries are reluctant to bring TNCs under control because of their power over the flow of capital and jobs that the TNCs have and the ease with which either or both can be moved in relatively short period of time in the event of a country falling out of favour with the TNCs.

¹¹⁷ F Khan 'Understanding the spread of systemic corruption in the Third World' (2008) 6 *American Review of Political Economy* 16; O Fagbadebo 'Corruption, governance and political instability in Nigeria' (2007) 1 *African Journal of Political Science and International Relations* 28 35.

¹¹⁸ See J Ruggie 'Protect, respect and remedy: A framework for business and human rights' (2008) 3 *Innovations: Technology, Governance, Globalisation* 189.

¹¹⁹ Kinley & Tadaki (n 3 above) 940.

¹²⁰ Kinley & Tadaki (n 3 above) 942.

It appears that only the United States of America has made a meaningful difference in the use of extra-territorial legislation to regulate TNCs. The Alien Tort Claims Act¹²¹ (ATCA) empowers the USA district court to hear civil claims of foreign citizens for injuries arising from actions that violate the law of a nation or a treaty of the United States.¹²² This Act has been utilised to some extent,¹²³ but its application has often been limited by jurisdiction and *forum non-conveniens* arguments and restrictive interpretations.¹²⁴ Also, apart from these, it is restricted to suits in the USA and has no universal application that can adequately deal with wider human rights violations. Not even soft law initiatives¹²⁵ could fill the vacuum. For instance, the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights¹²⁶ can appropriately be described as a 'lame tiger' because, although referred to as 'binding', it is voluntary. Its provisions are not enforceable on a TNC. What the current position amounts to is that reliance on a state-based framework for controlling TNCs is tantamount to turning a blind eye to human rights abuses arising from their operations.¹²⁷

It is against this backdrop that the article argues that extending the jurisdiction of the ICC to TNCs has become imperative in order to cut down the extent of, or to deter, human rights abuses. There is no doubt that the manner of atrocities committed by Shell in Ogoniland, for instance, cannot be substantially distinguished or removed from the definition of crimes over which the ICC currently has jurisdiction. Articles 5, 6, and 7 of the ICC Statute make it clear that crimes against humanity which, among others, include murder, rape, torture and attacks directed against any civilian population, such as were committed with the complicity of Shell and other TNCs in the Niger Delta, are punishable under the Statute.

A critical mind may want to ask why Third World countries, including Nigeria, have not of their own accord employed a corporate criminal regime to effectively punish or stop TNCs from human rights violations

¹²¹ This statute is alternatively referred to as the Alien Tort Statute (ATS). It is part of the Judiciary Act of 1979, ch 20 para 9(b), 1 Stat 73, 77 (codified as amended at 28 USC para 1350 (2000)). See Fuks (n 116 above) 112.

¹²² Kinley & Tadaki (n 3 above) 939.

¹²³ See *Doe v Unocal Corp* 963 F Supp 880 (CD Cal 1997) 110 F Supp 2d 1294 (CD Cal 2000); *Doe 1 v Unocal* 395 F 3d 932 (9th Cir 2002) 395 F 3d 978 (9th Cir 2003); *John Doe 1 v Unocal* 403 F 3d 708 (9th Cir 2005). Unocal Corporation was held liable for human rights violations of its subsidiary company in Myanmar. See also *Beanal v Freepport-McMoran Inc* 197 F 3d 161, 161 (5 Cir 1999). See generally Fuks (n 116 above) 118-119. For other cases, see MA Pagnattaro 'Enforcing international labour standards: The potential of the Alien Tort Claims Act' (2004) 37 *Vanderbilt Journal of Transnational Law* 203.

¹²⁴ S Joseph *Corporations and transnational human rights litigation* (2004) 83-99.

¹²⁵ See nn 8, 9, 10, 13 & 14 above.

¹²⁶ See n 14 above.

¹²⁷ Kinley & Tadaki (n 3 above) 1021.

without seeking the assistance of the ICC. The truth is that, like some Western common law jurisdictions that have corporate criminal regimes, Nigeria, for instance, recognises this concept but has not effectively put it to use as machinery for seeking justice against corporations. Corporate criminal liability is well established in Nigeria's jurisprudence. This is anchored in common law's organic theory of the corporation, which has been the hallmark of Nigeria's company statutory and case law.¹²⁸ Leaving aside the company statutory and case law, generally, section 18(1) of the Interpretation Act,¹²⁹ as well as chapter 1 of the Criminal Code¹³⁰ defines a 'person' as including a corporation, with the implication that all legal rules and offences applicable to 'a person' also applies to a corporation.

Section 65(1)(a) of the Companies and Allied Matters Act of 1990 (CAMA)¹³¹ provides that a corporation shall be criminally liable for the acts of its members in a general meeting, its board of directors or of its managing director to the same extent as if it were a natural person. Paragraph (b) of the same sub-section, however, underscores the sacrosanctity of corporate criminal liability in Nigeria by indicating that a corporation shall still be criminally liable notwithstanding that the offence in question was committed in the course of an activity or a business not authorised by its memorandum; thus foreclosing the use of the *ultra vires* argument as a defence in any criminal proceedings against a corporation.¹³²

The section 65 provisions are in any case a codification of Nigeria's pre-CAMA case law.¹³³ Worthy of note is the case of *Ibadan City Council v Odunkale*,¹³⁴ where the Supreme Court held that the mental state of a director, being the mind and will of a corporation, may be attributed to the corporation itself in order to ground corporate liability. In effect, corporations in Nigeria have been convicted of offences that include sedition,¹³⁵ knowingly publishing a false statement,¹³⁶ the violation

¹²⁸ C Okoli 'Criminal liability of corporations in Nigeria: A current perspective (1994) 38 *Journal of African Law* 35; JA Dada 'The organic theory as a basis of corporate liability' (1998) 4 *Current Jos Law Journal* 219.

¹²⁹ Ch I23, Laws of the Federation of Nigeria, 2004.

¹³⁰ Ch C38, Laws of the Federation of Nigeria, 2004. See also Okoli (n 128 above) 39.

¹³¹ Ch C20, Laws of the Federation of Nigeria, 2004.

¹³² Okoli (n 128 above) 37-38.

¹³³ *Lennard's Carrying Company v Asiatic Petroleum* (1915) AC 705 713-714, per Viscount Haldane; *Bolton v Graham* (1956) 3 All ER 624 630, per Lord Denning; *A-G (Eastern Region) v Amalgamated Press* (1956-1957) 1 ERLR 12; *James v Mid-West Motors Limited* (1978) NSCC 536 550, per Aniagolu JSC; *Mandilas and Karaberis Limited & Another v Inspector-General of Police* (1958) 3 FSC 20.

¹³⁴ (1979) 3 UILR 490.

¹³⁵ *R v Zik Press Ltd* (1947) 12 WACA 202.

¹³⁶ *Amalgamated Press* case (n 133 above).

of mining law,¹³⁷ stealing by fraudulent conversion,¹³⁸ and intentionally harbouring prohibited goods contrary to the import prohibition order.¹³⁹ A post-CAMA decision of the Court of Appeal today represents a succinct statement of Nigerian jurisprudence on corporate criminal liability. The court in *Adeniji v State* clearly enunciated:¹⁴⁰

There is no doubt therefore that the company could be made liable criminally for the actions of natural persons in control or with necessary authority and who are regarded as the alter ego of the company and such natural persons could be treated as the company itself. Corporations being a legal fiction can only act and think through their officials and servants. For the purpose of imposing criminal liability upon corporations other than vicarious responsibility, the conduct and accompanying mental state of senior officers, acting in the course of their employment, can be imputed to a corporation.

By implication of this decision, senior officers of a corporation, who are not necessarily the directors, can attract criminal sanctions for the corporation. But it is instructive to note that *Adeniji's case* also stated that a corporation could not be held criminally liable at the same time as the responsible officer, such that once the culpable conduct of an officer has been imputed to the corporation which is then found guilty, the officer is absolved from guilt.¹⁴¹ In other words, the court failed to uphold the doctrine of 'lifting the veil' in a criminal case. 'Lifting the veil' is an age-long common law principle enshrined also in criminal case law,¹⁴² and particularly observed by the Supreme Court in *Mandilas and Karaberis Limited and Another v Inspector-General of Police*.¹⁴³ Besides receiving criticism from scholars,¹⁴⁴ the decision on this issue may not represent the supreme law in the country by reason of judicial precedence. There has been an earlier Supreme Court decision (*Mandilas and Karaberis Limited*) to the contrary.

In any event, CAMA provides the grounds for holding oil TNCs criminally liable for their corporate malfeasance in the Niger Delta, which are the aftermath of officially-authorised actions. And there seems in theory to be no obstacle in prosecuting them. The same is the case

¹³⁷ *R v Attorneys for Anglo-Nigerian T in Mines Ltd* (1926) 9NLR 69.

¹³⁸ *Mandilas and Karaberis Limited's case* (n 133 above)

¹³⁹ *Board of Customs and Excise v Amaechi* (1978) 4 FRCR 169. See also L Ali *Corporate criminal liability in Nigeria* (2009) 127.

¹⁴⁰ (1992) 4 NWLR (Pt 234) 248 261, *per* Sulu-Gambari JCA.

¹⁴¹ n 140 above, 262-263.

¹⁴² *DPP V Kent & Sussex Contractors Ltd* (1944) KB 46; *R v ICR Haulage Ltd* (1944) KB 551.

¹⁴³ See n 133 above.

¹⁴⁴ Okoli (n 128 above) 42-43.

with NNPC.¹⁴⁵ It is thought that the complexity factors (such as touching on causation, burden of proof and extra-territorial informational need), which are often argued as complicating the prosecution of TNCs, may not be in issue in the peculiar case of the Niger Delta where the crimes in question are location-specific and involve the physical and direct application of force to the people.¹⁴⁶ The complexity factors are not of general application, therefore, and depend on the typology of industry and the nature of the crime involved. They are best associated with TNCs in the health, pharmaceutical, financial and securities industries.¹⁴⁷

Criminal prosecution is the highest level of state reprimand against an offending entity. Consequently, the joint venture alliance (and sometimes production-sharing contracts) between the Nigerian state (represented by NNPC) and the oil TNCs raises the question as well as suggesting why the Nigerian state has not mustered the courage to apply the strictest level of sanctions against entities in which it has vested an economic interest. While there is scope for private prosecution under Nigerian law, its application still lies much in the hands of the state who, through the office of the Attorney-General, must grant an official fiat before such private undertaking can commence.¹⁴⁸

It may be recalled that it is in part the failure of states to rise above political and economic considerations and visit justice on atrocities committed within their territories that necessitated the creation of the

¹⁴⁵ While the prosecution of a government-owned corporation is tantamount to crown prosecuting crown, and as such difficult to conceptualise, the Nova Scotia Court of Appeal in *R v Canada (Minister of Defence)* (1993) 125 NSR (2d) 208 para 21 (NSCA) has clarified that as no one, including government and its departments, is above the law, it is entirely appropriate to prosecute government, especially where such prosecution is to punish an action that is particularly destructive to the environment (which is exactly the same case as in the Niger Delta). The Court explained this as follows: 'The respondents argued that the prosecution of Her Majesty in Right of Canada by Her Majesty in Right of Canada creates an absurdity. While there may be conceptual difficulties, these must yield to the principle that Her Majesty in Right of Canada or a Province is not above the law. When a statute that Parliament has made binding upon Her Majesty is violated in her name and on her behalf, the declarative effect of a finding of guilt is more important than the penalty imposed. This is particularly true when the statutory violation consists of an act destructive to the environment. Decoste J dealt with a similar argument in the *Environment Canada* case (*Department of the Environment, Canada v Department of Public Works, Canada* (1992) 10 CELR (NS) 135 (C.Q.)).' Indeed, prosecution of a government corporation is not a novel phenomenon in Canada. The Alberta Ministry of Justice and Attorney-General, eg, has a well-established procedure for doing this, which particularly involves a private counsel conducting the prosecution. This is available at http://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/prosecuting_crown.aspx (accessed 20 March 2011).

¹⁴⁶ Ali (n 139 above) 193-194.

¹⁴⁷ As above.

¹⁴⁸ See secs 174(b) & 211(1)(b) of the 1999 Constitution; sec 342 of the Criminal Procedure Act, ch C41, Laws of the Federation of Nigeria, 2004; *Fawehinmi v Akilu* (1987) 11/12 SCNJ 151 or (1987) 4 NWLR (Pt 797) 832; and *Attorney-General of Anambra State v Nwobodo* (1992) 7 NWLR (Pt 256) 711.

ICC, not that the states do not have appropriate criminal regimes for the designated offences. *A fortiori*, the necessity of subjecting TNCs to the jurisdiction of the ICC is canvassed not because host states such as Nigeria do not have appropriate corporate criminal regimes, but because the use of such domestic criminal regimes to secure justice for victims of these crimes is seemingly undermined by factors that relate to political and economic considerations, as well as corruption.

The ICC is a permanent tribunal established to prosecute individuals for genocide, crimes against humanity and war crimes. Crimes of aggression will also fall under its jurisdiction after 1 January 2017.¹⁴⁹ The Court came into being on 1 July 2002, the date on which its founding treaty, the Rome Statute of the International Criminal Court,¹⁵⁰ entered into force. The Statute was adopted at a diplomatic conference in Rome on 17 July 1998. Although the Court may take its proceedings anywhere in the territory of state parties, its official seat and headquarters are in The Hague, Netherlands. The jurisdiction of the ICC extends to crimes committed on or after 1 July 2002 and only to cases where the accused is a national of a state party, where the alleged crime took place within the territory of a state party; or where a situation is referred to the Court by the United Nations Security Council.¹⁵¹

Essentially, the ICC complements existing national judicial systems and only exercises its jurisdiction where a national jurisdiction is unwilling or unable to investigate or prosecute designated crimes.¹⁵² This is the idea encapsulated in the ICC's 'complementarity principle'.¹⁵³ Some scholars have attempted to give a narrow interpretation to this principle by arguing that the underlying intention of the Rome Statute

¹⁴⁹ At the Review Conference of the Rome Statute concluded on 11 June 2010 in Kampala, Uganda, the Conference adopted a resolution by which it amended the Rome Statute so as to include a definition of the crime of aggression. But the actual exercise of jurisdiction over this offence by the ICC is subject to a decision to be taken after 1 January 2017 by the same majority of state parties, as required for the adoption of an amendment to the Statute. See International Criminal Court 'Review Conference of the Rome Statute Concluded in Kampala' <http://www.icc-cpi.int/menu/icc/press%20and%20media/press%20releases/press%20releases%20%282010%29/review%20conference%20of%20the%20rome%20statute%20concludes%20in%20kampala> (accessed 20 March 2011). See, particularly, the text of the Assembly of States Parties (ASP) Resolution RC/Res 6 adopted at the 13th plenary meeting on 11 June 2010, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (accessed 20 March 2011).

¹⁵⁰ The treaty is also referred to as the International Criminal Court Statute or just the Rome Statute.

¹⁵¹ Arts 12 & 13.

¹⁵² Art 17. See, generally, I Cameron 'Jurisdiction and admissibility issues under the ICC Statute' in D McGoldrick *et al* (eds) *The Permanent International Criminal Court: Legal and policy issues* (2004) 65; International Criminal Court 'ICC at a glance' <http://www.icc-cpi.int/menu/icc/about%20the%20court/icc%20at%20a%20glance/icc%20at%20a%20glance?lan=en-GB> (accessed 20 March 2011).

¹⁵³ MM El Zeidy *The principle of complementarity in international criminal law: Origin, development and practice* (2008) 157.

is to encourage national jurisdictions to prosecute international crimes so that, unless there is a total or substantial collapse or unavailability of a state's national judicial system, the 'unwilling' or 'unable' condition in article 17 cannot be said to have been met to warrant prosecution by the ICC.¹⁵⁴ This narrow interpretation is untenable. Rather, the cardinal objective of the Rome Statute is to annihilate international crimes by ensuring that every identified conduct that amounts to the designated crimes are surely, efficiently and effectively dealt with. The implication of a narrow interpretation is to provide room for national jurisdictions to use clogging political machinery to undermine the Rome Statute. For instance, a state party with no intention to prosecute ICC crimes committed within its territory may argue that it has a judicial system capable of carrying out investigation and prosecution, so as to keep the ICC off the case, yet take no action itself.

Darryl Robinson, who himself drafted the text of article 17, has explained that the real test in the complementarity principle is to determine whether a state is investigating or prosecuting a case or has done so. Where there are no such national efforts at all, then the case becomes admissible for prosecution by the ICC.¹⁵⁵ In other words, on the occasion of a state's inaction or in the absence of a national proceeding, a case falls for prosecution by the ICC.¹⁵⁶ The explanation of the draftsman appeals to common sense. The unwillingness or inability on the part of a state can only be deciphered by inaction or scarcity of national proceedings.

Nigeria is a state party to the Rome Statute. It signed the treaty on 1 June 2000 and ratified it on 27 September 2001.¹⁵⁷ The treaty's implementation legislation, the Rome Statute of the International Criminal Court (Ratification and Jurisdiction) Bill, was passed by the National Assembly on 19 May 2005.¹⁵⁸ However, the legislation is yet to come into force as it has not yet received presidential assent.¹⁵⁹ Notwithstanding the lack of presidential assent, the facts of the endorsement and ratification of the treaty are enough for the ICC to exercise immediate

¹⁵⁴ NN Jurdi 'Some lessons on complementarity for the International Criminal Court Review Conference' (2009) *South African Year Book of International Law* 28 29-30. See also NN Jurdi 'The prosecutorial interpretation of the complementarity principle: Does it really contribute to ending impunity on national level?' (2010) 10 *International Criminal Law Review* 73.

¹⁵⁵ D Robinson 'The mysterious mysteriousness of complementarity' (2010) 21 *Criminal Law Forum* 67 68. For more discourse on complementarity, see MA Newton 'Complementarity: Domestic jurisdiction consistent with the Rome Statute of the International Criminal Court' (2001) 167 *Military Law Review* 20.

¹⁵⁶ Robinson (n 155 above) 102.

¹⁵⁷ See the official website of the Coalition for the International Criminal Court, <http://www.iccnw.org/?mod=country&iduct=128> (accessed 21 March 2011).

¹⁵⁸ AM Jimoh 'Senate ratifies International Criminal Court treaty' *The Guardian* 20 May 2005 <http://groups.yahoo.com/group/Naija-news/message/3723> (accessed 21 March 2011).

¹⁵⁹ See n 157 above.

jurisdiction over international crimes committed within Nigerian territory.

The fundamental reason for considering that the ICC is appropriately positioned to act also as a criminal court for TNCs is that the ICC is an uninterested third party (unassociated with neither the host nor home state) to whom grievances of human rights violations can be lodged by victims. It would thus be in a position to act without being influenced by any form of economic considerations that often dominate the decisions of the current state officials to check the atrocious activities of the TNCs. Another attractive feature is that the ICC is a permanent body and has developed procedures for receiving complaints, investigating and prosecuting crimes, and is already accustomed to the imposition of fines, the confiscation of the proceeds of crime and reparations for victims.¹⁶⁰ Thus, the ICC will face little difficulty in devising an appropriate and uniformly-acceptable system of sanctions for TNCs.

A challenge to extending the ICC's jurisdiction to TNCs, however, is the issue of the non-recognition of corporate criminal liability by some state parties to the treaty, also the reason behind the failure at the Rome Conference to extend the ICC's jurisdiction over corporations. The original draft ICC Statute contained a proposal in article 23 that brings corporations within the jurisdiction of the Court. The provisions are the following:¹⁶¹

- (5) The Court shall also have jurisdiction over legal persons, with the exception of states, when the crimes committed were committed on behalf of such a legal person or by their agencies or representatives.
- (6) The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

This proposal was eventually dropped from the body of the Statute as the majority of the delegates failed to support it, especially those delegates whose national law did not recognise corporate criminal liability. These delegates were particularly concerned about the uncertainty created by the proposal on the operation of the ICC's complementary jurisdiction when the concept of corporate criminal liability was unknown in their national laws.¹⁶² In other words, the delegates were bent on avoiding a situation where it could be argued that because a state failed to prosecute a corporation, the ICC automatically descends on the corporation by virtue of article 17. The prevailing opinion therefore was that granting the ICC jurisdiction over corporations when corporate criminal liability was not recognised in all the state parties had the effect of rendering the complementarity principle in the Statute

¹⁶⁰ K Haigh 'Extending the International Criminal Court's jurisdiction to corporations: Overcoming complementarity concerns' (2008) 14 *Australian Journal of Human Rights* 199 200.

¹⁶¹ Quoted from Haigh (n 160 above) 202.

¹⁶² Haigh (n 160 above) 203.

impracticable.¹⁶³ The proposal was further opposed because of concerns about how the indictment would be served, the representation of the corporation, the presentation of evidence and how corporate intent would be deciphered.¹⁶⁴

I am inclined to agree with Kyriakakis that the complementarity principle in the Rome Statute would not be threatened by a proposal to extend the ICC's jurisdiction to corporations. The arguments canvassed as the basis for opposing the extension of the jurisdiction of ICC to TNCs, are untenable. Indeed, complementarity concerns were merely used as a cover for states' anxiety about how competing tension between state sovereignty and the international criminal justice would be resolved if the ICC's jurisdiction stretched to TNCs.¹⁶⁵

A number of UN conventions have already recognised corporate criminality at the international level. The United Nations Convention for the Suppression of the Financing of Terrorism,¹⁶⁶ the United Nations Convention Against Transnational Organised Crime and its Protocols,¹⁶⁷ and the United Nations Convention Against Corruption¹⁶⁸ all recognise international corporate criminal liability.¹⁶⁹ Unlike the ICC Statute, these Conventions give each state party the liberty to determine how it holds a legal person to account for its actions that contravene the Conventions. This may be by means of either criminal, civil or administrative proceedings. The logical implication of these Conventions, as Haigh clearly explains, is that it enables state parties to recognise corporate criminality at the international level, even if the state does not recognise such corporate criminal liability under its domestic law.¹⁷⁰ This approach thus gives room for international treaties that recognise and regulate international corporate criminal conduct to be settled, irrespective of differences in states' national legal systems regarding the notion of corporate criminality.¹⁷¹ Haigh further stresses that a state which does not recognise corporate criminal liability under its

¹⁶³ As above. See also K Ambos 'General principles of criminal law in the Rome Statute' (1997) 10 *Criminal Law Forum* 1 7.

¹⁶⁴ Haigh (n 160 above) 203.

¹⁶⁵ J Kyriakakis 'Corporations and The International Criminal Court: The complementarity objection stripped bare' (2008) 19 *Criminal Law Forum* 115 118 142. See also Haigh (n 160 above) 205.

¹⁶⁶ Adopted by the United Nations General Assembly in Resolution 54/109 of 9 December 1999.

¹⁶⁷ Adopted by the United Nations General Assembly in Resolution 55/25 of 15 November 2000 and opened for signature at the High-Level Political Signing Conference held in Palermo, Italy, 12-15 December 2000. It is also referred to as the Palermo Convention.

¹⁶⁸ Adopted by the United Nations General Assembly in Resolution 55/61 of 4 December 2000.

¹⁶⁹ Haigh (n 160 above) 206.

¹⁷⁰ As above.

¹⁷¹ As above.

domestic law may still be a party to the Conventions and, by taking appropriately effectual civil or administrative action against a corporation, may comply with its obligations under the Conventions.¹⁷²

The positive impact of the Conventions discussed above upon the present ICC debate is that, as corporate criminal liability has already been recognised in those Conventions, it is no longer an entirely new concept to international law or to state parties that opposed its introduction into the Rome Statute. The example from those Conventions may be copied for the Rome Statute. However, to give each state party leave to determine the way in which it will hold a corporation to account for its criminal actions that breaches the Statute would produce a similarly poor result as the present situation, because it boils down to leaving the regulation of the activities of TNCs in the hands of states. But I consider that striking a middle ground to this would suffice.

A provision extending the ICC's jurisdiction to corporate entities should be reintroduced in the Rome Statute with an option for state parties to ratify the Statute as a whole (that is, including the part of the Statute that extends the ICC's jurisdiction to corporations) or in part (excluding the part of the Statute that extends the ICC's jurisdiction to corporations). Thus, where a state party ratifies the Statute as a whole, TNCs within its territory become subject to the ICC and can be prosecuted at the ICC if they fall short of the expectations of the Rome Statute. In such an event, weak Third World countries like Nigeria would ratify the Statute as a whole. Where this happens, the ICC will be at liberty, under the complementarity principle, to swing into action where Nigeria fails to prosecute the TNCs' malfeasance.

Haigh equally suggests an exception-based approach to extending the ICC's jurisdiction to corporations.¹⁷³ By this approach, the ICC's jurisdiction may be extended to all corporations but with specific exception for corporations incorporated in states the domestic laws of which do not recognise corporate criminality. The pitfall of this approach, however, is that it would create an absurd scenario. For instance, two different TNCs registered in two different countries violate human rights in a Third World country like Nigeria, which amounts to a crime under the ICC Statute. If the domestic law of the home state of one of the corporations recognises corporate criminal liability and it is not recognised in the domestic law of the home state of the other corporation, then two different outcomes will emerge following the exception-based approach. One corporation would face prosecution at the ICC while the other will not. This outcome would not be welcomed.

Again, the other concerns raised by the delegates at the Rome Conference¹⁷⁴ who were opposed to extending the ICC's jurisdiction

¹⁷² As above.

¹⁷³ Haigh (n 160 above) 211.

¹⁷⁴ This refers to the international conference in Rome at which the ICC Statute was deliberated.

to corporations, that is to say, the concerns about how indictments would be served, the representation of the corporation, the presentation of evidence and how corporate intent would be deciphered, are without substance. These issues are minute and peripheral matters that can easily be fixed by adapting a range of domestic laws.¹⁷⁵ As well, supposing there is inconsistency, a *lacuna* in the provisions, or friction between international law (the Statute) and the domestic law of a state party on these issues, devising an appropriate compromise would not be a difficult task.

Regarding corporate intent, for instance, a good compromise can be seen in an articulated proposal for ICC jurisdiction over juridical persons, contained in a Working Paper presented by the French delegation at the Rome Conference. It reads as follows:¹⁷⁶

- 5 Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person for a crime under this Statute.

Charges may be filed by the prosecutor against a juridical person, and the Court may render a judgment over a juridical person for the crime charged if:

- (a) the charge filed by the prosecutor against the natural person and the juridical person alleges the matters referred to in subparagraphs (b) and (c); and
- (b) the natural person charged was in a position of control within the juridical person under the national law of the state where the juridical person was registered at the time the crime was committed; and
- (c) the crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and
- (d) the natural person has been convicted of the crime charged.

For the purpose of this Statute, 'juridical person' means a corporation whose concrete, real, or dominant objective is seeking private profit or benefit, and not a state or other public body in the exercise of state authority, a public international body or an organisation registered and acting under the national law of a state as a non-profit organisation

- 6 The proceedings with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The prosecutor may file charges against the natural and juridical persons jointly or separately. The natural person and the juridical person may be jointly tried.

¹⁷⁵ Eg, the Nigeria's CAMA at secs 78 and 65 makes provisions relating to the service of processes on a corporation, and establishment of corporate intent respectively.

¹⁷⁶ A/Conf/183/WGGP/L5Rev2, 3 July 1998. But see A Clapham 'The question of jurisdiction under international criminal law over legal persons: Lessons from the Rome Conference on an International Criminal Court' in Kamminga & Zia-Zarifi (n 18 above) 139-150; C Chiomenti 'Corporations and the International Criminal Court' Global Working Paper 01/05, Symposium: Transnational Corporations and Human Rights, New York University Law School, New York http://www.law.nyu.edu/global/workingpapers/2005/ECM_DL015787 (accessed 21 March 2011).

If convicted, the juridical person may incur the penalties referred to in article 76. These penalties shall be enforced in accordance with the provisions of article 99.

The above proposal presents a much-desired compromise. It is also encouraging, considering that it comes from a civil law jurisdiction. It is an indication that if there is a 'will' to advance corporate criminality under international law, differences in national laws will not pose any significant obstacles. The Rome Statute turned seven on 1 July 2009, and as such became due for general amendments and reviews.¹⁷⁷ Consequently, a Review Conference was held in the summer of 2010 which yielded some positive results. The Conference particularly adopted a resolution by which it included the crime of aggression within the scope of the ICC's jurisdiction.¹⁷⁸ Although the issue of corporate criminal liability was not discussed by the Conference, it is thought that with the door opening for amendments or reviews, corporate criminal liability will secure a place within the body of the Rome Statute in the future.

There appears to be a serious element of international politics and/or protection of economic interests in the whole ICC process. It was no big issue to negotiate the three UN Conventions mentioned above that recognise corporate criminal liability at the international level. They specifically serve the interest of the Western economic bloc. Transnational organised crime, terrorism and its financing, specifically, are crimes that are often targeted at Western economies. Those Conventions do not only target individual actors, but they equally punish any corporation that is used as a cover or shield in perpetrating those crimes. A serious commitment to combat and suppress those crimes drove the making of those Conventions.

It has been different altogether when it came to punishing corporations, national and transnational alike, whose atrocious operations amount to what can ordinarily be described as offences within the definitions of the ICC Statute. Corporate violations of human rights in poor Third World host states by Western-owned TNCs can only be checked and punished by extending the ICC's jurisdiction to these entities. The only reason why the initiative to take this step fails is that the human rights violations take place in poor Third World countries who are not members of the Western economic bloc, and the corporations involved represent and advance the economic interests of the same Western economic bloc.¹⁷⁹

¹⁷⁷ Chiomenti (n 176 above) 6.

¹⁷⁸ See n 149 above.

¹⁷⁹ The double standard of the industrialised Western world is the reason why these nations fail to use extraterritorially the same legal regime that they use at home to enforce corporate integrity among their TNCs. See J Clough 'Punishing the parent: Corporate criminal complicity in human rights abuses' (2007-2008) 33 *Brook Journal of International Law* 899. Australia may be taking the lead in attempting to punish corporations for criminal activities outside Australia when it introduced new

5 Conclusion

TNCs are no doubt crucial non-state actors on the international scene. The negative impact of their activities manifests itself in wide-scale and grave abuses of human rights. The hapless citizens bear the worst of these human rights abuses. Despite their enormous economic activity and the amount of literature that has been produced on them, there is still no single legal instrument that regulates their activities meaningfully. The Niger Delta region of Nigeria is known for, and indeed is, a metaphor for human rights abuses by oil TNCs. The Nigerian government, as is the case in many other countries around the globe, has failed to bring these corporations to book. It is proposed, therefore, that a stronger institution, the ICC, is ideally positioned to salvage the situation. The ICC's jurisdiction can be appropriately extended to corporations. The International Court has developed established procedures for prosecuting crimes. Apart from being a permanent body, it prosecutes suspects of its own accord when states turn a blind eye to criminal activities in their territories or are unable to act. This is the correct approach to stamp out or reduce the large-scale human rights abuses in the Niger Delta.¹⁸⁰

provisions for prosecution of ICC offences within the Australian Commonwealth Criminal Code. See J Kyriakakis 'Australian prosecution of corporations for international crimes' (2007) *Journal of International Criminal Justice* 1.

¹⁸⁰ It may be interesting to highlight that a totally different approach to dealing with the transnational corporations' excesses in African host states has been suggested by E Oshionebo in his recent book *Regulating transnational corporations in domestic and international regimes: An African case study* (2009). He particularly advocates for what I may call 'social partnership'. His thesis as summarised is that '[o]verall, this book acknowledges the mutual interdependence of business and society put proceeds on the premise that the amelioration of ongoing abuses must be at once bilateral and cultural. That is, both TNCs and host African state governments must reject the *status quo* and work to forge a sustainable future for Africa. Respect for human and environmental rights must become core values in the African business arena and African states.

A rejection of the *status quo* should start with the adoption of new attitudes geared towards positive outcomes. New attitudes might involve the pluralisation of regulation, in terms of mechanisms, strategies, and actors. Individual members of society, whether shareholders, investors, workers, consumers, communities, organisations, if organised and informed, have the capacity to influence corporate behaviour' (12).

Disentangling illness, crime and morality: Towards a rights-based approach to HIV prevention in Africa

Marius Pieterse*

Professor of Law, University of the Witwatersrand, South Africa

Summary

An increasing number of African states criminalise HIV transmission. In addition, several states criminalise private conduct traditionally associated with the risk for such transmission, such as homosexuality, sex work and drug use. However, there is increasing evidence that punitive responses to the HIV epidemic are inappropriate and counterproductive. They also fuel stigma and violate individual rights, especially those of members of marginalised groups. Relying on literature canvassing the content and effects of stigma pertaining to HIV, sex, perceived moral deviance and criminality and on studies questioning the effectiveness of criminal law in this context, this article disputes the appropriateness of employing the criminal law in relation to the transmission of HIV, as well as in relation to vulnerable or marginalised groups. Rather, the article argues for a human rights-infused, public health approach to HIV that upholds the rule of law, procedural justice and the principle of proportionality. Ultimately, the article asserts that, given the systemic causes of the African HIV and AIDS pandemic, solutions thereto should be similarly systemic in nature, rather than focused on individual instances of transmission.

1 Introduction

It is probably fair to say that HIV and AIDS have challenged the way in which we think about the relationship between public health, morality and law, more so than any other disease. Indeed, from their arrival on

* BLC LLB LLM (Pretoria), PhD (Witwatersrand); Marius.Pieterse@wits.ac.za. The research in this article was enabled by a grant from the NRF. An earlier version of the article was presented at the African Network of Constitutional Lawyers' Annual Conference held in Rabat, Morocco, 2-5 February 2011.

the international scene in the early 1980s, HIV and AIDS have highlighted the inadequacies of 'traditional' legal and public health approaches to disease control and prevention, as well as the urgent need to look beyond them.¹ Yet, as health systems around the world continue to buckle under the strain of the pandemic, policy makers seemingly remain tangled in conventional frameworks. In particular, while it is widely accepted that respect for and fulfilment of human rights yield the best results in the battle against HIV,² the rights of those afflicted by and vulnerable to the disease continue to be threatened or infringed by policies steeped in coercion, control and condemnation.

This is especially evident in Africa, which remains the epicentre of the HIV pandemic. On the one hand, there is increasing recognition across the continent that a rights-centred approach to public health is required to stem the tide of HIV. This is reflected, for instance, by the recently-proclaimed SADC Model Law on HIV and AIDS in Southern Africa³ and by the approach to HIV prevention adopted in countries such as South Africa. On the other hand, the African Commission on Human and Peoples' Rights (African Commission) has recently declared that it is 'deeply disturbed by the growing trend by various state parties across Africa towards criminalisation and mandatory testing of [people living with HIV] which leads to greater stigmatisation and discrimination'.⁴ This 'growing trend' has been further mirrored in increasing legal hostility towards social minorities traditionally associated with the spread of HIV, such as legally-sanctioned homophobia in, for instance, Uganda and Malawi.⁵

At this juncture, it is thus appropriate to reflect, once again, upon the manner in which the law responds to HIV and to those social groups most commonly associated therewith. The article takes issue with two related subsets of policy responses to HIV: first, those that employ the criminal law, or related coercive elements of public health law, in their

¹ E Cameron 'Legal and human rights responses to the HIV/AIDS epidemic' (2006) 17 *Stellenbosch Law Review* 47 52-53.

² M Kirby 'The never-ending paradoxes of HIV/AIDS and human rights' (2004) 4 *African Human Rights Law Journal* 163 167-68; M Heneke 'An analysis of HIV-related law in South Africa: Progressive in text, unproductive in practice' (2009) 18 *Transnational Law and Contemporary Problems* 751 754; R Johnson 'The Model Law on HIV in Southern Africa: Third World Approaches to International Law insights into a human rights-based approach' (2009) 9 *African Human Rights Law Journal* 129 141; UNAIDS *Criminal law, public health and HIV transmission: A policy options paper* (2002) (UNAIDS *Criminal law*) 15; UNAIDS *Policy brief on criminalisation of HIV transmission* (2008) (UNAIDS *Policy brief*) 2.

³ SADC *Model Law on HIV and AIDS in Southern Africa* (2008) <http://www.sadcpf.org> (accessed 31 March 2011).

⁴ African Commission on Human and Peoples' Rights *Resolution on the Establishment of a Committee on the Protection of the Rights of People Living with HIV and Those at Risk, Vulnerable to and Affected by HIV* (2010).

⁵ Uganda published the much-maligned Anti-Homosexuality Bill 18 of 2009, whereas Malawi has been in the news for arresting and detaining a same-sex married couple under public indecency laws.

efforts to prevent and control the spread of the virus and, secondly, those that seek to regulate the lives of individuals or groups who are considered vulnerable thereto. Without conducting a detailed study of the content and application of relevant laws and policies, the article engages with their effect on disease prevention efforts by relying, first, on literature canvassing the content and effects of stigma pertaining to HIV, sex, perceived moral deviance and criminality and, secondly, on a multitude of studies questioning their efficacy. It disputes the appropriateness of employing a punitive paradigm in relation to HIV transmission and argues in favour of a public health approach that emphasises the protection of civil and political rights as well as the fulfilment of socio-economic rights, reflects *ubuntu* and tolerance, and upholds the rule of law, procedural justice and the principle of proportionality. In conclusion, the article warns that criminal and other laws focusing on individual instances of HIV transmission obscure structural and systemic shortcomings in public responses to the HIV epidemic, which ultimately detract from prevention efforts and undermine the realisation of the right to health in Africa.

2 HIV, stigma and marginalisation

The term ‘stigma’ is used to refer to the labelling of persons as different or deviant in relation to certain shared social norms, based on their behaviour or characteristics. Such ‘othering’ then forms the basis of social exclusion, victimisation and discrimination against those who have hence been singled out. As such, stigma is closely related to social power structures and inequality:⁶

Through stigmatisation social distinctions are enhanced. Stigma thus becomes part of the social struggle for power. Difference is transformed into inequality. Moreover, it is used to produce, legitimise and reproduce social inequalities by establishing difference and using difference thus constituted to ascertain where groups of people fit into the structures of power.

Alongside traits such as race, sexual orientation and class, health status has triggered stigma for centuries,⁷ with both the effects of disease and its mode of transmission serving as justification for ‘othering’ and marginalising those who have been afflicted. In particular, disease transmission is often depicted as having been the consequence of socially irresponsible and/or abhorrent behaviour. This construction of disease, as the just deserts of the deviant, has always been particularly prevalent in relation to sexually-transmitted diseases and predominates much social discourse around HIV. Thus, HIV infection is often depicted

⁶ PM Eba *Stigma[ta]: Aids Review 2007* (2008) 12. See also 11.

⁷ See examples discussed by B Bergman ‘AIDS, prostitution, and the use of historical stereotypes to legislate sexuality’ (1998) 21 *John Marshall Law Review* 777 791-92; Eba (n 6 above) 11.

as due punishment for promiscuity, sexual deviance or some other socially abhorrent behaviour.⁸

A significant purpose of stigma in this context is to conceptually separate those who are ill from the 'normal', unaffected population, so as to externalise the threat of the disease and appease public fears of contagion. By dividing society into groups of healthy 'us' and infected 'them' and simultaneously apportioning blame for infection upon those singled out by the fact thereof, members of society can at once reassure themselves that they are safe against infection and justify their lack of compassion with those who have fallen ill.⁹

The close relationship between disease-related stigma and social power structures is illustrated by the fact that such stigma more often than not attaches especially to groups who are in any event socially marginalised, disempowered or stigmatised based on other traits.¹⁰ Accordingly, the 'us/them' distinctions inherent to stigmatisation of HIV status overlap with and reinforces existing social divisions and result in the further labelling and scapegoating of groups who are already socially vulnerable. This is especially the case where existing social marginalisation and stigma relates to sexual practices.¹¹ Think, for instance, of widespread initial depictions of AIDS as a 'gay plague' — a form of divine punishment for the perceived sexual deviance of gay men.¹² Other groups similarly associated with HIV-related stigma include sex workers (who, through the ages, tend to bear the brunt of stigma pertaining to sexually-transmitted diseases),¹³ 'loose women', intravenous drug users, immigrants and prisoners.

Tellingly, while it is true (and arguably especially true in relation to HIV) that social marginalisation and vulnerability exacerbate the threat of disease and that stigmatised members of marginalised groups are therefore particularly vulnerable to infection, disease-related stigma predominantly attaches to such groups regardless of whether their association with an illness is epidemiologically warranted. Hence, gay men, sex workers and injecting drug users continue to bear the brunt of HIV-related stigma even in regions such as sub-Saharan Africa,

⁸ See Bergman (n 7 above) 778; Cameron (n 1 above) 88-89; Eba (n 6 above) 12 38; Kirby (n 2 above) 167; N Nongogo 'HIV testing and voluntary counselling in the context of stigma' in F Viljoen (ed) *Righting stigma: Exploring a rights-based approach to addressing stigma* (2005) 94 97-98; C Visser 'Floundering in the seas of human unconcern: AIDS, its metaphors and legal axiology' (1991) 108 *South African Law Journal* 619 629-630.

⁹ See Eba (n 6 above) 41-42; M Pieterse 'The interdependence of rights to health and autonomy in South Africa' (2008) 125 *South African Law Journal* 553 556 564 568; F Viljoen 'Stigmatising HIV/AIDS, stigmatising sex? A reply to Professor Van Wyk' (2000) 41 *Codicillus* 11 14 16; Visser (n 8 above) 625 628.

¹⁰ Eba (n 6 above) 12 17-18 24.

¹¹ Visser (n 8 above) 630-631.

¹² See Eba (n 6 above) 24 27-28; Visser (n 8 above) 625-626.

¹³ Bergman (n 7 above) 793; Eba (n 6 above) 38-40.

where the overwhelming mode of HIV transmission is by way of non-transactional, heterosexual sex.¹⁴

Of particular relevance for this article is the extent to which stigma and marginalisation, in relation to HIV and those associated with its spread, are embedded in metaphors of guilt and innocence, crime and punishment:¹⁵

Symbolic stigma is enshrined in the characteristics or behaviours of groups or individuals who are conceived as deviant, amoral and therefore blame-worthy. It derives its strength from the oppositions between good and bad, evil and virtue, punishment and innocence.

Not only do HIV-positive persons and members of marginalised groups who are typically associated with HIV infection tend to be viewed as being responsible for and deserving of their own HIV status, they are also often accused of being vectors of disease who 'deliberately' infect 'innocent victims' through their 'immoral' behaviour.¹⁶ Accordingly, HIV is often seen as due punishment for criminal deviance, while HIV-positive status is itself tainted with perceptions of criminality.

Of course, the very notion of criminality is acutely stigmatised — 'society's power over individuals is nowhere more intrusive, nor its moral condemnation more profound, than when society stigmatises and punishes individuals as criminals'.¹⁷ The label 'criminal' simultaneously triggers, exacerbates and legitimises societal condemnation and marginalisation of those branded thus, thereby providing publicly-sanctioned valorisation for stigma and associated victimisation.¹⁸ Not coincidentally, then, several states criminalise behaviour associated with marginalised groups that bear the brunt of HIV-related stigma, such as sex between men, prostitution, illegal immigration and drug use, despite none of these actions involving 'victims' in the conventional sense. Moreover, an increasing number of states have sought to criminalise certain instances of HIV transmission. Whereas attempts to justify such criminalisation tend to reference social morality and other communal goals such as protection of the public health, their reflection

¹⁴ Eba (n 6 above) 38; Johnson (n 2 above) 156.

¹⁵ Eba (n 6 above) 38. See also Visser (n 8 above) 629-630.

¹⁶ See E Bonthuys 'Women's sexuality in the South African Constitutional Court' (2006) 14 *Feminist Legal Studies* 391 397 399 407; S Burris 'Disease stigma in US public health law' (2002) 30 *Journal of Law, Medicine and Ethics* 179 183; Eba (n 6 above) 12 27-28 38-39; Nongogo (n 8 above) 98; Visser (n 8 above) 629-630.

¹⁷ JK Strader 'Criminalisation as a policy response to a public health crisis' (1994) 27 *John Marshall Law Review* 435 445-446.

¹⁸ Eba (n 6 above) 48; PM Eba 'Pandora's box: The criminalisation of HIV transmission or exposure in SADC countries' in F Viljoen & S Precious (eds) *Human rights under threat: Four perspectives on HIV, AIDS, and the law in Southern Africa* (2007) 13 44-45 47-48 51; N Hunt & J Derricott 'Smackheads, crackheads and other junkies: Dimensions of the stigma of drug use' in T Mason *et al* (eds) *Stigma and social exclusion in healthcare* (2001) 190 191 202; Strader (n 17 above) 446; UNAIDS *Criminal law* (n 2 above) 23-24.

of the interplay between the stigma associated with sexual and social deviance, illness and crime is glaringly apparent.¹⁹

The effects of the matrix of stigma elaborated above on the private and public lives of HIV-positive persons and members of marginalised groups are extensive and profound.²⁰ For purposes of this article, it is important to highlight that feelings of fear, guilt, shame and hopelessness caused and exacerbated by HIV-related stigma prevent members of stigmatised groups, and others at risk of contracting HIV, from seeking testing, treatment, or information on HIV prevention.²¹ This, coupled with general public resistance towards open and effective treatment and support programmes, targeted at marginalised and stigmatised groups,²² severely hampers public health efforts at containing the spread and effects of HIV.

3 HIV, social marginalisation and crime in Africa

Citizens, moreover, thought of punishment. Their minds were in tune with the moralising and stigmatising response that those who had spread the virus were unclean, immoral and dangerous to the community — people who needed to be controlled, checked and sanctioned.²³

Since the early days of the HIV pandemic, states have faced pressure from a fearful public to ‘do something’ to curb the spread of the disease. These calls have escalated where health systems have been unable to cope with the effects of HIV and AIDS or where public efforts to stop its spread have been unsuccessful. In these circumstances, and further fuelled by media reports of individual instances of ‘irresponsible’ and ‘willful’ transmission of HIV, states have tended to resort to ‘politically-safe and intellectually-easy’ options of using the criminal law, or coercive public health powers, in attempts to rein in the epidemic.²⁴ Accordingly, it has been argued that the appropriation of criminal law in this context may be understood as one of a number of ‘structural

¹⁹ Strader (n 17 above) 441.

²⁰ See, generally, Eba (n 6 above); Nongogo (n 8 above).

²¹ Eba (n 6 above) 45-47; Eba (n 18 above) 18; LO Gostin *et al* ‘The law and the public’s health: A study of infectious disease law in the United States’ (1999) 99 *Columbia Law Review* 59 65 92-93; Heneke (n 2 above) 753; Kirby (n 2 above) 176; UNAIDS *Criminal law* (n 2 above) 17.

²² See Eba (n 6 above) 48; D Wikler ‘Personal and social responsibility for health’ in S Anand *et al* (eds) *Public health, ethics, and equity* (2004) 109 125.

²³ Kirby (n 2 above) 167.

²⁴ Quote from Strader (n 17 above) 435. See also Strader 436 447; E Cameron & E Swanson ‘Public health and human rights: The AIDS crisis in South Africa’ (1992) 8 *South African Journal on Human Rights* 200 232; Kirby (n 2 above) 167; Eba (n 18 above) 14-15; M Pieterse & A Hassim ‘Placing human rights at the centre of public health: A critique of *Minister of Health, Western Cape v Goliath*’ (2009) 126 *South African Law Journal* 231; Viljoen (n 9 above) 14; UNAIDS *Criminal law* (n 2 above) 13.

interventions' aimed at reducing the level of health-risk behaviour in the population.²⁵

Africa has been no exception in this regard. Several states across the continent criminalise the wilful or negligent transmission of HIV, either by way of legislation explicitly targeting HIV transmission or through more general public health or criminal statutes that make it illegal and punishable for someone to expose others to dangerous communicable diseases.²⁶ In other states, prosecution of wilful transmission is possible in terms of 'ordinary' criminal law, as either assault or attempted murder, whereas HIV status is also often a factor relevant in the sentencing of rape offenders. In South Africa, for instance, a person convicted of rape while knowing that he is HIV positive must be sentenced to life imprisonment unless exceptional and compelling circumstances justify a lesser sentence, regardless of whether HIV transmission in fact took place.²⁷ There have further been at least one attempted murder conviction in relation to wilful HIV transmission in South Africa,²⁸ as well as instances where delictual claims for damages suffered by the 'victim' of reckless or negligent infection have been successful.²⁹

It is further relevant that a great number of African states criminalise sexual or other high-risk activity associated with marginalised groups. With a number of exceptions, homosexuality, commercial sex and drug use are illegal across the region.³⁰ While the proffered reasons for criminalising private activities of marginalised groups and the extent of their criminalisation extend beyond HIV, protection of the public health tends to be one of the named goals of relevant criminal law measures.³¹ For example, one of the South African government's defences against a constitutional challenge to the criminal prohibition of commercial sex work was that prostitution was associated with increased transmission of HIV and other sexually-transmitted diseases.³²

Indeed, there is sometimes a clearly-articulated link between the criminalisation of HIV transmission and that of marginalised sexual or

²⁵ Z Lazzarini *et al* 'Evaluating the impact of criminal laws on HIV risk behaviour' (2002) 30 *Journal of Law, Medicine and Ethics* 239.

²⁶ States with such legislation include Benin, Botswana, Guinea, Guinea Bissau, Lesotho, Malawi, Mali, Niger, Sierra Leone, Tanzania, Togo, Zambia and Zimbabwe. For a discussion of specific statutes and provisions, see Eba (n 18 above) 29-34; Johnson (n 2 above) 146-147.

²⁷ In terms of sec 51(1) read with sec 51(3) and part 1 of Schedule 2 to the Criminal Law Amendment Act 105 of 1997. See *S v Snoti* 2007 1 SACR 660 (E) and other reported and unreported decisions discussed by Cameron (n 1 above) 71-72 76-77; C van Wyk 'The impact of HIV/AIDS on bail, sentencing and medical parole in South Africa' (2008) 23 *SA Public Law* 50 52-53.

²⁸ See *S v Nyalungu* [2005] JOL 13 254 (T) as well as unreported cases discussed by Cameron (n 1 above) 77; Eba (n 18 above) 24 n 62.

²⁹ See *Venter v Nel* 1997 4 SA 1014 (D) and discussion by Cameron (n 1 above) 79.

³⁰ See Eba (n 15 above) 40 and authorities cited there.

³¹ See Cameron & Swanson (n 24 above) 202 204.

³² See *S v Jordan* 2002 6 SA 642 (CC) para 86.

other private conduct. One particularly egregious example of this is Uganda's current Anti-Homosexuality Bill, which not only deems sex between men a crime punishable with life imprisonment, but goes further to include same-sex activity by HIV-positive persons under the ambit of a crime called 'aggravated homosexuality' which, upon conviction, is punishable by death.³³

Proponents of using the criminal law to regulate HIV transmission typically emphasise the necessity of ensuring that people behave 'responsibly' towards others and of protecting 'innocent' members of the public against the 'wilful', 'reckless' or 'negligent' conduct of certain ('irresponsible') HIV-positive individuals. It is typically advanced that the criminal law would deter high-risk conduct, while sending a clear message that such conduct is not tolerated in society and ensuring accountability for transgressions of this norm.³⁴ However, while acknowledging that it may be appropriate to involve the criminal law in isolated instances where individuals flagrantly and calculatedly infect others with a deadly or harmful disease,³⁵ the overwhelming majority of public health experts and human rights advocates strongly oppose its broader application in this context.

By and large, this opposition relates to the fact that employing the criminal law in order to curb the spread of disease, and in particular HIV, simply does not work. Since HIV is spread predominantly by means of consensual, heterosexual sex, often within stable relationships, it is unrealistic to expect that criminal law will be consistently and uncomplicatedly invoked by the 'victims' of transmission. Unsurprisingly, therefore, there have been precious few prosecutions and even fewer convictions for deliberate or negligent HIV transmission around the world.³⁶ Moreover, where prosecution is attempted under 'ordinary' criminal laws, it is virtually impossible to satisfy all the elements of relevant crimes. This is due, first, to significant problems establishing preconditions for culpability such as intent or causation and, secondly, to the prickly issue of victims' consent to the high-risk activity in question.³⁷ HIV-specific statutes, which tend to contain a range of far-reaching (and often somewhat bizarre) provisions aimed

³³ See secs 2-3 of the Anti-Homosexuality Bill 18 of 2009.

³⁴ See C van Wyk 'The need for a new statutory offence aimed at harmful HIV-related behaviour: The general public interest perspective' (2000) 41 *Codicillus* 2 4-7 10; Van Wyk (n 28 above) 63.

³⁵ See M Brazier & J Harris 'Public health and private lives' (1996) 4 *Medical Law Review* 171 179 188-191; Cameron & Swanson (n 24 above) 220; Eba (n 18 above) 23; F Viljoen 'Verligting of verlustiging: Regshervorming in 'n tyd van VIGS' (1993) 110 *South African Law Journal* 100 110; Viljoen (n 9 above) 13 16; UNAIDS *Policy brief* (n 2 above) 1.

³⁶ Eba (n 18 above) 38; Lazzarini *et al* (n 25 above) 247; Strader (n 17 above) 443.

³⁷ See Eba (n 18 above) 26-27; Strader (n 17 above) 443; UNAIDS *Criminal law* (n 2 above) 22-23.

at circumventing these difficulties,³⁸ are also seldom and inconsistently invoked, with limited success. Apart from a very rare number of cases of flagrant and calculated transmission where preconditions for culpability are clearly satisfied, the consensual and private nature of behaviour likely to lead to HIV transmission together with the fact that transmission does not always result from such behaviour, and that the source of HIV infection cannot always be accurately pinpointed, mean that the mechanism of the criminal law is poorly equipped to detect and prove transgressions.³⁹

Studies further show unequivocally that criminal law, in resting on erroneous assumptions of sex and drug use as rational, free, informed and calculated behaviour, entirely fails to deter high-risk conduct or, consequently, to protect people against HIV transmission.⁴⁰ Indeed, the false sense evoked by the criminal law among HIV-negative people that they are being protected against 'agents of disease' and thus need not themselves take precautions against HIV, may paradoxically increase their vulnerability to infection.⁴¹

Ultimately, it would seem that the only purpose fulfilled by the criminal law in relation to HIV transmission is a symbolic one.⁴² Unfortunately, this symbolism is severely problematic. It fosters and reinforces a discourse of culpability and blame around HIV transmission, which serves to locate the responsibility for HIV prevention solely with HIV-positive people, thereby denying the general responsibility upon everybody to protect themselves from infection.⁴³ Its effect is to label people as criminals, simply by virtue of their being sick or vulnerable to illness. In so doing, it fuels public fear and hysteria surrounding HIV and exacerbates the othering and stigmatising of those affected by or vulnerable to the disease. This, in turn, increases social hostility towards members of marginalised groups and increases their vulnerability to victimisation based on their actual or perceived HIV status.⁴⁴

³⁸ For examples, see Eba (n 18 above) 34-37.

³⁹ Brazier & Harris (n 35 above) 184; Lazzarini *et al* (n 25 above) 251.

⁴⁰ See BD Adam *et al* 'Effects of the criminalisation of HIV transmission in *Cuerrier* in men reporting unprotected sex with men' (2008) 23 *Canadian Journal of Law and Society* 143 157; Cameron & Swanson (n 24 above) 204 207; Eba (n 18 above) 38-39; Eba (n 6 above) 58; LO Gostin & Z Lazzarini *Human rights and public health in the AIDS pandemic* (1997) 106; Strader (n 17 above) 442 445; UNAIDS *Policy brief* (n 2 above) 1 4; UNAIDS *Criminal law* (n 2 above) 21.

⁴¹ Bergman (n 7 above) 816-817; Viljoen (n 9 above) 14.

⁴² Brazier & Harris (n 35 above) 184; Lazzarini *et al* (n 25 above) 252.

⁴³ Adam *et al* (n 40 above) 143-144; Cameron & Swanson (n 24 above) 220; Heneke (n 2 above) 764; UNAIDS *Policy brief* (n 2 above) 5; Viljoen (n 35 above) 111-112; Viljoen (n 9 above) 14.

⁴⁴ Bergman (n 7 above) 818; Bonthuys (n 16 above) 397; Brazier & Harris (n 35 above) 184; Eba (n 6 above) 46 48; Eba (n 18 above) 44; Heneke (n 2 above) 762; Lazzarini *et al* (n 25 above) 247; Viljoen (n 9 above) 13; Viljoen (n 35 above) 113; UNAIDS *Policy brief* (n 2 above) 5.

Indeed, due to the overlap between stigma flowing from HIV status and from membership of marginalised groups, there is a real risk, borne out by preliminary studies, that members of marginalised groups will be selectively targeted for prosecution in terms of HIV-related crimes. This possibility is enhanced where perceived high-risk activities associated with marginalised groups, such as transactional or male-to-male sex, or drug use, are themselves criminalised.⁴⁵ Ironically, epidemiological evidence shows unequivocally that such selective enforcement would misfire severely – whilst members of marginalised groups who are already tainted with perceptions of criminality present useful ‘sitting duck’ scapegoats for criminal campaigns, it is non-stigmatised, ‘everyday’ heterosexual sex that will remain the main driver of the African HIV epidemic, undetected by law enforcement.⁴⁶

The overall effect of the increased stigmatisation and marginalisation of HIV-positive people and members of marginalised groups, occasioned by criminalisation of both HIV transmission and high-risk activity is, first, to hamper HIV-prevention and education efforts (for instance, by complicating AIDS awareness campaigns and condom distribution among prisoners, sex workers and men who have sex with men) and, secondly, to deter people from seeking information, testing, treatment and support for HIV, for fear of exposure, stigma, victimisation and prosecution. Paradoxically, therefore, the effect of criminalising HIV transmission is to fuel the epidemic, by driving it underground and beyond the reach of public health initiatives.⁴⁷

Accordingly, the Joint United Nations Programme on HIV/AIDS (UNAIDS) has strongly cautioned against the creation of HIV-specific crimes. It has recommended that, if the criminal law is to be appropriated at all in the fights against HIV and AIDS, its role should be limited to punishing exceptional cases of actual and deliberate HIV transmission in instances where all elements of existing criminal offences are clearly present.⁴⁸

⁴⁵ Bergman (n 7 above) 816; Cameron & Swanson (n 24 above) 221; Eba (n 6 above) 48; Eba (n 18 above) 40-47; Gostin & Lazzarini (n 40 above) 106; Viljoen (n 35 above) 113; UNAIDS *Criminal law* (n 2 above) 26; UNAIDS *Policy brief* (n 2 above) 4.

⁴⁶ Cameron & Swanson (n 24 above) 207-209.

⁴⁷ Brazier & Harris (n 35 above) 184; Cameron & Swanson (n 24 above) 207-209 220-221; Eba (n 18 above) 42-44 51; Gostin & Lazzarini (n 40 above) 106; Heneke (n 2 above) 763; R Jurgens *et al* ‘People who use drugs, HIV and human rights’ (July 2010) *The Lancet* 97 101; Viljoen (n 35 above) 111; Viljoen (n 9 above) 15; LE Wolf & R Vezina ‘Crime and punishment: Is there a role for criminal law in HIV prevention policy?’ (2004) 25 *Whittier Law Review* 821 869; UNAIDS *Policy brief* (n 2 above) 4-5; UNAIDS *Criminal law* (n 2 above) 24-25.

⁴⁸ UNAIDS *Criminal law* (n 2 above) 27 32 39. See also Johnson (n 2 above) 147.

4 Human rights-infused, public health approach to HIV prevention

Public health measures tend to be mooted as the obvious alternative to criminalisation when it comes to combating HIV.⁴⁹ This is because disease prevention or health-maximisation efforts grounded in public health law, unlike criminal law, tend to focus on minimising vulnerability to disease rather than on assigning and punishing culpability for its spread.⁵⁰ Yet, public health law is also steeped in a tradition of coercion and control⁵¹ and its most readily-appropriated measures, such as mandatory testing, quarantine and isolation policies, have proved as controversial and potentially counterproductive in combating HIV and other serious diseases as has criminal law.⁵²

In recent years, however, there has been a shift in emphasis in public health law, away from control and towards protection and fulfilment of individual human rights.⁵³ In particular, the infiltration of human rights discourse into public health law has led to the elevation of the rule of law and adherence to the proportionality principle in the formulation and implementation of public health policies.⁵⁴ Today, public health policies are typically evaluated for human rights compliance by inquiring into the proportionality between their purpose and their human rights impact, with particular emphasis placed on the extent to which the measures succeed in achieving their purpose and on whether the purpose could be achieved through measures that are less restrictive of individual rights.⁵⁵

⁴⁹ See Eba (n 18 above) 51; UNAIDS *Criminal law* (n 2 above) 28.

⁵⁰ See, eg, arguments advanced in favour of a public health approach to HIV prevention in the context of intravenous drug use by D Wolfe & K Malinowska-Sempruch 'Seeing double: Mapping contradictions in HIV prevention and illicit drug policy worldwide' in C Beyrer & HF Pizer (eds) *Public health and human rights: Evidence-based approaches* (2007) 330 335-336 345-346.

⁵¹ See, in a different context, L London 'Confinement in the management of drug-resistant TB: The unsavoury prospect of balancing individual human rights and the public good' (June 2008) 1 *SA Journal of Bioethics and Law* 11 12.

⁵² See Brazier & Harris (n 35 above) 184-185; Eba (n 18 above) 54; UNAIDS *Criminal law* (n 2 above) 29-30.

⁵³ See Cameron (n 1 above) 54-55; Cameron & Swanson (n 24 above) 202; Gostin & Lazzarini (n 40 above) 43; London (n 51 above) 12; Pieterse & Hassim (n 24 above) 232 245.

⁵⁴ See London (n 51 above) 13-14; C Ngwenya 'Responses to AIDS and constitutionalism in South Africa' (2003) 24 *Obiter* 299 300-301 305.

⁵⁵ See Cameron & Swanson (n 24 above) 212-213; JF Childress & RG Bernheim 'Beyond the liberal and communitarian impasse: A framework and vision for public health' (2003) 55 *Florida Law Review* 1191 1202-1203; L Gostin & JM Mann 'Towards the development of a human rights impact assessment for the formulation and evaluation of public health policies' (1994) 1 *Health and Human Rights* 58-80; Gostin & Lazzarini (n 40 above) 57-57; London (n 51 above) 13; Pieterse & Hassim (n 24 above) 232-233. This mirrors the inquiry, under various constitutional systems, into the legitimacy of justifications offered in favour of restrictions of individual rights.

It should be clear from the discussion above that, save in isolated instances of deliberate and actual infection, criminal law measures aimed at controlling the spread of HIV are not proportional to the significant human rights burden that they impose, not least because of their complete lack of effectiveness. Similarly, 'traditional', coercive public health measures such as isolation or quarantine tend to impose a human rights burden on HIV-positive persons that is entirely disproportionate to the (limited) public health gains associated with their implementation. They are therefore generally regarded as being inappropriate for the prevention and control of HIV, except in exceptional circumstances.⁵⁶

Apart from highlighting the shortcomings of criminal or coercive laws in combating disease, human rights principles also provide the blueprint for a more appropriate approach to public health. Indeed, as reflected by the experience in countries such as South Africa, respect for and protection, promotion and fulfilment of human rights (including rights to liberty, dignity, equality, freedom from discrimination, access to information and access to health care services) can significantly enhance public health objectives. This is because adherence to these rights reduces stigma, increases public trust and voluntary participation in public health programmes and directs people who become infected with communicable diseases towards (rather than away from) the health system, in order to obtain appropriate care.⁵⁷ As Wolf and Vezina have noted:⁵⁸

Co-operative approaches to preventing transmission are far more successful than coercive approaches when dealing with a disease characterised by social stigma, misunderstanding, fear, and personal shame. Messages recognising the diverse circumstances of HIV-infected people, the difficult and imperfect prospects of changing private sexual behaviors, and the pressing needs of people living with HIV, are ultimately more effective than threats of prosecution and incarceration.

Given, first, that members of marginalised social groups bear the brunt of HIV-related stigma, secondly, that the extent of their marginalisation and vilification increases their vulnerability to HIV infection and, thirdly, that the combination of marginalisation and stigma have the effect of driving them away from the health system in much the same way as with the criminalisation of HIV transmission, it is also necessary

See, eg, the limitation clause in sec 36 of the 1996 South African Constitution.

⁵⁶ Cameron & Swanson (n 24 above) 212-217; Wolf & Vezina (n 47 above) 831; UNAIDS *Criminal law* (n 2 above) 17-18.

⁵⁷ See Cameron (n 1 above) 52-55; Cameron & Swanson (n 24 above) 202 212-213; Childress & Bernheim (n 55 above) 1197 1207; CT Cook & K Kalu 'The political economy of health policy in sub-Saharan Africa' (2008) 27 *Medicine and Law* 29 36; Gostin & Mann (n 55 above) 75 77; Gostin & Lazzarini (n 40 above) 43 47; Kirby (n 2 above) 167-168; London (n 51 above) 12; Pieterse & Hassim (n 24 above) 232; Wolf & Vezina (n 47 above) 830-831.

⁵⁸ Wolf & Vezina (n 47 above) 831.

to consider the manner in which criminal and coercive laws impact on the lives of vulnerable and marginalised groups. As with the criminalisation of HIV, the general consensus appears to be that subjecting already stigmatised minority groups to the further stigma and sanction of the criminal law is both highly inappropriate and utterly counterproductive from a public health perspective.

For this reason, UNAIDS has recommended that states decriminalise all forms of consensual adult sexual activity.⁵⁹ This recommendation pertains particularly to homosexuality and adult sex work, the continued widespread criminalisation of which appears to serve little purpose other than to enforce antiquated moral values and has been singled out as the main obstacle for HIV prevention and control measures, particularly in Africa.⁶⁰

While the broader human rights arguments in favour of decriminalising sex work and homosexuality are different (in that criminalising homosexuality impacts on identity and personhood in a manner that criminalising sex work arguably does not, whereas the criminalisation of sex work overlaps more visibly with the oppression of women), the public health reasons for doing so are identical. In both cases, the moral goals of criminalisation are ethically questionable whereas the public health goals are remote and somewhat spurious. In both cases, criminalisation fails dismally to either deter the sexual conduct in question or to alleviate the health risks associated therewith and appears to have little effect other than to fuel stigma and legitimise victimisation. Finally, in both cases, criminalisation increases vulnerability to HIV infection by increasing vulnerability to sexual violence, by complicating access to condoms and sexual health services and information, and by deterring HIV testing and treatment seeking.⁶¹

Yet, in the face of public demand for scapegoats for health and social problems, state responses to calls for the decriminalisation of sex work and homosexuality have been disappointing, particularly in Africa. In relation to homosexuality, South Africa's Constitutional Court has led the way by declaring criminal prohibitions on male-to-male sex unconstitutional, because they unjustifiably violated the rights to equality, dignity and privacy of men who have sex with men. The Court acknowledged the links between the stigmatisation, criminalisation and victimisation of gay men and held that there was no legitimate government purpose

⁵⁹ UNAIDS *Criminal law* (n 2 above) 22.

⁶⁰ As above. See also C Boudin & M Richter 'Adult, consensual sex work in South Africa: The cautionary message of criminal law and sexual morality' (2009) 25 *South African Journal on Human Rights* 179 192; Johnson (n 2 above) 141; Kirby (n 2 above) 169; Viljoen (n 35 above) 113.

⁶¹ See Bergman (n 7 above) 823; Boudin & Richter (n 60 above) 192 196-197; Eba (n 18 above) 53; Johnson (n 2 above) 156; J Stadler & S Delany 'The "healthy brothel": The context of clinical services for sex workers in Hillbrow, South Africa' (2006) 8 *Culture, Health and Sexuality* 451 452 458; Viljoen (n 35 above) 113.

which could justify their continued criminalisation.⁶² Unfortunately, this judgment has not impacted elsewhere on the continent, where the trend has been towards increased criminalisation, as evidenced by Uganda's draconian draft legislation alluded to above.

As to sex work, the general trend towards criminalisation across Africa has, regrettably, been mirrored by a much less progressive judgment from the South African Constitutional Court. In *S v Jordan*, the majority of the Court upheld the criminal prohibition of adult sex work in South Africa, finding that criminalisation served 'important and legitimate' public purposes such as combating violence, drug use and exploitation of children, that sex workers were themselves partly responsible for the diminution of their dignity and that the social stigma attached to sex work was unrelated to its legal prohibition.⁶³ Apart from its deplorable reliance and reinforcement of gendered stereotypes pertaining to sexual expression, the majority judgment has been criticised for its conservative moralism, for perpetuating gendered discourses that blame sex workers (and women, generally) for the spread of sexually-transmitted diseases and for insinuating that individuals can forfeit the protection of the law by virtue of their 'private' lifestyle choices, all of which are inimical to a human rights-based approach to health-promotion.⁶⁴

Beyond sexual marginalisation, there have in recent years also been increased calls for the decriminalisation of drug use for public health and human rights reasons. Just like the criminalisation of sex work or homosexuality, criminal prohibitions on drug use are largely ineffective, and have the effect of increasing users' vulnerability to HIV and other health risks, by forcing them to conceal themselves, by hindering their access to appropriate health services and safer modes of drug injection, and by significantly complicating health systems' ability to reach them.⁶⁵ Unlike men who have sex with men or sex workers, however, drug users lack social visibility and their human rights tend to be denied or overlooked.⁶⁶ Predictably, there have been few moves towards decriminalising drug use worldwide, even in regions where the HIV epidemic is intravenous drug use-driven.

Instead of criminalisation, experts argue for the public health regulation of drug use. This would involve widespread education about the HIV and other health risks associated with 'unsafe' drug use, access to drug substitution therapy and other voluntary rehabilitative services, as well as the wide-scale implementation of harm-reduction measures

⁶² *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC). See specifically paras 23, 26-28 & 37.

⁶³ *S v Jordan* (n 32 above). See specifically paras 10, 15-16 & 24.

⁶⁴ See Bonthuys (n 16 above) 392 400 403 399; Boudin & Richter (n 60 above) 186 194; Pieterse (n 9 above) 568.

⁶⁵ See Hunt & Derricott (n 18 above) 192; Jurgens *et al* (n 47 above) 98 101-102; Wolfe & Malinowska-Sempruch (n 50 above) 336.

⁶⁶ Jurgens *et al* (n 47 above) 98; Wolfe & Malinowska-Sempruch (n 50 above) 335.

such as needle exchange programmes, which have empirically been proven to be effective in minimising the transmission of HIV, among other diseases.⁶⁷ Criminalising drug use at best complicates, and at worst prohibits, the implementation of such measures. This notwithstanding, 'most countries with injection-driven epidemics continue to emphasise criminal enforcement and demand for abstinence over the best practices of public health'.⁶⁸ Accordingly, UNAIDS has recommended that criminal laws, at the very least, should not hinder the implementation of needle exchange programmes,⁶⁹ while the international scientific community and participants at the 2010 World AIDS Conference in Vienna have recently called for 'the acknowledgment of the limits and harms of drug prohibition, and for drug policy reform to remove barriers to effective HIV prevention, treatment and care', for the decriminalisation of drug users and for the 'reorienting [of] drug policies towards evidence-based approaches that respect, protect and fulfil human rights [of drug users]'.⁷⁰

Overall then, an approach to public health law that foregrounds human rights requires the jettisoning of the criminal law, both in relation to HIV transmission and to the activities of marginalised groups whose social vulnerabilities tend to place them at increased risk of contracting HIV. While the practice in many African states remains to opt instead for a punitive approach to HIV prevention, the recently promulgated SADC Model Law on HIV and AIDS in Southern Africa presents a welcome step towards such a human rights-based approach.

Recognising 'the importance of a human rights-based and gender-sensitive approach, and the involvement of those vulnerable to and living with HIV, on adopting effective legislation',⁷¹ the Model Law aims to:⁷²

- (a) provide a legal framework for the review and reform of national legislation related to HIV in conformity with international human rights law standards;
- (b) promote the implementation of effective prevention, treatment, care and research strategies and programmes on HIV and AIDS;

⁶⁷ See J Chalmers *Legal responses to HIV and AIDS* (2008) 80-83 86; LO Gostin & Z Lazzarini 'Prevention of HIV/AIDS among injection drug users: The theory and science of public health and criminal justice approaches to disease prevention' (1997) 46 *Emory Law Journal* 587 644 648 677-682; Jurgens *et al* (n 47 above) 97.

⁶⁸ Wolfe & Malinowska-Sempruch (n 50 above) 335.

⁶⁹ UNAIDS *Criminal law* (n 2 above) 22.

⁷⁰ Vienna Declaration (2010) <http://www.viennadeclaration.com> (accessed 31 March 2011). On the systemic advantages of a 'public health' rather than criminal justice approach to drug use, see further Gostin & Lazzarini (n 67 above) 590-592 642; RA Weisheit & JM Klofas 'The public health approach to illicit drugs' (1998) 23 *Criminal Justice Review* 197-207.

⁷¹ Preamble Model Law. See http://www.chr.up.ac.za/images/files/research/ahrru/news/ahrru_news_08_model_law_hiv_southern_africa.pdf (accessed 30 April 2011).

⁷² Sec 1 Model Law.

- (c) ensure that the human rights of those vulnerable to HIV and people living with or affected by HIV are respected, protected and realised in the response to AIDS; and
- (d) stimulate the adoption of specific measures at national level to address the needs of groups that are vulnerable and marginalised in the context of the AIDS epidemic.

The Model Law contains detailed provisions on HIV-related education and information campaigns,⁷³ prevention measures,⁷⁴ standards pertaining to HIV testing and counselling,⁷⁵ research and clinical trials,⁷⁶ as well as a substantial number of provisions elaborating the rights of HIV-infected and affected persons to, for instance, equality and non-discrimination, access to health care services, treatment, care and support, insurance, social security, education and work.⁷⁷

Importantly, the Model Law consistently reflects the intention to improve the position of marginalised groups in society in the context of HIV. For instance, it provides that HIV education and information campaigns must both include and promote acceptance of HIV-positive people as well as members of marginalised and vulnerable groups,⁷⁸ and requires that such people be included in male and female condom distribution programmes.⁷⁹ An entire chapter of the Law is devoted to HIV prevention in prisons. Suggested prevention measures include that prisoners be provided with condoms, lubricant and clean drug-injecting equipment.⁸⁰ The Model Law further recommends that members of vulnerable and marginalised groups be involved in 'the design, development and implementation of a national plan for the realisation of universal access to treatment, care and support services'.⁸¹

Crucially, the Model Law further requires states to 'ensure access to effective harm reduction programmes for drug users, including needle exchange and drug substitution therapy'⁸² and to consider decriminalising both adult sex work and consensual sexual relationships between persons of the same sex.⁸³ Unfortunately, this suggestion has not been phrased more imperatively. More disturbingly, the Model Law is silent on the criminal prohibition of intentional or negligent transmission of the HIV virus. While these omissions are lamentable, it is hoped that the African Commission's expressed concern over the increasing trend

⁷³ Secs 4-7 Model Law.

⁷⁴ Secs 9-11 Model Law.

⁷⁵ Secs 13-16 Model Law.

⁷⁶ Secs 37-39 Model Law.

⁷⁷ Secs 17-28 Model Law.

⁷⁸ Secs 4(2)(f)-(g) Model Law.

⁷⁹ Sec 11(1) Model Law.

⁸⁰ Sec 29(1) Model Law. See further secs 29-35.

⁸¹ Sec 36(5) Model Law.

⁸² Sec 11(3) Model Law.

⁸³ Sec 11(4) Model Law.

towards criminalisation in Africa, together with the recommendations of UNAIDS in this respect, will enter states' deliberations when they attempt to give effect to the provisions of the Model Law in their domestic health and legal systems.

5 Conclusion: Systemic responses to systemic problems

The magnitude of the HIV/AIDS challenge facing the country calls for a concerted, co-ordinated and co-operative national effort in which government in each of its ... spheres and the panoply of resources and skills of civil society are marshalled, inspired and led.⁸⁴

The constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perceptions of persons with HIV.⁸⁵

The extent and scale of the havoc wreaked by the African HIV and AIDS epidemics and by associated diseases like tuberculosis are ascribable, first, to the widespread poverty and associated living conditions on the continent and, secondly, to the inability of antiquated, under-resourced and under-capacitated health systems to cope with a public health challenge of this magnitude. By focusing on individual behaviour and characteristics in their responses to the epidemic, states divert focus from these systemic causes.⁸⁶ Blaming and punishing marginalised social groups for systemic failures is not only blatantly unfair, but also detracts attention and resources from what is necessary to address the crisis.⁸⁷

The article has underlined that faith in criminal law to address public health problems is largely misplaced. Elevating illness to crime exacerbates stigma and accordingly undermines the achievement of public health goals. For the most part, criminalising individual behaviour perceived to involve a (public or private) health risk is similarly counterproductive. Instead of criminalisation, the article reiterates calls for public health laws to foreground adherence to human rights and associated public law principles. Doing this has the effect of strengthening health systems by showing up fault lines in existing arrangements, enhancing accountability, ensuring meaningful patient participation, redirecting wasteful expenditure from counterproductive punitive measures and highlighting public obligations in relation to health care service delivery.

⁸⁴ *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 123.

⁸⁵ *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 36.

⁸⁶ Cook & Kalu (n 57 above) 30 49; Johnson (n 2 above) 148; Kirby (n 2 above) 172 175; London (n 51 above) 12; Pieterse (n 9 above) 556 564 568 572; Pieterse & Has-sim (n 24 above) 244-245; Strader (n 17 above) 447; Viljoen (n 9 above) 14.

⁸⁷ UNAIDS *Criminal law* (n 2 above) 17.

Responses to public health threats are most effective when grounded in science and in respect for individual rights. The HIV epidemic in Africa has for too long been fuelled by a lack of such grounding. African states have a legal obligation to 'take the necessary steps to protect the health of their people and to ensure that they receive medical attention when they are sick'.⁸⁸ In relation to HIV, this requires a commitment to health prevention policies that reduce stigma and vulnerability, while ensuring unencumbered access to prevention measures as well as to appropriate anti-retroviral treatment.⁸⁹ To the extent that health system strengthening is required to deliver on this commitment, that, rather than the scapegoating of those who are ill and vulnerable as a result of commitment failure, should be the focus.

⁸⁸ Art 16 African Charter on Human and Peoples' Rights.

⁸⁹ Cook & Kalu (n 57 above) 36; Kirby (n 2 above) 172 175.

The penalty of life imprisonment under international criminal law

*Esther Gumboh**

Doctoral Candidate; Teaching and Research Assistant, University of Cape Town, South Africa

Summary

In light of the global trend towards the abolition of the death penalty and the stand of the United Nations on the matter, it is not surprising that the maximum penalty available under international criminal law is life imprisonment. However, during the negotiations for the penal aspects of the Rome Statute, some delegates contended that life imprisonment is a violation of human rights such as human dignity and the prohibition against cruel, inhuman and degrading treatment or punishment. On the other hand, some delegates felt that excluding life imprisonment from the International Criminal Court's competence where the death penalty was not available would handicap its mandate to punish gross human rights violators. Adopting a human rights perspective, the article revisits this debate by critically examining the penalty of life imprisonment under international criminal law. It argues that no clear justification has been given for the imposition of life imprisonment and that the release mechanism for lifers needs to be improved. Focusing on the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court, the article analyses the relevant statutes and rules and the manner in which life imprisonment has been imposed by these tribunals. Further consideration is given to the enforcement of sentences with respect to the prospect of release for 'lifers'. The article concludes by stressing the need for a more focused and cautious approach to life imprisonment and the enforcement of sentences under international criminal law.

* LLB (Hons) (Malawi), LLM (Cape Town); egumboh@yahoo.com

1 Introduction

The concept of life imprisonment destroys human dignity, reducing a prisoner to a number behind the walls of a gaol waiting only for death to set him free. The fact that he may be released on parole is no answer. [F]or a judicial officer to impose any sentence with parole in mind is an abdication by such officer of his function and duty¹

Levy J, Namibia High Court

Although most states that have abolished the death penalty have accepted life imprisonment as an appropriate alternative,² the compatibility of the latter with human rights has been an ongoing debate both at national and international levels.³ Nevertheless, life imprisonment has been accepted as the maximum penalty under international criminal law. With specific reference to the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC),⁴ the article examines how this penalty has been applied under international criminal law. It commences with an overview of the human rights debate *vis-à-vis* life imprisonment, then investigates how the penalty has been imposed and the prospect of release for lifers.

Life imprisonment means different things in different countries. In some jurisdictions, it literally means that a prisoner spends the rest of his natural life in prison without the possibility of parole. In other jurisdictions, prisoners are sentenced to life imprisonment on the understanding that they will be considered for parole after serving a set number of years. In this essay, the emphasis is on life imprisonment as prescribed under international criminal law, that is, life imprisonment with the possibility of parole.

2 Life imprisonment and human rights

Life imprisonment without the possibility of parole is criticised as a violation of human rights. Below is a summary of some arguments against this kind of punishment.

¹ *S v Tjijo* 4 September 1991 (NM), unreported – but reproduced substantially in *S v Tcoeb* (2001) AHRLR 158 (NaSC 1996), previously reported as 1996 1 SACR 390 (NmS), para 16.

² R Stokes 'A fate worse than death? The problems with life imprisonment as an alternative to the death penalty' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 282.

³ D van Zyl Smit 'Life imprisonment as the ultimate penalty in international law: A human rights perspective' (1999) 9 *Criminal Law Forum* 5 26-45.

⁴ The Special Court for Sierra Leone is excluded because art 19(1) of its Statute demands imprisonment for a specific number of years.

2.1 Human dignity

Human beings should always be treated as ends in themselves;⁵ hence, an offender should not be turned into an object of ‘crime prevention to the detriment of his constitutionally-protected right to social worth and respect’.⁶ Even the vilest offender remains possessed of human dignity.⁷ In this context, life imprisonment has been criticised as a violation of the right to human dignity in that it is imposed as a deterrent to potential offenders, hence the instrumentalisation of offenders.

Moreover, it is doubtful whether deterrence can be achieved by life imprisonment or indeed long terms of imprisonment. The underlying causes of gross human rights violations, some of which lie within the political system, cannot be curbed by the threat of imprisonment. Indeed, not even the prospect of death can deter the commission of such crimes.

2.2 Cruel, inhuman and degrading punishment

It has been argued that life imprisonment presents ‘an intolerable threat to the human dignity’ of the offender because it is a cruel, inhuman and degrading punishment.⁸ At the heart of the prohibition of such punishment lies the concept of proportionality of punishment to the crime.⁹ In addition to being a form of cruel, inhuman and degrading punishment,¹⁰ disproportionate sentences are generally regarded as violations of other human rights.¹¹ The indeterminacy of life imprisonment and the potential loss of liberty until the offender dies lend it to criticism that it is a grossly disproportionate and arbitrary sentence. Certainty is a crucial element of the rule of law as recognised in the principle of legal certainty.¹² It is in the interests of justice to quantify sentences so that a prisoner knows exactly what his punishment is.¹³ Life sentences leave the quantification of punishment to death itself, hence they are arbitrary.

⁵ The second premise or maxim in Emanuel Kant’s *Categorical imperative*.

⁶ BVerfGE 45, 187 227-228 (1977), translated in R Miller ‘The shared transatlantic jurisprudence of dignity’ (2003) 4 *German Law Journal* 925 930.

⁷ *Gregg v Georgia* 428 US 153 (1976).

⁸ Van Zyl Smit (n 3 above) 29.

⁹ *S v Dodo* 2001 1 SACR 594 (CC) para 37.

¹⁰ D van Zyl Smit *Taking life imprisonment seriously in national and international law* (2002) 198.

¹¹ See D van Zyl Smit & A Ashworth ‘Disproportionate sentences as human rights violations’ (2004) 67 *Modern Law Review* 541.

¹² Van Zyl Smit (n 3 above) 29.

¹³ *Tjijo* (n 1 above).

2.3 Right to rehabilitation

Life imprisonment denies the prisoner any hope of rehabilitation and reintegration into society.¹⁴ Sentenced prisoners have a right to be given an opportunity to rehabilitate themselves¹⁵ and re-establish themselves in the community.¹⁶ Some judges have expressed the view that the mere possibility of parole does not in itself mitigate the fact that life imprisonment infringes the right to rehabilitation. As eloquently put by Levy J:¹⁷

When a term of years is imposed, the prisoner looks forward to the expiry of that term when he shall walk out of gaol a free person ... Life imprisonment robs the prisoner of this hope. Take away his hope and you take away his dignity and all desire he may have to continue living ... [E]ven though [he] may be out of gaol on parole, [he] is conscious of his life sentence and conscious of the fact that his ... debt to society can never be paid ... Life imprisonment makes a mockery of the reformatory end of punishment.

It is recognised that not all prisoners need rehabilitation. In such contexts, the right argued for here is the right to be returned to a free society.¹⁸ The essential content of the right to human dignity is seriously compromised 'if the prisoner, notwithstanding his personal development, must abandon any hope of ever regaining his freedom'.¹⁹

2.4 A death sentence?

It has been stated that life imprisonment is a death sentence²⁰ and that it amounts to 'putting an individual in a waiting room until his death'.²¹ It is therefore akin to death and results in a denial of dignity, because 'a human life involves not just existence and survival, but [also] the unique development of a personality, creativity, liberty, and unfettered social intercourse'.²²

Whether or not life imprisonment is a lesser punishment than the death penalty is a 'legal-philosophical question'.²³ Poor conditions of

¹⁴ G de Beco 'Life sentences and human dignity' (2005) 9 *The International Journal of Human Rights* 411 414.

¹⁵ Art 10(3) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) states that 'the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'.

¹⁶ *Lebach* BVerfGE 35, 187 235-236 (1973).

¹⁷ *Tjijo* (n 1 above).

¹⁸ Van Zyl Smit (n 3 above) 34.

¹⁹ BVerfGE 45, 187 245.

²⁰ See *Tjijo* (n 1 above) reproduced in *Tcoeb* (n 1 above).

²¹ De Beco (n 14 above).

²² LS Shellef *Ultimate penalties: Capital punishment, life imprisonment, physical torture* (1987) 138.

²³ GA Knoops *Theory and practice of international and internationalised criminal proceedings* (2005) 275.

detention can make it worse than death itself.²⁴ Life sentences without parole have also been equated to death sentences.²⁵ It is possible to argue that the *possibility* of parole does not diminish this proximity since there is no guarantee that the maximum sentence for life will not be served.²⁶

3 Life imprisonment under international criminal law

3.1 International Criminal Tribunal for Rwanda

The ICTR is empowered to impose a life sentence pursuant to Rule 101(A) of its Rules of Procedure and Evidence (RPE).²⁷ The Trial Chamber in *Kayishema* attempted to distinguish life imprisonment from a sentence of ‘imprisonment for a term up to and including the remainder of [a defendant’s] life’ as phrased in the Rule.²⁸ This resulted in four concurrent ‘remainder-of-life’ sentences being imposed, with the Chamber holding that the sentence should be given its ‘plain meaning’ and distinguished from a ‘life sentence’ as understood in national law.²⁹ The Appeals Chamber has also noted that, unlike life imprisonment, ‘imprisonment for a term up to and including the remainder of [a defendant’s] life’ as envisaged in Rule 101A ‘is *always* subject to possible reductions’.³⁰ This rather peculiar interpretation is ‘suspicious’ and ‘reveals some of the judges’ intention that a full life sentence be imposed’, an equivalent of the American life without parole sentence.³¹ Read in this manner, Rule 101A would violate international human

²⁴ Stokes (n 2 above) 288.

²⁵ D van Zyl Smit ‘Life imprisonment: Recent issues in national and international law’ (2006) 29 *International Journal of Law and Psychiatry* 405.

²⁶ Van Zyl Smit (n 10 above) 199.

²⁷ Rule 101A reads: ‘A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person’s life.’

²⁸ *The Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, judgment, 21 May 1999 para 31.

²⁹ *Kayishema* (n 28 above), para 32. On appeal, a single life sentence was imposed. See *Prosecutor v Kayishema*, ICTR-95-1, appeals judgment (Reasons), 1 June 2001.

³⁰ *Kambanda v Prosecutor*, ICTR-97-23-A, appeals judgment 19 October 2000, n 144 (emphasis in original). See, generally, JD Mujuzi ‘Is there a need for the ICTY to clarify the difference(s) between life imprisonment and imprisonment for the remainder of the offender’s life? The *Galić* and *Lukić* decisions’ (2010) 10 *International Criminal Law Review* 855.

³¹ Van Zyl Smit (n 10 above) 186–187. See also *Kigula v Attorney-General* Constitutional Petition 6 of 2003, Constitutional Court of Uganda (unreported) 140–142, where Twinomujuni J remarked: ‘Life imprisonment is a realistic alternative to a death penalty and it can only be a viable alternative if it means imprisonment for life, and not a mere 20 years.’

rights norms which regard life imprisonment without parole as a violation of human rights.³²

The ICTR has not clearly justified its imposition of life imprisonment. Instead, undue emphasis has been placed on the gravity of the offence. It has been held that life imprisonment can be imposed even if there are mitigating circumstances so long as ‘the gravity of the offence requires the imposition of a life sentence provided for’.³³ Alas, there is no threshold of gravity that unambiguously deserves such a sentence. The obscurity of this guideline is further compounded by the assertion that³⁴

mitigation of punishment does not ... reduce the degree of the crime, it is more a matter of grace than of defence. [T]he punishment assessed is not a proper criterion to be considered in evaluating the findings of the court with reference to the degree of magnitude of the crime.

In *Kambanda*, the gravity of the crimes and the defendant’s senior position led the court to impose a life sentence despite his plea of guilty and substantial co-operation with the prosecutor.³⁵ A similar sentence was imposed in *Akayesu* after the court emphasised that a ‘heavy penalty’ was warranted.³⁶ However, there is no knowing why the only appropriate ‘heavy penalty’ was life imprisonment. In *Ndindabahizi*, the Trial Chamber specifically mentioned that it had taken into account the defendant’s prospects of rehabilitation, but did not state its conclusion on the matter that justified the imposition of a life sentence.³⁷ A challenge against this sentence on the grounds that it did not give credit to the mitigating circumstances was unsuccessful.³⁸ The ICTR has since held that life imprisonment should generally not be imposed

³² *Tcoeib* (n 1 above) para 22: Life sentence without parole treats a prisoner as a ‘thing’ instead of a human being; *S v Bull* 2001 2 SACR 681 (SCA) para 23; *Kafkaris v Cyprus*, application 21906/04, judgment 12 February 2008, ECHR; Van Zyl Smit (n 10 above) 183-185; JD Mujuzi ‘Why the Supreme Court of Uganda should reject the Constitutional Court’s understanding of imprisonment for life’ (2008) 8 *African Human Rights Law Journal* 163-185.

³³ *Musema v Prosecutor*, ICTR-96-13-A, appeals judgment 16 November 2001, para 396.

³⁴ *Prosecutor v Akayesu*, ICTR-96-4-T, sentencing judgment 2 October 1998 8.

³⁵ *Prosecutor v Kambanda*, ICTR 97-23-S, judgment and sentence, 4 September 1998, paras 44 & 61-62. This sentence was upheld on appeal. See *Kambanda v Prosecutor*, ICTR-97-23-A, appeals judgment 19 October 2000, para 126. See also *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, ICTR-99-52-A, appeals judgment 28 November 2007, para 1038(3). (The existence of mitigating circumstances does not automatically preclude the imposition of life imprisonment.)

³⁶ *Akayesu* (n 34 above) 8; see also *Rutaganda v Prosecutor*, ICTR-96-3-T, judgment and sentence, 6 December 1999, paras 455-473.

³⁷ *Prosecutor v Ndindabahizi*, ICTR-2001-71-I, judgment and sentence 15 July 2004, para 498.

³⁸ *Ndindabahizi v Prosecutor*, ICTR-01-71-A, appeals judgment 16 January 2007, paras 124-142; see also *Prosecutor v Ngiyitegeka*, ICTR-96-14-A, appeals judgment, 9 July 2004, para 267; *Ngiyitegeka*, appellant’s brief, 23 December 2003, para 215.

where one has pleaded guilty 'in order to encourage others to come forward'.³⁹

The ICTR also appears to impose life imprisonment in lieu of the death penalty⁴⁰ in the name of 'recourse to the general practice' in Rwanda.⁴¹ Since the imposition of the death penalty in Rwanda was dependent on the circumstances of the offence,⁴² there can be no absolute certainty as to its imposition in any case. Therefore, while bearing in mind the practice in Rwanda, the court should focus on the circumstances of the case before it in determining the appropriate sentence. The ICTR has noted that life imprisonment is reserved for those who planned and ordered atrocities and who participated in them with 'particular zeal and sadism',⁴³ irrespective of the formal position held.⁴⁴

3.2 International Criminal Tribunal for the Former Yugoslavia

Controversy surrounds the imposition of life sentences by the ICTY pursuant to Rule 101(A) of the RPE because the courts of the former Yugoslavia were not allowed to impose life sentences; they could only impose the death penalty or a maximum term of 20 years' imprisonment.⁴⁵ Under article 24 of the ICTY Statute, the Trial Chamber must 'have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia'. In its defence, the ICTY has stated that it is not bound by the maximum penalty in the national courts;⁴⁶

³⁹ *Prosecutor v Serugendo*, ICTR-2005-84-I, judgment and sentence, 12 June 2006, paras 57 & 89.

⁴⁰ See eg *Akayesu* (n 34 above).

⁴¹ Art 23(1) Statute of the International Criminal Tribunal for Rwanda (ICTR Statute).

⁴² *Simba v Prosecutor*, ICTR-01-76-T, judgment and sentence 13 December 2005, para 434. Rwanda abolished the death penalty in 2007.

⁴³ *Simba* (n 42 above), para 434; See also *Prosecutor v Nchamihigo*, ICTR-01-63-T, judgment and sentence, 12 November 2008, para 388; *Prosecutor v Muvunyi*, ICTR-00-55A-T, judgment and sentence, 12 September 2006, para 538; *Prosecutor v Seromba*, ICTR-2001-66-I, judgment 13 December 2006, para 403; *Prosecutor v Ntagerura*, ICTR-99-46-T, appeals judgment 25 February 2004, para 815; *Ngiyitegeka v Prosecutor*, ICTR-96-14-T, judgment and sentence 16 May 2003, para 486; *Prosecutor v Muhimana*, ICTR-95-1B-T, judgment and sentence 28 April 2005, paras 604-616; *Prosecutor v Kamuhanda*, ICTR-99-54A-T, judgment and sentence, 22 January 2004, paras 6, 764 & 770; *Ndindabahizi* (n 37 above) paras 505, 508 & 511; *Musema* (n 33 above) para 388.

⁴⁴ *Karera v Prosecutor*, ICTR-01-74-T, judgment and sentence 7 December 2007, para 583; *Prosecutor v Musema*, ICTR-96-13-T, judgment and sentence 27 January 2000, paras 999-1008; *Rutaganda* (n 36 above) paras 466-473.

⁴⁵ WA Schabas 'Perverse effects of the *nulla poena* principle: National practice and the *ad hoc* tribunals' (2000) 11 *European Journal of International Law* 521-525.

⁴⁶ *Prosecutor v Tadić*, IT-94-1-T, sentencing judgment, 14 July 1997, para 21.

that life imprisonment is the natural alternative to the death penalty;⁴⁷ and that its imposition is supported by the *travaux préparatoires*.⁴⁸

These justifications are not convincing. Firstly, they reduce article 24 'to a mere statement of general principle of international law, providing only that the death penalty and punishments other than imprisonment may not be imposed'.⁴⁹ This undermines the legal certainty that the drafters of the article sought to create by their reference to the practice in the former Yugoslavia.⁵⁰ Secondly, the ICTY should seriously consider the acceptability of life imprisonment as an alternative to the death penalty; more so since the latter, and not the former, was imposed in the former Yugoslavia.⁵¹ Thirdly, it is debatable whether reliance on the *travaux préparatoires* was appropriate.⁵² Had the Security Council intended to make life imprisonment available to the ICTY, it would have been in the interests of legal certainty for the Statute to have stated so explicitly.⁵³

Rule 101(A) is yet another example of the inherent power of the ICTY to regulate itself, a weakness rooted in article 15 of the ICTY Statute that makes it 'alarmingly simple' to amend the RPE.⁵⁴ The ICTY 'simply invoked its power to make' the RPE in including life imprisonment as an applicable penalty.⁵⁵ However, the RPE being subordinate to the Statute, the imposition of life imprisonment is *ultra vires* the Statute.⁵⁶

⁴⁷ *Prosecutor v Erdemovic*, IT-96-22-T, sentencing judgment 29 November 1996, paras 33-39; *Tadić* (n 46 above) para 9.

⁴⁸ The statement relied on was that of Madeline Albright, the United States representative at the Security Council. See Provisional Verbatim Record of the 3217th meeting.

⁴⁹ Van Zyl Smit (n 10 above) 181.

⁵⁰ Van Zyl Smit (n 10 above) 181. In *Erdemovic* (n 47 above) para 38, the ICTY recognised that the reference to 'general practice' arose because of concerns about legal certainty but refused to give effect to the intention of the drafters, stating that its application did 'not recognise the criminal nature universally attached to crimes against humanity'; MC Bassiouni & P Manikas *The law of the International Tribunal for the Former Yugoslavia* (1996) 701-702 hold the opinion that Rule 101A also violates the prohibition of *ex post facto* laws; See also WA Schabas 'Sentencing and the international tribunals: For a human rights approach' (1997) 7 *Duke Journal of Comparative and International Law* 461 482, who avers that the principle of legal certainty can be respected without the need for the tribunals following 'in a strict sense' the practice of Yugoslavia or Rwanda.

⁵¹ Van Zyl Smit (n 10 above) 181-182.

⁵² D van Zyl Smit 'Punishment and human rights in international criminal justice' (2002) 2 *Human Rights Law Review* 1 8.

⁵³ As above.

⁵⁴ See J Laughland *Travesty: The trial of Slobodan Milosevic and the corruption of international justice* (2007) 90-91 who argues that the RPE can even be amended by an exchange of e-mails by the judges.

⁵⁵ Van Zyl Smit (n 52 above).

⁵⁶ Van Zyl Smit (n 52 above). This question does not arise in the ICTR since life imprisonment is imposed in Rwandan courts.

The ICTY has imposed three life sentences to date.⁵⁷ However, the lengthy terms that have been imposed in other cases are arguably tantamount to tacit life sentences.⁵⁸

3.2.1 The case of *Galić*

An example of the manner in which life imprisonment has been imposed by the ICTY is borne out by the case of *Galić*.⁵⁹ In that case, the ICTY Appeals Chamber held that the Trial Chamber had abused its discretion by imposing a sentence of 20 years on the accused,⁶⁰ which it described as having been taken from ‘the wrong shelf’ in light of the aggravating factors.⁶¹ Without further ado whatsoever, the sentence was substituted with life imprisonment. In his dissenting opinion, Pocar J was sceptical about the Appeals Chamber’s power to increase a sentence against which there would be no right of appeal,⁶² arguing that the case should have been remitted to the Trial Chamber for reconsideration in order to reserve the right to appeal.⁶³

Meron J, also dissenting, contended that there was no basis for tampering with the sentence. He noted that it was not ‘so low that it demonstrably shocks the conscience’ and had been imposed after

⁵⁷ *Prosecutor v Galić*, IT-98-29-A, appeals judgment 30 November 2006; *Prosecutor v Stakić*, IT-97-24-T, appeals judgment 31 July 2003; *Prosecutor v Lukić*, IT-98-32/1-T, judgment 20 July 2009. Stakić’s sentence was reduced to 40 years’ imprisonment on appeal. See *Prosecutor v Stakić*, IT-97-24-A, appeals judgment 22 March 2006, para 428.

⁵⁸ See *Prosecutor v Krištić*, IT-98-33-T, judgment 2 August 2001 (46 years) – reduced to 35 years in *Prosecutor v Krištić*, IT-98-33-A, appeals judgment 19 April 2004, para 275; *Prosecutor v Blaškić*, IT-95-14-T, judgment 3 March 2000 (45 years) – reduced to nine years in *Prosecutor v Blaškić*, IT-95-14-A, appeals judgment 29 July 2004, 258; *Prosecutor v Jelišić*, IT-95-10-T, judgment 14 December 1999 (40 years). In his partially dissenting opinion to the confirmation of Jelišić’s sentence in *Prosecutor v Jelišić*, IT-95-10-A, appeals judgment 5 July 2001, para 2, Wald J stated that the 40-year term imposed on the accused, who was 31 years old at the time of sentencing, was ‘in effect a life sentence’.

⁵⁹ *Galić* (n 57 above).

⁶⁰ *Galić* (n 57 above) para 456.

⁶¹ *Galić* (n 57 above) para 455.

⁶² See the partially dissenting opinion of Pocar J in *Galić* (n 57 above) paras 2-4 186-187.

⁶³ The question of whether or not an Appeals Chamber can competently increase a sentence is beyond the scope of this paper. Suffice to say that art 14(5) of ICCPR guarantees the right to appeal against sentence.

careful consideration of the circumstances of the case.⁶⁴ He concluded thus:⁶⁵

The majority's decision to increase Galić's sentence to life imprisonment may satisfy our sense of condemnation. But this increase disserves the principles of procedural fairness on which our legitimacy rests. As the highest body in our court system, we are not readily accountable to any other authority and thus have a particular obligation to use our power sparingly. We should not substitute our own preferences for the reasoned judgement of a Trial Chamber. A sound method for assuring that we have not fallen prey to such preferences is to measure our choices fully and comprehensively against those made in prior cases. Although precise comparisons may be of limited value, the radically different approach adopted by the majority in this case requires at least some explanation. Rather than undertaking such an analysis, however, the majority simply offers conclusory statements. I cannot accept the majority's approach. No matter what he has done, Galić is entitled to due process of law — including a fair application of our standard of review.

It is submitted that by imposing such an extreme punishment without proper justification, the Appeals Chamber itself abused its discretion. It is unfortunate that life sentences are imposed in this manner without due regard for an accused person's right to appeal.⁶⁶ Surely if it falls within the Trial Chamber's discretion to impose life imprisonment,⁶⁷ it also falls within its discretion to impose a lighter sentence provided all circumstances are considered? Even more unfortunate is the view expressed by Shahabuddeen J that the ICTY is not a state, hence it cannot be bound to uphold all fair trial rights.⁶⁸

3.3 International Criminal Court

Article 77(1)(b) of the Rome Statute of the ICC (ICC Statute) restricts the imposition of life imprisonment to cases where it is 'justified by the extreme gravity of the crime and the individual circumstances of the convicted person'. Although the ICC is expected 'to try nothing

⁶⁴ Separate and partially dissenting opinion of Meron J in *Galić* (n 57 above) paras 9 & 10 205-208. The gist of Meron J's argument was that the Trial Chamber had not committed a 'discernible error', hence the Appeals Chamber had no power to intervene on the sentence. (See *Prosecutor v Tadić* IT-94-1-A and IT-94-1-Abis, judgment in sentencing appeals 26 January 2000, para 22.) The Trial Chamber had in fact noted that a 20-year sentence was the maximum prison term available in the former Yugoslavia Courts. See *Prosecutor v Galić*, IT-98-29-T, judgment 5 December 2003, para 761. It is arguable, therefore, that it was imposed as a comparably heavy penalty, short only of the death penalty itself.

⁶⁵ Separate and partially dissenting opinion of Meron J (n 64 above) para 13.

⁶⁶ See also *Gacumbitsi v Prosecutor*, ICTR-2001-64-A, appeals judgment 7 July 2006, where the ICTR Appeals Chamber increased a 30-year sentence to life imprisonment.

⁶⁷ *Prosecutor v Jelišić*, IT-95-10-A, appeals judgment 5 July 2001, para 100.

⁶⁸ See separate and partially dissenting opinion of Shahabuddeen J in *Jelišić* (n 67 above) paras 25 & 26 55-56, asserting that the ICTY Statute is equivalent to a reservation to ICCPR.

but crimes of extreme gravity' and 'the most heinous offenders',⁶⁹ the restriction implies that life imprisonment should be the exception rather than the rule. Clear distinctions will have to be made to justify a life sentence.⁷⁰ It is hoped that, unlike the case in the *ad hoc* tribunals, this restriction, coupled with the provision for distinct sentencing hearings in article 76(2) of the ICC Statute, will bolster a more comprehensive approach to sentencing. Of some concern, however, is the manner in which the Statute limits the Court's discretion to a choice between a fixed term of 30 years' imprisonment or less and life imprisonment. While the limitation may influence the ICC to reduce its sentence in order to avoid a life sentence, it may also tilt in favour of a life sentence where a longer prison term would have otherwise sufficed.

4 Prospect of release

In order to pass the test of human dignity, life imprisonment should offer a 'real and tangible prospect' of release.⁷¹ It should be noted that the decision to release a prisoner under international criminal law is final and irreversible.⁷² None of the tribunals have supervisory powers over the offender after his release, a feature which can be attributed to the lack of an international police force. The inevitable reliance on states for the enforcement of sentences is therefore a setback in the development of a universal system of international criminal sentencing and enforcement proceedings.⁷³ This section considers the release system in the courts under discussion.

4.1 The *ad hoc* tribunals

The ICTR and ICTY cannot grant early release *proprio motu*. Their Statutes provide that pardon or commutation of sentences will only be considered '[i]f pursuant to the applicable law of the state in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence'.⁷⁴ The state of enforcement is required to notify the tribunal if the prisoner is so eligible. However, it is the president of the tribunal, in consultation with the judges, on 'the basis of the interests of justice and the general principles of law',⁷⁵ who is to make the final decision. Factors that must be taken into account include the

⁶⁹ WA Schabas *An introduction to the International Criminal Court* (2003) 317.

⁷⁰ Van Zyl Smit (n 52 above) 14.

⁷¹ *De Boucherville v The State of Mauritius* (2008) UKPC 37, para 23; *Kafkaris* (n 32 above) para 6 of the joint dissenting judgment of Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens JJ.

⁷² Schabas (n 69 above) 142.

⁷³ Knoops (n 23 above) 274.

⁷⁴ Arts 27 & 28 of the ICTY and ICTR Statutes respectively.

⁷⁵ As above.

gravity of the crime, the treatment of similarly-situated offenders, the demonstration of rehabilitation by the offender, and any substantial co-operation with the prosecutor.⁷⁶

4.1.1 Evaluating the tribunals' release system

It would be interesting to see how these tribunals would consider reducing a sentence on the basis of a factor which is in fact a mitigating factor in sentencing but which was 'negated' during sentencing. It is submitted that it would be paradoxical to grant release on the same factors that were evident during trial but which, for one reason or another, were considered insufficient to warrant a lenient sentence in the first place. For instance, would Kambanda benefit from his co-operation with the prosecutor at this stage?⁷⁷

A major weakness of this system is that the eligibility for pardon or commutation lies primarily with the state of enforcement.⁷⁸ This does not only put prisoners on an unequal footing due to differences in national laws,⁷⁹ but also renders the system susceptible to manipulation by states.⁸⁰ There is no guarantee that a lifer, or indeed any other prisoner, has a real prospect of release. Secondly, some of the criteria cannot be applied equally to all prisoners. For instance, co-operation is not possible in some crimes.⁸¹ In addition, not all prisoners may have the same potential for co-operation, such as being witnesses in other cases. This factor may also pressurise prisoners to co-operate with the prosecutor in the hope of increasing their chance of early release. Thirdly, consideration of the gravity of the crime at this stage may amount to 'double jeopardy' against prisoners whose crimes are very grave.⁸² Conversely, prisoners who committed less serious offences may benefit twice, both at sentencing and release.

While appreciating the need for equality in the treatment of prisoners, taking into account the treatment of 'similarly-situated prisoners' is not appropriate. It is unrealistic to expect all international prisoners to be considered for pardon at the same time, more so since the criteria for such pardon are subject to national law. Furthermore, it is not clear

⁷⁶ Rules 125 & 126 of the ICTY and ICTR RPE respectively.

⁷⁷ Kambanda provided 'invaluable information' to the prosecutor and agreed to testify in other cases. See *Prosecutor v Kambanda*, ICTR 97-23-S, judgment and sentence 4 September 1998, para 47.

⁷⁸ Van Zyl Smit (n 52 above) 9. The criteria for pardon are not always public knowledge. See JD Mujuzi 'The evolution of the meaning(s) of penal servitude for life (life imprisonment) in Mauritius: The human rights and jurisprudential challenges confronted so far and those ahead' (2009) 53 *Journal of African Law* 242-244.

⁷⁹ Van Zyl Smit (n 3 above) 51.

⁸⁰ A Hoel 'The sentencing provisions of the International Criminal Court' (2005) 30 *The International Journal of Punishment and Sentencing* 37-66.

⁸¹ Van Zyl Smit (n 10 above) 195.

⁸² Van Zyl Smit (n 10 above) 184.

whether the phrase ‘similarly-situated’ is confined to prisoners serving in the same country or those who committed similar crimes or indeed those tried jointly. It would be unfair to deny release to a prisoner on the ground that his ‘counterpart’ has not been given an opportunity for the same; when there is no uniform or alternative release system.

Fifthly, the Statute does not clarify what is meant by the ‘interests of justice’ or ‘general principles of law’. The former notion gives too much discretion to the Court.⁸³ It is a fluid concept capable of accommodating a wide variety of factors. This can, of course, act either in favour of or against the prisoner. However, it would have been better to explicitly list the factors.⁸⁴

Of great concern, in the context of this paper, is the fact that the system does not have special considerations for lifers. It is the possibility of release that saves life imprisonment from being a cruel, inhuman, and degrading punishment.⁸⁵ It is ironic that the *ad hoc* tribunals which have no release mechanism of their own have the power to deny release contemplated by the state of enforcement, leaving no guarantee that release may be considered again. In the absence of an independent release system, it is best that the tribunals not impose life imprisonment at all.⁸⁶

A solution to some of these problems may be the introduction of a rule providing for release pursuant to articles 27 and 28 of the ICTY and ICTR Statutes respectively, which vest the tribunals with supervisory powers over the enforcement of sentences.⁸⁷ Alternatively, review may be provided for in the sentencing judgment.⁸⁸ However, the latter measure would not satisfy the principle of equality. Moreover, whether such measures would in fact be *intra vires* the Statutes is debatable.⁸⁹

4.2 International Criminal Court

The ICC Statute reserves the right to reduce sentences to the Court itself.⁹⁰ The hearings on reduction of sentence are mandatory and are to be heard by three judges of the Appeals Chamber or a judge delegated by it.⁹¹ Article 110(3) mandates the ICC to review the sentence after ‘the person has served two-thirds of the sentence, or 25 years in the case of life imprisonment’. Subsequent hearings on reduction may

⁸³ Schabas (n 50 above) 513.

⁸⁴ The listing in the RPE (n 76 above) is not exhaustive.

⁸⁵ *Bull* (n 32 above).

⁸⁶ Schabas (n 50 above) 516.

⁸⁷ Schabas (n 50 above) 510.

⁸⁸ As above.

⁸⁹ As above.

⁹⁰ Art 110.

⁹¹ Rule 224(1) of the ICC RPE.

be scheduled every three years or at any time stipulated in the first hearing.⁹²

Reduction may be granted if the ICC is satisfied that the offender was either willing to co-operate with the Court from an early stage and continues to be so willing;⁹³ or rendered voluntary assistance in the enforcement of Court judgments and orders;⁹⁴ or if there are other factors 'establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence'.⁹⁵ Rule 223 of the ICC RPE expounds the last condition by listing the following criteria: genuine dissociation from the crime; prospect of resocialisation; impact of release on social stability and victims; significant action taken by the prisoner for the benefit of the victims; and the individual circumstances of the prisoner, such as age or poor physical or mental health.

4.2.1 Evaluating the International Criminal Court release system

The ICC release mechanism attempts to balance the interests of the offender, the victims and society at large.⁹⁶ While it is worth applauding as a considerable improvement on the *ad hoc* tribunals' system, it is not without its flaws. Firstly, there is concern with the set minimum term of 25 years for lifers. Though this period is reasonable because the maximum fixed term is 30 years,⁹⁷ it is rather harsh as a minimum and is in fact sufficient for retribution.⁹⁸ Further, it is questionable how two-thirds of a fixed sentence has been paralleled to 25 years.⁹⁹ The indeterminacy of life imprisonment means that 25 years can be any fraction of the sentence, indeed more than two-thirds of it.

The inclusion of article 110(4)(c) mitigates legal certainty of release.¹⁰⁰ The change of circumstances was initially intended to cater for a change in the political circumstances under which the original offence was committed.¹⁰¹ However, it now gives room for a fragmented release mechanism where one set of factors is fixed in the ICC Statute itself while the other is articulated in the RPE, hence subject to change at any time.¹⁰² To make matters worse, the Statute gives

⁹² Rule 224(3) of the ICC RPE. A sentenced person may also apply for an earlier subsequent hearing.

⁹³ Art 110(4)(a).

⁹⁴ Art 110(4)(b).

⁹⁵ Art 110(4)(c). Art 27 expressly proscribes the consideration of official capacity as a factor 'in and of itself'.

⁹⁶ Hole (n 80 above).

⁹⁷ Art 77(1)(a).

⁹⁸ Van Zyl Smit (n 52 above) 16.

⁹⁹ Van Zyl Smit (n 3 above) 52 observes that the determination of this period is 'inevitably arbitrary'.

¹⁰⁰ Van Zyl Smit (n 10 above) 195.

¹⁰¹ As above.

¹⁰² As above. As at 10 December 2009, the ICTY had amended its RPE 44 times.

room for the application of different criteria in subsequent hearings.¹⁰³ Consequently, the criteria in Rule 223 may be applied independently.

Interestingly, the factors set out in the ICC Statute and RPE do not bear a direct connection to the purposes of punishment. On the contrary, some of them render the reduction process an award ceremony. Reduction may be awarded for co-operating with the Court or assisting victims. There is no clarity as to when such co-operation or assistance should be made. However, from the wording of the Statute, which states 'early and continuing willingness' to co-operate, it can be said that co-operation before conviction may also be considered. This clearly puts offenders who plead guilty at a great advantage. Since there is nothing to preclude such an offender from benefiting from his plea both at the sentencing and reduction stages,¹⁰⁴ the ICC will have to distinguish its treatment of such factors at the two stages.¹⁰⁵ Other factors, such as assisting victims and the prisoner's dissociation from the crime, erroneously assume that prisoners generally accept their being guilty after conviction by a court of law.¹⁰⁶

The extent to which a prisoner may assist victims is greatly limited by the very fact of imprisonment itself. Prisoners with good connections outside the prison and sufficient finances would undoubtedly be better placed to offer such assistance. This would influence a positive attitude from victims, hence it would increase the chances of release for the concerned prisoner even more. It is not clear what action should be taken for the benefit of victims to qualify as 'significant'. Would an apology suffice? The Court may look to the impact of the action on the victims in order to assess its significance. The major challenge with such an assessment is the identification of victims, who may be countless.

The problem of taking into account the acknowledgment of the offence or dissociation therefrom is illustrated by the case of *Leger v France*, where the applicant's claim of innocence throughout his incarceration following a conviction of murder was seen as evidence of a lack of 'serious effort to readjust to society'.¹⁰⁷ This factor may also face evidential challenges. Would it be appropriate for the Court to look to the prisoner's communications with other people? I think not. It would be improper for a prisoner's friends or therapists to testify against him on this score based on his conversations with them. It is therefore submitted that acknowledgment of the offence should not be a major consideration, if at all.

¹⁰³ Art 110(5) allows the Court to apply 'such criteria as provided in the Rules' in subsequent hearings.

¹⁰⁴ Hoel (n 80 above) 65.

¹⁰⁵ See the discussion at 4.1.1 above.

¹⁰⁶ An offender can have less reason for assisting victims if he or she does not accept responsibility for their victimisation.

¹⁰⁷ *Leger v France*, Application 19324/02, judgment 11 April 2006, ECHR. For a detailed analysis of this case, see Stokes (n 2 above).

The prospect of resocialisation and successful resettlement can be criticised as having no relation with the punishment of the prisoner in the first place, save perhaps for its remote connection to rehabilitation. Resocialisation is dependent on a wide variety of factors, most of which are beyond the control of the prisoner. These include the attitude of the community towards the prisoner and the prospect of securing a job. Chances for success in these matters for the class of perpetrators to be tried by the ICC are indeed slim.

Continued detention based on the perceptions of victims would tend to be arbitrary. Some victims are more vengeful than others, while some take more time to heal. This is in turn related to the impact of the atrocities in the first place. Such considerations may also lead to the unequal treatment of prisoners. It would be inappropriate to detain a person simply because the victims concerned are still aggrieved, hence against the idea of his early release.

It is foreseeable that the determination of social instability would pose a great difficulty to the Court. It would be an affront to justice to deny release because it may cause social upheaval,¹⁰⁸ a situation over which the prisoner has no control. Such incarceration would not be 'punishment', but rather an abuse of imprisonment for convenience. This would result in arbitrary detention and degrading treatment. After all, the reactions of society are not considered in assessing the guilt of an accused person.

The individual circumstances of the prisoner, as envisaged in Rule 223, appear to be more appropriate. However, the problem is that such consideration is only possible after the prescribed period. A prisoner may be in a critical health or mental condition before the minimum period has elapsed. It is submitted that a more reasonable position would be achieved by the inclusion of a general proviso to article 110(3), to the effect that a reduction of sentence may be considered at any time after sentencing on medical, humanitarian or other compelling grounds.¹⁰⁹ There is no reason for consideration of age at this stage when the age of the prisoner at that point can be deduced during sentencing. A prisoner can be spared the turmoil of being a lifer if due account of his age is taken during sentencing.

4.3 Final observations on release systems

The ICC has tacitly set the preventive element of life imprisonment at 25 years. Once this has been served, the grounds for continued detention must be based upon considerations of risk and dangerousness; any other grounds would necessarily carry the risk of arbitrariness.¹¹⁰ While considerations of dangerousness can be accommodated into the

¹⁰⁸ Van Zyl Smit (n 3 above) 48.

¹⁰⁹ Van Zyl Smit (n 3 above) 52.

¹¹⁰ Stokes (n 2 above) 293.

'interests of justice' category in the *ad hoc* tribunal system, they can hardly be read into the ICC's article 110(4) or Rule 223. In any case, predictions of recidivism are 'notoriously hard to make', especially in politically-motivated crimes.¹¹¹ Indeed, do convicts like Rutaganda, Akayesu, Kambanda and other lifers pose a danger to society? Can they reoffend in the absence of the social conditions and political climate that facilitated their actions that have been characterised as international crimes? It is unfortunate that criminal law at times decontextualises offences from the circumstances in which they were committed.¹¹² Gross human rights violations are essentially group crimes; one can hardly commit them singly. Neither are they necessarily connected to previous criminal conduct that may predict future dangerousness.¹¹³ Therefore, the real question should not be whether the prisoner will be able to live a law-abiding life, but whether it is abusive to continue to detain him further.¹¹⁴ In the long run, despite the possibility of release, continued detention beyond a certain period will raise other issues of fundamental rights.¹¹⁵

5 Conclusion

This article has examined life sentences under international criminal law. Save for rehearsing aggravating and mitigating factors,¹¹⁶ the tribunals have paid little attention to justifying the imposition of life imprisonment. No wonder their sentencing judgments have been criticised as 'repetitive and ground-clearing exercise[s]'.¹¹⁷ There is a need for a more cautious approach to life imprisonment because of its potential to deny liberty indefinitely, especially where no independent release system is in place.

The uncertainty of release weighs heavily on lifers,¹¹⁸ and its denial has 'as much an impact on an offender as the initial sentencing decision'.¹¹⁹ Legal certainty as to the possibility of such release is therefore imperative. It is recommended that the criteria for release

¹¹¹ Van Zyl Smit (n 10 above) 194; see generally N Padfield (ed) *Who to release? Parole, fairness and criminal justice* (2007).

¹¹² P Allot 'Deliver us from social evil' Guest Lecture Series of the Office of the Prosecutor, 11 August 2004, The Hague, para 2.68.

¹¹³ AL Smeulers 'What transforms ordinary people into gross human rights violators?' in SC Carey & SC Poe (eds) *Understanding human rights violations: New systematic studies* (2004) 239-256.

¹¹⁴ De Beco (n 14 above). There can be no guarantee that any individual will live a law-abiding life.

¹¹⁵ Fura-Sandström J, dissenting, in *Leger* (n 107 above) para 14.

¹¹⁶ Pursuant to arts 23 & 24 of the ICTR and ICTY Statutes respectively.

¹¹⁷ Van Zyl Smit (n 52 above) 9.

¹¹⁸ United Nations Crime Prevention and Justice Branch *Life imprisonment* (1994) 20.

¹¹⁹ Van Zyl Smit (n 3 above) 52.

should be clearly spelt out in the Statutes of the *ad hoc* tribunals. The ICC regime promises better treatment of life imprisonment. However, its release mechanism is quite inflexible, with the Court only able to consider reduction of a sentence after 25 years in the case of lifers. Further, the manner of its implementation, particularly considerations of eligibility for release, raises significant challenges.

The position taken by international criminal law with regard to life imprisonment is undoubtedly in need of revision in light of the challenges raised in the article. It is hoped that this will be done in the near future to promote the protection of the human rights of offenders facing trials before international tribunals.

Social protection for Malawian migrants in Johannesburg: Access, exclusion and survival strategies

*Redson Edward Kapindu**

Deputy Director, South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC); Lecturer, Department of Public Law, University of Johannesburg, South Africa

Summary

Many migrants from Southern Africa come to South Africa every year in search of a better life. This article explores the extent to which foreign African migrants are covered or excluded by the social protection regime in South Africa, using the situation of Malawian migrants as a case study. The article demonstrates that there are both normative (or formal) exclusions, as well as practical exclusions from social protection faced by these migrants. In light of this grim reality, the article explores the various survival strategies that these migrants adopt in order to hedge against the risk of socio-economic shocks. The article shows that there are well-developed informal social protection networks largely based on nationality and kinship. Another key finding in the study is that, for many migrants, the movement to South Africa is in itself a social protection measure to protect against existing or future socio-economic risks and vulnerabilities in their native state. The article suggests that the experiences of Malawian migrants in Johannesburg are similar to the experiences of foreign migrants in various metropolitan societies in Eastern and Southern Africa.

* LLB (Malawi), LLM (Human Rights and Democratisation in Africa) (Pretoria); redson@saifac.org.za. This article is derived from the results of a field survey the author conducted on the Social Protection of Malawian Migrants in Malawi on behalf of the Forced Migration Studies Programme (FMSP) at the University of the Witwatersrand. My profound gratitude goes to the FMSP and the Institute of Development Studies at the University of Sussex for granting permission to publish this article that is based on those research findings. I would also like to express great appreciation to Prof Loren Landau and Dr Ingrid Palmary of the FMSP, and Dr Rachel Sabates-Wheeler of the Institute of Development Studies at the University of Sussex for their invaluable comments at various stages of this work.

1 Introduction

South Africa, as Africa's largest economy, is the foremost migrant-receiving country in Southern Africa. Migration to South Africa has been described as a well-established household poverty-reduction strategy.¹ Many people from within Southern Africa, therefore, migrate to South Africa in the hope of a better life. Migrants from Mozambique, Zimbabwe, Lesotho and Malawi are said to comprise the majority of undocumented or irregular immigrants to South Africa, with their total number being estimated at between 500 000 and 1 million.² In addition to these undocumented or irregular immigrants, there are also those migrants who are legally resident in the country.

The principal question that the article examines is how migrants deal with the various socio-economic risks and vulnerabilities associated with the status of an immigrant in South Africa. In addressing this question, the article begins by setting out the theoretical framework in which the social protection regime in South Africa is grounded, which includes obligations arising from international and regional human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), yet to be ratified by the country; and the African Charter on Human and Peoples' Rights (African Charter).

In addition, the article investigates the social protection avenues and strategies that the migrants adopt in the event of social protection exclusions, and whether their migration to South Africa, by itself, is a social protection strategy. Further, the article weighs up how the migrants compare their respective experiences in Malawi and South Africa in respect of their living standards and the general level of socio-economic vulnerabilities, risks and attendant protections.

Whilst the focus of the article is on Malawians living in various parts of Johannesburg, it is evident that these migrants' experiences largely mirror the experiences of other migrant groups in South Africa. Further, a survey of available literature demonstrates that the experiences

¹ A Bloch 'Gaps in protection' undocumented Zimbabwean Migrants in South Africa, Forced Migration Studies Programme (Migration Studies Working Paper Series 38).

² J Crush 'South Africa: Policy in the face of xenophobia' in MPI, Country Profiles (2008) <http://www.migrationinformation.org/Profiles/display.cfm?id=689> (accessed 12 March 2009). See also G Goodwin-Gill 'International and national responses to the challenges of mass forced displacement' in J Handmaker *et al* (eds) *Advancing refugee protection in South Africa* (2008) 33, where he states that a reasonable estimate of migrants in South Africa is in the range of 1 to 2 per cent of the total population (ie between 500 000 and one million). More recently, Martin has suggested that as of 2010, South Africa was hosting between two to eight million illegal immigrants. See G Martin 'Feature: Illegal migration and the impact of cross border crime' *DefenceWeb* 9 March 2011 http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=14001:feature-illegal-migration-and-the-impact-of-cross-border-crime&catid=87:border-security&Itemid=188 (accessed 5 April 2011).

of these migrants, including their survival strategies, are not unique to South Africa. They are common in the Eastern and Southern African region. Hence, the relevance of this study goes beyond that of the two countries, Malawi and South Africa.

2 Definition of social protection

In this section, a working definition of social protection for purposes of the study is adopted. Though apparently thin, there is a distinction between the concepts of social security and social protection, with the latter assuming a broader scope. The article deals with each concept in turn.

The International Labour Organisation (ILO) has done pioneering work in the field of social security. It stipulates access to basic and essential health care, income security for children, access to nutrition, education and care, a measure of social assistance to poor or unemployed persons, and ensuring income security through basic pensions for old or disabled persons as constituting what it considers a 'basic social security package'.³ It recommends that countries which have not yet achieved universal or widespread social security coverage should first aim to put in place for all residents in the country a basic and modest set of social security guarantees consisting of this basic 'social security package'. The ILO concludes that '[t]his is the launching platform for a further social security development process that provides greater security when the "fiscal space" of governments increases as economies continue to develop'.⁴

In South Africa, the White Paper on Social Welfare provides a definition, broadly similar to that of the ILO, albeit with some conceptual differences. It defines social security as entailing⁵

policies which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes for providing for their basic needs. State social assistance (grants) includes the following four categories of benefits: those associated with old age, disability, child and family care, and relief for the poor.

Whilst the ILO seems to limit social security to public measures, the South African White Paper, by referring to contributory and non-contributory schemes, proposes a definition that implies both public and

³ ILO Committee on Employment and Social Policy *Social security standards and the ILO campaign for the extension of social security* GB303 ESP_3_[2008-10-0169-1]-En.doc (Geneva, ILO: 2008) para 14.

⁴ As above.

⁵ Department of Welfare 'White paper for social welfare: principles, guidelines, recommendations, proposed policies and programmes for developmental social welfare in South Africa' <http://www.welfare.gov.za/documents/1997/wp.htm> (accessed 12 March 2009).

private measures.⁶ It remains unclear, however, as to whether this is the definitive position in South African law.⁷

Dekker makes reference to another form of social security, constituted by survival strategies adopted by those that are excluded from official social security schemes, both public and private.⁸ She states that informal social security has only recently been identified in South Africa as a new 'strand' to the traditional concept of social security.⁹ She goes on to state that¹⁰

[i]nformal social security arrangements rely heavily on principles of reciprocity and solidarity. Such social security does not only manifest itself in the form of monetary transfers, but can also assume the form of support and services unique to a particular group or community. Informal social security is always delivered in a specific context in which people have something in common, reflecting the principles of solidarity (*ubuntu*) and reciprocity. The most common examples of informal social security mechanisms in South Africa are stokvels and burial societies.

Thus, Dekker urges that informal social security can manifest itself in the form of neighbourhood-based mutual aid schemes developed among people within a specific community or kinship-based social security. Olivier *et al* seem to provide an even clearer and more elaborate definition of informal social security, stating that¹¹

[i]nformal social security arrangements are those self-organised informal safety nets which are based on membership of a particular social group or community, including, but not limited to, family, kinship, age group, neighbourhood, profession, nationality, ethnic group, and so forth.

Underpinning the concept of informal social security in Southern Africa is the value of *ubuntu*. This value received judicial expression by the

⁶ M Swart 'Social security' in S Woolman *et al* *Constitutional law of South Africa* (2006) 56D3-56D4.

⁷ Eg, more recently, in *Law Society of South Africa & Others v Minister for Transport & Another* 2011 1 SA 400 (CC), social security has been described as public financial support for people who are poor, have a disability or are vulnerable (para 45). This is evidently a very narrow conception of social security as it ties social security to 'public financial support'. It does not extend to informal and non-pecuniary forms of social security. The narrowness, though, seems explainable from the fact that the definition of social security was not necessarily germane to the determination of the case. The point was simply made by the Minister in passing, and the case rested on other issues surrounding the Road Accident Fund in South Africa. The Constitutional Court simply adopted the Minister's submissions in this regard.

⁸ AH Dekker 'Informal social security: A legal analysis' unpublished LLD thesis, University of South Africa, 2005 6.

⁹ As above.

¹⁰ As above.

¹¹ M Olivier *et al* 'Formulating an integrated social security response: Perspectives on developing links between informal and formal social security in the SADC region' paper presented at the EGDI and UNU-WIDER Conference on 'Unlocking human potential: Linking the informal and formal sectors' 17-18 September 2004, Helsinki, Finland.

Constitutional Court in the case of *S v Makwanyane*,¹² where Langa J (as he then was) stated that *ubuntu*¹³

is of some relevance to the values we need to uphold. It is a culture which places emphasis on community and on the interdependence of members of the community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from members of the community such person happens to be part of ... More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

Thus, Olivier observes that values such as *ubuntu*, which are all about solidarity, collective responsibility, compassion, equality, unity, self-determination, human respect and human dignity, form the basis of closely-interlaced communities that are discernible in the social, political and economic activities of Africans.¹⁴ The idea of informal social protection, including social security, lies at the core of this study. Significantly, following Gsägner, Dekker states that informal social security is generally uniformly practised in East and Southern Africa.¹⁵ This therefore signals that country-specific lessons, such as those to be drawn from the present study, can be extrapolated and applied to other countries in the region.

Dekker, however, goes on to caution against over-romanticising informal social security mechanisms in South Africa, stating that the system is imperfect and that, although it provides protection against certain risks, owing to the poor environment within which it functions, it only provides low level benefits and that it is not sufficiently placed to provide protection against large and long-term risks such as old age, HIV and AIDS or long-term unemployment.¹⁶

All in all, as the Committee on Economic, Social and Cultural Rights (ESCR Committee) has observed, the right to social security is of central importance in guaranteeing human dignity for all persons, particularly the most vulnerable and marginalised, when they are faced with circumstances that deprive them of their capacity to fully realise other fundamental human rights.¹⁷

Social protection as a concept has also been defined in various ways. The general view is that social protection is a wider concept than — and encompasses — social security, and that its increasing usage in rights literature owes to the difficulties presented by the narrow import of

¹² 1995 3 SA 391.

¹³ *Makwanyane* (n 12 above) para 224.

¹⁴ Olivier (n 11 above).

¹⁵ Dekker (n 8 above) 126. See also H Gsägner 'Linking informal and formal security systems' *Deutsche Stiftung für Internationale Entwicklung* <http://www.dse.de/ef/social.gsaenger.htm> (accessed 5 April 2011).

¹⁶ Dekker (n 8 above) 7.

¹⁷ ESCR Committee General Comment 19: The Right to Social Security (art 9) (GC 19) UN Doc E/C.12/GC/19.

social security.¹⁸ The Taylor Report, describing social protection, stated that¹⁹

[c]omprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development. *Comprehensive social protection is broader than the traditional concept of social security*, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the state.

Thus, although in this article frequent references will be made to the term ‘social security’, the reader should keep in mind that in those instances, the term is used as a subset of the wider notion of social protection.

Swart describes social protection as incorporating ‘developmental strategies and programmes designed to ensure minimum living standards for all citizens’.²⁰ It is interesting that Swart refers to all citizens rather than everyone.²¹ Her definition, however, apart from its narrow focus on citizens, is quite broad as the term ‘developmental strategies’, in particular, can be widely interpreted to include even private and informal initiatives. Mpedi states that ‘[s]ocial protection embraces social security and entails “policies and programmes designed to reduce poverty and vulnerability by promoting efficient labour markets, diminishing people’s exposure to risks, enhancing their capacity to protect themselves against hazards and interruption/loss of income”’.²² In contrast with Swart’s definition, Mpedi, by referring to ‘policies and programmes designed to reduce poverty and vulnerability’, seems to premise his definition on public measures.

Kabeer describes social protection as referring to ‘the full range of interventions undertaken by public, private and voluntary organisations and informal networks to support individuals, households and communities in their efforts to prevent, manage and overcome risks

¹⁸ LG Mpedi *Pertinent social security issues in South Africa* (2008) 7; Swart (n 6 above).

¹⁹ See Committee of Inquiry Into a Comprehensive Social Security System *Transforming the Present – Protecting the Future* (Draft Consolidated Report) March 2002, 41. The Committee was chaired by Prof Vivienne Taylor, hence the term ‘Taylor Report’ (my emphasis).

²⁰ Swart (n 6 above) 56D3-56D4.

²¹ Sec 27(1) of the South African Constitution guarantees the right to social security for everyone.

²² Mpedi (n 18 above).

and vulnerabilities'.²³ Sabates-Wheeler and Waite, on the other hand, define social protection as describing²⁴

all public and private initiatives that provide income or consumption transfers to the poor, protect the vulnerable against livelihood risks, and enhance the social status and rights of the marginalised, with the overall objective of reducing the economic and social vulnerability of poor, vulnerable and marginalised groups.

The definitions offered by Kabeer and Sabates-Wheeler and Waite are broadly similar and wide in their compass. However, Kabeer's definition specifically points to the role of voluntary organisations and informal networks in the social protection dynamic which the other definitions do not,²⁵ whilst Sabates-Wheeler and Waite's definition specifically singles out the target groups for the social protection initiatives as the 'poor, vulnerable and marginalised groups' and states that the overall objective is to reduce the 'economic and social vulnerability' of these groups.²⁶ Thus, both definitions provide important nuances that, together, enrich our ultimate conception of social protection.

Upon a synthesis of the various definitions set out above, in this article social protection is defined as the full range of interventions undertaken by public, private and voluntary organisations and informal networks that provide income or consumption transfers to the poor, protect the vulnerable against livelihood risks, and enhance the social status and rights of the marginalised, with the overall objective of reducing the economic and social vulnerability of poor, vulnerable and marginalised groups and ensuring at least a dignified minimum living standard for all.

3 Social protection as a fundamental right: A conceptual framework

This section explores the conceptual framework for social protection as a fundamental human right, focusing on the South African regime, but also with reference to developments elsewhere, particularly the Malawian situation. Along with the definitional section above, it lays the theoretical framework in light of which the specific findings in the following section ought to be gauged.

²³ N Kabeer *Mainstreaming gender in social protection for the informal economy* (2008) 4.

²⁴ R Sabates-Wheeler & M Waite *Migration and social protection: A concept paper* (2003).

²⁵ Kabeer (n 23 above).

²⁶ Sabates-Wheeler & Waite (n 24 above).

3.1 Socio-economic vulnerability of migrants

Migration is a century-old phenomenon. People migrate for numerous reasons, including the exploration of new economic opportunities such as jobs, reunification with or joining their families, study, a simple desire for a change of environment, flight from persecution and health grounds. Such movements have become even more pronounced in modern days due to increased globalisation, with better, easier and cheaper means of mobility and communication. In the context of social protection, the Labour Court of South Africa voices it accurately in the case of *Discovery Health Ltd v CCMA and Others (Discovery Health case)*,²⁷ where Van Niekerk J stated:²⁸

Globalisation has had a profound effect on international migration and has increased significantly the number of people who migrate as a means of escaping poverty, unemployment and other social, economic and political pressures in their home countries.

In the *Discovery Health case*,²⁹ the Court stated that there is a largely unresolved tension between the right of states to protect their labour markets and the protection of fundamental rights of those who, by choice or necessity, seek work in countries other than their own. It proceeded to observe that the ILO had noted that the resulting tension between internal and external forces tended to accentuate further the prejudices, xenophobia and racism of which migrants are often victims.³⁰

All these factors play out in characterising migrants as a vulnerable group. This vulnerability is often exacerbated by the fact that migrants are frequently treated as persons outside the political community of the host country, and this entails exclusion from various rights, privileges and amenities accorded to citizens. In the Canadian case of *Andrews v Law Society of British Columbia*,³¹ Wilson J explained some vulnerability attributes of migrants within the social polity, stating that³²

[r]elative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending ...' Their vulnerability to becoming a disadvantaged group in our society is captured by John Stuart Mill's observation ... that 'in the absence of its natural defenders, the interests of the excluded are always in danger of being overlooked'.

²⁷ *Discovery Health Ltd v Commissioner for Conciliation, Mediation and Arbitration & Others* Case JR 2877/06 (unreported, decision of 28 March 2008, Labour Court of South Africa).

²⁸ *Discovery Health Ltd* (n 27 above) para 45.

²⁹ As above.

³⁰ As above.

³¹ [1989] 1 SCR 143.

³² As above.

The judge then proceeded to say that this was a determination which was not to be made only in the context of the law which was subject to challenge, but rather in the context of the place of migrants in the entire social, political and legal fabric of society.³³ South African experiences show that the words of Justice Wilson are as true and applicable in Canada as they are in South Africa today.

Social protection is an agenda for reducing the vulnerability and risk of low-income households with regard to basic consumption and services, and it has become an important part of the development discourse at both national and international levels.³⁴ Kanyongolo states that social protection is one of the emerging topical issues in current studies in Africa, generally, and Southern Africa, in particular, observing that '[i]ncreasing levels of poverty and calls for the reduction or elimination of poverty and social exclusion have heightened debates on the subject'.³⁵

3.2 Social protection regime in South Africa

The general protection situation of migrants in South Africa is rather precarious, largely because of the adverse socio-economic conditions that most South Africans face. These conditions received judicial notice and expression in *Soobramoney v Minister of Health (KwaZulu-Natal)* (*Soobramoney case*),³⁶ where the Constitutional Court of South Africa stated that millions of people in the country live in deplorable conditions and in great poverty.³⁷ The Court enumerated a number of socio-economic problems that continue to beset South African society, including high levels of unemployment, inadequate social security and lack of access to clean water or to adequate health services. It stated that these conditions already existed when the Constitution was adopted and that a commitment to address them, and to transform the South African society into one in which there will be human dignity, freedom and equality, lies at the heart of the new constitutional order. It concluded that for as long as these conditions continue to exist, that aspiration will have a hollow ring.³⁸ In view of these daunting challenges, it has been observed that for obvious political reasons, the government's focus has fallen squarely on addressing the needs of citizens first, and deferring those of other groups that might be just as vulnerable.³⁹ The result is that non-nationals 'often "fall through the

³³ As above.

³⁴ Sabates-Wheeler & Waite (n 24 above).

³⁵ NR Kanyongolo 'Social security and women in Malawi: A legal discourse on solidarity of care' unpublished PhD thesis, University of Warwick, 2007.

³⁶ 1998 1 SA 765 (CC).

³⁷ As above.

³⁸ As above.

³⁹ F Belvedere *et al* 'Realising rights: The development of health and welfare policies for asylum seekers and refugees in South Africa' in Handmaker *et al* (n 2 above) 248.

cracks” in national health and welfare systems, and access to appropriate services is not always guaranteed’.⁴⁰

One of the measures put in place in South Africa under the 1996 Constitution to mitigate the impact of the deplorable living conditions and to reduce the vulnerability and risk of low-income individuals or households in the country, is the social security scheme provided for under section 27(1)(c) of the Constitution. Section 27 of the Constitution provides as follows:

- (1) Everyone has the right to have access to —
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

In light of the definition of social protection adopted above, it should be observed that this provision, taken as a whole, is quite strong in guaranteeing social protection as a right in terms that go beyond the usual restrictive compass of state-guaranteed social security. It is one of the hallmarks that distinguish the South African Constitution as broadly transformative of the socio-economic fabric of society, and as one of the most progressive constitutions in the world. The Constitution guarantees these rights for everyone, and some commentators have suggested that the term ‘everyone’ in section 27(1) of the Constitution means ‘everyone’, thus including non-nationals.⁴¹ In the case of *Khosa and Others v Minister of Social Development and Others; Mahlalele and Another v Minister of Social Development (Khosa case)*,⁴² the Constitutional Court, specifically addressing the right to social security, held that, given that the Constitution expressly provides that the Bill of Rights enshrines the rights of all people in the country, and in the absence of any indication that the rights under section 27(1) of the Constitution are to be restricted to citizens as in other provisions in the Bill of Rights, ‘the word “everyone” in this section cannot be construed as referring only to “citizens”’.⁴³

At the international level, article 2 of the Universal Declaration of Human Rights 1948 (Universal Declaration) provides that ‘everyone, as a member of society, has the right to social security’. It is submitted that membership in this regard has to be understood broadly to mean all persons that are subject to the jurisdiction of the state concerned. It

⁴⁰ As above.

⁴¹ M Pieterse ‘Foreigners and socio-economic rights: Legal entitlements or wishful thinking?’ (2000) 63 *Journal of Contemporary Roman Dutch Law* 51.

⁴² 2004 6 SA 505 (CC).

⁴³ *Khosa* (n 42 above) para 47.

is worth reckoning here that, whilst the Universal Declaration is a non-binding legal instrument in its conception, it has, through widespread state practice and a sense of legal obligation, generally been elevated to a more heightened level of authority where its provisions can no longer simply be neglected as non-binding. Whilst it is certainly not a treaty, it has a *sui generis* character and some of its provisions, at least, have crystallised into norms of customary international law.⁴⁴ Its language on social security is therefore highly relevant to South Africa.

Yet another important instrument is ICESCR. Article 9 of ICESCR provides for 'the right of everyone to social security, including social insurance'. Whilst it is significant that South Africa has not yet ratified ICESCR, it is equally significant that this fact notwithstanding, section 39(1)(b) of the Constitution imposes a peremptory obligation on any court, tribunal or forum to consider international law when interpreting the Bill of Rights, and this includes both binding as well as non-binding international law. Thus, ICESCR remains an important instrument in South Africa, even more so because the country signed the Covenant, and also that ICESCR significantly influenced the framing of socio-economic rights provisions under the Constitution.

The African Charter is also fairly significant in this regard. Article 18(4) of the Charter provides that '[t]he aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'. Thus, in the particular case of the elderly and people with disabilities, the African Charter specifically guarantees the right of social protection. A manifest weakness of the African Charter is the omission of other deserving categories for social protection guarantees such as the desperately poor, the unemployed, asylum seekers and refugees. South Africa is a party to, and therefore bound by, the provisions of the African Charter on social protection.

Another important instrument is the 2003 Charter of Fundamental Social Rights in SADC. Article 10 of the Charter states:

- (1) Member states shall create an enabling environment so that every worker in the region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits.
- (2) Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and assistance.

Olivier observes that the 'Charter makes comprehensive provision for the establishment of harmonised programmes of social security

⁴⁴ See *Filartiga v Pena Irala* 19 ILM 966 (1980). See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) Advisory Opinion*, ICJ Reports (1971) (Namibia Opinion) 16; *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa), Second Phase* 37 ILR (1966) 243 & 454.

throughout the region'.⁴⁵ The Charter contains provisions relating to the social protection of both workers and those who are not employed. He further states that, according to the Charter, state parties are enjoined to create an enabling environment such that every worker in the SADC region shall, regardless of status and the type of employment, have a right to adequate social protection. It further requires that those that are unable to either enter or re-enter the labour market and have no means of subsistence, should receive sufficient resources and social assistance.⁴⁶ The faithful implementation of obligations under this Charter would revolutionise the social protection regime in SADC. The import of article 10(1) seems to suggest that no discrimination is allowed with regard to social protection for workers, including migrant workers, irrespective of their immigration status. One problem with this provision is that it ties social protection to employment. Be that as it may, however, it is clear that a large majority of migrants fall into the category of workers and hence the strong relevance of this provision.

In the *Khosa* case,⁴⁷ the Constitutional Court was confronted with the question as to whether legislative provisions under the Social Assistance Act 59 of 1992 (since replaced with the Social Assistance Act 13 of 2004), that excluded permanent resident immigrants from accessing social security benefits under section 27(1)(c) of the Constitution, were consistent with the text of the Constitution. The Court declared the impugned provisions unconstitutional. Mokgoro J, delivering the judgment of the Court, stated:

The right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.

Millard argues that the *Khosa* case 'signalled a departure from the introspective and nationalistic approach towards social assistance that previously characterised the South African system'.⁴⁸ The Social Assistance Act (2004) was passed as a regulatory framework to facilitate the implementation of the right to social security. The Act, however, applies

⁴⁵ M Olivier 'Social protection in the SADC region: Opportunities and challenges' (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 377-402 386.

⁴⁶ Olivier (n 45 above) 386-387.

⁴⁷ *Khosa* (n 42 above).

⁴⁸ D Millard 'Migration and the portability of social security benefits: The position of non-citizens in the Southern African Development Community' (2008) 8 *African Human Rights Law Journal* 37 42.

to citizens and permanent residents only.⁴⁹ Dekker argues that '[a]lthough South Africa has a fairly well-developed social security system for a developing country, the system suffers from many deficiencies'. As an instance, he states that the system 'is in fact not comprehensive and many categories of people are excluded from its protective scope'. Millard identifies the position of non-nationals as one of the weak aspects of South Africa's social security system; stating that apart from⁵⁰

some exceptions for foreigners with permanent residence status, non-nationals are generally excluded from social security in South Africa. This is particularly evident in social insurance in South Africa. As far as employment-based schemes are concerned, entitlement to benefits mainly depends on employee-status. It follows that only those who have permanent residence, or whose stay in the country is otherwise legal, may qualify to be 'employees' in terms of the unemployment insurance Act or the Occupational Injuries Act.

He then observes that the Road Accident Fund is the only fund that is both not premised on employment, as well as not dependent on the nationality of the claimant.⁵¹

All in all, it is clear that social protection is a guaranteed fundamental human right in South Africa. The enjoyment of the right, however, as discussed above, is beset with multiple challenges. In light of these challenges, migrants often find themselves in a high-risk and vulnerable situation. Finding coping mechanisms in such an environment against livelihood risks and vulnerabilities in order to enhance their social status and to ensure a decent livelihood in dignity for themselves and their families is bound to be an arduous task. Dekker aptly states that⁵²

[i]n order to financially sustain themselves, those not covered by formal social security have developed their own survival strategies. These survival strategies can be labelled as informal social security and exhibit elements of, and reveal similarities to, concepts such as social assistance and social insurance. It can therefore be stated that, in South Africa, formal social

⁴⁹ See sec 5(1)(c) of the Act. The Act does, however, grant the Minister responsible powers to prescribe some categories of persons that might also benefit from the provisions of the Act. In the case of *Government of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC), the Constitutional Court of South Africa, elucidating on state obligations in respect of socio-economic rights generally (of which formal social protection measures form part), and the right to housing, in particular, stated that '[a] society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality ... Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril should not be ignored by the measures aimed at achieving realisation of the right. [T]he Constitution requires that everyone must be treated with care and concern. If the measures ... fail to respond to the needs of those most desperate, they may not pass the [reasonableness] test' (para 44).

⁵⁰ Millard (n 48 above) 41.

⁵¹ As above.

⁵² Dekker (n 8 above) 6.

security and informal social security are both systems which provide social protection.

In the next section, the article analyses some of the findings of the field survey conducted, and draws conclusions against the theoretical framework of social security and social protection in South Africa and Malawi as discussed.

4 Findings and analysis

4.1 General information

A total of 44 Malawian migrants were interviewed from various areas in Johannesburg. These areas included Johannesburg CBD, Cresta, Randburg, Forsdburg, Brixton, Diepsloot, Brixton, Hillbrow, Alexandra, Thembisa, Roodepoort, Mayfair and Melville. In terms of gender, the large majority of respondents were men. Their ages ranged from 18 years (the youngest) to 53 years (the oldest). Most of the respondents were relatively young, in their mid-twenties to early thirties. One thing that is therefore immediately apparent is that most Malawian migrants fall in the most economically-active and productive age group with the most pressing socio-economic obligations.

In terms of family life, a large majority of the respondents were married and had children. Strikingly, the overwhelming majority of the respondents who had children indicated that they had left their children in Malawi. One of the major factors leading to this situation, according to most of them, is the general lack of access to educational facilities in South Africa. This shows a direct link between exclusion of migrants from some forms of social protection with the splitting of families. Such splitting of families implicates the right to family life of the migrants concerned. In the case of *Dawood and Others v Minister of Home Affairs and Others*,⁵³ O'Regan J observed that the institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of society and bear an important role in the rearing of children,⁵⁴ and that although there is no provision in the Constitution guaranteeing the right, a number of constitutional rights might still be implicated and that 'the primary right implicated is ... the right to dignity'.⁵⁵ Thus, the right to family life is recognised and protected under the South African Constitution, and the state has an obligation to respect, protect and promote this right. The state therefore is under an obligation to

⁵³ 2000 3 SA 936.

⁵⁴ Para 36.

⁵⁵ The right to human dignity is protected under sec 10 of the Constitution of South Africa.

ensure that this right is respected, protected and promoted through its policies and practices.⁵⁶

With regard to levels of education, most of the respondents had a high school education, followed by those with a primary school education, and a relatively small number who had tertiary or higher education. It would therefore appear that most Malawian migrants in Johannesburg are relatively low-skilled people. The findings also, albeit with a small sample, seem to suggest that there is higher unemployment in Malawi, in respect of people with less than tertiary education, than in South Africa, and this largely explains why most of the migrants fall into this education bracket. Following research conducted in South Africa in 2007, Sward and Sabates-Wheeler found that, upon comparison of the socio-economic conditions of Malawians who had migrated to the United Kingdom with those that had migrated to South Africa, '[t]here were significant socio-economic differences between the two groups ... as those who migrated to South Africa were typically from poorer families and had lower levels of education and occupational status than those who moved to the UK'. This study therefore confirms these previous research findings in so far as the socio-economic conditions of the average Malawian migrant in Johannesburg are concerned.⁵⁷

The result is that due to their low socio-economic station in life, most Malawian migrants in Johannesburg are very prone to socio-economic shocks and hence in need of social protection avenues to hedge against the risks and vulnerabilities in this regard. It is therefore pertinent that this study explores the social protection avenues that they have.

4.2 Residence status

Malawians living in Johannesburg fall into various residence categories. Although a large majority of Malawian migrants in the study were staying in Johannesburg on expired one month visitors' permits, there was still a significant representation of those in other residence categories. These included permanent residents, work permit holders, study permit holders, visitors' permit holders (for dependants of those on either work or study permits), asylum seekers and recognised refugees. For those on expired one month visitors' permits, some of these permits had been expired for several years. No respondent, however, indicated that they had entered South Africa illegally or undocumented. In relation to those that claimed to be asylum seekers or recognised refugees, it is interesting that when the respondents were asked the reasons for coming to South Africa, none indicated that they fled from actual or potential persecution in Malawi which would ground a claim for

⁵⁶ Sec 7(2) of the Constitution.

⁵⁷ J Sward & R Sabates-Wheeler 'Social protection of migrants from the global south: Protection gaps and strategies to "self-insure"' Development Research Centre on Migration, Globalisation and Poverty: Briefing Paper 14 (2008) http://www.migrationdrc.org/publications/briefing_papers/BP14.pdf (accessed 12 March 2009).

refugeehood. On further engagement with some of the 'asylum seekers', it emerged that they simply adverted to the asylum procedure in order to regularise their stay in South Africa and to be able to secure more formal and better jobs.

Thus, it appears that the asylum procedure is being used by some migrants as a way of mitigating the effects of the socio-economic exclusions that they face, in addition to using the procedure as a hedge against deportation. It, however, needs to be emphasised that, considering that this was a relatively small sample survey, there might be some Malawian migrants who have genuine asylum claims within the terms of the Refugees Act of 1998.

4.3 Reasons for migration

As stated above, the overwhelming majority of respondents cited economic hardships in Malawi, in particular scarcity of jobs or very poor pay in instances where they were previously employed, as reasons for migrating to South Africa. There was a general feeling that life in South Africa was better than in Malawi. Most of the migrants already had networks such as friends or relatives in South Africa when they migrated. The other reasons for coming to Johannesburg were to join family and to study. A few indicated that they had previously been deported and had returned to South Africa. They cited as reasons for their return the harsh economic conditions in Malawi that were comparatively much worse than in South Africa, even after factoring in all the risks and vulnerabilities associated with being an African foreigner in South Africa.

In summary, therefore, it may be concluded that most of the Malawian migrants moved to South Africa as a social protection strategy.⁵⁸ This is also illustrated further by the regular remittances they send to Malawi, and investments that they are making pending their return. This is consistent with Bloch's statement that migration to South Africa is a well-established household poverty reduction strategy in Southern Africa,⁵⁹ as well as Dekker's proposition that informal social protection arrangements rely heavily on principles of reciprocity and solidarity between those in the sending region or country, and those in the host region or country.

4.4 Duration of stay

Most of the respondents were fairly new migrants to South Africa, and a large proportion had been in the country for less than two years. Regarding their plans of staying in South Africa, many respondents indicated that their intentions of staying in South Africa were short term only. As shown earlier, most indicated that they had left their

⁵⁸ Sabates-Wheeler & Waite (n 24 above).

⁵⁹ Bloch (n 1 above).

families behind and that their reason for coming to South Africa was to accumulate sufficient funds or resources that would provide them with a stepping stone for running businesses and leading a good life back in Malawi. A permanently resident respondent, John Phiri,⁶⁰ interestingly indicated that he also had only short-term plans of further stay in South Africa. He stated:

My ID indicates that I am a non-citizen of RSA and that has led to my being denied opportunities of different types on many occasions. My lack of strong command of local languages also contributes to similar instances. I therefore do not plan on staying in South Africa for much longer. Although savings are generally impossible from my modest income, I am starting off slowly with a small business to raise funds, and I have already acquired land in Malawi.

His statement similarly reveals that his stay in South Africa is largely a social protection strategy. It also shows the existence of xenophobic undercurrents that even occasion social exclusion of permanently resident migrants from various services in the country to which they are legally entitled.

4.5 Access to employment and conditions of work

A large majority of the respondents were employed in the informal sector, while a few others indicated that they were self-employed. No respondent, however, said that they were unemployed. It would therefore appear that the level of unemployment among Malawian migrants in the city is significantly low. However, a large majority indicated that they had previously experienced unemployment. As a coping strategy during such hard times, with a few exceptions that indicated that they had to struggle by themselves, the overwhelming majority indicated that they were supported by relatives, friends or both during such periods. This is characteristic of informal social assistance as a form of social protection, and fits into the description of informal social security as discussed by Dekker and Olivier and others above. Thus it emerges, consistent with Dekker and Olivier's propositions, that these informal social protection avenues are two-pronged: (a) community-based (friends); and (b) kinship-based (relatives).

Very few among those employed, and these were exclusively those employed in the formal sector, indicated that they had concluded formal contracts or any form of written employment contract with their employers. Most complained of being underpaid as compared to South Africans doing the same job. When asked why they could not demand better pay or fair and equal treatment, the reply was that they were foreigners with no proper immigration papers and hence they could be summarily dismissed and/or reported to the police for deportation at any time if they made such attempts.

⁶⁰ Not his real name.

The few who indicated that they had concluded formal contracts and that their employers complied with equal treatment labour laws were the more highly-educated ones with proper immigration permits. Upon further interrogation, none of the respondents indicated that they belonged to any form of labour union. Most either feared that they would not be admitted to membership by reason of not having proper immigration papers, or they feared that they would be summarily dismissed by their employers once it was discovered that they had joined a labour union since they had no proper immigration documents. A permanently resident migrant, addressing the same issue, said that 'perhaps as a non-citizen, there is this sense of not belonging'.

Thus, the findings generally revealed that the illegal residence status for most of the migrants exposed them to exploitation on the labour market, and exclusion from participation in some activities necessary to protect or promote their rights, such as participation in labour or trade union activity. The general 'sense of not belonging' brought out by the permanently resident respondent above, however, also reveals that some of the exclusions are the result of more complex social phenomena other than simple issues of residential or immigration status. They pervade the general experience of the migrant and seem deeply rooted in xenophobic attitudes prevalent in the host society as well as perhaps a lack of motivation or will to integrate on the part of the migrants.

A general lack of knowledge about their rights is another factor that significantly contributes to the exploitative labour practices that they are subjected to. For instance, none of the respondents were previously aware that they could as well present an employment dispute with an employer to the Commissioner for Conciliation, Mediation and Arbitration (CCMA) irrespective of their immigration status in the country. An illustrative case on this point is the *Discovery Health* case,⁶¹ where the Court held that the CCMA had jurisdiction on various grounds. Among other things, it held that if section 38(1) of the Immigration Act, 2002 were to render a contract of employment concluded with a foreign national who does not possess a work permit void, it would not be difficult to imagine the inequitable consequences that might flow from the provision, particularly when persons without the required authorisation accept work in circumstances where their life choices are limited and where they are powerless on account of their unauthorised engagement to initiate any right of recourse against those who engage them.⁶²

This passage particularly resonates with the circumstances in which most of the respondents in this survey found themselves. The Court

⁶¹ See n 27 above.

⁶² *Discovery Health* case (n 27 above) para 30.

was mindful that others would interpret its position as condoning its illegality and justified itself by saying, among other things, that⁶³

[i]f employers were aware that foreign nationals who do not have work permits had rights of recourse to the LRA and the BCEA (and thereby to CCMA and to this Court) they would be less likely to breach s 38(1) of the Immigration Act by entering into contracts in these circumstances.

As much as the position taken by the Court in this case is such that it might eventually lead to declining job opportunities for illegally-resident foreign migrants in South Africa, what it does is to affirm that once employed, foreign migrants are entitled to labour law protection just like any other employee in the country. Interpreted liberally, this position at law could even assist such employees to recover their employment dues and have them sent to them in their home countries in the event of deportation.

A number of Malawians personally known to the author have previously been deported from South Africa and all of them state that it is practically impossible to recover their outstanding employment dues once deported, and frequently they forfeit all their property acquisitions, except in a few cases where friends or relatives are able to organise to send the property to the owner in Malawi. They were unaware of any formal protective measures they could take. A lack of knowledge therefore excluded them from formal social protection, albeit very limited, legally available to them under South African law.

4.6 Access to health care

Access to health care services is a constitutional right in South Africa, and is guaranteed for everyone.⁶⁴ Further, the Constitution provides in section 27(3) that no one may be refused emergency medical treatment. Thus, from a constitutional standpoint, both the more general right of access to health care services and the specific right to emergency medical treatment are guaranteed for everyone irrespective of status such as nationality or immigration status.

From the survey, a large majority of the respondents stated that they benefited from or had access to free health services in Malawi. This was in sharp contrast with their experiences in South Africa as most of them indicated difficulties in accessing the public health care system. Thus, only a few indicated that they were able to access public health services at a small fee, but they complained that they faced xenophobic hostility from health care personnel. Some indicated that they had been turned back from public hospitals by reason of a lack of South African identity documents. From a constitutional perspective, it seems clear that a denial of access to health care services on account of a lack of a South African identity document or a

⁶³ *Discovery Health* case (n 27 above) para 33.

⁶⁴ See sec 27(1)(a) of the Constitution.

valid permit is inconsistent with section 27(1)(a) of the Constitution. The study here also reveals a significant lack of knowledge of their rights among Malawian migrants in this regard. Many respondents indicated that in the event of illness or other need for health-related attention, they resorted to private clinics and that, normally, where someone is in financial need, friends and relatives contribute towards the cost of treatment. This practice is illustrative of an extensive and well-established pattern of informal networks of social assistance based on nationality and kinship, as a survival strategy and hence a form of social protection in an environment of exclusion from access to health care.⁶⁵

It is apparent, however, that the practice of refusing foreign migrants who do not possess valid South African identity documents access to health care services is not officially sanctioned by the authorities. Thus, in a memorandum from the National Department of Health in Pretoria, dated 15 February 2007, the Department advised provincial departments that

[p]atients should not be denied ART [anti-retroviral treatment] because they do not have an ID if all issues affecting adherence have been addressed and the treatment team is convinced that the patient stands to benefit from the intervention.

It appears, however, that the practice of exclusion on account of identity documents continued, at least in the Gauteng region, prompting the Gauteng Department of Health to issue another memorandum to hospitals and health care providers dated 4 April 2008, stating that it had come to its attention that the practice of excluding undocumented or irregular migrants from public health care services was continuing and that it was 'not acceptable'. A directive was therefore issued that 'no patient should be denied access to any health care service, including access to anti-retrovirals irrespective of whether they have a South African identification document or not'. From this survey, however, it would appear that such exclusions from access are still continuing. As other commentators have said, '[a]s with many aspects of these debates on rights entitlement, the policy may look good, but it simply does not translate well in practice'.⁶⁶ Landau criticises these exclusionary practices, stating that '[p]roviding health care for refugees, asylum seekers and other non-nationals is a critical public health concern', and arguing that the 'denial of health care can lead to the spread of infection and disease to migrants and communities in which they live. Apart from being a violation of human

⁶⁵ Dekker (n 8 above).

⁶⁶ See Belvedere *et al* (n 39 above).

rights and dignity, illness potentially limits the contributions of all South Africans.¹⁶⁷

4.7 Access to education

Section 29 of the Constitution guarantees everyone the right to basic education, including adult basic education. Further, the South African Schools Act⁶⁸ provides for compulsory school attendance for children between the ages of seven and 15 years. Section 3(1) of the Act imposes a duty on every parent (including a guardian) to cause every learner within that age bracket for whom he or she is responsible to attend school from the first day of the school year. In addition, section 5(3)(a) of the same Act provides that '[n]o learner may be refused admission to a public school on the grounds that his parent is unable to pay or has not paid ... school fees'. From these provisions, it is clear that the law requires all children of the defined school-going age to attend school. This includes migrant children.

The study reveals that, just as in the case of access to health services, most Malawian migrants in Johannesburg (or their children and/or dependants) have previously benefited from the free primary education policy of the Malawian government. By contrast, they reported that their South African experience was fundamentally different with no respondent indicating that they had access to free primary education. Only a small number indicated that their children could access fee-based public education or private education. In fact, it emerged that exclusion from the public education system, and the high cost of enrolment in the few private schools that permit admission irrespective of residence permit documentation, largely explain the large number of respondents interviewed who indicated that their children were attending school in Malawi. It is interesting that, whilst most respondents are able to access at least private health care in South Africa irrespective of the status of their stay in the country, it is very difficult for them to enrol their children in schools, including private schools. On further interrogation, a number of respondents indicated that, whilst it is possible for children to be admitted to some private schools, they still needed a formal South African identity document in order to be registered for purposes of the matric examinations. Thus, some stated that their children had been forced to change surnames so as to appear as if they are children of either South Africans or Malawians with South African identity documents.

It is submitted that changing or the prospect of changing children's identities under these circumstances clearly violates their rights to a given name and human dignity. Thus, access to education

⁶⁷ LB Landau 'Regional integration, protection and migration policy challenges in Southern Africa' in Handmaker *et al* (n 2 above) 37.

⁶⁸ Act 84 of 1996.

for undocumented immigrants in South Africa, or the lack thereof, appears to be a major exclusion for Malawian migrants from one of the essential elements of the 'basic social security package' within the social protection framework.⁶⁹ The exclusion seems to be a matter of practice/implementation, rather than normative (that is, as a result of law or state policy). It is a practice that violates, among others, the provisions of the South African Schools Act of 1996.

Universal free primary education has become increasingly recognised as a fundamental and non-derogable right in the international arena. It is therefore strongly recommended that the South African government urgently institutes an inquiry into the question as to the accessibility of basic education for migrant children in South Africa, with a view to ensuring that there is, in practice, universal and compulsory basic education for all children as provided for in the Constitution, the South African Schools Act, as well as international treaties such as the Convention on the Rights of the Child of 1989 (CRC).

4.8 Safety net social assistance

Safety net grants, for purposes of the survey, included child protection grants, disability grants, old age grants and other direct financial or material provisioning from the state with regard to social security. In the South African context, these are generally provided for under section 4 of the Social Assistance Act of 2004. All of the grants mentioned in section 4 are tied to citizenship and, with the decision in the *Khosa* case, they extend to permanent residents. However, there is provision for the Minister to make exceptions under section 5(1)(c) of the Act, with the concurrence of the Minister of Finance, and to extend the application of the Act to other groups or categories of persons. In addition, section 13 of the Act provides that the Minister may provide social relief of distress to a person who qualifies for such relief as may be prescribed. Again this provision is not couched in terms that restrict its application to citizens (and permanent residents).

In terms of the survey, no respondent had been able to access the child support grant either in Malawi or South Africa. These provisions are simply not available in Malawi, whether by requirement of law or through deliberate government policy. It is worth mentioning, however, that under the Children and Young Persons Act,⁷⁰ there is provision for what are referred to as approved schools that were set up to, among other things, provide for the reception, education and vocational training of children in need of care and protection.⁷¹ This is a form of social protection for children, but it is noteworthy that access

⁶⁹ See ILO (n 3 above).

⁷⁰ Cap 26:03 Laws of Malawi.

⁷¹ Secs 34 & 35 of the Act (n 70 above).

is very limited as there is only one such school at present.⁷² In South Africa, on the other hand, the state has a scheme for the provision of social assistance grants such as child support, disability and old age grants. Malawian (and other) migrants, however, with the exception of permanent residents, are excluded from the scheme. In the survey herein, all the respondents stated that they did not and could not benefit from the social assistance schemes on account of nationality. Such exclusion is attributable to statutory requirements that limit the right to social security for everyone as guaranteed under section 27(1)(c) of the Constitution, by excluding all non-nationals, apart from permanent residents, from accessing these and other social security grants. In addition, the only permanent resident interviewed was a middle-class income earner who did not qualify for the grants according to the means criteria for accessing the grants. No person with disabilities or elderly person (of the age that qualified for such grants) was interviewed or responded to the questionnaire. However, a number of interviewees indicated that in so far as one does not have a South African identity document, it is practically impossible for one to access any of the social security grants. However, as has been shown above, there are some flexibilities built into the Social Assistance Act based on which the Minister may make social protection provision for groups of migrants in need or in distress. It would appear that it was on the basis of these flexibilities that the South African government made provision for the victims of the xenophobic attacks of May 2008. However, the problem with reliance on such ministerial discretion is that it does not amount to a claimable right on the part of the migrants. It seems to be a measure that would be dependent on, amongst others, agitation from lobby groups.

In Malawi, by contrast, there is no scheme of social assistance grants for people with disabilities. However, under the Handicapped Persons Act,⁷³ free education and vocational training is provided to people with disabilities under the auspices of the Malawi Council for the Handicapped (MACOHA) that is established under the Act. Upon completion of their training, MACOHA provides the trainees, when funds permit, with starter pack tool kits to assist them to start small-scale skills-based businesses. This, it is submitted, is an important social protection measure for people with disabilities, which generally migrant workers with disabilities in South Africa might not get unless they acquire permanent residence status. The weakness with the MACOHA scheme is that it is rather irregular due to insufficient and unstable funding from government. It would appear that a major problem is the lack of a rights-based approach to the importance of MACOHA on the part of the Malawi government.

⁷² Chilwa Approved School in Zomba.

⁷³ Cap 33:02 Laws of Malawi.

All in all, it would appear that formal social protection provisioning for Malawian migrants is almost as non-existent in practice in South Africa as it is in Malawi. The difference lies perhaps in the fact that the informal networks that provide informal social protection are more sustainable in Malawi due to a wider network of the extended family than they are in South Africa where the connection is largely community (nationality)-based rather than stronger kinship-based systems.

4.9 Social protection in situations of desperate need

Under this heading, the study sought to ascertain whether the respondents were aware of any measures that the South African government takes or might take in the event that they find themselves in circumstances of desperate need. None of the respondents indicated that they had access to any government safety net scheme designed to mitigate the impact of extreme poverty or any circumstances of desperate need in South Africa. Such situations include unemployment, homelessness, hospitalisation and funerals, among others. The same was generally said about the respondents' experiences in Malawi. As a way of dealing with this challenge, most of the respondents indicated that when such a situation occurs, or if it is to occur, they fall or would fall back on informal family or community networks of Malawians who normally help out until the situation improves. In the event of the problem persisting, for instance unemployment because of illness, the common practice, according to most interviewees, is to send them back to Malawi. This is consistent with Dekker's assertion that informal social security is not in itself sustainably reliable and that it necessarily needs to be augmented with formal measures. Only a few respondents, however, indicated that they belonged to informal but well-organised associations, to which they make regular modest contributions, and that when adverse situations arise, these associations assist.

A few others indicated that they would either rely on personal savings to deal with any such situation, or that they were not sure as to the strategy they would adopt in such a situation.

It is submitted, however, that according to the reasonability test set by the Constitutional Court in the *Grootboom* case,⁷⁴ government policies that exclude provision for migrants who are in situations of desperate need, irrespective of their immigration status, are unreasonable and hence fall foul of section 27(1)(c) of the Constitution.⁷⁵

4.10 Remittances and investments

The overwhelming majority of respondents indicated that they sent money (remittances) to Malawi, albeit at widely varying intervals,

⁷⁴ n 49 above.

⁷⁵ As above.

ranging from monthly to yearly or upon request, among others. The money is sent for varying purposes, including general support of their family members, investment purposes such as buying land or building houses, and maintaining savings in Malawi, either to hedge against the prospect of deportation that normally results in migrants forfeiting all their property and savings in South Africa, whilst others were simply accumulating savings so that they would have finances to enable them to pursue a decent livelihood upon return to Malawi since most of them did not have long-term intentions of settling in South Africa. The overall picture thus further exemplifies the fact that migration to South Africa is a well-established social protection strategy for many Malawians.

Sabates-Wheeler and Waite state that '[t]he economics of migration literature provides a framework for understanding how migration may be conceptualised as a social protection strategy ... insurance and investment [are] the two main alternative motivations for migrants to send remittances back to their families'.⁷⁶

From the above findings on remittances it is clear that the respondents are seeking to self-insure in the event of a shock such as sudden deportation, or to invest as a way of reducing poverty and its associated vulnerabilities or simply to enhance their living standards.

5 Conclusion

This article has shown that the primary reason for the migration of most Malawian migrants to Johannesburg is the search for jobs and other economic opportunities. The article demonstrates that most Malawian migrants are either unskilled or semi-skilled and thus very vulnerable to socio-economic shocks. This exposes them to risks that require proper social protection measures to hedge against. The study has further revealed that there are both institutionalised/formal, as well as practical, exclusions of Malawian migrants in Johannesburg from the provision of basic social security. Institutionalised/formal exclusions are manifested through such schemes as social assistance. Practical exclusions are manifested in areas such as access to public health care services and access to public education where, notwithstanding otherwise inclusive legislation, the practical experience for most migrants is that of exclusion. The result is that migrants generally fall back on informal social assistance networks in order to survive in hard times. This is in sharp contrast with the experiences of these migrants when in Malawi, particularly in the areas of access to health and basic education. In the *Khosa* case, the Court recognised the existence of these informal social protection networks, stating that the exclusion of people 'in need of social-security programmes forces them into relationships of

⁷⁶ Sabates-Wheeler & Waite (n 24 above).

dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa. These families or dependants ... may be in need of social assistance themselves.⁷⁷ The Court further observed that the denial of welfare benefits therefore impacted not only on those without other means of support, but also on the families, friends and communities with whom they have contact.⁷⁸ The Court's analysis is borne out by the survey findings as most of the people who provide welfare in the event of a fellow migrant finding himself or herself in desperate need are themselves very low income earners who are very vulnerable to socio-economic shocks and risks. There is also extensive formal exclusion of these migrants from the provision of contingency-based assistance for the ultra-poor or vulnerable, such as child support, disability and old-age grants, as well as social relief of distress. However, it was found that none of the respondents had access to these in Malawi either.

As a way of preventing threats to livelihood security, Malawian migrants generally tend to build social networks that provide a form of informal social insurance and/or assistance. These, in the short term, seem to provide relatively effective coping social protection strategies in difficult times. They are, however, not sustainable in the long term. In addition, most of the migrants send remittances back to Malawi that serve various purposes. These include supporting families left behind, personal investments as a way to self-insure against the shock of deportation, and medium to long-term investments for the future. Thus, this falls within Sabates-Wheeler's paradigm of the dichotomous dimensions of social protection in the context of migration, namely, migration as a phenomenon that exposes the migrant to risks and vulnerabilities necessitating appropriate hedges, and migration as a social protection strategy to reduce pre-existing poverty or economic-related risks and vulnerabilities in home countries, in the instant case, Malawi.⁷⁹

Whilst this study has focused on South Africa and Malawi, and specifically addressed the situation of Malawian migrants in Johannesburg, a couple of points are worth making: First, as eloquently expressed by Dekker, informal social security frameworks are generally uniform in East and Southern Africa, and this in turn entails that findings from country-specific studies still have strong relevance in other countries in the region.⁸⁰ In this regard, there is everything to suggest that the informal social protection strategies adopted by Malawian migrants in Johannesburg are generally applicable to other migrant groups both in South Africa and elsewhere in East and Southern Africa. Secondly,

⁷⁷ *Khosa* (n 42 above) para 76.

⁷⁸ As above.

⁷⁹ Sabates-Wheeler & Waite (n 24 above).

⁸⁰ Dekker (n 8 above).

some of the problems facing migrant workers, such as a general lack of portability of social security benefits for non-nationals, are common throughout the region.⁸¹ The ESCR Committee has specifically emphasised the obligation on the part of states to ensure that such benefits are portable.⁸²

The article also demonstrates that, whereas in South Africa the social protection frameworks for the elderly and people with disabilities are formalised and institutionalised, consistent with the requirements under article 18(4) of the African Charter, the situation in Malawi remains rather tenuous. Whilst some formal provision is made in respect of people with disabilities under the Handicapped Persons Act, the provision remains largely unsatisfactory. In respect of the elderly, no specific provision is made in terms of social protection.

The position in Malawi is similar to that obtaining in many African states. What emerges therefore is that South Africa, with all its social protection weaknesses as discussed in this article, remains a pacesetter on the African continent in setting up normative standards that demonstrate a commitment to taking progressive steps towards the full realisation of social protection generally, and most specifically for marginalised groups such as the elderly and people with disabilities. South Africa's approach is broadly consistent with its social protection obligations under the Universal Declaration and the African Charter, among other important instruments, and it sets a good example for Africa.

⁸¹ Millard (n 48 above).

⁸² ESCR Committee General Comment 19 (n 17 above) paras 36-38.

The utility of environmental rights to sustainable development in Zimbabwe: A contribution to the constitutional reform debate

Tumai Murombo*

Senior Lecturer, School of Law, University of the Witwatersrand, South Africa

Summary

The current economic situation in Zimbabwe was caused by a number of factors, including legitimate attempts to redress historical imbalances in the ownership of land. Land is part of the natural resources of a country and without sustainable management and use of natural resources, a country may not be able to promote and fulfil other human rights. By now, Zimbabwe could have been almost out of its economic whirlpool if only it was able to sustainably manage its natural resources, in spirit of the state's trusteeship over natural resources. The constitutional reform process in Zimbabwe presents a timely opportunity to lobby for the inclusion of environmental rights in the new Constitution. It is crucial to understand why such rights should be included and what benefit they may bring to the people of Zimbabwe. Environmental rights are crucial to sustainable development and the fulfilment of other human rights, especially socio-economic rights, that depend on the availability of resources. All human rights are therefore interdependent and complementary. Nevertheless, environmental rights will only thrive in an environment where the rule of law and good governance are respected. By incorporating environmental rights in the new Constitution, Zimbabwe will be following not only developments in South Africa, but also trends in international environmental law and the regional protection of human rights, especially in Africa.

* LLB (Hons) (Zimbabwe), LLM (Cape Town), LLM (Pace NY); Tumai.Murombo@wits.ac.za. An earlier draft of this paper was presented at the 7th Annual Colloquium of the IUCN Academy on Environmental Law, 1-5 November 2009, held in Wuhan, China. Comments and feedback from conference participants are gratefully acknowledged.

1 Introduction

The constitutional protection of environmental rights is one of the key strategies towards achieving sustainable development and environmental protection in developing countries. However, the conceptual and legal foundations of this strategy are not always clearly understood. The constitutional reform debate in Zimbabwe must include discourse on the constitutional protection of environmental rights, among other human rights, especially social, economic and cultural rights, given developments in South Africa and other jurisdictions. Ultimately, however, the efficacy of constitutional environmental rights depends on a number of other variables, including the social, economic, cultural and political context, good governance, the rule of law as well as the effective implementation and enforcement of environmental laws.

Evidently, the entrenchment of environmental rights¹ in national constitutions is the norm worldwide as nations become conscious of the need to protect the environment through effective legal methods. This ideological shift² is further pushed by, and interacts with, the international environmental movement which has seen the propagation of several international conventions and declarations. These instruments have shaped and given impetus to domestic environmental law.³

Developments in environmental law and policy place the environment in a proper legal framework to enable a country's citizens to effectively participate in the sustainable and equitable exploitation of natural resources, as well as their conservation. At the root of all this is a set of emerging norms and values that have materialised from the policy fermentation that shaped the direction of environmental law. Sustainable development is one such emerging concept, the essential elements of which can arguably be said to contain the justification for the heightened awareness to protect the environment without stifling reasonable socio-economic development. The perceived antithetical relationship between development and the environment has seen the environment being trumped by developmental interests. Sustain-

¹ An environmental right is a working term which has been devised for the purposes of this research. It does not reflect on the nature of the right advocated for, that is, it does not reflect on whether the right argued for should be a right to the environment or a *duty* to protect the environment imposed on human beings.

² *Director: Mineral Development, Gauteng Region & Sasol Mining (Pty) Ltd v Save the Vaal Environment* 1999 2 SA 709 (SCA) para 20; *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Dept of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) para 57.

³ These include the Stockholm Declaration of 1972; the World Conservation Strategy (WCS) prepared by the International Union for the Conservation of Nature (IUCN) in 1980; the Brundtland Report 1987; the Rio Declaration and Agenda 21 produced by the Rio Summit in 1992. See P Sands *Principles of international environmental law* (2003) generally; and J Glazewski *Environmental law in South Africa* (2005) 29.

able development is thus seen as the tool to integrate these uneasy bedfellows.

In this article, I critically discuss the extent to which the constitutional protection of environmental rights in Zimbabwe, in the context of developments in South Africa and the region, may promote sustainable development.⁴ Zimbabwe still has a 'cease-fire'⁵ Constitution, the Bill of Rights of which is ineffective, shallow, and is honoured in the breach rather than in the observance. Zimbabweans are arguing for the constitutional reform process to be prioritised and it is therefore a good time to put the plight of environmental rights within the framework of this process.

I begin by hypothesising that, for environmental law to achieve its objective of environmental protection and sustainable development, it is necessary to constitutionally protect environmental rights.⁶ Secondly, I argue that, given the centrality of access to, and management of, natural resources to the Zimbabwean economic debacle, environmental law and policy become crucial to a successful economic resuscitation process. While the focus has been directed towards gross civil and political human rights violations, little attention has been paid to the role of natural resources management, including land, in resolving the Zimbabwean economic situation. I therefore seek to analyse the extent to which sustainable economic development and economic recovery are a result of the way in which the government manages the country's natural resources.

Next, I proffer a justification for environmental rights generally and in Zimbabwe, and then focus on the synergies between sustainable

⁴ And enjoyment of other human rights: D Shelton 'Human rights and the environment: Substantive rights' in M Fitzmaurice *et al* (eds) *Research handbook on international environmental law* (2010) 265.

⁵ By this it is meant that the 1979 Lancaster House Constitution was a document produced out of negotiations to end the liberation war, hence it contains many unfortunate compromises as Britain gave its former colonies constitutions which had little by way of human rights protection. The Zimbabwean Constitution has a Declaration of Rights which was effectively used by the Supreme Court in the late 1980s and early 1990s to advance human rights generally. See eg its application in *Catholic Commission for Justice and Peace v Attorney-General & Others* 1993 1 ZLR 242 (SC); *In re Munhumeso & Others* 1994 1 ZLR 49 (S); 1995 1 SA 551 (ZS); 1995 2 BCLR 125 (ZS); *Commissioner of Police v CFU* 2000 1 ZLR 503 (H); 2000 9 BCLR 956 (ZH); *Nyambirai v NSSA* 1995 2 ZLR 1 (S); 1996 1 SA 636 (ZS); 1995 9 BCLR 1221 (ZS), to name but a few. It does not have any provisions expressly guaranteeing the right to a decent environment.

⁶ First, the hypothesis is limited to developing countries because this article focuses on Southern Africa. Note, however, the still unsettled definitions of the notion of 'developed' and 'developing'. Secondly, it has been argued that most developed countries have established traditions of environmental management and may not need constitutionally-guaranteed environmental rights. This applies to countries like the United Kingdom and the United States of America. Note, however, that even in those countries there has been agitation for constitutional protection of environmental rights; see C Juma 'Private property, environment and constitutional change' in C Juma & JB Ojwang (eds) *In land we trust* (1996) 369.

use of natural resources and the protection of other human rights. By 'synergies' I emphasise that all human rights are interdependent and complementary.⁷ Environmental protection and the sustainable use of natural resources through the rights paradigm are illusions if other crucial human rights⁸ are not promoted and guaranteed. Similarly, these rights, central to healing and peace in Zimbabwe, remain moot without the proper management of natural resources to sustain better livelihoods. In the last section I discuss the constitutional *lacunae* and propose the current constitutional reform process as an opportunity to include environmental rights in Zimbabwean law.

2 Why environmental rights?

2.1 Justifying the constitutional protection of environmental rights

The problems highlighted above regarding the underestimation of the role of natural resources in the promotion and fulfilment of human rights are compounded if one looks at whether we should have environmental rights in the first place. Many arguments have been advanced against the inclusion of environmental rights in constitutions. These arguments have been varied and diverse.⁹ In brief, it has been argued that the concept of 'third generation' human rights *per se* brings confusion to the whole field of human rights.¹⁰ Its vagueness and indeterminacy are difficult to cure, so it is argued. Would such rights be justiciable?¹¹ Who would be

⁷ A Sachs *Protecting human rights in a new South Africa* (1991) 141, where he correctly writes that '[h]uman rights in the broadest sense are indivisible. When we breathe the air of freedom, we do not want to choke on fumes.' See also *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC) 1184; HJ Steiner & P Alston *International human rights in context: Law, politics and morals. Text and materials* (2000) 247.

⁸ Sachs (n 7 above).

⁹ See S Attapatu 'The right to a healthy life or the right to die polluted? The emergence of a human right to a healthy environment under international law' (2002) 16 *Tulane Environmental Law Journal* 65 113 (arguments against environmental rights); see also MR Anderson 'Human rights approaches to environmental protection: An overview' in AE Boyle & MR Anderson (eds) *Human rights approaches to environmental protection* (1996) 14; see also W Ncube *et al* 'Towards the constitutional protection of environmental rights in Zimbabwe' 1996 (13) *Zimbabwe Law Review* 97 101-102.

¹⁰ A Boyle 'The role of international human rights law in the protection of the environment' in Boyle & Anderson (n 9 above) 46.

¹¹ On the justiciability of socio-economic rights, see UN Committee on Economic, Social and Cultural Rights General Comment 9 (1998) UN Doc E/1999/22, Annex IV in Steiner & Alston (n 7 above) 276-277; see also *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744; 1996 10 BCLR 1253 (CC) para 78; and the *Grootboom* case (n 7 above). It is submitted that the *ratio* of these cases applies with equal force to the justiciability of environmental rights.

the right bearers and the duty bearers?¹² Some have argued that first and second generation rights¹³ can be extended to protect the environment without creating a new distinct environmental right. Indeed, this has been done in some jurisdictions,¹⁴ but we should not put the judiciary in this unenviable position of constitutional interpretation (or rather activism) when we can do better by expressly including environmental rights in a constitution. This has been done in many countries, including South Africa, without any particular constitutional legal disharmony.¹⁵

The basis upon which various scholars have rested their dislike of environmental rights cannot clearly be reduced to a single issue. The major problems, however, are essentially substantive as well as definitional and contextual. Should the right be substantive or procedural?¹⁶ Should it be a right given to inanimate objects or to human beings only, that is, should it be informed by an anthropocentric or ecological ideological outlook?¹⁷ Ultimately the question is: Why should the environment be constitutionally protected anyway? Are they really human rights?

¹² JG Merrills 'Environmental protection and human rights: Conceptual aspects' in Boyle & Anderson (n 9 above) 31-33.

¹³ Most of these arguments have been debunked and the focus is now on how to implement and enforce socio-economic and environmental rights.

¹⁴ Indian courts are well known for their activism in this regard: See the case of *Indian Council for Enviro-Legal Action v Union of India* 3 SC C 212 (1996) and many others. In Southern Africa, the Tanzanian High Court used the right to life to protect people from pollution arising from a dump site in the case of *Joseph D Kessy v Dar es Salaam City Council* Civil Case 29 of 1988. For a detailed analysis of these and other cases, see 'Constitutional environmental law: Giving force to fundamental principles in Africa' Environmental Law Institute (ELI) *Research Report* May 2000 16-17, especially 29 http://www.elistore.org/reports_detail.asp?ID=527 (accessed 31 March 2011). See also MR Anderson 'Individual rights to environmental protection in India' in Boyle & Anderson (n 9 above) 214-216; Shelton (n 4 above) 267.

¹⁵ Sec 24 of the South African Constitution, 1996.

¹⁶ Attapatu (n 9 above) who breaks environmental rights into 'substantive' and procedural environmental rights. Similarly, J Razzaque 'Human rights to a clean environment: Procedural rights' in Fitzmaurice (n 4 above) 284 discusses the right to participation, the right to formation and the right of access to justice as procedural environmental rights, when arguably these are established civil and political rights. This may be unhelpful and I argue that the better view is to look at the so-called procedural environmental rights as merely instances where existing civil and political rights can be used to advance, defend or vindicate substantive environmental rights.

¹⁷ Sec 24 of the South African Constitution Act. It, eg, grants the right to every person; however, it also places a *duty* on every person to protect the environment, that is, the right has horizontal application as between ordinary citizens or legal persons. Art 39 of the Constitution of the Republic of Madagascar provides that everyone has a duty to respect the environment. Can another person or an environmental NGO enforce this right to respect on behalf of the environment? Art 72 of the Mozambican Constitution of 1992 provides that all citizens have a duty to defend a balanced environment. The Mozambican provision, art 72, could arguably be an exception in this respect.

This brief historical overview serves to put this analysis in context. In many democracies the constitution is the supreme law of the land; it contains and outlines the identity and ethos of a people and provides for the essential aspects of a people's government and administrative systems and forms the basis for the whole legal system. The inclusion of environmental rights places the environment within its proper legal framework and shows a commitment to sustainable development.¹⁸ The old idea of viewing conservation as a peripheral luxury has given way to sustainable development and, as rightly pointed out:¹⁹

The aim [of environmental rights] is not to limit or stifle development but to ensure that development projects incorporate environmental criteria or environmental impact assessment with a view to ensuring that development is carried out within the framework which stresses the importance of environmental factors.

It has also been argued that constitutional inclusion not only ensures protection at the highest level of the law, but also that it places environmental issues at the same level of concern as other human rights. This submission is made on the basis of the acknowledged inter-dependence of rights generally.²⁰ It can be argued that the ranking of rights into a hierarchy should be avoided as it can serve as a stumbling block to a holistic approach to human rights protection, as has been acknowledged globally.²¹ Attapatu contends that, despite the Vienna Declaration's call to treat human rights as indivisible and interdependent:²²

Economic, social, and cultural rights are often seen by states as being subordinate to civil and political rights despite the fact that deprivation of socio-economic rights can and does give rise to a violation of civil and political rights. For people in developing countries, in particular, socio-economic rights have assumed a much greater significance than civil and political rights.

I argue that in the constitutional reform process in Zimbabwe, a hierarchical approach to human rights, with an overemphasis on civil and political rights, must be resisted.

¹⁸ Juma (n 6 above) 366-367.

¹⁹ Ncube (n 9 above) 102; see also *Fuel Retailers* case (n 2 above) para 59.

²⁰ On the indivisibility of rights, see art I(5) of the Vienna Declaration and Programme of Action, UN Conference on Human Rights, 14-25 July 1993 <http://www.unhcr.ch/html/menu5/wchr.htm> (accessed 15 August 2010); see to the contrary F du Bois 'Social justice and the judicial enforcement of environmental rights and duties' in Boyle & Anderson (n 9 above) 152-157, who argues that whatever their formulation, the implementation of environmental rights is fraught with conceptual difficulties.

²¹ JG Merrills 'Environmental rights' in D Bodansky *et al* (eds) *The Oxford handbook of international environmental law* (2007) 664-675: 'Nevertheless, the tendency for rights to be discussed, as it were, in separate compartments, which is encouraged by the practice already noted of formulating certain rights in rather vague terms, is to be deplored.'

²² Attapatu (n 9 above) 109.

While helpful, existing rights, such as the right to life, can never sufficiently ensure the full protection of the environment. The environment is not merely a matter of life and death; it is also a matter of justice and sustainability. A claim for a fair share in the resources of a country or a push towards sustainable development does not fit within the paradigm of life rights, as equally a claim to save a wetland like the Isimangaliso or the Vaal²³ cannot be premised on a right to life. To sum up:²⁴

Established human rights standards approach environmental questions obliquely, and lacking precision, provide clumsy tools for urgent environmental tasks. It may be argued that a comprehensive norm, which relates directly to environmental goods, is required.

The tangential applicability of existing human rights clearly makes them unsuitable, on their own, for environmental protection and sustainable development.²⁵ On the contrary, environmental protection is necessary for the achievement of all human rights.²⁶ It is submitted that the foundational character of environmental protection makes it necessary to have a specific environmental right.²⁷

In many countries, rights enshrined in the constitution have special enforcement procedures that are streamlined and stand clear of the traditional procedural hurdles present in many legal systems.²⁸ In the case of Zimbabwe, section 24(1) of the Constitution provides that any person complaining of a violation of any of his rights can use the special enforcement procedure provided therein. The procedure provides for quick redress. In the case of a detained person, it does away with the traditional problems associated with legal standing, although it leaves this snag intact in respect of persons not in detention. The procedural advantage of having an environmental right in the bill of rights is invaluable. In South Africa, sections 38 and 39 of the Constitution

²³ The Vaal is a South African wetland subject matter of litigation in *The Director: Mineral Development, Gauteng Region & Another v Save the Vaal Environment & Others* 1999 2 SA 709 (SCA).

²⁴ Anderson (n 9 above) 8-9.

²⁵ Eg, a number of cases have been brought before the European Court of Human Rights claiming a violation of the right to privacy and home life (art 8 European Convention on Human Rights) to achieve environmental objectives. See *Lopez-Ostra v Spain* (1994) EHRR 20, 227; *Guerra & 39 Others v Italy* (1998) EHRR 26, 357; and *Powell & Raynor v United Kingdom* (1990), EHRR 12, 335.

²⁶ Attapatu (n 9 above) 103.

²⁷ See PE Taylor 'From environmental to ecological human rights: A new dynamic in international law?' (1998) 10 *Georgetown International Environmental Law Review* 309.

²⁸ See sec 39 of the South African Constitution; see also T Murombo 'Strengthening *locus standi* in public interest environmental litigation: Has leadership moved from the United States to South Africa?' (2010) 6 *Law, Environment and Development Journal* 165; T Humby 'Reflections on the *Biowatch* dispute: Reviewing the fundamental rules of costs in the light of the needs of constitutional and/or public interest litigation' (2009) 12 *Potchefstroom Electronic Law Journal* 95 166.

provide for a category of persons who have legal standing to enforce rights in the bill of rights. These include:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

In the context of environmental law, this is augmented by section 32 of the National Environmental Management Act 107 of 1998 (NEMA) which, among others, gives standing to a person seeking to sue in the interests of protecting the environment. Undoubtedly, one is unlikely to find such wide provisions opening the doors of the courts to almost everyone with a cause of action premised on a violation of human rights in the whole of Southern Africa. The South African Constitution in this regard sounded the death knell of the common law *locus standi* doctrine as far as human rights are concerned. One can imagine the consequences if the environmental right in section 24 of the South African Constitution had been excluded from the Bill and put in an ordinary statute without special enforcement provisions.

At the international level, the trend towards the globalisation of human rights theory and the nature of national and global environmental problems make it imperative to look at environmental protection from a broader perspective than that of national politics.²⁹ The sequel of adopting a human rights approach to environmental protection is that global enforcement becomes relevant, especially in the case of Zimbabwe where allegations of gross human rights violations abound.³⁰ Enshrining environmental rights in the Constitution will enhance the level of protection afforded to the environment by opening the possibility of using international human rights systems against violations of such rights,³¹ an opportunity lacking in the arena of international environmental law.

²⁹ In this context, to effectively combat global warming and climate change, concerted and harmonised regional approaches are more effective than sporadic national initiatives. See W Scholtz 'The promotion of regional environmental security and Africa's common position on climate change' (2010) 10 *African Human Rights Law Journal* 1.

³⁰ Human Rights Watch *Diamonds in the rough: Human rights abuses in the Marange diamond fields of Zimbabwe* (2009) 28.

³¹ D Hunter *et al International environmental law and policy* (2002) 1284-1285. See also D Takacs 'The public trust doctrine, environmental human rights, and the future of private property' (2008) 16 *New York University Environmental Law Journal* 711 733, arguing that '[e]nvironmental human rights create more duties of each individual and the sovereigns who serve them not only not to usurp resources that are the object of these rights, but to affirmatively protect the natural objects and processes that form the basis of the rights'.

Finally, regional environmental trends have moved towards recognising environmental rights to promote sustainable development.³² At the regional level, the revised African Convention on the Conservation of Nature and Natural Resources recognises in article III the principle of peoples' environmental rights. The Southern African Development Community (SADC) treaty also provides that '[i]n accordance with the provisions of this treaty, member states agree to co-operate in the areas of ... natural resources and the environment'.³³ The relevance of these provisions is that member states' co-operation in environmental endeavours presupposes some degree of legal harmonisation, if not uniformity, in the ideologies and laws in the areas of co-operation. For instance, member states cannot effectively co-operate on trans-frontier conservation projects when other states do not have the necessary environmental laws, including environmental constitutional provisions.³⁴ The SADC treaty and the African Convention provisions echo and are complemented by the African Charter of Human and Peoples' Rights (African Charter) adopted at Banjul in 1981. Article 24 provides that '[a]ll peoples shall have a right to a *general satisfactory environment favourable to their development*'.³⁵ The African Union Constitutive Act further states as one of the objectives of the Union, the 'promot[ion] [of] sustainable development at the economic, social and cultural levels as well as the integration of African economies'.³⁶ Similarly, article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights provides that '[e]veryone shall have the right to live in a healthy environment and to have access to basic public services'.

These regional developments are noted here as they are important in rallying states towards embedding environmental rights in constitutions with a view to promoting sustainable development and combating global environmental problems that transcend political and

³² See generally Glazewski (n 3 above) 71.

³³ Art 24. The revised African Convention on the Conservation of Nature and Natural Resources was adopted the 11 July 2003 at the Assembly of the African Union; see also Draft Declaration on Human Rights and the Environment produced by the United Nations Human Rights Commission in 1994 <http://fletcher.tufts.edu/multi/www/1994-decl.html> (accessed 31 March 2011); and the Ksentini Report *Review of further developments in fields with which the sub-commission has been concerned human rights and the environment* E/CN.4/Sub.2/1994/9 <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/eeab2b6937bcaa18025675c005779c3?Opendocument> (accessed 28 March 2011).

³⁴ Scholtz (n 29 above).

³⁵ My emphasis. This right was, among other rights, at issue in the communication of *Social and Economic Rights Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), where the African Commission ruled that the activities of the Nigerian government were violating, among other rights, the environmental and developmental rights of the people of Ogoniland.

³⁶ Art 3(j) African Union Constitutive Act http://www.africa-union.org/root/au/about-act/constitutive_act_en.htm (accessed 28 March 2011).

geographical demarcations. They are also crucial for the management of shared resources like shared water courses, wildlife and straddling species. I argue that the regional trend towards the harmonisation of environmental laws and rights is a cogent reason why the environment should be protected in Zimbabwe's future Constitution.

One cannot overemphasise the legal advantages of including environmental rights in a constitution. This introductory discussion illustrates that it would be remiss for Zimbabweans not to include environmental rights in the new Constitution. But how will environmental rights assist Zimbabwe to pull out of its economic quagmire in the long term?

3 Environmental rights as a precondition for sustainable development

At this stage Zimbabwe needs laws and policies that support expedited economic recovery in a sustainable development framework. The preceding section generally deliberated on the advantages of having constitutionally-protected environmental rights. In this section, I look at whether environmental rights can underpin sustainable economic development in Zimbabwe.

Arguably, in international law the concept of sustainable development is still a norm of soft law³⁷ and has not attained the status of customary international law. Some have discounted the utility of the concept in international law discourse altogether.³⁸ They argue that the concept is only a 'soft law'³⁹ norm and state practice has not rendered it widely accepted and uniformly deployed.⁴⁰ It has also, in the extreme, been argued that the concept remains problematic, nebulous

³⁷ DB Magraw & LD Hawke 'Sustainable development' in Bodansky *et al* (n 21 above) 624: 'Sustainable development is "soft law" – that is, a normative statement supported by a political or other commitment and, thus, something more than policy even though it is not legally binding (though it may become binding in the future).' V Lowe 'Sustainable development and unsustainable arguments' in A Boyle & D Freestone (eds) *International law and sustainable development: Past achievements and future challenges* (1999) 19 31: 'Sustainable development is a "metaprinciple, acting upon other legal rules and principles".'

³⁸ K Bosselman 'Losing the forest for the trees: Environmental reductionism in the law' (2010) 2 *Sustainability* 2424 2438: 'Soft law represents a consensus of the international community of states that is considered legally relevant, although not binding' <http://www.mdpi.com/2071-1050/2/8/2424/pdf> (accessed 31 March 2011).

³⁹ D Bodansky *The art and craft of international environmental law* (2010) 14: 'The very term *soft law* betrays some confusion about the definition of law ... Difficulty of law from politics particularly acute in international environmental law, which often addresses issues in a pragmatic, non-legalistic way.'

⁴⁰ Magraw & Hawke (n 37 above) 624; Lowe (n 37 above).

and merely an 'emergent legal principle'.⁴¹ Despite this, one may, however, argue that the concept of sustainable development is the single most important emerging norm of international environmental law that has attained widespread recognition, finding its way into regional environmental conventions and national constitutions and shaping domestic environmental laws and policies.⁴² Without overburdening the reader with the semantics of the concept and its origins and future, it suffices to note that much has been written on it, particularly regarding its legal content and status under international environmental law.⁴³ However, much less has been written about this concept in the context of environmental rights protection in Zimbabwe, especially the role that environmental rights can play in promoting sustainable development. Authorities agree that the concept has certain components, some of which may assist us in unravelling the interface between environmental rights, sustainable development and other complementing environmental principles. Sands argues that the recurring elements of sustainable development are:⁴⁴

⁴¹ I Brownlie *Principles of public international law* (2008) 278; PW Bernie & AE Boyle *International law and the environment* (2002) 47 also doubt the legal status of the concept. Contrast Sands (n 3 above) 208, who suggests that the concept is now recognised at international law and notes that the principle of 'sustainability' can be said to have featured in international relations as far back as 1893, 199.

⁴² Most post-Stockholm international environmental declarations and conventions in one way or another refer to sustainable management or utilisation of resources; see the 1992 Convention of Biological Diversity which talks of 'sustainable use'; art XIV of the African Convention on the Conservation of Nature and Natural resources deals with sustainable development and natural resources; see Weeramantry J in the *Case Concerning the Construction of the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (1998) 37 *International Legal Materials* 162 204 ; South Africa's NEMA and Zimbabwe's Environmental Management Act (ch 20:27) all treat sustainable development as a fundamental principle of environmental management.

⁴³ The internationally-accepted definition is 'development that meets the needs of present without compromising the ability of future generations to meet their own needs', coined by the World Commission of Environment and Development (WCED)'s report *Our common future* (1989); see also D French 'Sustainable development' in Fitzmaurice *et al* (n 4 above) 55: 'Similar uncertainties arise if one suggests sustainable development is a putative rule of customary international law. There is not only the *factual* question whether sustainable development has, as yet, become such a rule, but more fundamentally, the legal question, whether it is possible for sustainable development to develop into such a rule.' Magraw & Hawke (n 37 above) 613; see also Glazewski (n 3 above) 13; R Callway 'Introduction: Setting the scene' in G Ayre & R Callway *Governance for sustainable development: A foundation for the future* (2005) 13: 'Sustainable development continues to be thought of as 'an issue' — a passing catchphrase something that one addresses among a whole plethora of other global concerns and priorities. This totally misses the point. It is sustainable development that *defines* how we *do* good governance' (emphasis in original).

⁴⁴ Sands (n 3 above) 252.

- (1) the need to preserve natural resources for the benefit of future generations (the principle of intergenerational equity);
- (2) the aim of exploiting natural resources in a manner which is 'sustainable', or 'prudent', or 'rational', or 'wise', or 'appropriate' (the principle of sustainable use);
- (3) the 'equitable' use of natural resources, which implies that use by one state must take account of the needs of other states (the principle of equitable use, or intra-generational equity); and
- (4) the need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, and that development needs are taken into account in applying environmental objectives (the principle of integration).

Brown Weiss goes further to dissect the concept of intergenerational equity, interrogating if and whether current generations have any moral or legal obligations towards future generations, concluding that we hold the earth in trust for future generations.⁴⁵ It is in this sense that I submit that the public trust doctrine informs and complements sustainable development. This doctrine, while having its origins in American law,⁴⁶ could arguably be said to have been part of the Roman-Dutch law concept of public property.⁴⁷ This incorporates the idea of trusteeship over natural resources by current generations.⁴⁸ Brown Weiss argues that 'each generation is both a trustee for the earth with obligations to care for it and a beneficiary with rights to use it'.⁴⁹

⁴⁵ E Brown Weiss 'Implementing intergenerational equity' in Fitzmaurice *et al* (n 4 above) 102.

⁴⁶ *Illinois Central Railroad v Illinois* 146 US 387 (1892); JL Sax 'Liberating the public trust doctrine from its historical shackles' (1980) 14 *UC Davis Law Review* 185 189.

⁴⁷ P Kameri-Mbote 'The use of the public trust doctrine in environmental law' (2007) 3 *Law, Environment and Development Journal* (2007) 195 197 <http://www.lead-journal.org/content/07195.pdf> (accessed 28 March 2011).

⁴⁸ While initially limited to public resources such as water and the air, the public trust doctrine has since been expanded to include other natural resources such as minerals and biological resources. See eg the South African National Environmental Management: Biodiversity Act 10 of 2004 (sec 3 headed 'State's trusteeship of biological diversity'); the Minerals and Petroleum Resources Development Act 28 of 2002 (sec 3 headed 'Custodianship of nation's mineral and petroleum resources'); the National Water Act 1998 (sec 3 provides, among other things, that '[a]s the public trustee of the nation's water resources the national government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate').

⁴⁹ Brown Weiss (n 45 above) 102. In some jurisdictions, this principle has been applied in practical cases to defend the rights of future generations; see *Juan Oposal & Others v the Honourable Fulgencio Factoran Jr, Secretary of the Department of the Environment and Natural Resources & Others (Oposa v Factoran)* (1993) Supreme Court of the Philippines, SCRA 224, 1792; *ILM* 33 173.

Similarly, the element of equitable use⁵⁰ in sustainable development makes the notion of environmental justice relevant to sustainable development as this notion has at its core the pursuit of equity in terms of the distribution of environmental burdens and benefits within the current generations.⁵¹ I argue that protecting environmental rights without concomitantly alerting the state that, as sovereign 'owner' of natural resources within its jurisdiction, it is bound by duties of trusteeship towards its present and future citizens, may ultimately prove ineffective. This is particularly so given the tendency of many states in Africa to treat natural resources as proprietary owners to the exclusion of their people who remain perpetually impoverished in the midst of plenty.

Most of the modern instruments of environmental protection in domestic environmental laws are derived from the substance of sustainable development.⁵² In South Africa, for instance, NEMA has given legal content to most of these principles.⁵³ Principles such as inter- and intra-generational equity, environmental impact assessment (EIA), environmental justice, integrated environmental management, polluter pays, the public trust doctrine, and public participation are the essence of the concept of sustainable development.⁵⁴ Sustainable development contains the foundations of environmental law and regulation.⁵⁵ It permeates environmental law from international instruments, regional instruments, and national laws and policies.

3.1 Complementing principles and concepts

Two further principles of environmental law that complement sustainable development merit special mention in the context of Zimbabwe. These are the public trust doctrine and environmental justice. Comparatively, the South African framework environmental legislation, NEMA,

⁵⁰ French (n 43 above) 60, arguing that working towards intra-generational equity (between the north and the south) is pivotal for sustainable development. This argument can very well be applied to the need to promote equity between rich and poor within states. French argues elsewhere that intra-generational equity concerns itself with the need for fairness in international law both in terms of social and *environmental justice*; D French 'International environmental law and the achievement of intra-generational equity' *Environmental Law Reporter* 10469-10485.

⁵¹ C Rechtschaffen *et al Environmental justice: Law, policy and regulation* (2009) 3-21.

⁵² Magraw & Hawke (n 37 above) 627.

⁵³ Sec 2 of the National Environmental Management Act 108 of 1998; sec 24 of the Constitution of South Africa is predicated on the concept of sustainable development.

⁵⁴ Sec 2(4) NEMA.

⁵⁵ Glazewski (n 3 above) 9-10; similarly, international environmental law is built upon international conventions and custom, which are now either substantively informed or related to sustainable development or the use of natural resources and the control of environmental problems. See also *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Environment and Land Affairs* 2004 5 SA 124 (W) 144B-C; *Fuel Retailers case* (n 2 above) paras 45 & 57.

provides for and defines these principles in relation to sustainable development as follows:⁵⁶

- 4 (a) Sustainable development requires the consideration of all relevant factors including the following:
 - ...
 - (c) Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.
 - ...
 - (o) The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

These principles are important in the context of environmental rights discourse in Zimbabwe. If properly applied in an environmental law framework that is premised on a constitutionally-guaranteed environmental right, they can effectively provide an avenue to control the way in which a state manages natural resources and the role of citizens with regard to those resources.⁵⁷ Takacs thus correctly argues:⁵⁸

The public trust doctrine is both an appealing idea that lays the groundwork for environmental human rights, and a venerable legal doctrine that has historically managed to protect certain resources for public use, and may still be called upon to protect those resources in the name of environmental human rights.

I argue that sustainable development, bolstered by the public trust doctrine and the concept of environmental justice,⁵⁹ should be the theoretical basis for enshrining environmental rights in the proposed Zimbabwean Constitution. Furthermore, thinking within the spirit of sustainable development and its components of intergenerational⁶⁰ and intra-generational equity, which is important for developing states, can help current political leaders view themselves as dispensable. The leaders are only trustees not only of the country, but also of natural resources which are the backbone of Zimbabwe's economy. Even if the proposed Constitution contains civil, political and socio-economic rights, these, especially the latter, would be difficult to fulfil

⁵⁶ Secs 4(a), (c), & (o) NEMA.

⁵⁷ Kameri-Mbote (n 47 above) 199 (explaining the nature of the obligations of the state as trustee over natural resources). These concepts can be used to control access to and sustainable use of diamonds in Chiadzwa, public land resources, and other natural resources in partnership with local communities, the government merely being a trustee for present and future generations.

⁵⁸ Takacs (n 31 above) 733.

⁵⁹ The Preamble to NEMA, eg, correctly links environmental injustice to the violation of environmental rights. It provides that '*inequality in the distribution of wealth and resources, and the resultant poverty, are among the important causes as well as the results of environmentally harmful practices*' (my emphasis).

⁶⁰ Fully elaborated on by Brown Weiss (n 45 above) 100 102-104.

and promote without sustainable management and the use of natural resources anchored by environmental rights provisions.⁶¹

When constitutions provide that the rights to housing, access to sufficient water,⁶² food and health must be fulfilled progressively '*subject to available resources*', they refer, among other resources, to a country's natural resource capital. Natural resources are converted into the capital that sustains economic growth and development, which in turn can raise the quality of life in a country.⁶³ Countries that manage their natural resources in unsustainable ways invariably have poor human rights records, not only in relation to civil and political rights but, more importantly, socio-economic rights.⁶⁴ Hunter *et al* assert that⁶⁵

[t]he failure to protect and promote human rights *prevents progress towards environmental protection and sustainable development* ... It is no accident that where the environment has been most devastated from large uncontrolled development projects, human rights abuses are the most severe. Moreover, with enormous wealth at stake in many of these conflicts, environmental and human rights activists are being targeted, sometimes directly by government or at least with its tacit approval.

Zimbabwe's poor human rights record since 1998 is not coincidental given how, from that time, exemplary natural resource managed programmes and agriculture started to collapse.⁶⁶ These collapsed much faster given, among other causes, the absence of effective constitutional protection of the environment in the Lancaster House Constitution. Unfortunately, this happened in a context where the government of Zimbabwe attempted to play the role of public trustee of the country's natural resources, addressing intra-generational issues regarding land ownership. While this end was and remains noble,⁶⁷ the means used and the process followed bordered on the outrageous.

⁶¹ Shelton (n 4 above) 265 279 ('Human rights cannot be enjoyed in a degraded environment'). The rights to life, health, food, water, even privacy are all compromised by the absence of environmental protection.

⁶² See L Stewart & D Horsten 'The role of sustainability in the adjudication of the right of access to adequate water' (2009) 24 *SA Public Law* 486; *Mazibuko & Others v City of Johannesburg & Others* 2010 3 BCLR 239 (CC); 2010 4 SA 1 (CC) (at the core this case was about how South Africa can manage its water resources to promote the right of access to sufficient water provided for in the Constitution).

⁶³ See eg secs 24, 26, 27 and 28 of the South African Constitution and United Nations Economic and Social Council, General Comment 12 'The right to adequate food' (art 11) 1999/05/12. E/C.12/1999/5.

⁶⁴ Hunter *et al* (n 31 above) 1281.

⁶⁵ As above (my emphasis).

⁶⁶ Chaotic land invasions left productive land barren and fallow while national park fences were torn down in a wave of uncontrolled settlements, while even before 1998 illegal mining had become a common sight, the recent being the diamond saga in Chiadzwa.

⁶⁷ See generally Ministry of Lands, Agriculture, and Rural Resettlement 'Land Reform and Resettlement Programme: Revised Phase II' (Harare: Government of Zimbabwe, April 2001).

The presence of widespread poverty is one of the key indicators of a state's failure to fulfil socio-economic rights, and the best way to eliminate poverty is by promoting sustainable economic growth (creating jobs, wealth, and uplifting the standard of living).⁶⁸ A generally-overlooked consideration is the role that constitutionally-guaranteed environmental rights can play in poverty alleviation. However, as pointed out by the South African Constitutional Court in the *Fuel Retailers* case:⁶⁹

Economic and social development is essential to the wellbeing of human beings ... socio-economic rights that are set out in the [South African] Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environmental base. *Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development.* Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked. And as has been observed ... [e]nvironmental stresses and patterns of economic development are linked to one to another. Thus, agricultural policies may lie at the root of land, water, and forest degradation. Energy policies are associated with the global greenhouse effect, with acidification, and with deforestation for fuel wood in many developing nations. These stresses all threaten economic development.

If the new Zimbabwean Constitution is going to assist the country's future growth, it is vital for it to contain environmental rights among the usual civil, political and socio-economic rights. Environmental rights play a complementary role in ensuring that other rights are enjoyed, promoted, protected and fulfilled.

A major pitfall that some developing countries face is the supposition that economic development means the creation of private wealth at the expense of the welfare of the larger public.⁷⁰ For instance, one could surmise that the potential for Zimbabwe to move towards sustainable economic development through the proper management of landed and mineral resources is exponential, but a private wealth mentality in the

⁶⁸ K Bosselmann *et al* 'Governance for sustainability issues, challenges, successes' *IUCN Environmental Policy and Law Paper* 70 (2008) 7. See generally the UNDP Human Development Report 'Beyond scarcity: Power, poverty and the global water crisis' 2006 <http://hdr.undp.org/en/reports/global/hdr2006> (accessed 16 August 2010).

⁶⁹ *Fuel Retailers* (n 2 above) para 44. The court continues to state in para 45 that '[t]he Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development.' See further T Murombo 'From crude environmentalism to sustainable development: *Fuel Retailers*' (2008) 3 *South African Law Journal* 488.

⁷⁰ A good example is how affirmative action programmes, such as the indigenisation policy in Zimbabwe or the BEE policy in South Africa, eventually enrich a few of the elite while the greater majority of people languish in abject poverty.

country hampers any large-scale focused economic development.⁷¹ The economies of South Africa and Botswana, for instance, get most of their resilience from the proper sustainable management of mineral resources that are harnessed to drive social and economic upliftment (socio-economic rights).

The utility of natural resources as anchoring resources for the fulfilment of socio-economic rights also depends on good political and environmental governance and the rule of law.⁷² In this respect, Attapatu notes:⁷³

The procedural components of sustainable development — the right to information and the right to participate in decision-making processes — coincide with environmental procedural rights. These procedural rights are principles of *good governance* — transparency and accountability and *upholding the rule of law*, indicating that in order to achieve good governance, sustainable development is necessary.

Environmental rights can play an even larger role where the rule of law and good governance exist,⁷⁴ issues that are broader and beyond the scope of this paper. As pointed out by authorities, '[t]here is a political consensus that the rule of law and good governance are a necessary foundation for efforts to achieve sustainable development'.⁷⁵ Hope concurs, defining good governance as⁷⁶

⁷¹ See B Cousins 'Time to ditch the "disaster" scenarios' *Mail & Guardian* 21 May 2010 <http://www.mg.co.za/article/2010-05-20-time-to-ditch-the-disaster-scenarios> (accessed 15 August 2010), arguing that the land reform did benefit quite a number of people in Zimbabwe despite the flagrant poor implementation of the programme. 'Clearly, agriculture in Zimbabwe has indeed experienced significant problems in the years following radical land reform, but the notion of "total failure" is inaccurate. A new agrarian structure has come into being, with a much wider range of farm sizes and farming systems than in the past, replacing a highly unequal and dualistic structure.'

⁷² LA Feris 'The role of good environmental governance in the sustainable development of South Africa' (2010) 13 *Potchefstroom Electronic Law Journal* 73; M Sachiko & D Zaelke 'Rule of law, good governance, and sustainable development' http://www.inece.org/conference/7/vol1/05_Sachiko_Zaelke.pdf (accessed 16 August 2010).

⁷³ Attapatu (n 9 above) 126.

⁷⁴ Shelton (n 4 above) 279; defined by the United Nations Development Programmes (UNDP) as 'the exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises the mechanisms, processes and institutions, through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.' The UNDP elaborates the concept further, adding that '[g]ood governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law. Good governance ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision making over the allocation of development resources' (my emphasis) <http://mirror.undp.org/magnet/policy/chapter1.htm> (accessed 28 March 2011).

⁷⁵ M Sachiko & Z Durwood 'Rule of law, good governance and sustainable development' 7th International Conference on Environmental Compliance and Enforcement http://www.inece.org/conference/7/vol1/05_Sachiko_Zaelke.pdf (accessed 28 March 2011).

⁷⁶ KR Hope 'Toward good governance and sustainable development: The African Peer Review Mechanism' (2005) 18 *Governance* 283 285 (my emphasis).

entail[ing] the existence of efficient and accountable institutions — political, judicial, administrative, economic, corporate — and entrenched rules that *promote development, protect human rights, respect the rule of law*, and ensure that people are free to participate in, and be heard on, decisions that affect their lives.

It is only now that the government of Zimbabwe is realising the need to promote good natural resource governance with regard to land, mineral and other natural resources that could, with proper management, already have taken the country out of its economic difficulties. The inextricable relationship between environmental and socio-economic rights and therefore economic development cannot be overemphasised.

4 Environmental rights in the current legal environment of Zimbabwe

In terms of human rights, the government of Zimbabwe has a varied record. In the first decade of independence, the judiciary handed down relatively progressive decisions, but this impressive record has since been destroyed.⁷⁷ One should note that even in the presence of a proactive judiciary, parliament was undoing the progress by continually amending the Constitution to reverse progressive human rights decisions.⁷⁸ This happened on several occasions in the life of the current Constitution which contains a declaration of rights (with only civil and political rights).

One wonders therefore if it is possible for Zimbabwe to have a progressive constitution with a bill of rights, with a constitutional system of parliamentary supremacy where the legislature can, and has previously shown itself to, be antagonistic to progressive human rights protection. Will it be any different with socio-economic and environmental rights? The judiciary in Zimbabwe was very active up until the end of the late 1990s.⁷⁹ Without constitutional environmental rights, a proactive judiciary can be invaluable in promoting environmental protection and sustainable development. Thus, if one looks at Indian constitutional jurisprudence, the right to life and the right to health,

⁷⁷ This is a contentious issue with some viewing the current judiciary as simply pan-African as opposed to the largely white bench of the 1980s and 1990s whose allegiances were put into doubt with their avid protection of white commercial farmers on land cases.

⁷⁸ See J Dugard 'The role of human rights treaty standards in domestic law: The Southern African experience' in P Alston & J Crawford (eds) *The future of UN human rights treaty monitoring* (2000) 269.

⁷⁹ This was so with the predominantly white Supreme Court bench. Perceptions of that Court being packed started soon after land invasions and war veterans, acting in cohorts with the Justice Ministry, openly invited most of the white judges to resign as they were perceived to be serving the interests of white commercial farmers and presented obstacles in the land reform programme.

among other rights, are also environmentally relevant but require a proactive judiciary.⁸⁰ Nevertheless, the absence of constitutional environmental rights does not imply that there is no legislative activity on environmental issues. In fact, in Zimbabwe, environmental legislation is as old as colonialism.⁸¹

There are many statutes regulating the exploitation of natural resources and some sector-specific instruments controlling certain environmentally harmful activities. However, most of these laws were premised on the inveterate penchant of the colonialists to extract wealth from nature with no regard to sustainability. This body of laws has received its fair share of criticism⁸² and I shall not deal with it in this article.

A key piece of environmental legislation in Zimbabwe is the Environment Management Act (EMA).⁸³ It may be argued that there is already provision for environmental rights in EMA; therefore there is no need for specific constitutional environmental rights. This framework environmental statute seeks to introduce an integrated approach to environmental management. It repeals some of the major colonial natural resource exploitation legislation noted above⁸⁴ and purports to cover as much scope as possible, ranging from environmental management, pollution control, waste management, public participation, access to information, biodiversity issues and institutional arrangements. EMA doubles as framework environmental legislation while

⁸⁰ I do not intend to make any detailed analysis of Indian jurisprudence here, just a comparative reference; for a detailed analysis, see J Razzaque *Public interest environmental litigation in India, Pakistan and Bangladesh* (2008); *MC Mehta v Kamal Nath* 1997 1 SCC 388; and *MC Mehta & Others v Shriram Food and Fertilizer Industries and Union of India (Oleum Gas Leak case - III)* AIR 1987 SC 1026.

⁸¹ See eg the Land Husbandry Act (Chapter); Natural Resources Act (ch 20:13) recently repealed by EMA, and the old Water Act (ch 20:22). A common feature of these environmental statutes is that they regulated the exploitation of natural resources and were not about conservation or sustainable utilisation. See J Murombedzi 'The evolving context of community-based natural resource management in sub-Saharan Africa in historical perspective' 2-4, Plenary Presentation, International CBNRM Workshop, Washington DC, USA, 10-14 May 1998 http://www.cbnrm.net/pdf/murombedzi_001.pdf (accessed 16 August 2010).

⁸² W Chinamhora 'Towards environmental impact assessment in Zimbabwe: Making developers and project proponents ecologically conscious' (1995) 7 *Legal Forum* 41; W Chinamhora 'Zimbabwe's Environmental Impact Assessment Policy of 1994: Can it achieve sound environmental management' (1995) 7 *Legal Forum* 37; W Ncube 'Land tenure systems, natural resources and environmental protection in Zimbabwe: The legal regulatory framework' 1996 (8) *Legal Forum* 26; W Chinamhora & D Ruhukwa 'Towards an Environmental Management Act: Review and revision of Zimbabwe's environmental legislation' Report for the Ministry of Environment and Tourism, 1995.

⁸³ Act 13 of 2002 or ch 20:27.

⁸⁴ Sec 143 repeals the Natural Resources Act (ch 20:13), but preserves regulations and by-laws made under that Act. Sec 144 repeals the Atmospheric Pollution Prevention Act (ch 20:03), the Hazardous Substances and Articles Act (ch 15:05) and the Noxious Weeds Act (ch 19:07).

providing for some sector specific regulatory aspects. Important for this paper, EMA contains a part (Part II) on General Principles of Environmental Management and Functions of the Minister,⁸⁵ which creates an environmental right. The question that arises in connection with Part II is whether it creates a fully justiciable environmental right or whether it only provides for general principles of environmental management *stricto sensu*. It is submitted that the latter interpretation is consistent with the objectives behind Part II of EMA. The majority of the provisions in Part II provide for well-known principles of environmental law, such as integrated environmental management,⁸⁶ the precautionary principle,⁸⁷ polluter pays⁸⁸ and sustainable development.⁸⁹ Towards the end there is a clear caution that⁹⁰

[t]he environmental rights and principles of environmental management set out in subsections (1) and (2) shall serve as the general framework within which plans for the management of the environment shall be formulated; and (a) serve as the guidelines for the exercise of any function concerning the protection or management of the environment in terms of this Act or any other enactment; and (b) guide the interpretation, administration and implementation of any other law concerning the protection or management of the environment.

This provision undoubtedly confirms my contention that the right *purported* to be created by EMA and which was applauded during debates on the green paper is impotent as an environmental human right.⁹¹ In fact, since EMA was enacted in 2002, the management of natural resources in Zimbabwe, especially land and mineral resources, has gone from bad to worse, only slightly recovering under the inclusive government.⁹² A clear example is the current debacle in the exploitation of the newly-discovered diamond deposits in Chiadzwa that has allegedly been characterised by uncontrolled mining with extensive environmental damage, corruption and a disregard for human rights.⁹³ This is clear evidence that any *purported* protection of environmental rights in some ordinary statute is ineffective and strengthens the

⁸⁵ Part II, especially secs 4 & 5.

⁸⁶ Sec 4(2)(a).

⁸⁷ Sec 4(2)(f).

⁸⁸ Sec 4(2)(g).

⁸⁹ Sec 4(2)(e).

⁹⁰ Sec 4(3).

⁹¹ This is in clear contrast to the approach taken in the Constitution of the Republic of South Africa, 1996 and subsequent decisions by South African courts that have largely upheld the right to an environment not harmful to health or wellbeing. See *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W).

⁹² Before the inclusive government, no one could account for the revenue from diamond mining then taking place under a free-for-all situation. The inclusive government brought some order in the area, reducing the chaos there, and involving the Kimberly Process, even though the situation is far from ideal.

⁹³ Human Rights Watch (n 30 above), in general.

argument advanced here that only constitutional entrenchment can deliver sustainable development. All things being equal, constitutional protection will only be effective in an environment where the rule of law and good governance prevail.

While a number of legal strategies used in EMA could be more potent if deriving their authority from an environmental right enshrined in a constitution, such a constitutional provision does not currently exist. The constitutional inclusion of environmental rights can, firstly, bolster environmental protection and sustainable development,⁹⁴ while the inclusion of other complementing social, economic and cultural rights will create a conducive environment for the rule of law and good governance. This is especially true, given the interdependence of the various categories of human rights as argued above. There is no basis to claim the equitable sharing of land resources or other natural resources when one has no guarantee of freedom of expression, movement, the right to liberty or access to and equality before the courts. Equally, without the protection of property rights, ownership rights are rendered nugatory. A conceptual understanding of contemporary human rights as interdependent and complementary is therefore a commendable development to the extent that it puts all rights in a proper conceptual framework. It is within this context that one considers civil and political rights to promote the enjoyment of socio-economic and environmental rights. With the exception of EMA, the rest of Zimbabwe's environmental laws remain technical and regulatory in focus, without any sustainability foundation.

It was in the context of an absence of constitutional environmental provisions that the political protagonists in the Global Political Agreement⁹⁵ agreed to the making of a new Constitution in Zimbabwe.⁹⁶ The constitutional reform process begun with the appointment of a Select Committee of Parliament of Zimbabwe on the Constitution Organisation Profile (COPAC) in 2009.⁹⁷ COPAC has since begun public outreach consultations. During the outreach process, a Land, Environment and Natural Resources Civil Society Cluster on Constitutional Reform (a coalition of environmental civic organisations) was tasked with developing a position paper on environmental rights. This was because a narrow focus on land resources had nearly overshadowed

⁹⁴ As discussed above.

⁹⁵ 'Agreement between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) formations, on resolving the challenges facing Zimbabwe' <http://www.copac.org.zw/downloads/category/7-government-of-national-unity.html#> (accessed 28 March 2011).

⁹⁶ Art VI (6.1 of the Agreement) – The constitutional reform process was supposed to be completed within 18 months of the formation of the inclusive unity government. These timeframes have since been abandoned given hitches in funding and political obstacles put in the way of COPAC.

⁹⁷ COPAC <http://www.copac.org.zw/home/copac-organisation-profile.html> (accessed 28 March 2011).

consideration of the environment in its broad sense.⁹⁸ The coalition has since submitted its recommendations to COPAC. The parameters of environmental rights were clearly laid out in the Constitutional Rights Card prepared by a leading civic organisation.⁹⁹

At the core, the proposed right is embedded in sustainable development, equitable access to natural resources and procedural rights to ensure that the right can be exercised. To be effective, the environmental right must be complemented by civil and political rights such as freedom of association, expression and assembly. But what precisely is the relevance of these other rights to the promotion of environmental rights and sustainable development?

5 Relevance of civil and political rights

Civil and political rights underpin the enjoyment of freedoms that are crucial in any democratic society. While natural resources can support a better quality of life, civil and political rights guarantee both substantive and procedural freedoms without which all other rights cannot be enforced. A further important dimension is that the rule of law is necessary for any rights to be enforced and enjoyed. In this respect, a far greater challenge to the fulfilment of environmental rights is a failure to appreciate the causal relationship between good (environmental, political, economic and cultural) governance, the rule of law on the one hand, and sustainable natural resources management on the other. Sustainable management or the use of natural resources is an approach premised on the existence of appropriate institutions, procedural guarantees, and public participation in natural resources management. Without doubt, the absence of legal mechanisms to control how responsible state institutions manage natural resources is a recipe for disastrous policies exploited by those seeking self-aggrandisement through political office and patronage.

Zimbabwe is a case in point while, as argued elsewhere above, natural resources could sustain sustainable socio-economic development, and there are not yet effective legal and policy frameworks to ensure the sustainable use of natural resources, especially with reference to

⁹⁸ S Mtisi 'Environment cluster CSOs engage Zimbabwean constitutional reform body' 29 April 2010 <http://www.accessinitiative.org/blog/2010/04/environment-cluster-csos-engage-zimbabwean-constitutional-reform-body> (accessed 27 March 2011); S Mtisi 'Constitutional talking points revised: Includes environment and natural resources' <http://www.accessinitiative.org/blog/2010/06/constitutional-talking-points-revised-includes-environment-and-natural-resources-questi> 3 June 2010 (accessed 27 March 2011).

⁹⁹ Zimbabwe Environmental Law Association (ZELA) 'Constitutional rights card: Environment, natural resources and land' <http://www.zela.org/news/Press%20Statements/Constitutional%20Campaign%20Card%20on%20Environment.pdf> (accessed 27 March 2011).

mineral and landed resources. Yet, in the midst of this legal and policy vacuum, mineral resources are being extracted and exported, with little to no benefit to the fiscus, let alone to the communities that live in areas endowed with these resources.¹⁰⁰

A failure to manage political governance properly often results in chaos and creates 'second governments' that are perpetually in conflict with the ruling governments, creating good conditions for wanton destruction of the environment and unsustainable extraction bordering on the plundering of mineral resources. Examples include the DRC and Sierra Leone. This has been avoided in Zimbabwe on the whole, but reports of continued human rights violations in Chiadzwa, Marange, and the failure to account for diamond sales proceeds and renewed land grabs are ominous.¹⁰¹ What is urgently required is the cleaning up of institutions responsible for the collection of state revenue from the use of natural resources. Poor governance in this regard remains a huge challenge to the inclusive government.

Given the above, it is an understatement that environmental rights, like socio-economic rights, can only be respected, protected and fulfilled in a free society ruled by law and not by man. More often than not, the rule of law is easily promoted where civil and political rights are respected, and more so where there is an active civic society sector playing the role of watchdog. Civic society organisations, specifically public interest human rights and environmental organisations, must play an important role in bringing government to account for their protection and fulfilment of environmental rights. Procedural civil and political rights, which some have called procedural environmental rights, are crucial in this regard.¹⁰² Civic society organisations, in addition to building the community's capacity to participate, can also effectively help by setting high thresholds for policy makers and implementers.

It is in this light that one sees an opportunity for civic society environmental organisations to play their role in the current constitutional reform process in Zimbabwe and beyond. The centrality of the rule of law and good governance to the fulfilment and protection of environmental and other socio-economic rights highlights the role that civil and political rights may play in a constitutional system of government.

¹⁰⁰ Very recently the government department responsible for mineral resources had to stop an unauthorised auctioning of 600 000 carats of diamonds by the private companies that are currently mining diamonds in Chiadzwa. See 'Zim stops diamond auction' *Southern Times* 12 October 2009; 'Government of Zimbabwe stops auction of 300 000 carats of rough diamonds' *Diamond World News Service* 11 January 2010 <http://www.diamondworld.net/contentview.aspx?item=4537> (accessed 15 August 2010); and 'Ministers fight over diamonds' *Zimbabwe Independent* 10 June 2010 <http://www.theindependent.co.zw/local/26877-ministers-fight-over-diamonds.html> (accessed 15 August 2010).

¹⁰¹ Human Rights Watch (n 30 above).

¹⁰² Razzaque (n 16 above) 285.

As noted above, environmental rights will be difficult to implement and protect in an environment where there is no freedom of association, assembly, access to the courts and administrative justice, as well as access to information. These civil and political freedoms guarantee that civic society and environmental organisations can effectively play the role advocated above as watchdogs to promote sustainable development through the proper use of natural resources and promoting accountability in access to, and distribution of, natural resources.

6 Future of environmental rights in Zimbabwe in the constitutional legal reform process

As public trustee of national resources, the state is overall accountable for how resources and the environment are protected. However, the need to protect the environment in the new Constitution should be premised on a recognition that citizens have rights as well as duties. An environmental right without a correlative duty on the state and its citizens to protect the environment may achieve little by way of sustainable development and economic growth. It is essential that the constitutional provisions impose positive duties both on the state and its citizens to protect the environment. Environmental protection is not a matter for the state alone, especially if one takes into account the fact that citizens interact more with the environment than do state organs and further that, in the case of Zimbabwe, the ordinary citizens have been at the forefront of unsustainable exploitation of natural resources.¹⁰³

If environmental rights are coupled with correlative duties, it implies the horizontal applicability of the right as between private entities. Unlike civil and political rights, a unique requirement of environmental rights is that they should apply to all persons and the state, equally binding all against all and each. Individuals should be able to enforce the environmental rights against a private individual or a company the activities of which may be violating the right.

There is a need to ensure procedural integrity and efficiency by making provision for other rights that enable the effective enforcement of environmental rights.¹⁰⁴ These rights are fundamental, not only on their own, but also as instruments with which to enforce the environmental rights. One would therefore not want to portray them purely as complementary rights. Their effect is to give an assurance of the efficacy of remedies for genuine breaches of the rights. Within the framework of this paper, these rights are treated, in addition to their individual substantive aspects, as important complementary

¹⁰³ Gold and diamond artisanal mining has caused extensive environmental damage all over the country.

¹⁰⁴ See Glazewski (n 3 above); Boyle & Anderson (n 9 above) 182 195.

rights for the enforcement of environmental rights. These include the right of access to information. Environmental enforcement particularly depends on the availability of information which, more often than not, is held by state departments and functionaries and big companies. For the ordinary person to enforce the right, they need access to that information, some of which may require expert interpretation.¹⁰⁵ Public participation must form the basis for the constitutional enactment process. It is crucial for the Constitution to guarantee these procedural aspects if the environmental right is to make any sense and achieve its objectives.

A survey of developments in South Africa¹⁰⁶ illustrates that a necessary corollary of these is the right to just administrative action¹⁰⁷ and access to justice and the courts,¹⁰⁸ which means that people should be entitled to be treated in a just and rational way by administrative functionaries when making decisions that affect them and the environment. Environmental issues involve a lot of administrative work, for instance the granting of permits, authorisations, orders and licences. Environmental impact assessment reports need to be approved, and so on. One has no doubt that to eschew human frailty in these bureaucratic procedures, people should have the right to have reasons for administrative decisions and have the right to seek review of those decisions and policies where they are perceived to be (or are) unfair. One can see the interrelated nature of these rights and their complementary nature from experiences in South Africa.¹⁰⁹ The nature and scope of the right will largely depend on how it is worded in the constitution. Ideally, the constitution's language should focus on a balanced environment in the context of integrated environmental management and the ecosystems approach to environmental management. The provision should not be too narrow in focus and neither should it be too wide or vague; a balance therefore has to be achieved in the phraseology of the provision.

¹⁰⁵ W du Plessis 'Access to information' in A Paterson & LJ Kotzé (eds) *Environmental compliance and enforcement in South Africa: Legal perspectives* (2009) 199; sec 32 South African Constitution.

¹⁰⁶ A detailed comparative survey is beyond the scope of this paper. However, throughout the paper I have made reference to relevant South African jurisprudence as South Africa is at the forefront of advancing sustainable development through the constitutional right to an environment not harmful to health and wellbeing. See generally authorities in nn 2 & 3 above.

¹⁰⁷ Sec 33 South African Constitution.

¹⁰⁸ Sec 34 South African Constitution.

¹⁰⁹ See *Trustees, Biowatch Trust v Registrar: Genetic Resources & Others* 2005 4 SA 111 (T) for the importance of access to information and administrative justice to environmental rights generally.

7 Conclusion and recommendations

The constitutional reform debate in Zimbabwe should focus on formulating a new constitution that will cure the misdeeds of the past constitutional dispensation. It has been argued above that such a new constitution should have an environmental right motivated and informed by the factors dealt with in this paper. Global and regional developments call for Zimbabwe to harmonise its environmental laws with those of other SADC countries, in this case by including environmental rights in the Constitution. Whilst it is prudent to take one's cue from regional and international developments, it should not be forgotten that the adoption of foreign legal principles or systems is a process which must be based on an objective and prudent consideration of the local context and eventual assimilation.¹¹⁰ In the field of environmental management, this caution should be tempered by the fact that environmental regulation invariably involves the management of shared resources and the control of problems that transcend national boundaries, hence the need for a degree of harmonisation in terms of transplanted laws and policies if the regional system is to be effective.¹¹¹

Taking into account the ecological context of Zimbabwe as well as its social, economic and cultural context, I recommend that the new constitution should contain a provision in its preamble acknowledging the importance of an ecologically-balanced environment and sustainable development. Then, in the bill of rights, a specific clause enshrining these rights must be included based on regional and international developments, and the inputs of Zimbabweans in the consultative hearings currently underway. In addition to these clauses, the constitution should contain a clause expanding the right of standing to enforce environmental rights and other human rights. This is to dislodge the historical limitations placed on *locus standi* under the common law still applying in Zimbabwe.¹¹² These recommendations presuppose a consciousness or awareness of the right of access to information.

As noted above, environmental regulation depends on co-operation at the international and regional levels. The constitution should therefore have a clause providing for the recognition of customary international principles of environmental law, indirect incorporation of international environmental conventions, and progressive principles in declarations. However, to have good and meticulous constitutional legal provisions is one thing; compliance and enforcement another. A detailed study of this aspect is beyond the scope of this article, but

¹¹⁰ M Faure *et al* 'Bucking the Kuznets Curve: Designing effective environmental regulation in developing countries' (2010) 51 *Virginia Journal of International Law* 95 134-135 147.

¹¹¹ As above.

¹¹² The existing Class Actions Act (ch 8:17) is not useful in this regard.

one would recommend that EMA be given strong teeth to ensure effective compliance and enforcement. This is especially so if a future constitution enshrines environmental rights, as EMA would need to be amended to become an implementing statute for these rights, as is the case with NEMA in South Africa which implements section 24 of the South African Constitution.

Local government and human rights: Building institutional links for the effective protection and realisation of human rights in Africa

Conrad Mugoya Bosire*

Doctoral Researcher and PhD Candidate, Local Democracy, Peace and Human Security Programme, Community Law Centre, University of the Western Cape, South Africa

Summary

There is increasing recognition of the role of local government in the protection and realisation of human rights obligations. Recent studies on links between local government, decentralisation and human rights are evidence of this growing recognition. In Africa, there are newly-formed pan-African institutions on local government. Local authorities and national local government associations have also formed a regional association. National ministries in charge of local government have formed a regional inter-ministerial forum on local government and decentralisation. This trend is replicated at sub-regional levels in Africa. While the place and role of local government in international human rights law are not yet fully understood, the formation of these institutions provides an appropriate avenue for the same. The article makes a case for institutional collaboration between these regional institutions, sub-regional institutions and the African Commission on Human and Peoples' Rights in order to achieve more effective rights protection. While this article presumes that such institutional collaboration will lead to better protection of human rights, it makes a further argument that this will only happen where the specific gaps identified are addressed to strengthen the role of local government in human rights.

* LLB (Moi), LLM (Human Rights and Democratisation in Africa) (Pretoria); conrad.bosire@gmail.com

1 Introduction

The end of the Cold War announced the 'third wave' of democracy in the 1990s in Africa which was characterised by the replacement of single-party autocracies with multi-party politics and democratically-elected governments.¹ Democratisation was accompanied by decentralisation, taking the form of a transfer of powers and functions to newly-created or existing sub-national units.² Western countries began paying increased attention to a respect for human rights as evidenced by measures such as making donor aid conditional upon human rights enforcement, democracy and the rule of law.³ The process of decentralisation was motivated by, among other factors, the failure of centralised forms of government, adopted in most African states after independence, to achieve the desired national unity and development.⁴ Thus, decentralisation and human rights gained prominence at the same time and have been linked to concepts such as democracy, development and conflict resolution.⁵ Noting this development, a report on the link between local government and human rights states:⁶

Underway since the 1970s, local government reforms have accelerated in the last decade and decentralisation has occurred in numerous countries and in very different regional and political contexts. It is a key plank in the good governance agenda that has been promoted by United Nations and International financial institutions, and because it focuses development priorities and aid at the local level, it is widely seen to be an effective approach for reducing poverty. Also where minorities exist, decentralisation and local authority offer alternatives to political secession and are believed to reduce conflict.

While decentralisation and human rights developed at about the same time in Africa, it is generally acknowledged that the two areas have developed almost in isolation despite having many common features. There is a fairly recent trend to establish conceptual and practical links between the two areas, in this regard, a report by the International Council on Human Rights and Policy (ICHRP) notes that decentralisation and local government are both 'associated with the

¹ Y Fessha & C Kirkby 'A critical survey of subnational autonomy in African states' (2008) 38 *Publius: The Journal of Federalism* 248 249.

² As above.

³ ICHRIP *Local rule: Decentralisation and human rights* (2002) 4.

⁴ See generally B Neuberger 'Federalism in Africa: Experience and prospects' in DJ Elazar (ed) *Federalism and political integration* (1979) 183.

⁵ WS Ayres 'Supporting decentralisation: The role and experience of the World Bank' in Swiss Agency for Development and Co-operation *Decentralisation and development* (1999) 70-85.

⁶ ICHRIP (n 3 above) 1; JW Nibbering & R Swart 'Giving local government a more central place in development: An examination of donor support for decentralisation' <http://www.lux-development.lu/workshop/segou2010/docs/NL%20Donor%20support%20for%20decentralisation.pdf> (accessed 20 October 2010).

ideas of democratic reform and with theories of good government that emerged at the end of the cold war'.⁷ However, in practice, they are separate and independent institutional and legal regimes on human rights and decentralisation.⁸

The African Charter on Human and Peoples' Rights (African Charter) is the primary human rights instrument in the region.⁹ The African Commission on Human and Peoples' Rights (African Commission) is the body that is mandated to monitor the implementation of human rights by state parties to the African Charter.¹⁰ While there is no such primary legal instrument or institution to guide decentralisation and local government in Africa, there are emerging efforts to establish institutional co-operation in local government at the regional and sub-regional levels in Africa.¹¹ These include a pan-African ministerial body on local government and decentralisation, the All-African Ministerial Conference on Local Government and Decentralisation (AMCOD)¹² and a regional local government association, the United Cities on Local Government Association (UCLGA).¹³ While institutional arrangements on human rights in Africa are fairly advanced as compared to institutional arrangements on local government, the latter institutions are gaining ground at the regional and even international level.¹⁴

As will be argued later in this article, local government functions are at the core of the realisation of certain basic and fundamental human rights obligations. Thus, there is a growing realisation of the importance of local government in the implementation of human rights obligations. A step towards institutional links between institutions of local government and human rights may lead to the better protection of human rights in the region. This article discusses the rationale, avenues and possibilities of institutional links between institutions of local government and human rights at the regional level in Africa. While this article presumes that such institutional collaboration will lead to better protection of human rights, it further argues that this can only

⁷ ICHRP (n 3 above) 2.

⁸ J Ahikire *Decentralisation in Uganda today: Institutions and possible outcomes in the context of human rights* (ICHRP working paper) (2002) 8.

⁹ Adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, (1982) 21 *International Legal Materials* 58; C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29, entered into force 21 October 1981.

¹⁰ Art 30 African Charter.

¹¹ H Hoffschulte 'The UN Guidelines on Decentralisation and the Strengthening in Local Authorities' in B de Villiers (ed) *Review of provinces and local governments in South Africa: Constitutional foundations and practice* (2008) 107-127.

¹² The All-African Ministerial Conference on Decentralisation and Africa: Decentralisation and local democracy (AMCOD) 'African Ministers choose Yaounde their headquarters' <http://allafrica.com/stories/201010040896.html> (accessed 7 October 2010).

¹³ The United Cities and Local Government in Africa (UCLGA); see their website <http://www.uclgafrica.org> (accessed 8 October 2010).

¹⁴ Hoffschulte (n 11 above) 108-116.

happen where such collaboration finally leads to the identification of specific gaps and niche areas for co-operation and collaboration for better rights protection.

This article does not, even for a moment, propose a change to the legal status of local government under international law. Specifically, it does not call for equal rights and treatment for local governments and national governments at the international level. Rather, it argues for the recognition of the growing role of local government at the international level and calls for collaboration between supranational institutions of local government and human rights as a first step towards defining and protecting the role of local government in international human rights. The term 'local government', as used in this article, refers to all sub-national governments, including provinces, unless the specific context specifies otherwise.

The article consists of six sections. The first section introduces the topic and outlines the scope of the article; the second section discusses the basis and rationale for calling for institutional links; the third gives an overview of the current activities of the African Commission that touch on local government and the gaps that can be filled through institutional collaboration; the fifth focuses on pan-African and sub-regional institutions of local government and describes their nature, status, activities in relation to the topic of the article. The last section, by way of conclusion, gives a way forward and suggests specific steps to be taken in order to have appropriate institutional links in local government and human rights for a more effective realisation and protection of human rights.

2 Local government and human rights in Africa: The basis and rationale for institutional collaboration and co-operation

There is a growing realisation of the importance of local government in the implementation of international human rights law.¹⁵ Some fundamental human rights obligations fall within the functional competence of sub-national governments as opposed to national government. For instance, typical local government services and functions, such as water and sanitation services, housing, solid waste management, education and other typical local government functions, fall within the realm of economic, social and cultural rights.¹⁶ Key human rights instruments, such as the African Charter and the International Covenant on

¹⁵ ICHRP (n 3 above) 19-31.

¹⁶ ICHRP *Local government and human rights: Doing good service* (2005) 81-86.

Economic, Social and Cultural Rights (ICESCR),¹⁷ among other instruments, contain provisions the realisation whereof depends on effective local government service delivery. Thus, while national governments sign and ratify international human rights instruments, the primary obligation to implement specific fundamental rights rests with local government or sub-national governments generally.

Further, it has also been recognised that by their very nature and typical functions, local governments are the most appropriate level where the enjoyment and exercise of certain fundamental rights may be enjoyed. For instance, the Preamble to the European Charter of Local Self-Government¹⁸ recognises that the right of citizens to participate in the conduct of public affairs can be exercised most directly at the local level.¹⁹ Public or community participation, a core principle of local government,²⁰ linked to the right to participation in political processes, is also protected under the International Covenant on Civil and Political Rights (ICCPR)²¹ and the African Charter.²²

The increased recognition of the role of local government has perhaps led to yet another emerging trend of constitutional entrenchment and the protection of local government as a distinct sphere or level of government in national constitutions.²³ States previously never entrenched local government in their constitutions and even federal governments that operate on the principle of shared and self rule were no exception.²⁴ The constitutional entrenchment of local government is usually accompanied by a constitutional separation of powers and functions between the national government and local government.²⁵ In some instances, local governments have constitutional mandates, the performance of which leads to the actual fulfilment of international

¹⁷ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with art 27.

¹⁸ Council of Europe 'European Charter of Self-Local government' European Treaty Series 122.

¹⁹ Paras 4 & 5 of the Preamble to the Charter.

²⁰ Eg, sec 154 of the Constitution of the Republic of South Africa provides for 'involvement of communities and community organisations in matters of local government' as one of the objects of local government.

²¹ Arts 1(1) & 25 of the Convention protect the right to participation in government through elections and also freedom to freely determine and pursue their political development.

²² Art 13 African Charter.

²³ An appropriate example is South Africa; sec 40(1) of the Constitution provides that '[i]n the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and related'.

²⁴ Forum of Federations 'Background paper on the place and role of local government in federations' Cities and Federalism Conference, Rio de Janeiro, Brazil, 6 and 7 May 2002 (prepared by Prof Nico Steytler, Community Law Centre, University of the Western Cape).

²⁵ Steytler (n 24 above) 1-2.

human rights obligations.²⁶ For instance, provincial cultural matters are an exclusive function of provinces in South Africa,²⁷ and such a provision actually implements the right to culture that is provided for under article 17(2) of the African Charter.²⁸ States are therefore beginning to recognise and respect the distinct role of local governments, even in the context of international obligations.

Further, recent years have witnessed the increased participation of local government and other sub-national units in international and cross-border activities.²⁹ This trend may be seen especially in areas such as trade³⁰ and cross-border co-operation between local governments commonly referred to as 'twinning agreements',³¹ covering issues that range from technical co-operation, capacity building, to economic and development assistance.³² This trend calls for an evaluation of the broad principles which govern the involvement of local governments generally in international law matters.

2.1 Rationale for institutional co-operation and links

There are a number of factors, norms and principles that lay a basis for institutional co-operation between pan-African institutions consisting of local government and supra-national human rights institutions. These include the principle of subsidiarity, the need to protect local autonomy as a means of standard setting in regard to local government and human rights, and as a response to the emerging role of local government at the supranational level. Each of these grounds is discussed in more detail in the section below.

2.1.1 Principle of subsidiarity

The *New Oxford dictionary* defines subsidiarity as 'the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more local level'.³³ There are different modes of the principle of subsidiarity. These include

²⁶ C Bosire 'Local government and human rights in Africa: Forging the necessary institutional links' (2010) 12 *Local Government Bulletin* 23-24.

²⁷ Sch 5 of the Constitution of South Africa on 'Functional areas of exclusive legislative competence' (Part A).

²⁸ Art 17(2) states that '[e]very individual may freely take part in the cultural life of his community'.

²⁹ See generally C Murray & SA Nakhjavani 'South Africa' in H Michelmann (ed) *A global dialogue on federalism: Foreign relations in federal countries* (2009) 212-239.

³⁰ N Steytler 'Cross-border relations of South African provinces' in Nomos Verlagsgesellschaft *External relations of regions in Europe and the world* (2003) 247.

³¹ As above.

³² Steytler (n 30 above) 249.

³³ J Pearsall (ed) *The new Oxford dictionary in English* (1998) 1851, quoted in L du Plessis "'Subsidiarity": What's in the name for constitutional interpretation and adjudication?' (2006) 2 *Stellenbosch Law Review* 207 208.

institutional subsidiarity, jurisdictional subsidiarity and adjudicative subsidiarity.³⁴ However, institutional subsidiarity is the most relevant to this article. Du Plessis defines institutional subsidiarity as ‘the identification and empowerment of an appropriate institutional actor to perform a certain function’.³⁵ He notes further that³⁶

[i]nstitutional subsidiarity as a force in societal life constrains any more encompassing or superordinate institution (or body or community) to refrain from taking for its account matters which a more particular, subordinate institution (or body or community) can appropriately dispose of, irrespective of whether the latter is an organ of state or civil society.

The principle of institutional subsidiarity thus calls on national governments to refrain from taking over functions that are best or most appropriately performed by local government. As explained above, there are local government service delivery functions that are linked to the fulfilment of fundamental human rights, such as economic, social and cultural rights. This is an example of local government functions that the principle of institutional subsidiarity seeks to protect. Basic services, such as water and sanitation and solid waste management, require decentralised and efficient services that respond to the particular needs of a community. Decentralised and effective services to a community can be achieved in a more effective manner through local government as opposed to central government.

Further, and as alluded to earlier, local government is best suited to fulfil fundamental human rights such as participation and involvement.³⁷ Indeed, the principle of institutional subsidiarity has been recognised widely by local government instruments such as the UCLGA,³⁸ the Commonwealth Aberdeen Agenda³⁹ and the European Charter on Local Self-Government. The European Charter is considered to have the clearest articulation of the principle.⁴⁰ Article 4(3) of the European Charter reads:

Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirement of efficiency and economy.

Applying the principle of institutional subsidiarity to the context of this article, human rights obligations may be performed more effectively where responsibility for their performance is given to the most

³⁴ For a discussion on the meaning and distinction of the different modes of the subsidiarity, see Du Plessis (n 33 above) 209; J de Visser ‘Institutional subsidiarity in the South African Constitution’ (2010) 21 *Stellenbosch Law Review* 90-115.

³⁵ De Visser (n 34 above) 91.

³⁶ Du Plessis (n 33 above) 209-210.

³⁷ See Preamble to the European Charter on Self-Local Government (n 18 above).

³⁸ De Visser (n 34 above) 98.

³⁹ As above.

⁴⁰ De Visser (n 34 above) 99.

appropriate tier or sphere of government. Institutional collaboration and application of this principle will lead to the identification of areas of human rights that should be left to local government. Such collaboration and co-operation may lead to the development of principles that will guide the application of the principle of institutional subsidiarity in the performance of human rights obligations in Africa. Consequently, regional bodies, such as the African Commission, the UCLGA and the AMCOD, may enforce this principle and ensure that the institutional integrity of local government is protected and respected to achieve a more effective realisation and protection of human rights.

The African Commission may use the principle of institutional subsidiarity in guiding state parties to the African Charter on how to implement the African Charter. For instance, the African Commission may list rights provided for under the African Charter that can best be performed by sub-national governments and encourage states to put in place mechanisms to ensure that sub-national governments are given such opportunities. As a result, the different rights provided for under the African Charter can be performed by different spheres or levels of government based on their respective strengths for the more effective protection and realisation of rights. Using this approach, application of the principle will ensure that the rights contained in the African Charter are realised and protected in a more effective and efficient manner.

However, the application of the principle of subsidiarity for the more effective protection of human rights in Africa can only happen where it is preceded by appropriate and effective institutional links between regional institutions of human rights and local government. Such links entails the sharing of positive experiences on which areas of human rights are best performed by local government and measures that can be taken to strengthen and make them more effective. The UCLGA is, for instance, the most appropriate forum where experiences and perspectives on local government and human rights in Africa can be shared and discussed. Such a discussion may focus on which rights in the African Charter are best left to local government and the role that the African Commission can play to facilitate them. Thus, institutional collaboration and co-operation will be the first step towards such developments.

2.1.2 Protecting local government and local autonomy

Local autonomy ensures that local institutions are able to exercise their powers and functions independently and effectively. Local autonomy entails adequate resources in the hands of local government and adequate control over such resources, utilising them for local development, with accountability lying with the local community as opposed

to the central government.⁴¹ Local governments draw a large part of their funds from transfers from central governments, thus there is a need for proper relations with the national government. The efficiency of local governments therefore depends on the quality and nature of the relationship between the central government and local government, which relationship should enhance autonomy. The ICHR report on Decentralisation and Human Rights notes:⁴²

Local governments remain elements in a larger polity: they are not independent politically and usually economically dependent and they enjoy limited, not sovereign powers. The quality of the relationship between central and local government is crucial to local government's performance; just as a local government's relationship with its electorate is crucial to its sovereignty.

Thus, there is a pressing need to protect local autonomy in order to guarantee the effectiveness of local government. Where the local autonomy has been secured, local governments are in a better position to effectively fulfil fundamental rights that fall within the functional areas of such provinces.

There are cases where local autonomy is threatened by national governments. This impedes the effectiveness of local governments. Some central governments or political leaders pursue centralisation policies that go against the principle of local autonomy.⁴³ Political dominance and interference in local government affairs impede the effectiveness of local government. In Kenya,⁴⁴ Uganda⁴⁵ and Ethiopia,⁴⁶ for instance, the political leadership used different avenues to regain political control of the respective capitals (Nairobi, Addis Ababa and Kampala) in instances where they fell into the hands of the opposition.

Political interference and unwarranted take-overs and control of local government by national governments not only violate core civil and political rights, but may also lead to the disruption of local government services, thus affecting the enjoyment of a range of economic, social and cultural rights. Institutional collaboration will lead to a common understanding and development of strategies on how local autonomy can be protected and promoted. Regional bodies may play a crucial role in protecting local governments from unwarranted political

⁴¹ See generally WO Oyugi 'Decentralisation for good governance and development: The unending debate' (2000) 21 *Regional Development Dialogue* 3.

⁴² ICHR (n 3 above) 39.

⁴³ See eg N Steytler 'One-party dominance and the functioning of South Africa's decentralised system of government' in R Hrbek (ed) *Political parties and federalism: An international comparison* (2004) 159.

⁴⁴ R Southall & G Wood 'Local government and the return to multi-partyism in Kenya' (1996) 95 *African Affairs* 504.

⁴⁵ J Namutebi & C Bekunda 'House passes Kampala takeover Bill' *The New Vision* 4 November 2010 <http://www.newvision.co.ug/D/8/13/736999> (accessed 4 November 2010).

⁴⁶ *Ethiopian Review* 'Ethiopia: Addis Ababa city administration to regain control of police commission' <http://www.ethiopianreview.com/articles/2165> (accessed 27 April 2009).

interference and use the effective realisation of human rights obligations as the basis for their interventions.

2.1.3 Standard setting for local government and human rights in Africa

Local government and human rights practice vary from one African country to another as a result of different factors. Factors such as the political culture, legal system, the level of economic development influence the practice of local government in the area of human rights. While there are varied standards and practices, there is a need for a common approach to local government based on a common agreement. A report on the institutional framework on decentralisation and human rights in Uganda notes that:⁴⁷

A rights-based approach to local government would allow for critical interrogation of people's relationship to local government institutions and the relations that emanate from them. Decentralisation in the context of rights raises issues of people as subjects in the whole question of citizenship and how they are located within the political economic and social processes of local government and relation between them.

Thus, there is a need to have a rights-based approach to local government and decentralisation in Africa. Such an approach will lead to the development of institutional principles upon which the commitment of states to genuine decentralisation can be judged. The link between human rights and local government, even at the national level, remains unclear and, as the report on Uganda notes:⁴⁸

Decentralisation in Uganda has the potential for [the] generation of spaces for citizens demands for services and accountability. However, such concerns have not been framed within the context of human rights which in turn would give it more significance in as far as people's relationship to local government is concerned.

Uganda is one of the few African countries that embarked on an ambitious process of decentralisation under a new constitutional order in the early 1990s.⁴⁹ However, as shown above, the process is beset with challenges. The ICHRP report notes a general weak link between local government and human rights generally.⁵⁰ Thus, there is a need for measures to strengthen the link between local government and human rights. Institutional co-operation between the two areas becomes a significant step in this regard.

While institutional links may lead to the adoption of common regional standards on local government and human rights in Africa, the varying

⁴⁷ Ahikire (n 8 above) 2.

⁴⁸ Ahikire (n 8 above) 8.

⁴⁹ S Makara 'Decentralisation and urban governance in Uganda' unpublished PhD thesis, University of the Witwatersrand, 2009.

⁵⁰ ICHRP (n 3 above) 19-31.

standards of local government and human rights practice from one country to another are a challenge. This is further complicated by the fact that countries in Africa have different legal systems inherited from different colonial regimes.⁵¹ However, there is a basis upon which common standards in local government and human rights can be adopted. The presence of an African human rights instrument and a Commission to monitor its implementation and the emergence of pan-African institutions on local government are critical steps towards discussions on common regional standards on local government and human rights. There are specific opportunities and avenues for cooperation that are actually emerging, for instance, the UCGLA has written to the African Union (AU) leadership, calling for a regional charter on decentralisation and local government.⁵² AMCOD, on the other hand, is recognised as the technical advisory committee to the AU on decentralisation.⁵³ These two regional institutions on local government can thus get together and discuss with the African Commission on how to push the agenda of effective local governments in Africa forward. These developments, discussed in greater detail in the next section of this article, are vital steps towards a discussion of common regional approaches to decentralisation and local government in Africa.

The Council of Europe has a successful history of experience with the European Charter of Local Self-Government.⁵⁴ The Charter entered into force on 1 September 1988 after it had been ratified by the required minimum number of only four nations.⁵⁵ The Charter has since been an important instrument in entrenching democracy in the region. Hoffschulte notes that the Charter has become⁵⁶

... the basic text underlying the democratic reforms and new constitutions of all nations intending to join the Council of Europe. Those states wanting to join the European Union (EU) used the Charter and their transposition into national law to overcome the centralism of old inherited power structures and to build their democracies 'bottom up' by decentralisation and the strengthening of regional and local levels.

The experience of the European Charter was instrumental in the drafting of a World Charter on Local Self-Government that was prepared

⁵¹ These include anglophone Africa (former British colonies); francophone Africa (former French colonies); lusophone Africa (former Portuguese colonies); and the Arab countries in the North.

⁵² UCGLA Memorandum of the United Cities and Local Governments of Africa (UCLGA) to the African Union (AU) presented by the presidency of the UCLGA to His Excellency the Honourable President Olusegun Obasanjo, GCFR, President of the Federal Republic of Nigeria and Chairperson of the African Union in Abuja, Nigeria, 1 November 2005.

⁵³ AU '12th ordinary summit of the AU Heads of State and Government ends today in Addis Ababa' (press release 43/2009).

⁵⁴ Hoffschulte (n 11 above) 113-118.

⁵⁵ Hoffschulte 113.

⁵⁶ Hoffschulte 114.

in 1998.⁵⁷ Based on the experience of the European Charter, the same process can start in Africa and this can lead to the development of common regional standards for local government and decentralisation in Africa. There is a communication already before the AU on the need for a similar instrument in Africa which calls for institutional co-operation between local government and human rights in Africa. Such co-operation and collaboration will set the ground for discussions on a regional charter in Africa.

2.1.4 Emerging 'international role' of local government ('glocalisation')

De Visser explains that '[g]lobalisation has heralded in a shift in political power from the nation state to the supra-national and international levels'.⁵⁸ The resulting factor in this trend is that the factors at play at the international scene are increasingly having an impact on people at the local level. This trend, where international and regional activities impact on the local more than the national level, has come to be referred to as 'glocalisation'.⁵⁹ De Visser further notes:⁶⁰

National boundaries are rapidly losing their importance as criteria on the basis of which investment decisions are made and these decisions are more and more influenced by the standard of services provided by local governments. Hence, municipalities become contenders in global investment competition for investment.

The end result of the trend described above is that local communities and local governments are being connected with the international system and this has a direct impact on local government. There is a need to evaluate the process of glocalisation and its impact on the enjoyment of human rights at the local level. Does glocalisation offer opportunities or challenges to local governments in terms of the realisation of fundamental rights? What is the niche role for local governments in human rights protection in view of the current trend? Appropriate institutional linkages and discussions between the pan-African local government and human rights institutions can start answering some of the questions. Local governments are no longer the institutions that were conceived in the classical sense of local government and there is a need to develop principles to guide this.

⁵⁷ Hoffschulte 113.

⁵⁸ J de Visser *Developmental local government: A case study of South Africa* (2005) 26.

⁵⁹ De Visser (n 58 above) 27 notes that it not clear who coined the term and when. However, he further notes that '[a]t the opening of the Africities Conference 2000, the following remark was made by the Secretary-General of the Union of African Towns, Mr Badreddine Senoussi: "Globalisation should allow local authorities to be the speakers of the people in addressing irregularities."'

⁶⁰ De Visser (n 58 above) 27.

3 Local government and human rights institutions in Africa: Silent co-operation

The African Commission rarely, if ever, engages local governments directly in its work. The African Commission focuses its work on national governments only.⁶¹ Similarly, non-governmental organisations (NGOs) dealing with human rights issues direct most or all of their advocacy efforts at national governments.⁶² The ICHRP report notes that, while some attention may at times be directed to other spheres of government, this happens rarely and is almost exclusively directed at states/regional governments in federal states.⁶³ However, the report further notes that even in such cases, regions/states in a federation are treated as having secondary responsibility in the realisation of human rights.⁶⁴

The deliberate avoidance of lower spheres of government is, however, not unique to the African Commission. The ICHRP report notes the same trend even by UN human rights treaty bodies and experts appointed under special mechanisms. The report notes that 'when UN experts visit countries to investigate human rights, they usually raise complaints with central governments, even if the abuses are being carried out by lower levels of authority'.⁶⁵ States are the primary actors in international law (which international human rights law is part of). National spheres of governments are the primary subjects of international law as they are the ones which negotiate and conclude treaties, thus taking responsibility to implement the obligations at the international level.⁶⁶ Consequently, states are the primary actors and duty-bearers at the international level and supranational human rights bodies such as the African Commission are wont to focus on national governments. This trend is not misplaced as any direct approach to sub-national bodies will go against fundamental tenets of international law such as state sovereignty and non-interference.

Indeed, until the UN Habitat II Conference of 1996 in Istanbul, the UN was reluctant to engage local governments directly in its decentralisation and local government programmes and chose instead to deal with national governments.⁶⁷ There was also initial resistance by national governments⁶⁸ at attempts to have local government representatives participate directly in the conference sessions at UN Habitat

⁶¹ Ahikire (n 8 above) 2.

⁶² As above.

⁶³ ICHRP (n 3 above) 37-39.

⁶⁴ ICHRP (n 3 above) 37.

⁶⁵ As above.

⁶⁶ As above.

⁶⁷ Hoffschulte (n 11 above) 110-111.

⁶⁸ As above.

II.⁶⁹ National governments advanced the same argument of non-interference in internal affairs. Hoffschulte notes that the same resistance persisted in later conferences and still continues to be a major challenge, including during the adoption of a World Charter on Local Government.⁷⁰ Even the European Charter on local self-government, whose successful experience inspired the drafting of a World Charter on Local Government, faced initial resistance by member states based on the same argument of 'non-interference in their internal affairs'.⁷¹

However, the UN Habitat II Conference has also been hailed as a 'breakthrough' as local governments were directly engaged during the congress. Hoffschulte notes that 'local authorities were not only recognised as the "strongest partner close to the citizens", but they were also treated as levels of government'.⁷² The European Charter on local self-government continues to provide a useful example of member states. It uses its success as a basis for winning states opposed to a world charter on local government.⁷³

While the African Commission has as yet not directly or substantially engaged local governments, a review of the work of the African Commission shows that the Commission has in the past dealt with substantial issues of human rights that touch on local government. This can be seen when the African Commission considered communications under section 62 of the African Charter, in its examination of state reports and during promotional visits and fact-finding missions by commissioners. There are NGOs whose human rights work and activities touch on local government and decentralisation issues. Participation of NGOs in sessions of the African Commission and other activities of the Commission bring the African Commission into indirect touch with local government.

In *Katangese Peoples' Congress v Zaire*,⁷⁴ the African Commission observed that self-determination, as provided for under the African Charter, can be fully exercised through local government.⁷⁵ In arriving in its decision, the African Commission noted that there were no human rights violations that warranted the exercise of the right to self-determination in a manner that affects the sovereignty and territorial integrity of Zaire, as it was then referred to.⁷⁶ The African Commission proceeded to hold that, in the absence of any violations which justify external secession and fragmentation of the state of Zaire, the region of Katanga had an option of using local government and other

⁶⁹ Hoffschulte 110-111.

⁷⁰ Hoffschulte 110.

⁷¹ Hoffschulte 114.

⁷² Hoffschulte 109.

⁷³ Hoffschulte 113.

⁷⁴ (2000) AHRLR 72 (ACHPR 1995).

⁷⁵ n 74 above, para 4.

⁷⁶ As above.

arrangements, such as federalism, to exercise the right to self-determination as provided for under article 20(1) of the African Charter.

However, while the African Commission noted that the Katanga region could use local government to achieve self-determination, it did not go as far as describing, even at a general level, how same could be achieved. The African Commission never used the opportunity to engage with the place of local government in the realisation of the right to self-determination. A similar trend by the African Commission can be seen even in later communications, such as *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of the Endorois Welfare Council) v Kenya (Endorois case)*.⁷⁷ While the Commission noted in its decision that the concerned local government authorities⁷⁸ had failed to protect some rights of the Endorois people,⁷⁹ the Commission did not proceed to make any substantive findings and recommendations against the local government institutions concerned.⁸⁰ Instead, the Commission focused its recommendations and follow up on the national government. Thus, the African Commission makes general recommendations which directly impact on local governments of state parties without recognising such recommendations expressly as duties of local governments.

There are also several activity reports which report of meetings between commissioners and officials of ministries in charge of local government officials during promotional visits and fact-finding missions.⁸¹ However, in most of these cases, there is no substantial engagement with local government or sub-national units of government. Thus, it is evident from the instances discussed above that the African Commission has never engaged with or focused on the distinct role that local government can play to ensure more effective protection and realisation of human rights.

Direct and substantial engagement with local governments around the continent presents pervasive consequences as this may be challenged on the basis of traditional norms, such as sovereignty and non-interference in internal affairs. The sheer number of local authorities across the continent can also overwhelm the African Commission if it decides to directly engage with each local government authority on the entire continent. Thus, a proposal for direct and substantial engagement of local authorities with the African Commission presents both legal and practical challenges. However, these legal and practical difficulties do not prevent the need to interrogate the distinct role that

⁷⁷ Communication 276/2003.

⁷⁸ Baringo and Koibatek County Councils.

⁷⁹ *Endorois case* (n 77 above) 159.

⁸⁰ *Endorois case* (n 77 above) 178.

⁸¹ African Commission Report Promotional Mission to the Republic of Mali 9-18 April 2004 9-10.

local governments play in the realisation of human rights and what role the African Commission can play to strengthen this role.

The formation of Pan-African Local Government bodies, such as the AMCOD and the UCLGA, presents an opportunity to better understand and refine the role of local governments. The fact that the two bodies are not local authorities *per se* makes it easier for the two bodies to work with the African Commission without meeting any of the main challenges identified above in order to develop means of strengthening human rights protection at the local level. Institutions similar to the AMCOD and the UCLGA have been formed at sub-regional levels in Africa and can still directly engage with the African Commission with little or no legal and practical difficulties. Ultimately, the African Commission and the pan-African institutions on local government should identify opportunities that can lead to more effective human rights protection at the local level. These institutions can then discuss the broad principles that can guide the African Commission with respect to local government, including if and how the Commission can get into direct contact with local authorities. The next section of the article briefly discusses the initiatives and process that led to formation of these regional and sub-regional bodies on local government.

4 Local government at regional and sub-regional levels in Africa

Pan-African institutions on local government can be classified into two broad categories: local government associations and inter-governmental institutions on local government. While the former draw their membership mainly from individual local authorities and national local government associations (organised local government), the latter are composed of national ministries that are in charge of local governance in their respective countries. An example of an inter-governmental institution of local government is the AMCOD which is composed of Ministers of local government in charge of local government across the continent. The UCLGA is an example of a regional local government association. A similar pattern of institutions is replicated at the sub-regional level in Africa and the next section discusses the main institutions at the regional and sub-regional levels under the two broad categories identified above.

4.1 Regional local government associations

The UCLGA is the continental body that represents local government in Africa at the regional level.⁸² The UCLGA was formed on 18 May 2005 in Pretoria, South Africa, after a merger of the three umbrella

⁸² UCGLA (n 52 above).

regional associations on local government.⁸³ It has established formal institutional links with the AU and has submitted a memorandum of its proposals to the Assembly of Heads of State and Government of the AU, including the adoption of a regional charter that commits member states to devolve their powers to sub-national units.⁸⁴ The UCLGA has a membership of over 40 national local government associations from all regions of Africa and consisting of 2 000 cities on the continent.⁸⁵ The UCLGA has since changed its headquarters to Rabat, Morocco, and enjoys the diplomatic status of a pan-African international organisation.⁸⁶ The AU has expressed its willingness to work with the UCLGA in order to enhance local democracy and other objectives of its formation.⁸⁷

UCLGA is also a founding member of the United Cities and Local Government (UCLG), the global body that represents local governments, and which operates as its regional section in Africa.⁸⁸ The UCLG was formed after calls for a unified local government during the UN Habitat II Congress in 1996.⁸⁹ The UCLG replaced a loose organisational structure that was formed after the UN Habitat II Congress, named the World Association of Cities and Local Authorities Coordination (WACLAC).⁹⁰ The UCLG was also formed after a merger of the major international local government associations into one body under the UCLG.⁹¹

UCLGA's Constitution lists one of its objectives to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.⁹² The mission statement of UCLGA is, among other things, to 'ensure democracy, equality and respect for human rights at the local level'. UCLGA has organised forums where the human rights situation at the local level has been discussed and has identified the role that

⁸³ The three institutions that were merged were the African Union of Local Authorities (AULA), Union de Villes Africaines (UVA) and the African Chapter of the Unao dos Cidades Lusofono Africana.

⁸⁴ UCGLA (n 52 above).

⁸⁵ See <http://www.uclga.org/pages/content/?&language=EN&id=19> (accessed 2 November 2010).

⁸⁶ As above.

⁸⁷ Assembly of the AU Opening Speech by His Excellency President Olusegun Obasanjo, President of the Federal Republic of Nigeria, Chairperson of the AU at the 5th ordinary session of the AU Assembly, Sirte, Libya, 4 July 2005.

⁸⁸ As above.

⁸⁹ Hoffschulte (n 11 above) 113.

⁹⁰ As above.

⁹¹ UCLG has its headquarters in Barcelona and commands presence in 136 of the 191 member states of the UN. Over 1 000 cities in over 95 countries across the world are direct members and also boast 115 national local government associations representing virtually all the existing local government associations.

⁹² Art 4, para 4.10 of the Constitution of the United Cities and Local Government Association (as amended by the UCLGA Extraordinary General Assembly Kopanong Resort and Conference Centre, Johannesburg, South Africa, 18 September 2008).

UCLGA can play.⁹³ This is the clearest indication that UCLGA is ready for dialogue and institutional collaboration for better and more effective realisation of human rights at the local level in Africa.

There are also significant developments at the sub-regional level. The East Africa Local Government Association (EALGA), based in Arusha, Tanzania,⁹⁴ represents local government in the East African Community. However, unlike UCLGA, EALGA draws its direct membership from the national local government associations of member states of the East African Community (EAC); there are no individual member local government authorities in EALGA.⁹⁵ Apart from EALGA, there are no other sub-regional local government associations. However, sub-regional communities are also coming up with ministerial forums of local government and it remains to be seen whether these will inspire the formation of sub-regional local government associations. However, sub-regional associations are not recognised within the structure of UCLGA and thus do not feature much in this discussion.⁹⁶

4.2 Regional inter-governmental institutions in local government

AMCOD is a regional forum of ministers in charge of local government and decentralisation.⁹⁷ AMCOD was formed after a series of meetings and activities on strengthening local governance.⁹⁸ In its last Special General Meeting on 30 September 2010 in Yaounde, AMCOD agreed on establishing a secretariat in Yaounde, on member states' contribution, an institutional logo and other important institutional arrangements.⁹⁹ AMCOD operates as a technical committee to the AU on matters of decentralisation,¹⁰⁰ thus making AMCOD an expression of the willingness of the AU to engage with local government as a level of government. At the Yaounde meeting, the president of UCLGA

⁹³ During the conference, papers were presented on women's rights in local government in Uganda and Zimbabwe.

⁹⁴ See the website <http://www.ealga.org> for more information (accessed 9 October 2010).

⁹⁵ As above.

⁹⁶ See UCLGA website <http://www.uclga.org/pages/content/?language=EN&Id=26> (accessed 3 November 2010).

⁹⁷ AMCOD (n 12 above).

⁹⁸ See report by the United Nations Public Administration and Development Programme Ministerial Conference on Leadership Capacity Development for Decentralised Governance and Poverty Reduction in Africa and 'All-Africa Ministerial Conference on Decentralisation and Local Government (AMCOD), held at Palais des Congres, Yaounde, Cameroon, 3-4, for detailed information on the forums and activities that led to formation of the AMCOD.

⁹⁹ P Bidjocka 'Decentralisation: Experts deliberate on working document' *CRTV* 30 September 2010 http://www.crtv.cm/cont/nouvelles/nouvelles_sola_fr.php?idFielid=8002&table=nouvelles&sub=national (accessed 3 October 2010).

¹⁰⁰ AU '12th ordinary summit of the AU Heads of State and Government ends today in Addis Ababa', press release 43/2009.

noted that ‘with the establishment of both AMCOD and UCLGA, the decentralisation policy can now walk on both legs: the central government leg through AMCOD and the local government leg through UCLGA’.¹⁰¹

Similarly, there are efforts to have local government associations and ministerial initiatives on local government at the sub-regional level. In the East Africa region, ministers of local government met on 5 to 6 March 2010 in Uganda and adopted the Munyonyo Declaration on Leadership Capacity Building for Local Governance and Service Delivery in the East African Community.¹⁰² The Declaration recognises the special role of local government in the fulfilment of Millennium Development Goals (MDGs) which mainly hinge on economic, social and cultural rights.¹⁰³ The Declaration committed the participating governments to past initiatives on local government, such as the Aberdeen Agenda and the Kampala Agenda adopted under the Commonwealth Local Government Forum (CLGF).¹⁰⁴ In Southern Africa, the Department of Co-operative Governance and Traditional Affairs (CoGTA) hosted local government ministers from the Southern Africa Development Community (SADC) on 29 April 2009 to discuss a common regional agenda for local government in the sub-region.¹⁰⁵ The SADC Forum has also managed to establish a desk on local government matters at the SADC headquarters in Namibia.¹⁰⁶

5 Opportunities for forging institutional links in local government and human rights

The institutions and activities described above form a basis upon which institutional links and co-operation can be built. Activities through

¹⁰¹ President of the UCLGA, Tarayia Ole Kores, speaking during the extraordinary session of AMCOD on 30 September 2010; see E Kendemeh ‘Africa: Decentralisation – African Ministers choose Yaounde their headquarters’ <http://allafrica.com/stories/201010040896.html> (accessed 5 October 2010).

¹⁰² Adopted during the ‘Leadership Capacity-Building Workshop for Local Governance and Service Delivery in East African Community’ facilitated by UNDP held at the Commonwealth Resort Munyonyo Hotel, Kampala, Uganda, 5-6 March 2009.

¹⁰³ Preamble and main text of the Declaration focused on achievement of MDGs.

¹⁰⁴ CLGF ‘Time for local democracy, the Aberdeen Agenda: Commonwealth Principles on Good Practice for Local Democracy and Good Governance’, adopted during the general meeting of the CLGF, convened in Aberdeen, Scotland on 18 March 2005, following the Third Commonwealth Local Government Conference Deepening Local Democracy, 15-17 March 2005, attended by over 46 countries, including over 20 ministers with responsibility for local government.

¹⁰⁵ See Declaration of SADC Local Government Ministers Meeting, held at Sheraton Hotel, Pretoria, South Africa on 29 April 2010.

¹⁰⁶ IMC Chombo ‘Speech by the Honourable Minister of Local Government, Rural and Urban Development’ in J de Visser *et al* (eds) *Local government reform in Zimbabwe* (2010) xi.

which institutional links can be started include sessions of the African Commission,¹⁰⁷ and AMCOD and UCLGA meetings and forums, such as Africities Conferences.¹⁰⁸ These institutions need to start engaging with the idea of institutional linkages aimed at ensuring better protection and promotion of fundamental human rights. The African Commission has many avenues through which it can engage with pan-African local government institutions. The means available to the African Commission include avenues such as communications, state reporting, promotional visits and fact-finding. Each of these is discussed briefly below.

5.1 State reporting

State parties to the African Charter are required every two years to submit reports to the African Commission on the status of implementation of the African Charter.¹⁰⁹ The African Commission examines the reports submitted and engages state parties in constructive dialogue followed by general recommendations which note positive aspects of the report as well as areas where a state needs to improve in order to comply with the African Charter. This avenue offers the African Commission and state parties an opportunity to involve local government in the process. Firstly, the African Commission may call on state parties to substantially engage local government authorities and their associations to participate in the preparation of state reports under the African Charter. This should especially be encouraged in regard to Charter provisions that are relevant to local government functional areas. Generally, there has been very little or no involvement of sub-national units of government in the preparation of state reports to the African Commission and other treaty monitoring bodies.¹¹⁰

Secondly, the African Commission may recommend that state parties include representatives of local government in state delegations in sessions for constructive dialogue. The participation of local government representatives in constructive dialogue with the African Commission can be extremely useful where the core human rights concerns in a particular state are directly relevant to local government. In such a case, the relevant local government authorities may engage in a productive engagement with the African Commission on how to fulfil Charter

¹⁰⁷ African Commission 47th ordinary session 12-26 May 2010, Banjul, The Gambia http://www.achpr.org/english/_info/47th%20Ordinary%20Session.html (accessed 10 October 2010).

¹⁰⁸ A periodic event organised by UCLGA that brings together the UCLGA membership and other stakeholders on local government in the region. The last Africities Conference was held in Marrakech, Morocco, from 16-20 December 2009.

¹⁰⁹ Art 62 African Charter.

¹¹⁰ Community Law Centre 'South Africa: State of State reporting under international human rights law' reader prepared for the seminar on Promoting constitutional rights through international human rights law: The state of South Africa's state reporting held in Cape Town, South Africa, 22 September 2010.

obligations. The African Commission has, on many occasions, called for as wide participation as possible in the preparation of state reports and direct participation of local government in the process will go a long way to ensuring such participation.¹¹¹

5.2 Communications

The African Commission receives communications from individuals on violations of Charter obligations and also inter-state complaints on violations of the African Charter.¹¹² There are cases where the African Commission has received complaints on issues which relate to local government, for instance, the *Endorois* case, where local government authorities in Kenya had failed to honour constitutional and Charter obligations in respect to the land rights of the Endorois people.¹¹³ County Councils, created under the Local Government Act of Kenya,¹¹⁴ held the Endorois lands in trust for the community and were supposed to utilise the land according to the interests of the Endorois people.¹¹⁵ However, the Endorois people alleged a violation of their rights over their traditional lands.¹¹⁶ However, nowhere in the case and submissions were the relevant local government authorities involved. Submissions of the Kenyan government in the communication were brief, general and devoid of practical and detailed information on which steps, if any, the concerned local authorities took to safeguard the rights of the Endorois.¹¹⁷ The African Commission should use opportunities such as the *Endorois* case to clarify the place, role and extent of the accountability of local government to Charter obligations.

5.3 Promotional visits and fact finding

Commissioners from the African Commission carry out occasional visits to member states. In most cases, such visits are meant to promote the objectives and purpose of the Charter. During such visits, commissioners meet with various government officials of state parties. In some cases, commissioners meet with ministers and ministry officials

¹¹¹ K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Journal* 280-283.

¹¹² Arts 47-59 African Charter.

¹¹³ *Endorois* case (n 77 above) 159.

¹¹⁴ Cap 265 Laws of Kenya.

¹¹⁵ Sec 115(1) of the immediate former Constitution of Kenya states that '[a]ll trust land shall vest in the county council within whose area of jurisdiction it is situated'. Subsec (2) further provides that '[e]ach county council shall hold the trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under African customary law for the time being in force, and applicable thereto, be vested in any tribe, group, family or individual'.

¹¹⁶ n 80 above.

¹¹⁷ *Endorois* case (n 77 above) 31-32.

in charge of local government.¹¹⁸ Promotional visits and fact-finding missions bring commissioners in close contact with local government and they should use such opportunities to highlight the synergies and need for more institutional collaboration between the African Commission and local government or representatives of local government at the national level.

Fact-finding missions and promotional visits by the African Commission provide an opportunity for the Commission to clarify practical links between local governments, national governments and the Commission for better protection of human rights. For instance, the African Commission may decide to carry out a fact-finding mission to assess human rights situations and the manner and extent to which local governments can be engaged by the African Commission for effective human rights protection. Reports from fact-finding missions which concern local government authorities will go a long way to understanding how the role of local governments can be strengthened.

5.4 Non-governmental organisations, local government and the African Commission

NGOs play an important role in terms of influencing the agenda of the African Commission and have been noted to have a robust relationship with the African Commission.¹¹⁹ NGOs participate in the work of the African Commission through the submission of communications, participating in sessions of the African Commission, the submission of shadow reports and other activities of the African Commission. This is an avenue that can be explored in order to influence the agenda of local government and human rights in the workings of the African Commission. NGOs that have a working relationship with the African Commission can submit communications related to local governments to the African Commission. This will in turn create an opportunity to discuss the nature of responsibility of local governments in the African Commission or at least to clarify the role of the African Commission to ensure that local governments are strengthened to perform their role.

A more desirable step is to grant institutions such as the UCLGA, sub-regional local government associations and even national local government associations, observer status at African Commission sessions. National local government associations and their regional and sub-regional counterparts are not local government authorities *per se* and can thus participate in African Commission activities, in the same way as NGOs and national human rights institutions. These institutions can in turn influence the agenda of the African Commission and

¹¹⁸ African Commission (n 81 above) 9-10.

¹¹⁹ BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2010) 10 *African Human Rights Law Journal* 27.

continue the discussion on local government and human rights. Local government associations can also submit shadow reports, communications and participate in civil society forums of the African Commission. Local government associations may, for instance, approach the African Commission where political interference by national governments in local government matters impedes the latter from performing duties that lead to the fulfilment of fundamental human rights. This will in turn lead to a clarification of the role and extent to which the African Commission can go to protect the institutional integrity of local governments in order to promote rights protection.

6 Towards regional institutional collaboration for the effective realisation and protection of human rights at the local level

This article has attempted to make a case for institutional links between pan-African institutions for local government and the African Commission. In so doing, the article discussed the rationale and justification for such institutional collaboration and links. The motivation behind building such institutional links is to develop strategies for more effective protection of human rights at the local level. However, there is a need for more reflection on how institutional collaboration can be achieved and how this can lead to better protection of human rights. The ICHRP report notes that 'human rights provide a helpful and practical approach for solving some of the difficulties and disputes regarding social and economic development that local and central authority confront'.¹²⁰ Institutional collaboration at the regional level will lead to a better understanding of the complimentary role that local authorities may play in the protection and promotion of human rights in the region.

As discussed above, the African Commission has avenues through which institutional links can be built. Apart from the traditional avenues available for engaging issues of local government and human rights, such as communications and state reports, the African Commission may decide to employ special mechanisms. A special mechanism, such as the appointment of a Special Rapporteur on Local Government, Decentralisation and Human Rights, can be a significant step towards addressing this. From the cases and experiences discussed above, it is clear that even the African Commission needs to improve its approach to issues of local government and human rights. The appointment of a Special Rapporteur can lead to the clarification of possible areas of convergence and co-operation. The Special Rapporteur can also give broad

¹²⁰ ICHRP (n 3 above) 41.

guidance on how such collaboration can lead to better protection of human rights.

The establishment of a permanent Secretariat for the AMCOD is another important development in institutional collaboration on local government and human rights in Africa. This is because the AMCOD has the status of a technical committee on decentralisation matters to the AU. Given its close link to UCLGA and its commitment to local democracy and governance, the AMCOD is definitely an important lobbying point in AU structures. The AMCOD can easily lead the process of a regional instrument on decentralisation and local government, given its status in the AU and its proximity to the AHSG. However, there is a need for institutional collaboration between the AMCOD, UCLGA and the African Commission for further strategies. Human rights and democracy are core concerns for all these institutions and institutional collaboration will definitely lead to further strategies on how to strengthen and achieve local democracy and the effective realisation of human rights in the region.

Realising the right to primary education in Cameroon

Serges Alain Djoyou Kamga*

Doctoral Candidate and Researcher, Centre for Human Rights, University of Pretoria, South Africa

Summary

Cameroon is party to all international and regional instruments providing for the right to education, and compulsory and free primary education in particular. The article examines Cameroon's compliance with the right to free education, based on the normative content of the right to education, defined by the United Nations Committee on Economic Social and Cultural Rights as compulsory and free universal access to primary education that is available, accessible, acceptable and appropriately adapted (known as the '4 A's'). The article reviews to what extent primary education is compulsory and free to all children in Cameroon; it focuses on the 4 A's framework and assesses the justiciability of the right. The article concludes that, although primary education is compulsory in the country, it is not yet available, accessible and adaptable, but is largely acceptable when it is available. Furthermore, the justiciability of the right to primary education is hindered by constitutional practices such as the lack of standing in court for private individuals, the lack of constitutional remedies in case of a violation of rights, and weak separation of powers, characterised by the pre-eminence of the executive.

1 Introduction

Education is a basic human right that builds the capacity of individuals to claim other human rights. Primary education is a first step towards ensuring human development. The importance of primary education

* Lic-en-dt (Yaoundé II), LLM (Human Rights and Constitutional Practice) (Pretoria); sergesalain26@gmail.com. I am greatly indebted to Prof Charles Fombad for his valuable and incisive comments on earlier drafts.

is underscored by the international community that calls for compulsory free primary education. This call is contained in international instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹, which also explains state obligations for a detailed plan of action for the progressive implementation of the right to compulsory education free of charge for all.² The Convention on the Rights of the Child (CRC),³ and the 1960 United Nations Educational and Cultural Organisation (UNESCO) Convention against Discrimination in Education also set out the right to free compulsory primary education.⁴ These provisions for free and compulsory primary education are the substance of the political pledges made under the Dakar Framework for Action regarding the national Education for All (EFA) action plan.⁵

This article focuses on Cameroon which is often referred to as 'Africa in miniature',⁶ for having all the characteristics of Africa broadly. At the regional level, the right to education is secured in the African Charter on Human and Peoples' Rights (African Charter)⁷ and the 1990 African Charter on the Rights and Welfare of the Child (African Children's Charter).⁸ Cameroon is party to all these instruments,⁹ providing for the right to education which is enshrined in paragraph 23 of its Constitution's Preamble in these words:

The state shall guarantee the child's right to education. Primary education shall be compulsory. The organisation and supervision of the education shall be the bounden duty of the state.

Given that governments hold the primary responsibility to fulfil the realisation of the right to education and primary education, in

¹ ICESCR, General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, arts 13(2)(a) and 14.

² Art 14 and ESCR Committee General Comment 11.

³ Art 28(1).

⁴ Art 4(a).

⁵ The Dakar goals set at the World Education Forum (2000).

⁶ Expression used by the first President of Cameroon in his early speeches, as quoted by C Tamasang 'The right to water in Cameroon: Legal framework for sustainable utilisation' 9, paper prepared for a workshop entitled 'Legal aspects of water sector reforms' organised in Geneva from 20 to 21 April 2007 by the International Environmental Law Research Centre (IELRC) in the context of the research partnership 2006-2009 on Water Law sponsored by the Swiss National Science Foundation (on file with author).

⁷ Art 17 African Charter on Human and Peoples' Rights, adopted on 27 June 1981 by the OAU Assembly, OAU Doc CAB/LEG/67/3 Rev 5 (1982) 21 *International Legal Materials* 58; C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29, entered into force on 21 October 1986.

⁸ Art 11 African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990), entered into force on 2 November 1999.

⁹ ICESCR (ratification 27 June 1984); CEDAW (ratification 23 August 1994); CRC (ratification 11 January 1993); African Charter (ratification 20 June 1989); African Children's Charter (ratification 5 September 1997).

particular, the aim of the article is to examine to what extent Cameroon complies with its international obligations related to the right to primary education.

The basic standard used to assess state compliance is the extent to which primary education is compulsory and free for all in the country. In addition, the extent to which primary education is available, accessible, acceptable and adaptable, is considered. This standard is prescribed by the Committee on Economic, Social and Cultural Rights (ESCR Committee) in its General Comment 13, which calls upon state parties to ICESCR to ensure the availability, accessibility, acceptability and adaptability of education or to comply with the '4-A right to education framework'.¹⁰ In the course of this assessment, the extent to which the right to primary education is justiciable will also be considered.

The article is divided into four sections, including this introduction. The second section explains the substance of the right to primary education which entails its compulsory and free character, the need for a plan of action and the '4-As framework'. It investigates the application of each of these elements in the educational system of Cameroon. The third section examines the justiciability of the right to primary education and the final section provides concluding remarks.

2 Right to primary education

Primary education, understood as 'the main delivery system for the basic education of children outside the family',¹¹ is to be compulsory, free of charge and subjected to a detailed implementation plan and comply with the 4 A's.

2.1 Compulsory

The compulsory aspect of primary education emphasises the obligatory character of education which is to be given to all children without discrimination. To use the words of the ESCR Committee, 'neither parents, nor guardians, nor the state are entitled to treat as optional the decision as to whether the child should have access to primary education'.¹² The state is duty bound to ensure that all children attend primary school without any consideration based on culture or any other factor. Article 13(2)(a) of ICESCR provides: 'Primary education shall be compulsory and available free to all.' Accordingly, primary education should be

¹⁰ The right to education, Preliminary Report of the Special Rapporteur submitted in accordance with African Commission Resolution 1998/33, K Tomasevski, UN Doc E/CN.4/1999/49, paras 51-56; also K Tomasevski Human rights obligations in education: The 4-A scheme (2006).

¹¹ ESCR Committee General Comment 13, para 9.

¹² ESCR Committee General Comment 11, para 6.

mandatory; it should be at the disposal of everyone, free of charge and should include free school supplies.

In Cameroon, there is no legislation allowing children to be absent from primary school for cultural, religious, family or other reasons. On the contrary, all national legislation encourages parents to send their children to primary schools. Primary education is thus compulsory in Cameroon.

2.2 Free of charge

Primary education shall be offered to all without fees charged to the children, parents and guardians. This requirement prohibits all fees, including indirect costs such as compulsory charges levied on parents or expenditure uniforms.¹³ The imposition of compulsory uniforms to be worn by learners should entail their availability free of charge to learners from poor families.¹⁴ As will be shown under the section allocated to economic accessibility, primary education is far from being free in Cameroon.

2.3 Plan of action

Under the right to primary education framework, state parties to ICE-SCR are compelled to 'adopt a plan of action'¹⁵ with clear deadlines¹⁶ to give effect to the right. In this regard, the plan of action for the progressive implementation of compulsory education free of charge for all is a 'continuous obligation', compelling states to monitor and improve a plan to have a permanent universal free education for all.¹⁷ Cameroon has endorsed a sector plan for primary education,¹⁸ which will be discussed throughout the article. The following sections investigate the 4 A's.

2.4 Availability

According to the ESCR Committee,¹⁹ availability requires that working educational institutions and programmes are available in sufficient quantity. It also entails facilities at schools such as well-equipped classrooms, libraries, sanitation facilities for both sexes, safe drinking water, trained and well-paid teachers and teaching materials.

¹³ n 12 above, para 7.

¹⁴ UNESCO *The right to education free of charge for all: Ensuring compliance with international obligations* (2008) 6.

¹⁵ General Comment 11, para 9.

¹⁶ n 15 above, para 10.

¹⁷ UNESCO (n 14 above) 3.

¹⁸ UNESCO EFA Global Monitoring Report 'Reaching the marginalised' (2010) 253; figure 4.17. The Sector plan for primary education is included in the 1998 Cameroon Education Framework Act 633/PJ L./ATN.

¹⁹ General Comment 13, para 6(a).

In the Cameroonian context, primary education consists of ‘the first six grades of compulsory schooling, normally provided to six to 12 year-olds (though with high repetition rates, students up to age 14 are often included)’.²⁰

In order to ensure the availability of education, the government uses numerous policies. It started the process of reform and decentralisation of its education system after the World Conference on Education for All held in Jomtien, Thailand, in 1990. This reform undertaken through the Cameroonian decentralisation policy in a context of educational reform and economic crisis was informed by both the principles articulated in Jomtien and by the realities of an economic crisis, the negative effects of which have marked all sectors of national activity, including the education sector.²¹

The Cameroonian decentralisation policy in a context of educational reform and economic crisis entails, among others, the adoption of the Cameroon’s Education Framework²² which set up the legal framework for the reform; aiming, among others, to universalise free primary education. In addition, the 2000 Dakar Framework for Action promoting education for all²³ gave another impulse to ensure the availability of free primary education. Through this framework, states commit themselves to:

- expanding and improving comprehensive early childhood care and education, especially for the most vulnerable and disadvantaged children;²⁴
- eliminating gender disparities in primary and secondary education by 2005, and achieving gender equality in education by 2015, with a focus on ensuring girls’ full and equal access to and achievement in basic education of good quality;²⁵ and
- improving all aspects of the quality of education and ensuring excellence of all so that recognised and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills.²⁶

Informed by these commitments, and in order to ensure free and compulsory primary education, Cameroon formally adopted an EFA National Plan in 2002. This plan aims to serve both as a strategy

²⁰ ‘Cameroon — Preprimary and primary education’ <http://education.stateuniversity.com/pages/229/Cameroon-PREPRIMARY-PRIMARY-EDUCATION.html> (accessed 17 February 2011).

²¹ UNESCO *Education policies and strategies 7 — Decentralisation in education: National policies and practices* (2005) 25.

²² Act 633/PJ L/ATN, adopted in 1998 (n 18 above).

²³ The goal of Education for All was adopted in Dakar, Senegal, from 26 to 28 April 2000 through the Dakar Framework for Action.

²⁴ Art 7(i).

²⁵ Art 7(v).

²⁶ Art 7(vi).

document at the national level and as a tool to be used by development partners at continental and international levels. It comprises a decentralisation methodology and an implementation strategy, the time frame for its operationalisation is divided into three stages: short term from 2003 to 2005, medium term from 2006 to 2010, and long term from 2011 to 2015.²⁷ Still to improve the availability of education, Cameroon uses priority six of Cameroon's Poverty Reduction Strategy Paper (PRSP)²⁸ aimed at strengthening human resources and the social sector and facilitating the integration of vulnerable groups into the economy to cater for the right to education.²⁹

In assessing free primary education, the General State of Education Workshop held in May 1995 in Yaoundé, Cameroon, provided a general consensus calling for free and compulsory basic education for all. As a result, the principle of free primary education was underlined by the government's order of February 1996 that organises education in the country,³⁰ and was translated into the Finance Law 2000/8 of 30 June 2008.³¹ In addition, through Decree 2004/320 of 8 December 2004, to ensure the availability of education, the government created three ministries: one in charge of basic education (nursery and primary schools), the other in charge of secondary education (general and technical) and the last one in charge of higher education.

Against the background of these policies aiming to ensure education for all, Cameroon attempted to ensure the availability of primary education. In this respect, having received the HIPC funds of CFAF 16,66 million, 3 768 primary schools were built from 2001 to 2005, and 1 498 classrooms by development partners (Japan and the African Development Bank). More than a thousand teachers were recruited.³² The implementation of the education sector strategy was successful through rational management of personnel, and computers were set up in various schools to enhance the quality of services provided.

²⁷ UNESCO (n 21 above) 26.

²⁸ The PRSP is the World Bank-IMF-sponsored framework for poverty reduction. It is important to note that attached to the 1996 Heavily Indebted Poor Countries (HIPC) initiative characterised by timelines associated with debt reduction.

²⁹ The other priorities of the PRSP are: promoting a stable macro-economic framework; strengthening growth by diversifying the economy; revitalising the private sector as the main engine of growth and a partner in delivering social services; developing basic infrastructures and natural resources while protecting the environment; accelerating regional integration in the framework of the Economic and Monetary Union of Central Africa (CAEMC/CEMAC); and improving the institutional framework, administrative management and governance. Also, the Cameroonian government's strategy to fight against poverty as presented by the government of Cameroon in April 2003 at <http://www.imf.org/external/pubs/ft/scr/2003/cr03249.pdf> (accessed 16 June 2008).

³⁰ Order 20/B1/1464/MINEF/MINEDUC/CAB/ of 13; art 2 of the Order indicates that primary education is free.

³¹ Art 11(3) of this law emphasises that primary education is free.

³² IMF Country Report 06/260 of July 2006, para 213.

Furthermore, to ensure the continuation of education in rural areas, the government adopted a circular on rationalising the management of national education staff.³³ Accordingly, teachers remain in their working posts and may be transferred only after at least three academic years in the initial school, and five years for administrative personnel, except in case of transfer to join one's family or for health reasons where the submission of proof is required.

In spite of these measures, many schools still lack teachers, especially in rural areas where conditions do not attract them. In fact, most rural areas have no electricity or infrastructure and, consequently, teachers are reluctant to settle in such areas. Most of those employed there are trained teachers waiting to be on the government pay roll and are paid by the pupils' parents.³⁴ In such schools, teachers are very often absent or late due to the bad quality of roads and bridges.³⁵

In this regard, on 27 February 2006, there were reports on schools without teachers in the country. For instance, in Balepipi Government Primary School, made up of three old huts, located around 300 kilometres northwest of Douala, there was a 'chronic shortage of teachers' because teachers of the school who were paid by the pupils' parents had gone on strike after 30 months without receiving their monthly salary of 10 000 FCFA (US \$23,60).³⁶

Ironically, the Balepipi Primary School is located only 300 kilometres from Douala, the economic capital of the country. What about schools in the rural areas located thousands of kilometers from towns? Kodo, a statistician involved in the School Charter Project, answers in these terms:³⁷

When you leave the town and travel into the country side in any direction, you will be able to gauge the extent of the disaster: one-room schools (with a single teacher responsible for six different levels), twinned courses taught by individuals with no appropriate training, establishments where more than 85% of teachers are unpaid volunteers, etc. Reading today's official statistics, you might think the government is mocking the educational community.

³³ Circular Note B1/1464/MINEDUC/SG/DESG/DRH/ of 2 July 2003.

³⁴ Telephone conversation with Maurice Kamga who worked as a teacher and primary school headmaster in rural areas for more than 30 years and is now on pension (3 March 2011).

³⁵ More insight on the accessibility of education in Cameroon will be provided in section 3 of this article (section 3.2 below).

³⁶ Education International '[2006-02-27] Cameroon: School without teachers, teachers without schools' <http://www.ei-ie.org/en/article/show.php?id=33&theme=educationforall> (accessed 9 June 2008). It is important to note that this happened in spite of the adoption of Decrees 2000/048, 2000/049 and 2000/050 of 15 March 2000 and, most importantly, Decree 2002/041 of 4 February, which improves teachers' working conditions such as the increase of retirement age in the higher education sector as well as an increase in salaries.

³⁷ As above.

Sustaining this view, the Cameroonian Millennium Development Goals (MDGs) Progress Report at Provincial Level indicates the need to build more classrooms and school infrastructures in order to reduce the number of learners per classroom.³⁸

In the same vein, it is argued that classes are overcrowded, teachers are in short supply and inadequately trained, and school hygiene and sanitation facilities are inadequate.³⁹ A study by the Ministry of Education and the Ministry of Youth and Sports in 2004 found that elementary schools only had sufficient seats for 1,8 million students, whereas 2,9 million students went to school.⁴⁰ The study also showed that the northern provinces were severely neglected. This was reflected in the fact that teachers appointed in the three provinces (Adamawa, North and Extreme North) of that region represented only 5,7 per cent of all teachers working throughout the 10 provinces in the country. In addition, several schools in the region had no water or sanitation.⁴¹

In these schools, teachers ended up becoming volunteers because they were not paid for 10 to 40 months. In the meantime, 4 000 qualified teachers were jobless.⁴² The precarious situation of teachers which is characterised by difficult working conditions⁴³ was acknowledged by Cameroon which linked such conditions to the effects of the economic crisis.⁴⁴ There is an urgent need to ameliorate teachers' conditions and employ many more teachers to ameliorate the availability of primary education.⁴⁵

Notwithstanding the official attachment of Cameroon to international human rights standards,⁴⁶ as demonstrated by the adoption of a plan of action and several other policies, the presence of schools without teachers, the lack of school buildings for all grades, the lack of proper sanitation at school and the neglect of schools in rural areas, show that primary education is not yet available for all in the country.

³⁸ December 2003 Cameroon MDGs Progress Report at Provincial Level, 6.

³⁹ 'The right to education in Cameroon' <http://www.gcicameroon.org/education.htm> (accessed 31 March 2011).

⁴⁰ As above.

⁴¹ As above.

⁴² As above.

⁴³ Cameroon's second periodic report (2006) para 299, http://www.achpr.org/english/_info/statereport_considered_en.html (accessed 17 May 20011).

⁴⁴ As above.

⁴⁵ MDGs Progress Report (n 38 above) 5.

⁴⁶ Para 5 of the Preamble of the Cameroonian Constitution reads: '[We] affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations and the African Charter on Human and Peoples' Rights and all duly ratified international conventions relating thereto.'

2.5 Accessibility

According to the ESCR Committee,⁴⁷ an accessible education system has three features:

- a non-discriminatory education system where everybody is allowed in the classroom;
- physical accessibility. School institutions should be within a safe physical reach, or via modern technology such as a ‘distance learning’ programme; and
- an economic accessibility characterised by an affordable education for all at secondary and tertiary level and a free education at primary level.

2.5.1 Non-discriminatory accessibility

Every state party to ICESCR must afford equal access to primary education for all children of school-going age residing in their territory, including foreign nationals and irrespective of their legal status in the country.⁴⁸

The Cameroonian Constitution guarantees the right to equality and the right not to be discriminated against in these terms: ‘All persons shall have equal rights and obligations.’⁴⁹ The right to equality and the prohibition of discrimination apply to all sectors, including education. Thus, everyone, boys and girls, should have equal access to school and should not be discriminated against on any ground at school.

Free universal access to primary school was one of the main objectives of the decentralisation policy echoed in the 1998 Cameroon’s Education Framework Act.⁵⁰ One of its main objectives was to facilitate access to school for all children, specifically in the most disadvantaged communities.⁵¹ As noted earlier, the country committed itself to ‘eliminating gender disparities in primary and secondary education by 2005, and achieving gender equality in education by 2015, with a focus on ensuring girls’ full and equal access to and achievement in basic education of good quality’.⁵²

However, the statistics are not encouraging. In the Adamawa Province, for example, it is reported that ‘girls’ enrolment, attendance and completion rates are of particular concern due to increased burdens in the home and lack of girl-friendly environments in schools’.⁵³ Nev-

⁴⁷ General Comment 13, para 6(b).

⁴⁸ ESCR Committee General Comment 13, para 34.

⁴⁹ Preamble of the Constitution, para 6.

⁵⁰ Act 633/PJ L./ATN (n 22 above).

⁵¹ UNECSO (n 21 above) 27.

⁵² Art 7(v).

⁵³ UNICEF Humanitarian Action Update, Cameroon, 4 June 2008.

ertheless, to enhance the inclusiveness of girls, since 2000-2001, the government introduced several pedagogic innovations, including:

- School, Friend of Children, Friend of Girls: This initiative emphasises a respect for the rights of the child, a healthy school environment which considers the health of the child, promotes gender equality in an environment where the right to participation of learners, families and communities matters;⁵⁴
- 'Big Sister' initiative. Accordingly, based on the African culture, the eldest of the girls take care of the very young ones, especially little girls who are beginners at school;⁵⁵
- Community Pre-school Centre which is a pre-school set up for boys and girls aged between three and five years old.⁵⁶

Although these initiatives should be commended, so far only 77 per cent of girls eligible to attend primary school are in fact enrolled, whereas 88 per cent of eligible boys are enrolled in primary schools.⁵⁷

As far as the schooling of children with disabilities is concerned, these children are not included as nothing or very little is done to accommodate them at schools. Consequently, children with disabilities are unable to access education.⁵⁸ The government should strive towards the reasonable accommodation of learners with disabilities. In this respect, there is a need to equip primary schools with Braille for blind learners, to set up ramps to facilitate access for wheelchairs and to have lifts to ensure that physically-impaired learners access classrooms and offices. The first step in accommodating persons with disabilities in primary schools is the ratification of UN Convention on the Rights of Persons with Disabilities, which provides guidance on how to ensure the rights to education for learners with disabilities.

Overall, though Cameroon strives to ensure non-discriminatory access to primary education, a lot more needs to be done to enrol more girls in primary schools and to give equal access to learners with disabilities, hence the conclusion that access to primary education is still discriminatory in the country.

2.5.2 Physical accessibility

Physical accessibility of schools entails a location of schools within a short distance or the use of appropriate distance-learning methods.⁵⁹

⁵⁴ Cameroon's second periodic report (n 43 above) para 309.

⁵⁵ As above.

⁵⁶ As above.

⁵⁷ Cameroon's third report (2010) para 281 (see overview of primary education in 2008); http://www.achpr.org/english/_info/statereport_considered_en.html. (accessed 17 May 2011).

⁵⁸ 'Cameroon — Disabled children' <http://www.helpfornonprofit.com/harbour-center-cameroon.html> (accessed 15 March 2011).

⁵⁹ ESCR Committee General Comment 13.

This subsection focuses on the following questions: To what extent are schools physically accessible or to what extent are modern technologies such as distance-learning schemes used to bring school closer to those who are not within the physical reach of the school?

The 1998 Cameroon's Education Framework Act,⁶⁰ referred to earlier, also aims to ensure physical access by bringing the schools to the local community. However, in some parts of the country, rural schools, specifically, are still located far from people's houses and pupils have to walk several kilometres to school. Furthermore, as alluded to earlier, learners who are physically impaired cannot access school premises. The government should ensure that primary schools are close to people's homes and provide a system for those who are unable to reach schools. This can be done by putting emphasis on distance learning which is yet to be a reality at primary school level.

2.5.3 Economic accessibility

At the primary level, the education for all is yet to be a reality⁶¹ in a country where several families are bogged down by the price of learning materials, uniforms and other school-related expenses, as well as the payment of teachers' salaries by learners' parents.⁶² In her 2006 Global Report on education, the UN Special Rapporteur on the Right to Education, Tomasevski, located Cameroon in the group of countries without free education.⁶³ Her argument was based on Cameroon's report to CRC, clearly highlighting the cost paid by learners' parents:

- (a) parents of pupils, 80 per cent of whose required contribution goes to fund school operating costs;
- (b) decentralised local communities (communes), through programmes for the construction and equipment of schools and anti-malaria prophylaxis or 'nivaquinisation' for pupils;
- (c) parents' associations, which make an appreciable contribution to the outfitting and running of schools.⁶⁴

In the same vein, while analysing Cameroons' report, the ESCR Committee clearly expressed its concern about 'the requirement of a parental contribution in the form of compulsory fees levied by primary schools which, in view of high levels of poverty, greatly restrict access to primary education, particularly for girls'.⁶⁵ Similarly, the CRC Committee,

⁶⁰ Act 633/PJ L/ATN (n 22 above).

⁶¹ African Commission 31st ordinary session (n 43 above) para 3(a).

⁶² Education International (n 36 above).

⁶³ K Tomasevski 'The state of the right to education worldwide free or fee: 2006 Global Report' 23.

⁶⁴ UN Doc CRC/C/28/Add 16 (2001) para 217; also Tomasevski (n 63 above).

⁶⁵ Concluding Observations of the ESCR Committee: Cameroon, 8 December 1999.

when considering the Cameroonian Report under article 44 of CRC,⁶⁶ noted the lack of free primary education as a matter of concern.⁶⁷ It consequently called upon Cameroon to '[i]ncrease its budgetary allocations for basic and secondary education; [but also to guarantee] that primary school is free by addressing indirect and hidden costs of basic education'.⁶⁸ In other words, Cameroon was called upon to implement its commitment to ensuring free primary education as provided for by the 1996 Government Order and the 2008 Financial Law.

In spite of several governmental commitments⁶⁹ to ensure free primary education, several charges, including fees 'for medical examinations and certificates as well as for examinations'⁷⁰ are still paid by learners' parents. Wilson argues that 'translating policy and legislative change that abolishes fees into the practice of free [primary] education has proved difficult'.⁷¹ This observation clearly applies to Cameroon that is yet to translate its commitments on EFA into reality.

2.6 Acceptability

An acceptable education entails an education of which the 'form and substance, including curricula and teaching methods, [are] acceptable to students and in some cases to their parents; it should be relevant, culturally appropriate and of good quality'.⁷² It should uphold the advancement of the child's other rights.⁷³

Apart from the 1998 Cameroon's Education Framework Act⁷⁴ 633/PJ L./ATN which has the effectiveness of primary education as an objective, a presidential decree aiming to ensure greater quality of education

⁶⁶ Art 44(1) of CRC reads: 'States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made on the enjoyment of those rights.' The report mentioned above is the second periodic report of Cameroon (CRC/C/CMR/2) considered by the CRC Committee at its 1464th and 1466th meetings (see CRC/C/SR 1464 and CRC/C/SR 1466), held on 14 January 2010, and adopted, at the 1501st meeting, held on 29 January 2010.

⁶⁷ Concluding Observations of the CRC Committee: Cameroon CRC/C/CMR/CO/2 (2010) para 65.

⁶⁸ n 67 above, paras 66(a) & (d).

⁶⁹ In his annual message to the youth of the country, in 2000, President of Cameroon Paul Biya announced that public primary education would be free; also *Discours de son excellence Monsieur A Kontchou Kouomegni, ministre d'état chargé des relations extérieures du Cameroun, 56ème session de la Commission des Droits de l'Homme*, Geneva, 22 March 2000; and Tomasevski (n 53 above) 23.

⁷⁰ Tomasevski (n 53 above) 23.

⁷¹ WD Wilson 'Human rights: Promoting gender equality in and through education' background paper for the Education for All Global Monitoring Report 2003/4 – Gender and education for all: The leap to equality 11 <http://unesdoc.unesco.org/images/0014/001469/146974e.pdf> (accessed 20 June 2010).

⁷² General Comment 13, para 6(c); also Tomasevski 1999 Report (n 10 above).

⁷³ UNESCO (n 14 above) 3.

⁷⁴ Act 633/PJ L./ATN (n 22 above).

beyond mere revision of the curriculum was issued in 2002.⁷⁵ This piece of legislation aims to provide acceptable education from primary to tertiary level by 'ensuring better controlled distribution of roles, functions and actions'.⁷⁶

However, the implementation of this policy is questionable because when Cameroon had 11 000 state primary schools, it had 55 266 primary school teachers in charge of three million pupils. This is an average teacher/student ratio of 1:54. The minimum standard set by UNESCO is one teacher per 45 students.⁷⁷

Nevertheless, seeking an acceptable primary education, the country adopted a decision⁷⁸ laying down the procedures for the advancement of primary school pupils with a view to improving the efficiency of primary education. In this context, an order⁷⁹ was passed to reorganise the First School Leaving Certificate Examination in the English and French-speaking parts of Cameroon; it also comprised calls for further reflection and understanding of the learner rather than his memory. Through these measures, Cameroon attempts to ensure that curricula and teaching techniques are adequate to meet basic learning needs such as literacy, oral expression, or numeracy and individual rights of learners, use of language, parental preference and discipline of learners.

However, Chia, a former secondary school teacher and teacher's trainer, is of the view that the government is not doing a good job as far as the appropriateness of education is concerned. According to him,⁸⁰

[t]he problem that exists in the Cameroonian education system, especially in elementary and secondary education, is the problem of quality teaching and that of quality learning. The basic problems in the elementary schools are related to language skills acquisition. Such skills include inability to write, spell, speak and understand. Students on entry to secondary school class cannot write their notes, cannot speak and understand even what they may read. They are very much unable to read a printed text to a level of understanding and response. Because of this problem, the students are only interested in playing as they face learning difficulties. Play is an alternative to learning the curriculum.

In fact, as correctly observed by UNICEF:⁸¹

⁷⁵ Presidential Decree 2002/004 of 14 January 2002 on the organisation of the Ministry of National Education.

⁷⁶ UNESCO (n 21 above) 28.

⁷⁷ Education International (n 36 above).

⁷⁸ Decision 315/B1/1464/MINEDUB of 21 February 2006.

⁷⁹ Order 64C/84/MINEDUC/CAB.

⁸⁰ K Chia 'Improving quality of education in Cameroon' *Rudea's Vision* May 2008 <http://www.kabissa.org/about> (accessed 25 March 2010).

⁸¹ UNICEF Humanitarian Action Update, Cameroon, 4 June 2008 'UNICEF responds to a child survival and education crisis in Eastern and Northern Cameroon' (n 53 above).

Children's right to quality education is compromised by overcrowded and insufficiently equipped classrooms, lack of learning materials and teachers who must manage as many as 100 to 200 children per class and often without basic teaching materials or training.

The government of Cameroon, however, targets human rights education to render primary education acceptable. In this regard, it prohibits corporal punishment in schools.⁸² In 1998, Cameroon was criticised by the ESCR Committee on the grounds that not only was there no indication that issues of human rights education were incorporated into school curricula, but there was no evidence to show how school teachers were trained in matters of human rights at school.⁸³

However, these shortcomings are remedied by efforts to improve the appropriateness of education, including measures such as 'the addition of human rights to the primary curriculum, a teacher's guide to human rights education at all levels (primary, secondary and higher) has been prepared at the suggestion of the National Commission on Human Rights and Freedoms'.⁸⁴ Since the 2008/2009 academic year, human rights education, supported both by the Ministry of Basic Education (through a committee) and the National Commission on Human Rights and Freedoms, is a reality in primary schools.⁸⁵

In addition, in addressing the right to health at school, since 2009, the government has begun the integration of HIV/AIDS education into the country's primary school curriculum, making it compulsory for children from six to 12 years of age.⁸⁶ Furthermore, in improving the quality of education, the government also designed educational programmes in line with the Information Communication Technology (ICT) which, among others, entails equipping classrooms and offices with ICT materials.⁸⁷

Despite the above, a lot more needs to be done to empower visually-impaired students through the provision of computers with Braille. It may be argued that primary education is in general acceptable.

⁸² This is the content of the Law of Cameroon National Educational Guidelines 98/004 (1998); also art 35, corporal punishment in schools is explicitly prohibited in the draft Child Protection Code.

⁸³ ESCR Committee Pre-Sessional Working Group 7-11 December 1998, List of Issues: Cameroon. 17/12/98; E/C.12/Q/CAMER/1 para 53.

⁸⁴ Human Rights Council Working Group on the Universal Periodic Review, 4th session, Geneva, 2-13 February 2009, National Report submitted in accordance with para 15(a) of the Annex to Human Rights Council Resolution 5/1* Cameroon, UN Doc A/HRC/WG.6/4/CMR/1 para 46.

⁸⁵ Cameroon second periodic report (n 57 above) para 274.

⁸⁶ 'Cameroon trains teachers on HIV education in primary schools' http://www.unicef.org/infobycountry/cameroon_51320.html (accessed 15 March 2011).

⁸⁷ Cameroon third report (n 57 above) para 276.

2.7 Adaptability

In terms of adaptability, 'education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings'.⁸⁸ In other words, states should adapt the education to the needs of the learners, the needs of society and the job market. Adaptability entails mobile schools for nomadic groups.

At the primary school level, education should be adapted to communities and respond to the needs of learners within their diverse social and cultural environment. In attempting to adapt education to the environment, learners may be taught in their local languages. This call was also made by Fonlon,⁸⁹ Njock,⁹⁰ Tadadjeu,⁹¹ Chumbow⁹² and Essono,⁹³ who all believe that local languages could be used alongside English and French in education. Currently, English and French are the official languages of education in the country. No education is provided in children's mother tongues. Cameroon has two main education systems established by France and Great Britain, the former colonial masters:

- a French francophone Cameroon education system tailored after the French francophone system; and
- an English anglophone Cameroon education system tailored after the British anglophone system.

In fact, bilingualism in Cameroonian schools is not yet a reality 'as individuals only master their colonial master's system with little cross-interaction with the other system even when both systems are on the same campus'.⁹⁴ Nevertheless, Cameroon is still considering the possibility of teaching national languages at school. It should even emulate Namibia's action in adapting education to the San indigenous group's cultural environment. In this case, Namibia implemented the Nyae-Nyae Village School Project, which integrated the traditional

⁸⁸ ESCR Committee General Comment 13 para 6(d).

⁸⁹ B Fonlon 'A case for early bilingualism' (1963) 4 *ABBIA: Cameroon Cultural Review* 56-94; B Fonlon 'The language problem in Cameroon' (1969) 22 *ABBIA: Cameroon Cultural Review* 5-40.

⁹⁰ BB Njock 'Le problème linguistique au Cameroun' (1966) 73 *L'Afrique et L'Asie* 3-13.

⁹¹ M Tadadjeu 'Language planning in Cameroon: Toward a trilingual education system' in RK Herbert (ed) *Patterns in language, culture, and society: Sub-Saharan Africa* (1975) 53-75; M Tadadjeu (ed) *L'enseignement des langues au Cameroun - Language education in Cameroon* (1981).

⁹² EA Anchimbe 'Socio-pragmatic constraints to native or indigenous language education in Cameroon' in F Olaoba *et al* (eds) *Selected proceedings of the 36th annual conference on African linguistics* (2006) 133-141.

⁹³ JM Essono 'De l'enseignement des langues nationales dans le secondaire: Les problèmes d'organisation' in Tadadjeu (n 91 above) 104-118.

⁹⁴ See 'Education in Cameroon The Cameroon education system' <http://www.cameroon-today.com/education-in-cameroon.html> (accessed 27 February 2009).

and culturally-appropriate mother tongue education with formal education. This effort brought the right to education to marginalised groups.⁹⁵ Furthermore, still in Namibia, the Gquaina Primary School encourages cultural diversity and employs teachers who speak the Ju'hansi language and provide mother tongue education for Ju'hansi students in grade 1.⁹⁶ In copying these best practices, Cameroon should adapt the education system to the culture in areas where people stay away from school for cultural and religious values. For instance, Cameroon should strive to have a system of mobile schools for nomadic people. To use the words of the Cameroonian MDG report, it is imperative to 'adapt the school syllabus to suit the climate in the Far-North, North and Adamawa provinces and encourage Informal Basic Education'.⁹⁷

The other challenge facing Cameroon remains adapting the school environment to children with special needs, such as children with disabilities who must be included in mainstream schools.

Overall, the changes in primary education are yet to be finalised as the country is to bring education to children where they are (nomadic children); the country is still considering the possibility to have education in local languages and need to adapt the system to disabled learners' needs.

3 Justiciability of the right to primary education in Cameroon

Justiciability means 'the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur'.⁹⁸ This section argues that, in principle, the right to primary education is justiciable, but that this does not happen in practice.

⁹⁵ RK Hitchcock & D Vinding 'Introduction' in RK Hitchcock & D Vinding (eds) *Indigenous people's rights in Southern Africa* (2004) 11; also SA Djoyou Kamga *Promotion of indigenous and tribal peoples' rights through the implementation of the principles of ILO Convention No 169 and the African Charter on Human and Peoples' Rights: Namibia Desk Review* (2007) 32; ILO project under the auspices of the Centre for Human Rights, University of Pretoria (on file with author).

⁹⁶ IWIGIA briefing on Namibia, July 2005; also Djoyou Kamga (n 95 above).

⁹⁷ MDGs Progress Report (n 38 above) 5.

⁹⁸ International Commission of Jurists *Courts and the legal enforcement of economic, social and cultural rights: Comparative experience of justiciability* (2008) 6.

3.1 Constitutional guarantee of the justiciability of the right to primary education

The Preamble and articles 45 and 65 of the Cameroonian Constitution clearly provide for the justiciability of the right to primary education. According to the Preamble:⁹⁹

The state shall guarantee the child's right to education. Primary education shall be compulsory. The organisation and supervision of the education shall be the bounded duty of the state.

Accordingly, the right to primary education is not optional and the state should comply with its obligation to provide it and can therefore be taken to court if the right is not made available. The Cameroonian Supreme Court, however, subscribing to Bhagwan and Bhushan's views,¹⁰⁰ emphasises that the Preamble provides contextual guidance and contains mere principles, and therefore not justiciable.¹⁰¹ Nonetheless, this view cannot stand because the Constitution, itself, is unequivocal on the legal status of the Preamble. The Constitution, in article 65, clearly states that the Preamble 'is part and parcel of the Constitution' and is as such justiciable. This view is strengthened by article 45 of the Constitution, which provides as follows:

Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement.

This provision shows that, in terms of domestication of treaties, Cameroon subscribes to the monist approach, according to which international agreements automatically become part of domestic law as soon as they are entered into. From a monist perspective, any treaty provision is self-executing if it is directly applicable and does not require 'further implementing action for it to be legally binding at national level'.¹⁰² The provision should be given effect immediately at the local level. Therefore, the justiciable right to free and compulsory primary education, as contained in ICESCR, CRC and the African Charter, all ratified by Cameroon, is directly applicable and self-executing in Cameroonian domestic law. However, the justiciability of the right to primary education is hindered by several obstacles.

⁹⁹ Para 23.

¹⁰⁰ V Bhagwan & V Bhushan *Comparing constitutions* (1987) 12.

¹⁰¹ Rapport de la Cour Suprême du Cameroun (2000), as quoted by GZ Sebenzile *The Treatment Action Campaign (TAC) case as a model for the protection of the right to health in Africa, with particular reference to South Africa and Cameroon* (2005) 41.

¹⁰² E Denza 'The relationship between international and national law' in MD Evans (ed) *International law* (2006) 437; also M Dixon *Textbook on international law* (2007) 88.

3.2 Obstacles to the justiciability of the right to primary education

The obstacles to the justiciability of the right to primary education are four-fold: private individuals' lack of standing in constitutional matters; the lack of remedies in case of a violation of human rights; a weak separation of powers; and the inability of the Cameroonian Commission on Human Rights to ensure the justiciability of the right.

3.2.1 Lack of standing in constitutional matters

Although arguably the Preamble and article 65 cater for a bill of rights, not only does the Cameroonian Constitution formally not contain a bill of rights, it does not have 'constitutional provisions which enable private individuals to petition the court in case of an alleged violation'¹⁰³ of the right to primary education. This raises the question of standing in court.

Even though the High Court is competent to deal with numerous matters, including non-administrative ones,¹⁰⁴ only the yet-to-be-established Constitutional Council is competent to consider 'the constitutionality of laws, treaties and international agreements'.¹⁰⁵ More importantly, only the President of the Republic, the President of the National Assembly, the President of the Senate, one-third of the members of the National Assembly or one-third of the Senators can bring a case to the Constitutional Council,¹⁰⁶ except cases concerning election disputes. In other words, individual Cameroonians do not have standing to challenge the constitutionality of laws. This is a clear hindrance to access to justice in general and to litigate the right to primary education in particular. Cameroon should revise its Constitution to ensure that everyone has standing in constitutional claims.

3.2.2 Lack of constitutional remedies for a violation of human rights

The Cameroonian Constitution is silent about remedies in cases of human rights violations. The country fails to enact judicial measures needed for the enforceability of human rights and the right to primary education in particular. In her 2006 Global Report on the State of the Right to Education Worldwide, the UN Special Rapporteur on the Right to Education, Tomasevski, correctly observes that Cameroon kept away from the human rights language and used the expression 'equality

¹⁰³ MD Afuba 'The constitutional protection of civil and political rights in Cameroon' (2006) *University of Botswana Law Journal* 68-69.

¹⁰⁴ Law 89/019 of 29 December 1989.

¹⁰⁵ Constitution, para 47(1).

¹⁰⁶ Constitution, para 47(2).

of opportunity for access to education'.¹⁰⁷ This approach shows that Cameroon does not view education as an entitlement or as a claimable right. In the same vein, during the examination of the 1998 Cameroon report, the ESCR Committee raised its concern 'about the legal status of the Covenant in the Cameroonian legal system'.¹⁰⁸ The Committee 'regrets that the delegation [of Cameroon] has not been able to clarify the position of the Covenant in Cameroonian law, nor provide any specific references to cases in which the Covenant has been invoked in national courts of law'.¹⁰⁹ This remark led Chofor Che to argue that 'Cameroon should clearly and unequivocally integrate socio-economic and political rights in its Constitution, as well as adopt definite measures for their enforcement by state organs'.¹¹⁰

The country should revise its Constitution with specific attention to the incorporation of a bill of rights, and the provision of remedies in cases of human rights violations. In this vein, Cameroon should act to institutionalise the justiciability of socio-economic rights and the right to primary education, in particular, in line with the call by the High-Level Group to governments in the developing world to 'ensure that free and compulsory primary education is a right reflected in national legislation and in practice'.¹¹¹ In fact, as correctly observed by Arbour, 'it is through action at the national level that international human rights obligations can be translated into reality'.¹¹²

3.2.3 Weak separation of powers

Cameroonian constitutionalism is characterised by the pre-eminence of the executive power. The President of Cameroon appoints members to the bench and the legal department.¹¹³ In addition, the President 'shall be assisted in this task by the Higher Judicial Council which shall give him its [non-binding] opinion on all nominations for the bench and on disciplinary action against judicial and legal officers'.¹¹⁴ This provision turns judges into mere civil servants who aspire to nominations and promotions and will therefore not contradict the executive that takes

¹⁰⁷ Tomaveski global report (n 10 above) 23; also UN Doc CRC/C/28/Add.16 (2001) paras 192-193.

¹⁰⁸ Concluding Observations of the ESCR Committee: Cameroon 8 December 1999 E/C12/1/Add.40 para 11.

¹⁰⁹ As above.

¹¹⁰ CA Chofor Che 'Challenges of incorporating and enforcing a bill of rights in the Cameroonian Constitution' (2008) 2 *Cameroon Journal of Democracy and Human Rights* 1 <http://www.cjdh.org> (accessed 20 March 2011).

¹¹¹ High Level Group on EFA (Abuja, Nigeria, November 2002), as quoted by UNESCO (2008) 4.

¹¹² L Arbour *The Plan of Action of the Office of the United Nations High Commissioner for Human Rights in Protection and Empowerment* (2005); also Rights and Democracy Annual Report 2005/2006 1.

¹¹³ Art 37(3) of the Constitution.

¹¹⁴ As above.

decisions in terms of their careers. These magistrates will not stand for public interests when their personal interest is at stake.

Furthermore, the interference and domination of the judicial power by the executive reaches the Constitutional Council where the President of the Republic appoints 11 members for a non-renewable term of office of nine years 'from among personalities of established professional renown' and 'of high moral integrity and proven competence'.¹¹⁵ In addition, all 'former Presidents of the Republic shall be *ex officio* members of the Constitutional Council for life',¹¹⁶ even if they lack expertise in terms of law and human rights. According to Nguélé, a term of office of nine years ensures the independence of the Constitutional Council.¹¹⁷ However, it is worth noting that an appointed judge of nine years' service could serve his or her employer's interest to the detriment of fundamental freedoms. An elected judge is much more prone to serve the interest of justice through which the right to primary education may be litigated.

As mentioned above, the review of the constitutionality of laws has been conferred by article 47 of the Constitution to the Constitutional Council. Nevertheless, since the latter has never been established, section 67(4) of the Constitution, dealing with transitional and final provisions, states that the Supreme Court shall perform the duties of the Constitutional Council until the latter is set up. The Supreme Court can therefore exercise such powers as have been conferred on the Constitutional Council.¹¹⁸ These powers are extremely restricted in two ways: First, under article 47, it can only entertain disputes on a number of issues. With respect to the most important issue concerning unconstitutional laws, its jurisdiction is limited to an abstract pre-promulgation review of laws only. Secondly, as mentioned above, only a few individuals have *locus standi* to bring a case before the Supreme Court. This effectively renders the process meaningless because the very people who usually initiate laws are the only people competent to challenge the constitutionality of laws. This is unlikely to happen. Hence, there is an urgent need to establish a strong separation of powers, an independent Constitutional Council, and to ensure that private individuals have standing to challenge the constitutionality of laws as this will enhance respect for human rights and the prospects for the justiciability of the right to primary education in the country.

Having observed that the justiciability of the right to free primary education is hindered by the pre-eminence of the executive on the

¹¹⁵ Art 51(1) of the Constitution.

¹¹⁶ Art 51(2) of the Constitution.

¹¹⁷ M Nguélé Abada 'L'indépendance des juridictions constitutionnelles dans le constitutionalisme des Etats francophones post guerre froide: L'exemple du conseil constitutionnel Camerounais' <http://www.droitconstitutionnel.org/congresmtp/textes5/ABADA.pdf> (accessed 25 March 2011).

¹¹⁸ CM Fombad *International encyclopaedia of laws: Constitutional law* (2003) 125.

judiciary domain, the following section will examine whether the National Commission on Human Rights and Freedoms of Cameroon (Cameroonian Commission on Human Rights) can ensure the justiciability of the right to primary education.

3.2.4 The inability of the Cameroonian Commission on Human Rights to ensure the justiciability of the right to primary education.

National human rights commissions are institutions established to check human rights abuses in countries. They also have a promotional and protective mandate as provided for by the Principles Relating to the Status of National Institutions (Paris Principles).¹¹⁹

In terms of its mandate, the Cameroon Human Rights Commission is competent to promote and protect human rights. The promotion of human rights is conducted through workshops, seminars and awareness-raising campaigns. The protective mandate consists of recording and investigating complaints of human rights violations, visiting detentions and incarceration centres¹²⁰ and reporting on them. The Commission is a mere observer that cannot entertain difference.

In order to enhance the prospect of having a justiciable right to primary education in the country, the government shall, among others, vest the institution ‘with quasi-jurisdictional competence’;¹²¹ the Cameroonian should cease to be ‘an observer’¹²² and should be empowered¹²³

[t]o hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organisations, associations of trade unions or any other representative organisations.

The Cameroonian Commission on Human Rights should be given the opportunity to improve ‘the legality and fairness of public administration as well as providing a mechanism for the domestic implementation of international human rights obligations’.¹²⁴ It must

[a]ctively protect and promote human rights and not exist simply as an investigative mechanism which reacts to human rights violations [with a report]. The institution must work systematically and holistically towards

¹¹⁹ Adopted by General Assembly Resolution 48/134 of 20 December 1993.

¹²⁰ Decree 90-1459 of 8 November 1990, para 2.

¹²¹ See Paris Principles, paragraph allocated to ‘Additional principles concerning the status of commissions with quasi-jurisdictional competence’.

¹²² Banda, the Chairperson of the Cameroonian Commission of Human Rights, as quoted by CCDH Press Release (n 119 above).

¹²³ n 21 above.

¹²⁴ J Klaaren ‘South African Human Rights Commission’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2010) 24-c12.

the attainment of internationally-recognised human rights¹²⁵ in general and the right to primary education in particular.

Overall, the limited protective mandate of the Cameroonian Commission on Human Rights hinders its ability to ensure the justiciability of the right to primary education.

4 Concluding remarks

The aim of this article is to investigate to what extent Cameroon complies with its obligations pertaining to the right to primary education. Put differently, to what extent is primary education compulsory, available, accessible, acceptable, adaptable and justiciable.

As to whether it is compulsory, the article shows that all national policies related to primary education compel the state and parents to send children to primary school. Sending children to primary school is not optional, but mandatory, therefore primary education that is sustained by an action plan is compulsory.

As far as the availability of education is concerned, notwithstanding the enactment of numerous policies and the building of classrooms and additional school buildings, the availability of primary education is hindered by a lack of teachers, sanitation facilities at schools, and the lack of school buildings in rural areas where learners from different grades are taught in the same classroom at the same time.

Regarding the accessibility of primary education, focusing on non-discriminatory access, the article shows that national policies to ensure equal access to primary education are yet to bring girls' enrolment to the same level as that of boys. In addition, learners with disabilities are excluded from primary education which has no mechanism to ensure their reasonable accommodation. In terms of physical accessibility, this is yet to be a reality as several primary schools are still located miles away from children's homes, and learners have to walk long distances away from school while those with a mobility problem have to stay behind without any possibility of receiving distance education. As far as economic accessibility is concerned, an analysis of the economic accessibility of education shows that children are bogged down by indirect fees such as books and uniform costs, levies and other fees paid through parent associations. These fees amount to education costs which illustrate the lack of free primary education in the country.

On the issue of acceptability, in spite of the shortcomings in operationalising appropriate curricula at the primary level, as well as challenges related to the acceptance of disabled learners, the institution of human rights education, the integration of HIV/AIDS education in the curricula as well as the incorporation of ICT education at the

¹²⁵ As above.

primary level sustain the argument that primary education is acceptable when it is in fact available.

However, the conclusion is not the same as far as the adaptability of primary education is concerned because Cameroon is yet to provide education in local languages, and is yet to bring education to nomadic students. In addition, the accommodation of children with special needs at schools remains an aspiration.

On the final point of justiciability, the article shows that the Preamble which, according to article 65, is part and parcel of the Constitution, renders the right to primary education justiciable. In addition, article 45 of the Constitution, which indicates the monist approach to the domestication of international law, renders the right to primary education self-executing and subject to immediate application.

The article shows, however, that the justiciability of the right is hindered by constitutional practices such as the lack of standing in court for private individuals, the lack of constitutional remedies in case of a violation of rights, and a weak separation of powers characterised by the pre-eminence of the executive. The justiciability of the right is also hindered by the inability of the Cameroonian Human Rights Commission to protect the right because of its lack of jurisdictional competence.

The Inter-American human rights protection system: Structure, functioning and effectiveness in Brazilian law

Valerio de Oliveira Mazzuoli*

Professor of Public International Law and Human Rights and Co-ordinator, Master in Law Programme, Federal University of Mato Grosso, Brazil

Summary

The article provides a brief background to the Inter-American system of human rights and its monitoring organs, the Inter-American Commission and the Inter-American Court of Human Rights. It then focuses on the relationship between the two institutions, looking in particular at how cases are instituted before the Court. Against this background, the process of ensuring effective domestic enforcement of the Court's judgments in Brazil is investigated with reference to two decided cases and a draft Bill pending before Congress.

1 Introduction

This article aims to study the Inter-American system of human rights protection, with a special focus on its implications for Brazilian law.¹ Therefore it is meant, first, to provide an understanding of the origin of the Inter-American system, its creation and its organs (the Inter-American Commission and Court). Second, it surveys the procedural journey of processing a complaint against a state in the Inter-American

* Juris Doctor (Rio Grande do Sul (Brazil)), Master in International Law (São Paulo State University (Brazil)); mazzuoli@ufmt.br

¹ See V de O Mazzuoli *Curso de direito internacional público* (2010) 824-842.

system, the domestic effect of judgments adopted by the Inter-American Court, as well as the (always complicated) issue of the enforcement of the judgments of the Court in Brazil.

Among regional systems of protection, the first and oldest is the European system. Its original treaty, called the European Convention on Human Rights, dates back to 1950. It has dealt with the largest number of cases of human rights violations so far. The Inter-American regional system is the second oldest. It was established by the American Convention on Human Rights (American Convention) in 1969. The most recent system is the African regional system, still relatively young, established by the African Charter on Human and Peoples' Rights (African Charter) in 1981.

The creation of these systems is in accordance with the Charter of the United Nations (UN) of 1945, which expressly states (in article 1(3)) that one of the goals of the UN is 'to achieve international co-operation' in order to promote and stimulate 'respect for human rights and fundamental freedoms for all, without distinction of race, sex, language or religion'.²

We focus here on the Inter-American regional system of human rights protection, which is the system that directly affects Brazil (as well as all the states of the American continents). This should not lead us to think, however, that the Inter-American system of human rights protection concerns only the so-called 'Latin-American countries', since it also affects the United States of America and Canada, as well as the Caribbean states that have already become parties of the Organization of American States (OAS) or will do so in the future.³

2 Inter-American system of human rights

As pointed out above, parallel to the global system of protection of human rights, there are also regional systems of protection (for

² For the text in Portuguese, see V de O Mazzuoli *Coletânea de direito internacional* (2010) 233.

³ A complete study of the Inter-American system of human rights can be found in the book *Comments on the American Convention on Human Rights* that the author has written in collaboration with Luiz Flávio Gomes, and which was published in Brazil by Revista dos Tribunais Publishing (2009), to which we refer the interested reader. See LF Gomes & V de O Mazzuoli *Comentários à Convenção Americana sobre Direitos Humanos (Pacto de San Jose da Costa Rica)* (2009).

example the European⁴ and the African⁵ systems). Among them is the Inter-American system,⁶ composed of four main instruments: the Charter of the Organization of American States (1948); the American Declaration of the Rights and Duties of Man (1948), which, although not technically a treaty, outlines the rights mentioned in the Charter of the OAS; the American Convention on Human Rights (1969), and the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, dubbed the Protocol of San Salvador (1988) (ESC Protocol).⁷

Throughout the Inter-American system, there exists the general obligation to protect the 'fundamental rights of the individual without distinction as to race, nationality, creed or sex'⁸ (article 3(1) of the OAS Charter).⁹ In relation to the responsibility of American states for human rights violations, I should highlight the system proposed by the American Convention, of which the member states of the OAS form part.

⁴ For a study on the European system of human rights protection, see JES Fawcett *The application of the European Convention on Human Rights* (1987); J-F Flauss 'Le droit de recours individuel devant la Cour européenne des droits de l'homme: Le Protocole No 9 à la Convention Européenne des Droits de l'Homme' (1990) 36 *Annuaire Français de Droit International* 507-519; P Mahoney & S Prebensen 'The European Court of Human Rights' in R St J MacDonald *et al* (eds) *The European system for the protection of human rights* (1993) 621-643; D Harris & G Janssen-Pevtschin 'Le Protocole No 11 à la Convention Européenne des Droits de l'Homme' (1994) 20 *Revue Trimestrielle des Droits de l'Homme* 483-500; M O'boyle & C Warbrick *Law of the European Convention on Human Rights* (1995); D Gomien *et al* *Law and practice of the European Convention on Human Rights and the European Social Charter* (1996); J Rideau 'Le rôle de l'Union Européenne en matière de protection des droits de l'homme' (1997) 265 *Recueil des Cours* 9-480; F Matscher 'Quarante ans d'activités de la Cour Européenne des Droits de l'Homme' (1997) 270 *Recueil des Cours* 237-398; and E Lambert *Les effets des arrêts de la Cour Européenne des Droits de l'Homme: Contribution à une approche pluraliste du droit européen des droits de l'homme* (1999).

⁵ About the African regional system, see BS Ngom *Les droits de l'homme et l'Afrique* (1984); EG Bello 'The African Charter on Human and Peoples' Rights: A legal analysis' (1985) 194 *Recueil des Cours* 9-268; K M'Baye *Les droits de l'homme en Afrique* (1992); F Ougouroguz *La Charte Africaine des Droits de l'Homme et des Peuples: Une approche juridique des droits de l'homme entre tradition et modernité* (1993); UO Umzurike *The African Charter on Human and Peoples' Rights* (1997); and M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008).

⁶ See HF Ledezma *El sistema interamericano de protección de los derechos humanos: Aspectos institucionales y procesales* (1999).

⁷ See JC Hitters *Derecho internacional de los derechos humanos* (1993); R Nieto Navia *Introducción al sistema interamericano de protección a los derechos humanos* (1993); A Dulitzky 'Una mirada al sistema interamericano de derechos humanos' (1998) 20 *América Latina Hoy* 9-19; and F Andreu-Guzmán '30 años de la Convención Americana sobre Derechos Humanos: todavía hay mucho camino por recorrer' (2001) 1 *El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI* 301-307.

⁸ For the text in Portuguese, see Mazzuoli (n 2 above) 261.

⁹ For a study on the precedents of human rights protection in the OAS Charter, see H Gros Espiell 'Le système interaméricain comme régime régional de protection internationale des droits de l'homme' (1975) 145 *Recueil des Cours* 13-20.

This system does not exclude the subsidiary application of the system introduced by the OAS Charter itself, as detailed by article 29(b) of the American Convention (Rules of Interpretation). It provides that none of its provisions may be interpreted as 'restricting the enjoyment or exercise of any right or freedom recognised by virtue of the laws of any state party or by virtue of Conventions to which one of the said states may be a party'.¹⁰

The American human rights protection system originated with the proclamation of the Charter of the Organization of American States (Charter of Bogotá) in 1948,¹¹ at the 9th Inter-American Conference, which also adopted the Declaration of the Rights and Duties of Man.¹² The latter formed the basis of protection in the American system before the conclusion of the Convention (in 1969) and still remains the instrument of regional expression in this area, mainly to the non-parties to the American Convention.¹³

After the adoption of these two instruments, a gradual maturation of the mechanisms of human rights protection in the American system occurred, of which the first step was the creation of a specialised body to promote and protect human rights within the OAS: the Inter-American Commission on Human Rights, a proposal adopted at the 5th Meeting of Foreign Ministers, held in Santiago, Chile in 1959. As initially proposed, the Commission had to function until the establishment of an American convention on human rights, which eventually happened in San José, Costa Rica, in 1969.¹⁴

¹⁰ For the text in Portuguese, see Mazzuoli (n 2 above) 1006. For a study on the interpretation of this kind of international provision, see V de O Mazzuoli *Tratados internacionais de direitos humanos e direito interno* (2010) 116-128.

¹¹ See E Márquez 'Documentos internacionales sobre los derechos humanos: La Carta de la OEA' *México y las declaraciones de derechos humanos* México, DF: Instituto de Investigaciones Jurídicas de la UNAM (1999) 217-232.

¹² See T Buergenthal & D Cassel 'The future of the Inter-American human rights system' *El futuro del sistema interamericano de protección de los derechos humanos* (1998) 539-572; C Ayala Corao 'El sistema interamericano de promoción y protección de los derechos humanos' *México y las declaraciones de derechos humanos*, México, DF: Instituto de Investigaciones Jurídicas de la UNAM (1999) 99-118; and C Ayala Corao 'Reflexiones sobre el futuro del sistema interamericano de derechos humanos' (2001) 30/31 *Revista IIDH* 91-128.

¹³ See AA Cançado *Tratado de direito internacional dos direitos humanos* (2003) 33-34.

¹⁴ See Gros Espiell (n 9 above) 35-37; A de C Ramos *Direitos humanos em juízo: comentários aos casos contenciosos e consultivos da Corte Interamericana de Direitos Humanos* (2001) 57-58.

3 American Convention on Human Rights

The American Convention,¹⁵ which is the key instrument of the Inter-American system of human rights, was signed in 1969 and entered into force on 18 July 1978, after having obtained the minimum of 11 ratifications. Only the member states of the Organization of American States may become parties. Its creation has strengthened the human rights system established by the Charter of the OAS and made explicit by the American Declaration, thus making the Commission on Human Rights more effective. Until then, the Commission was simply an organ of the OAS. Despite its importance in consolidating individual liberty and social justice in the Americas, some countries, like the United States of America (which has only just signed it) and Canada have not ratified the American Convention and, apparently, are not willing to do so. Brazil did not ratify it until 1992. The Convention was internally promulgated by Decree 678 of 6 November in that year.

The protection of human rights under the American Convention brings reinforcement to or complements the protection provided by the domestic laws of state parties (see the Preamble of the Convention). This means that it does not remove from states the primary responsibility to nurture and protect the rights of persons within their jurisdiction. However, in instances of a lack of a defence, or inadequate protection, the Inter-American system may interact, contributing to the common goal of protecting a certain right that the state has failed to guarantee or respect as it should.

In Part I the Convention lists an array of civil and political rights similar to the International Covenant on Civil and Political Rights (ICCPR). These rights include the right to life; the right to liberty; the right to be entitled to a fair and public hearing and an impartial trial; the right not to be held in slavery or servitude; the right to freedom of conscience and belief; the right to freedom of thought and expression; and the right to a name and nationality. In Part II, the treaty sets out the means to achieve the protection of the rights listed in Part I.

It is important to observe that the American Convention does not specifically establish any social, economic or cultural rights. It contains only a general reference to such rights.

In 1988, aiming at guaranteeing such rights, the General Assembly of the OAS adopted the Additional Protocol to the American Convention, the ESC Protocol, which entered into force in November 1999, when the 11th instrument of ratification was deposited in accordance with article 21 of the Protocol.¹⁶ Brazil ratified the Protocol in 1999. It

¹⁵ The official Brazilian version of the American Convention on Human Rights can be found published in Mazzuoli (n 2 above) 998-1015.

¹⁶ See F Piovesan *Direitos humanos e o direito constitucional internacional* (2006) 228.

was domestically promulgated by Decree 3321 of 30 December of that year.

As to the other international instruments that compose the Inter-American system, the following are also worth noting: the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990);¹⁷ the Inter-American Convention to Prevent and Punish Torture (1985); the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994), known as the Convention of Belem do Para; the Inter-American Convention on International Traffic in Minors (1994); and the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999). Unfortunately, these instruments have not been ratified by many of the state parties to the OAS, the only exception being the Convention of Belem do Para, which so far has been ratified by an impressive number of 31 out of 35 member states.

For the protection and monitoring of the established rights, the American Convention is composed of two bodies: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

4 Inter-American Commission on Human Rights

The origin of the Inter-American Commission on Human Rights is a resolution and not a treaty. This was Resolution VIII of the 5th Meeting of Consultation of Foreign Ministers, held in Santiago (Chile) in 1959.¹⁸ However, the Commission began to operate in the following year, in accordance with its founding statute, under which its function is to promote the rights established both in the OAS Charter and in the Declaration of the Rights and Duties of Man.

According to the Charter of the OAS, the Inter-American Commission on Human Rights is not only an organ of the Organization of American States, but also an organ of the American Convention on Human Rights, and thus has a double function. The Inter-American Court of Human Rights, in turn, is an organ of the American Convention only. While all state parties to the American Convention must be members of the OAS, the converse is not true since not all the members of the OAS are parties to the American Convention.¹⁹ We consider the Inter-

¹⁷ Brazil made the following statement at the signing of the Protocol: 'In ratifying the Protocol to Abolish the Death Penalty, adopted in Asunción on June 8, 1990, I declare that, due to constitutional obligations, I make a reservation in terms set out in Article 2 of the Protocol in question, which guarantees to the States Parties the right to apply death penalty in wartime in accordance with the international law, for extremely serious crimes of a military nature.'

¹⁸ See Gros Espiell (n 9 above) 23; Cançado Trindade (n 13 above) 34-35.

¹⁹ See JM Arrighi *OEA: Organização dos Estados Americanos* (2004) 52.

American Commission rather as an organ of the American Convention than an organ of the OAS in this article.²⁰

The Commission consists of seven members who must be persons of high moral authority and recognised competence in the field of human rights. These members are elected individually by the General Assembly of the OAS, from a list of candidates proposed by the governments of the member states. Each of these governments may propose up to three candidates, nationals of the proposing states, or of any other member of the organisation. Whenever a list of three candidates is offered, at least one of them must be a national of a member state other than the applicant. Commissioners are elected for four years and may be re-elected only once, but the terms of the three members appointed at the first election expire after two years. Soon after such election, the names of these three members are to be drawn by lot in the General Assembly. No more than one national of each country may take part in the Commission.

The Commission represents all the member states of the OAS and has as its main function the promotion of the observance and protection of human rights.

One of the main competencies of the Commission is to consider claims from individuals or groups of individuals, or from non-governmental entities legally recognised in one or more member states of the OAS, related to infringements of the human rights contained in the American Convention by a state party (article 41(f)).²¹ Thus, individuals, despite not having direct access to the Court, may also initiate the procedure for the processing of the state, by presenting a petition to the Commission.

The complaints procedure before the Commission is governed by articles 48 to 51 of the American Convention. Article 49 provides that if a friendly settlement has been reached in accordance with paragraph (1)(f) of article 48, the Commission must draw up a report, which must be transmitted to the petitioner and to the state parties to the Convention, and shall then be communicated for publication to the Secretary-General of the Organization of American States. This report must contain a brief statement of the facts and the finding. If any party in the case so requests, the fullest possible information must be provided to it. If a settlement is not reached, the Commission must, within the time limit established by its statute, draw up a report (first report)

²⁰ See Gros Espiell (n 9 above) 23-34.

²¹ See Gros Espiell (n 9 above) 27-30; A de C Ramos *Processo internacional de direitos humanos: Análise dos sistemas de apuração de violações dos direitos humanos e a implementação das decisões no Brasil* (2002) 229-238; and Piovesan (n 16 above) 232-233. For an overview of the cases against Brazil in the Inter-American Commission until 2005, see LF Gomes & V de O Mazzuoli 'O Brasil e o sistema interamericano de proteção dos direitos humanos' in AZ Schmidt (ed) *Novos rumos do direito penal contemporâneo: livro em homenagem ao Prof Dr Cezar Roberto Bitencourt* (2006) 427-437.

setting forth the facts and stating its conclusions.²² If the report, in whole or in part, does not represent the unanimous decision of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1(e) of article 48 must also be attached to the report. The report must be transmitted to the states concerned, which is not at liberty to publish it. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit²³ (articles 50(1) to (3)). If the state does not meet these recommendations, and if the petitioner is in agreement, the case is submitted to the Court by the Commission.²⁴

If, within a period of three months from the sending of the Commission's report to the state concerned, the matter has neither been settled nor submitted by the Commission or the state concerned to the Court, and its jurisdiction accepted, the Commission — now in the phase of the second report — may, by a vote of an absolute majority of its members, set forth its own opinion and conclusions concerning the question submitted to its consideration.²⁵ This phase of the second report, as noted, will occur only when the matter has not been resolved or has not been submitted to the Court's decision, in general, because the state is not party to the American Convention, or if it is, it has not yet recognised the contentious jurisdiction of the Court by the Commission or the state concerned.²⁶ Note that the term 'has not been' is linked to the last phrase 'submitted to the Court's decision', which leads us to conclude that only if the case was not submitted to the Court's decision would the Commission continue to its internal procedure of (non-judicially) processing the state, thus editing its second report.²⁷ At this stage, the Commission must make pertinent recommendations and must prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined. When the prescribed period has expired, the Commission must decide by a vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report (articles 51(2) and (3)).

The 12 states that have not ratified the American Convention are not relieved from their obligations under the OAS Charter and the Declaration of the Rights and Duties of Man. They may normally trigger the American Commission, which will make recommendations to governments with respect to the human rights violated in the state concerned. As mentioned before, this happens because the

²² Art 50(1) American Convention.

²³ Arts 50(1) to (3).

²⁴ See Arrighi (n 19 above) 108.

²⁵ See Piovesan (n 16 above) 236.

²⁶ Art 51(1) American Convention.

²⁷ See Gomes & Mazzuoli (n 3 above) 255.

Inter-American Commission, besides being an organ of the American Convention, is also (originally) an organ of the OAS Charter. In case of non-compliance with what has been established by the Commission, the General Assembly of the OAS could be triggered to impose sanctions against the state.²⁸ Although the imposing of international sanctions for human rights violators is not expressly mentioned among the powers of the General Assembly (under article 54 of the OAS Charter), the fact is that, as a political body, it is responsible for ensuring compliance with the provisions of the OAS Charter which, in this case, would be a violation of human rights.²⁹ This subsidiary system of the OAS will only be extinguished when all American states have ratified the American Convention and accepted the contentious jurisdiction of the Inter-American Court.

Notice, therefore, that there is a functional split as to the duties of the Commission, which can act both as an organ of the OAS, or an organ of the American Convention (in the latter case, assuming that the state parties to the Convention have already accepted the contentious jurisdiction of the Inter-American Court). The Commission, then, is at the same time an Inter-American system organ of 'general vocation' (when it acts as an OAS organ), and a 'procedural organ' of that same system (with respect to the functions assigned by the Convention).³⁰ This is the ambivalent or two-faced aspect of the Commission which we referred to above. There is no doubt, however, that the system of the American Convention is superior to the OAS system. First of all, it covers many more rights than those mentioned in both the OAS Charter and the American Declaration; secondly, because the judgments of the Inter-American Court are binding on the state parties to the Convention, which is not the case with the recommendations of the quasi-judicial system of the OAS Charter.³¹

To finish this study on the Commission, let us remember that three Brazilians have already chaired the Inter-American Commission on Human Rights: the jurist Carlos Alberto Dunshee de Abranches (1969-1970); Professor Gilda Maciel Correa Meyer Russomano (1989-1990); and the lawyer Hélio Bicudo (1999-2000). More recently, Mr Paulo Sérgio Pinheiro, also a Brazilian, served as member of the Commission. His mandate expired on 31 December 2007.

²⁸ See Gros Espiell (n 9 above) 30-31.

²⁹ See Ramos (n 14 above) 68-69; and also his *Processo internacional de direitos humanos* (n 21 above) 221-224. (In these two works, the author refers to art 53 of the OAS Charter, when he means art 54 of the Charter).

³⁰ H Bicudo 'Defesa dos direitos humanos: sistemas regionais' (2003) 17 *Estudos Avançados* 231.

³¹ See Ramos (n 14 above) 71.

5 Inter-American Court of Human Rights

The Inter-American Court of Human Rights — which is the second organ of the American Convention — is the jurisdictional organ of the American system that addresses the cases of human rights violations alleged to have been committed by the state parties of the OAS that have ratified the American Convention.³² This is a supranational tribunal able to condemn state parties to the American Convention for human rights violations. The Court does not belong to the OAS, but to the American Convention, having the nature of an international judicial body. This is the second court of human rights established in regional context (following the European Court of Human Rights, based in Strasbourg, responsible for implementing the 1950 Convention).³³ Although officially the Inter-American Court's birth was in 1978, upon the entry into force of the American Convention, its operation was effective only in 1980 when it issued its first advisory opinion, and seven years later, when it issued its first ruling.³⁴

The Inter-American Court — which is based in San José, Costa Rica — is composed of seven judges (of different nationalities) from the member states of the OAS. They are elected in their individual capacity from among jurists of the highest moral authority and recognised competence in questions of human rights, who meet the conditions required for the exercise of the highest judicial functions, in accordance with the law of the state of which they are nationals or the state that proposes them as candidates (section 52). The judges of the Court are elected for a period of six years and may be re-elected only once. They must remain in office until their terms expire. A quorum for the deliberations of the Court is five judges (article 56).

The Court has an advisory jurisdiction (on the interpretation of the provisions of the Convention as well as the provisions of treaties concerning the protection of human rights in the American states),³⁵ as well as a contentious jurisdiction, suitable for the trial of concrete cases, when one of the state parties to the American Convention is

³² For details, see CA Dunshee de Abranches 'The Inter-American Court of Human Rights' (1980) 30 *American University Law Review* 79-125; T Buergenthal 'The Inter-American Court of Human Rights' (1982) 76 *American Journal of International Law* 1-27; AS Dwyer 'The Inter-American Court of Human Rights: Towards establishing an effective regional contentious jurisdiction' (1990) 13 *Boston College International and Comparative Law Review* 127-166.

³³ For a detailed comparison between the two systems, see H Gros Espiell 'La Convention Américaine et la Convention Européenne des Droits de l'Homme: Analyse comparative' (1989) 218 *Recueil des Cours* 167-412.

³⁴ See T Buergenthal 'Recordando los inicios de la Corte Interamericana de Derechos Humanos' (2004) 39 *Revista IIDH* 11-31; Arrighi (n 19 above) 105-107.

³⁵ See T Buergenthal 'The advisory practice of the Inter-American Human Rights Court' (1985) 79 *American Journal of International Law* 1-27; CR Miguel 'La función consultiva en el sistema interamericano de derechos humanos: Crisálida de una jurisdicción supra-constitucional?' (1998) II *Liber amicorum: Héctor Fix Zamudio* 1345-1363.

alleged to have violated any of its provisions.³⁶ However, the contentious jurisdiction of the Inter-American Court is limited to state parties to the Convention that explicitly recognise its jurisdiction. This means that a state party to the American Convention cannot be sued in the Court if it does not accept its contentious jurisdiction. In ratifying the American Convention, state parties automatically accept the advisory jurisdiction of the Court. However, contentious jurisdiction is optional and may be accepted later or on an *ad hoc* basis.

Allowing states to opt into the Court's contentious jurisdiction was a strategy to encourage the states to ratify the Convention, without fear of immediately becoming defendants – and it has paid off. Brazil accepted the contentious jurisdiction of the Court on 3 December 1998, through Legislative Decree 89. According to this Decree, only the allegations of human rights violations that occurred after that date may be submitted to the Court.³⁷

It is worth noting that both individuals and private institutions are barred from approaching the Court directly (article 61), unlike the situation in the European Court of Human Rights.³⁸ The Commission – which in this case acts as a body of first instance – may refer a case to the Court. This can also be done by another member state, provided that the respondent state has previously accepted the Court's jurisdiction to act in such a context – that is, to deal in interstate cases involving human rights – requiring the condition of reciprocity.³⁹ It must also be stressed that the Commission (in cases triggered by individuals) cannot act as a party in such a case, since it has already decided on the admissibility of the case.

The Court neither reports cases nor makes recommendations in exercising its contentious jurisdiction, but issues sentences that, according to the Pact of San José, are final and binding. In other words, the Court's judgments are binding on those states that accept its jurisdiction.⁴⁰ When the Court declares the violation of a right safeguarded by the Convention, it orders the immediate repair of the damage and requires, if applicable, payment of just compensation to the injured party. Under article 68 of the Convention, state parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. The part of a judgment that stipulates compensatory damages may be executed in the country concerned

³⁶ See H Gros Espiell 'El procedimiento contencioso ante la Corte Interamericana de Derechos Humanos' (1986) 19 *Boletín Mexicano de Derecho Comparado* 511-548.

³⁷ See Ramos (n 14 above) 61.

³⁸ See, in this regard, AA Cançado Trindade *Evolution du droit international au droit des gens: l'accès des individus à la justice internationale (le regard d'un juge)* (2008).

³⁹ See JF Rezek *Direito internacional público: curso elementa* (2002) 215.

⁴⁰ See Cançado Trindade (n 13 above) 52. About the authority of international judgments, see LNC Brant *L'autorité de la chose jugée en droit international public* (2003).

in accordance with its internal procedures governing the execution of judgments against the state.

6 Procedure in bringing a state before the Court

If the state concerned refuses to accept the conclusions established by the Inter-American Commission in its first (or preliminary) report, it may refer the case to the Inter-American Court, provided that the state has recognised the Court's compulsory jurisdiction. The activation of the Court by the Commission is achieved by means of judicial proceedings, comparable to the bringing of an action to court under the rules of civil procedure. Beyond the Commission, however, other states (which have also expressly recognised the contentious jurisdiction of the Court) may bring a case against a state before the Court, since the human rights guarantee is an objective requirement of interest to all state parties to the American Convention.⁴¹ The latter, amounting to a denunciation of one state by another, has not yet occurred (for obvious reasons).

The process of bringing a state before the Inter-American Court is provided for in the Court's Rules of Procedure. The version currently in force, is dated 24 November 2009.⁴² The Commission sends a docket of the application of demand in one of the working languages (which are Spanish, English, Portuguese and French) to the Secretariat of the Court (in San José, Costa Rica). The petition must indicate the claims (including those relating to reparations and costs), the parties to the case, a statement of the facts, the resolution to initiate proceedings and the admissibility of the complaint, and supporting evidence and names of witnesses.

Moreover, to examine the case, the Court must receive the following information from the Commission: (a) the names of the delegates; (b) the names, addresses, telephone numbers, electronic addresses and facsimile numbers of the representatives of the alleged victims, if applicable; (c) the reasons leading the Commission to submit the case before the Court and its observations on the answer of the respondent state to the recommendations of the report to which article 50 of the Convention refers (see its contents below); (d) a copy of the entire case file before the Commission, including all communications following the issue of the report to which article 50 of the Convention refers; (e) evidence received, including audio recordings and transcriptions where relevant, with an indication of the alleged facts and arguments on which they rest (the evidence received in an adversarial proceeding will be indicated); (f) when the Inter-American public order of human

⁴¹ See Ramos (n 14 above) 88-99.

⁴² It was approved by the Court in its 85th ordinary period of sessions. This is the 5th regulation of the Inter-American Court since its establishment.

rights is affected in a significant manner, the possible appointment of expert witnesses, the object of their statements, and their *curricula vitae*; and (g) the claims, including those related to reparations. When it has not been possible to identify one or more of the alleged victims who figure in the facts of the case because it concerns massive or collective violations, the tribunal must decide whether to consider those individuals as victims (article 35 of the Rules of Court). As the Inter-American Commission is the plaintiff, the complaint must be accompanied by the report referred to in article 50(1) of the Convention:⁴³ 'If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions.' After a suit is initiated, the President of the Court does a preliminary examination of the demand by checking whether or not all the requirements for its commencement were met, and may require the applicant to remedy deficiencies within 20 days (article 38 of the Rules of Court).⁴⁴

It is interesting that the new Rules of the Court (2009) provide for the position of an 'Inter-American Defender' who will act, by the Court's designation, in cases where the alleged victims do not have duly-accredited legal representation (article 37).

According to article 28(1) of the Rules of the Inter-American Court, the demand, its defence, the written pleadings, motions, other evidence and petitions to the Court may be submitted in person, via courier, facsimile, telex, mail and other means generally used. In the case of submissions by electronic means, the original documents, as well as the proof that follows, should be submitted within 21 days from the final date of the written documents. In the previous Regulation (of 2000), the time limit was seven days (under article 26(1)), which was considered too exiguous.

The preliminary stage of the demand is to be followed by the citation of the state defendant and the subpoena of the Inter-American Commission when it is not the plaintiff (the Commission will act in this case as *custos legis*). The procedures of the adversarial system are initiated, in which the defendant state may submit preliminary objections within two months of its citation. If the Brazilian state is the defendant, it should act through the international office of the Solicitor-General of the Union, with operational support from the Ministry of Foreign Affairs. It should be mentioned that nothing prevents the applicant from withdrawing from the process. If the defendant state has not yet been cited, such a withdrawal must be accepted. After the defendant is cited, the Court may accept or refuse the withdrawal of the applicant (to make this decision, representatives of the victims or their relatives, etc, should be heard).⁴⁵

⁴³ For the text in Portuguese, see Mazzuoli (n 2 above) 1010.

⁴⁴ See Gomes & Mazzuoli (n 3 above) 279-280.

⁴⁵ See Ramos (n 14 above) 90-91.

Nothing prevents the parties from reaching an amicable settlement by informing the Court. In such a case, the Court approves the conciliation, acting now as a supervisor of the human rights standards protected by the American Convention. Nothing prevents the Court from rejecting a friendly settlement in the event it deems the agreement to be contrary to the provisions of the American Convention.

The defendant state, within a period of four months following notification of the case, has the right to present its defence. The state's answer should include the necessary documents to prove its arguments as well as a list of witnesses and experts. Such defence must be communicated by the Secretary to the persons mentioned in articles 39(1)(a), (c) and (d) of the Rules of Court, which are the President and the Court's judges; the Commission, provided it is not the plaintiff; and the alleged victim, his or her representatives, or the Inter-American Defender, if this is the case.

Preliminary exceptions may only be invoked in response to the demand. The response should include the facts alleged by the state, as well as its legal arguments, its conclusions, supporting documents with an indication of evidence that the author of the exception may want to present. The presentation of preliminary exceptions has no suspensive effect on the proceedings as regards the merits or deadlines of the case. The parties interested in presenting written responses to the preliminary exceptions may do so within a period of 30 days from receipt of the notice. When it is deemed necessary by the Court, it may convene a special hearing on preliminary exceptions, after which it must decide on them. However, the Court may also adopt a summary decision on preliminary exceptions and the merits of the case, according to the principle of procedural economy.⁴⁶ Next, the President of the Court must fix the date for hearings and oral argument.⁴⁷

After concluding the discovery process (with discussions, questions during debates, and such⁴⁸), the Court proceeds to deliberations and delivers a judgment on the merits. This judgment contains (a) the names of the person who presides in the Court, the judges who rendered the decision, the Secretary and the Deputy-Secretary; (b) the identity of those who participate in the proceedings and their representatives; (c) a description of the proceedings; (d) the facts in the case; (e) the submissions of the Commission, the victims or their representatives, the respondent state and, if applicable, the petitioning state; (f) the legal arguments; (g) the ruling on the case; (h) the decisions on reparation and costs, if applicable; (i) the result of the voting; and (j) a statement

⁴⁶ Art 42 of the Rules.

⁴⁷ Art 45 of the Rules.

⁴⁸ On the probative question in the Inter-American Court, see A Bovino *A atividade probatória perante a Corte Interamericana de Direitos Humanos*, *SUR – Revista Internacional de Direitos Humanos* (2005) 61-83.

indicating which text of the judgment is authoritative (article 65 of the Rules of Court).

When a finding on the merits of a case does not rule specifically on reparations, the Court will announce that it intends to issue a finding at a later stage and whether it intends to require additional briefs or hearings on reparations.⁴⁹ If the Court is informed that the parties to the proceedings came to an agreement on the enforcement of the judgment upon merit, it will verify whether the agreement is consistent with the Convention and will decide on the matter (articles 66(1) and (2)).

Notification of the award to the parties is made by the Court Secretariat. Until the parties are notified of the finding, the texts, the arguments and votes all remain confidential. The findings are signed by all the judges who participated in the vote and by the Secretary. However, the finding shall be valid when signed by a majority of the judges and the Secretary. The original copies of judgments must be deposited in the archives of the Court. The Secretary must deliver certified copies to the state parties, the parties concerned, the Permanent Council through its President, and the Secretary-General of the OAS and all other interested persons who so request.

7 Internal effectiveness of judgments passed by the Inter-American Court in Brazil

A complex legal issue that arises in relation to decisions by the Inter-American Court — a discussion that is also relevant to the judgments of any international court — relates to the arguable need for such decisions to be subject to ratification by the Superior Court of Justice (STJ — *Superior Tribunal de Justiça*) to be internally effective in Brazil.⁵⁰ An observation to be made here is that I am not dealing with a problem regarding the ratification of foreign judgments by the STJ, but of international judgments, which is a different issue, for the reasons discussed below.

The subject is regulated in Brazil by the Federal Constitution of 1988 (article 105(I)(i), introduced by Constitutional Amendment 45/2004), the Law of Introduction to the Civil Code (articles 15 and 17), the Code of Civil Procedure (articles 483 and 484) and the Internal Rules of the Supreme Court (articles 215 to 224). On an international level, there

⁴⁹ See VMR Rescia *Las reparaciones en el sistema interamericano de protección de los derechos humanos*, *Revista IIDH* (1996) 129-150.

⁵⁰ Before the entry into force of Constitutional Amendment 45/2004, the jurisdiction for homologation of foreign judgments was subjected to the Supreme Court. See, in this regard, V de O Mazzuoli 'Sentenças internacionais no Supremo Tribunal Federal' (2002) *Jornal Correio Braziliense*, Supplement 'Law and Justice', Brasília, 3.

are rules for this matter in the Bustamante Code of 1928, still in force in Brazil (article 423 and further).

In my view, the sentences handed down by international courts do not require ratification by the STJ. In the specific case of judgments of the Inter-American Court, the rule contained in article 105(I)(i), introduced by Constitutional Amendment 45/2004 and repeated by article 483 of the Code of Civil Procedure, which states that the sentence pronounced by a foreign court will not be effective in Brazil unless ratified by the Supreme Court, is not enforceable.⁵¹ (Presently, after Constitutional Amendment 45/2004, the competent court is the Superior Court of Justice.) Judgments handed down by 'international courts' are not foreign judgments referred to by the instruments mentioned. 'Foreign judgments' should be understood as ones pronounced by a court of a sovereign state, and not emanating from an international tribunal which has jurisdiction over state parties.

One might think that a foreign judgment is any judgment that is not national and, therefore, is an award either made by the judiciary of any state, or issued by an international court. Both should then be subject to incorporation before they accomplish their internal purposes in Brazil. However, this argument does not seem to hold, when differentiating the legal status and procedure of foreign judgments from that of international courts. International law is not to be confused with foreign law. International law deals with international legal regulations, in most cases done by international standards. International law, therefore, disciplines the performance of states, international organisations, and also individuals. Foreign law, however, is subject to the jurisdiction of a particular state, such as Italian, French or German law. It is any law subject to the jurisdiction of a country other than Brazil. A decision given in Argentina will always be a foreign decision.

A court 'that knows legal issues not likely to be decided by a national court is considered an international court',⁵² and the sentence it pronounces will also be qualified accordingly. The sentences handed down by 'international courts' will be international judgments in the same way that sentences handed down by 'foreign courts' will be foreign judgments, not to be confused with each other.

There is, therefore, a clear distinction between foreign judgments (subject to the sovereignty of any state) to which article 483 of the Code refers, and international judgments rendered by international courts that do not flow from the sovereignty of any individual state but, on the contrary, have jurisdiction over the state itself. A Brazilian

⁵¹ For the text in Portuguese, see Mazzuoli (n 2 above) 1562.

⁵² I Brownlie *Princípios de direito internacional público* (1997) 603.

international law specialist who expressly indicated such a view is José Carlos de Magalhães, who expressed the following view:⁵³

It should be stressed that an international judgment, although it can have the character of a foreign judgment, for not coming from a national judicial authority, is not always the same thing. An international sentence consists of a judicial act emanating from an international judicial organ of which the state is a party, either because it accepted compulsory jurisdiction, such as the Inter-American Court of Human Rights, or because, by special agreement, agreed to submit the solution of a particular dispute to an international body such as the International Court of Justice. The same may be said of submitting a dispute to an international arbitration court, giving specific jurisdiction for the designated authority to decide the dispute. In both cases, the submission of the state to the jurisdiction of the International Court, or to the arbitrators, is optional. One can accept it or not. However, if accepted by a formal declaration, as is authorised by Legislative Decree 89 of 1998, the state is obliged to comply with the decision that will be given. If it does not, it will not be complying with an obligation of international character and thus be subject to sanctions that the international community has the right to apply.

The same expert concluded:

One such sentence is, therefore, not dependent on incorporation by the Supreme Court [the Superior Court of Justice], even as it itself may have been the power that violated the human rights for which the compensation was determined. It is not, in this case, an *inter alios* sentence strange to the country. Being party to it, it needs to be complied with, as one would comply with the decision of its own courts.

This leads us to the conclusion that the STJ has neither constitutional nor legal authority to provide for the incorporation of judgments pronounced by international courts which decide over the alleged sovereign state power, and have jurisdiction over the state itself. To contend otherwise is contrary to the principles that seek to govern the community of states as a whole, with a view to the perfect co-ordination of the powers of states in this scenario of rights protection.

In short, the judgments of the Court, according to the wording of article 68(1) of the American Convention, have immediate effect in domestic law, and should be enforced by the authorities of the state.

8 Problem of enforcement of the Court's judgments in Brazil

Unfortunately, the Inter-American system of human rights still lacks an effective system of enforcement of Court judgments under the domestic legislation of the states found in violation of the Convention, in spite of article 68(1) of the American Convention which expressly provides for

⁵³ JC Magalhães *O Supremo Tribunal Federal e o direito internacional: uma análise crítica* (2000) 102. In this same sense, see Ramos (n 14 above) 496-497; and his *Processo internacional* (n 21 above) 331-336.

the commitment of state parties in 'accepting the decision of the Court in any case in which they are parties'.⁵⁴ Also, article 65 determines that the Court must inform the General Assembly of the Organisation of 'cases where a state has not complied with its judgments'.⁵⁵

The first international finding against Brazil for a violation of rights protected under the American Convention related to the case of *Damião Ximenes Lopes*, in Petition 12.237, referred by the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights on 1 October 2004. The case concerned the death of Mr Damião Ximenes Lopes (who suffered from mental retardation) in a health centre, called Guararapes Nursing Home (located in Sobral, in the state of Ceará), which is part of the Brazilian Unified Health System. While in the hospital for psychiatric treatment, the victim suffered torture and ill-treatment by the attendants of the nursing home. The state's failure to investigate and punish those responsible and the lack of judicial guarantees were considered to violate four articles of the Convention: articles 4 (life); 5 (physical integrity), 8 (judicial guarantees) and 25 (judicial protection). In its decision of 4 July 2006 – which was the first judgment in the Inter-American system concerning human rights violations of persons with disabilities – the Inter-American Court determined, among other things, the obligation of the Brazilian state to investigate those responsible for the death of the victim, to conduct training programmes for professionals in psychiatric care, and to pay compensation (within one year) to the victim's family for material and emotional damages, totalling US \$146 000 (equivalent to R\$ 280 532,85 at the time).

The Brazilian government decided to pay the amount ordered by the Inter-American Court immediately, in deference to the rule of article 68(1) of the Convention. Through Decree 6185 of 13 August 2007, the President authorised the Special Secretariat for Human Rights of the Presidency to

take the necessary steps to comply with the decision of the Inter-American Court of Human Rights, issued on July 4, 2006, regarding the case *Damião Ximenes Lopes*, especially the compensation for the violations of human rights to the family (article 1).

In another case tried by the Inter-American Court (the second case against Brazil before the Court), the Brazilian state was found not to have violated the Convention. This was the case of *Nogueira Carvalho v Brazil*, submitted to the Court on 13 January 2005 by the Inter-American Commission. The Commission held the Brazilian state responsible for

⁵⁴ For the text in Portuguese, see Mazzuoli (n 2 above) 1013 on enforcement/implementation.

⁵⁵ For the text in Portuguese, see Mazzuoli (n 2 above) 1012. In this regard, see Arrighi (n 19 above) 108; VMR Rescia 'La ejecución de sentencias de la Corte' in JE Méndez & F Cox (eds) *El futuro del sistema interamericano de protección de los derechos humanos* (1998) 449-490; Gomes & Mazzuoli (n 3 above) 308-310.

violating the rights provided for under articles 8 (judicial guarantees) and 25 (judicial protection) of the American Convention, to the detriment of Jaurídice Nogueira de Carvalho and Geraldo Cruz de Carvalho, for its alleged lack of due diligence in the process of investigating the facts and punishing those responsible for the death of their son Francisco Gilson Nogueira de Carvalho, and the lack of an effective remedy in this case. Mr Gilson Nogueira de Carvalho was a lawyer, a human rights activist, and devoted part of his professional work to denounce the crimes committed by the 'Golden Boys' (an alleged death squad in which civil police officers and other government officials took part) and to support prosecutions initiated as a result of these crimes. On account of this he was murdered on 20 October 1996 in the city of Macaíba, in the state of Rio Grande do Norte. The Commission stressed that the poor performance of state officials, viewed as a whole, led to the lack of investigation, arrest, prosecution, trial and conviction of those responsible for the murder of Mr Gilson Nogueira de Carvalho, and that, after more than 10 years, these persons had still not been identified and prosecuted. The Inter-American Court, in a judgment of 28 November 2006, emphasised that, although it is the duty of a state to facilitate the necessary means to ensure that human rights defenders may carry out their activities freely, as well as to protect them from threats incurred as a means to prevent injuries to their lives and integrity, there were not, in this case, infringements of any of the rights provided for in the Convention. This finding was due to the fact that the Brazilian police opened an investigation on 20 October 1996 to investigate the death of Gilson Nogueira de Carvalho, in which different avenues of investigation into persons responsible for the murder were considered, among them one that related to his death due to his prosecution of an alleged death squad known as Golden Boys. Because of this the Court found that it had not been established that the state had violated the rights to judicial protection and guarantees enshrined in articles 8 and 25 of the Convention.⁵⁶

The major problem concerning compliance with the obligations imposed on the state by the Inter-American Court is not related to the payment of indemnity (which should be fulfilled by the state, as did the Brazilian government in the case of *Damião Ximenes Lopes*, cited above), but the difficulty of performing the duties of investigating and punishing those who are responsible for violations of human rights. Although it is not expressly written in the Convention that states have such duties (investigation and punishment of the guilty), its best interpretation is that these duties are implied there. Therefore, three obligations of states convicted by the Court may be abstracted from the finding: (a) duty to indemnify the victim or his family; (b) duty to investigate the

⁵⁶ See the sentence in http://www.corteidh.or.cr/docs/casos/articulos/seriec_161_por.pdf (accessed 30 September 2010).

facts in order to prevent new similar events from happening again; and (c) duty to punish those responsible for the human rights violations.

It should be emphasised that, if the state fails to observe article 68(1) of the American Convention (which provides that states accept, *sponte sua*, the Court's decisions), it incurs a further violation of the Convention, thus activating in the Inter-American system the possibility of a new contentious procedure against such state.⁵⁷

If the state fails to comply with the Court's order, the victim himself or herself or the Federal Prosecutor (on the basis of article 109(III) of the Constitution, which states that 'federal judges are the ones to process and decide cases based on a treaty or contract between the Union and a foreign state or international organisation')⁵⁸ may initiate a suit to ensure the effective enforcement of the finding, since it is enforceable in Brazil, with immediate effect, and the state must merely comply with internal procedures regarding the implementation of a decision against a state.⁵⁹

Also, in the case of failure by the state to comply with the sentence, the Inter-American Court (according to article 65 of the Convention) should inform the General Assembly of the OAS in its annual report to be submitted to the organization and make proper recommendations. The General Assembly of the OAS, unfortunately, has done nothing to require that states comply with reparation or compensation awards.⁶⁰

In the opinion of some authors, in case of default by a state on an international decision, the well-known order of preference pursuant to article 100 of the Brazilian Constitution of 1988 should be excluded from the procedure of enforcement of the Court order, as it causes too much delay in the payment of compensation to the victim.⁶¹ Thus, pursuant

⁵⁷ See AA Cançado Trindade *O direito internacional em um mundo em transformação* (2002) 612-613.

⁵⁸ For the text in Portuguese, see Mazzuoli (n 2 above) 93.

⁵⁹ See Piovesan (n 16 above) 241.

⁶⁰ For criticism of the OAS work in these cases, see Gomes & Mazzuoli (n 3 above) 309-310.

⁶¹ Thus states art 100 of the Constitution (amended by Constitutional Amendment 62 of 9 December 2009): 'The payments owed by the Federal, State, District and Municipal Public Treasuries, by virtue of a court decision, are to be issued solely in chronological order of submission of the judicial requests, and to the respective credits account, being it prohibited the designation of cases or people in budgetary appropriations and additional credits opened for this purpose. (1) The debts of alimony include those derived from salaries, wages, pensions and their complements, pension benefits and compensation for death or disability, based on civil liability due to force of *res judicata*, and shall be paid with precedence over all other debts, except those referred to in (2) of this article. (2) The debts of alimony whose holders are sixty (60) years old, or even older, on the date of issuance of the judicial request, or are patients of serious disease, defined according to the law, shall be paid with precedence over all other debts, even to the triple value of the equivalent set by law for the purposes of the provision of (3) of this article, admitted the fractioning for this purpose, while the remainder will be paid in chronological order of submission of the judicial request.' For the text in Portuguese, see Mazzuoli (n 2 above) 84-85.

to this, one should match the Court's condemnatory sentence with a support obligation and thereby create a proper order for its payment, certainly faster and more attuned to the spirit of the Convention.⁶² In this case, the problem is that, when article 100(1) of the Constitution defines what 'alimony debts' are, it makes no reference, even remotely, to the possibility of matching an international condemnatory sentence with a support obligation. It refers only to 'compensation for death or disability, based on civil liability due to force of *res judicata*', which may not be the case before the Inter-American Court (for example, a Court condemnation in case of civil arrest for debt of an unfaithful trustee, not allowed by article 7(7) of the Convention, which is neither a death nor a disability case, among many others).

The truth is that there is no provision under Brazilian law to force the payment of compensation ordered by the Inter-American Court. In this case, there is only Bill 4667/2004 pending before Congress. If approved, it will mandate the Union to pay the due compensation to victims. Thus, pursuant to article 1 of the Bill, the 'decisions and recommendations of the international organs of human rights protection stated by treaties that have been ratified by Brazil, bring forth immediate legal effects and have binding legal force under the Brazilian legal system'. It further states:

The Union, in view of the enforceable character of the decisions of the Inter-American Court of Human Rights provided for in the Legislative Decree 89 of 3 December 1998, and the quasi-jurisdictional importance of the Inter-American Commission on Human Rights provided for in the Legislative Decree 678, of 6 November 1992, will adopt all necessary measures to fully comply with the international decisions and recommendations, giving them absolute priority.

According to article 2 of the Bill, when 'the decisions and recommendations of the international human rights protection organs involve compliance with the obligation to pay, the Union will be in charge of the payment of the economic compensation to the victims'. Paragraph 1 of this Bill also requires the Union to make the payment of economic reparations to the victims within 60 days of notification of the decision or recommendation of an international human rights protection organ.

In Brazil, the liability to pay compensation rests with the Union, which is responsible for the acts of the Republic. However, losses suffered by the Federal Treasury due to a duty to indemnify may be recovered from the party responsible for the violation of human rights.

⁶² See, in this regard, Ramos (n 14 above) 499.

9 Concluding remarks

The Inter-American system of human rights is still little-known in Brazil, although well-articulated and fully operational. Today, Brazilian jurists do not have much knowledge about the exact operation of the international judicial system, nor are they able to hold the state accountable for the infringement of a right provided for in the American Convention.

Brazil is several years behind others in adapting to the third wave of state, law and justice, called internationalism. Only after the case tried by the STF in the Extraordinary Appeal 466.343-1/SP does Brazil seem to have entered the 'wave' of international law, a trend far advanced in other countries of the world.⁶³ Similarly, even long after it had joined the major international covenants and conventions on human rights, these treaties are not given much visibility in Brazil.⁶⁴

So far we have been surrounded by lawyers who neither care to consult the Constitution nor regard it as important. What could we say then of the application of human rights treaties by those lawyers who regard such treaties as distant and foreign to Brazil? Therefore, a sound knowledge of the judicial mechanism of the Inter-American system of human rights is necessary for every third millennium jurist.

⁶³ In this regard, see Mazzuoli (n 1 above) 334-346; Mazzuoli (n 10 above) 125-126.

⁶⁴ For a pioneer study on this theme in Brazil, see V de O Mazzuoli *O controle jurisdicional da convencionalidade das leis* (2009).

Human rights developments in African sub-regional economic communities during 2010

Solomon T Ebobrah*

Extraordinary Lecturer, Centre for Human Rights, University of Pretoria, South Africa; Lecturer, Niger Delta University, Nigeria

Summary

In 2010, judicial and non-judicial human rights developments continued to grow within the framework of three of the most active regional economic communities in Africa, albeit at different paces. During the year, the East African Community and Economic Community of West African States structures sought to consolidate their existing human rights work. The East African Court of Justice tried to establish itself as a human rights court, making pronouncements that will shape the direction of human rights litigation before it. The EACJ continued to assert its role despite the non-adoption of the protocol required to expressly confer human rights jurisdiction upon it. In Southern Africa, while the Summit endeavoured to shape the democratic culture in the region, the Southern African Development Community Tribunal faced a serious challenge to its continued existence and operation as a forum for human rights realisation. These developments are analysed against the background of their overall significance to human rights in Africa.

1 Introduction

Within the last two to three years, the involvement of African sub-regional organisations in the promotion and protection of human rights on the continent has increasingly become entrenched. Progressively, even if sometimes grudgingly, important actors in the African human

* LLB (Rivers State), LLM (Human Rights and Democratisation in Africa), LL.D (Pretoria); sebobrah@yahoo.co.uk

rights system have had to deal with the reality that sub-regional bodies now contribute to the development of Africa's human rights agenda. Hence, for instance, in the development of a human rights strategy for Africa, the African Union (AU) recognised the emerging role of sub-regional bodies by creating room for their continued operation in the field whilst ensuring that they address the threat of conflict with continental institutions.¹ In a similar vein, the human rights work of the judicial arms of the sub-regional organisations has been acknowledged by the African Court on Human and Peoples' Rights (African Human Rights Court), to the extent that these sub-regional judicial bodies were invited to participate at a colloquium for Africa's international judicial and quasi-judicial bodies operating in the field of human rights.² These seemingly isolated events, when taken together, paint a picture of an expanded continental human rights system with sub-regional building blocks and justify the growing attention being paid to these sub-regional institutions.

Notwithstanding what could pass as an increasing acceptance of their involvement in the field of human rights in Africa, it is not all known sub-regional organisations in Africa that have ventured into the field. Over the relatively short span of visible sub-regional human rights activity on the continent, only three of the over 14 regional economic communities currently existing in Africa have maintained some form of sustained action in the field.³ As has been the case in the last two years, the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) have remained visible and active in one form or another in the promotion and protection of human rights on the continent.⁴ While it is beyond the scope of this contribution to try to understand and explain this trend, any keen observer would notice that these three sub-regional organisations have exhibited some evidence of deep integration in what theorists have branded as 'new regionalism'.⁵ Some would argue that 'new regionalism', as practised by these three sub-

¹ A zero draft of the Human Rights Strategy for Africa emerged some time in 2010 (on file with author).

² The Colloquium of the African Human Rights Court and Similar Institutions took place in Arusha, Tanzania, between 4 and 6 October 2010.

³ As noted by F Viljoen *International human rights law in Africa* (2007) 488, the AU recognises eight RECs as building blocks of the African Economic Community (AEC) and, by extension, the AU. However, it has to be noted that sub-regional organisations such as the International Conference on the Great Lake Region (ICGLR) have also developed sub-regional human rights standards that are worthy of note even though no significant institutional human rights activity is evident in its organisational structure.

⁴ See, generally, ST Ebobrah 'Human rights developments in the African sub-regional economic communities during 2009' (2010) 10 *African Human Rights Law Journal* 233.

⁵ Generally, see B Hettne 'The new regionalism: A prologue' in B Hettne *et al* (eds) *National perspectives on the new regionalism in the South* (2000).

regional bodies, may have accounted for their sustained involvement in the field of human rights realisation. Whatever the explanation may be, the involvement of African sub-regional bodies in the field has not been without its detractors.

In some ways, the year 2010 was a significant watershed for sub-regional human rights work in Africa. While advancements were recorded in some sectors, in others less than impressive events occurred that potentially threaten the continued existence of sub-regional *loci* for human rights realisation. This contribution sets out and undertakes a modest analysis of some of the most important human rights developments in the organisational frameworks of the EAC, ECOWAS and SADC. Divided into three main sections, each of which deals separately with each organisation, the contribution considers both judicial and non-judicial human rights activities that occurred in these organisations in 2010. Owing to obvious limitations of access to primary materials and space, the contribution does not attempt to present an exhaustive consideration of its subject matter. However, an effort has been made to include the most significant developments.

2 East African Community

In 1999, the Treaty establishing the EAC was adopted by the three original founding partner states, namely, Kenya, Tanzania and Uganda.⁶ The main objective of the EAC is to develop and engage in 'policies and programmes aimed at widening and deepening co-operation among partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs'.⁷ In pursuit of its objectives, article 5(2) the 1999 Treaty (as amended) envisages the progressive establishment of a Customs Union, a Common Market, a Monetary Union and ultimately a Political Federation.⁸

Under the 1999 Treaty of the EAC, the promotion and protection of human rights is not one of the expressly-stated objectives of integration.⁹ However, the Treaty contains ample references to human rights

⁶ The EAC was initially founded by Kenya, Tanzania and Uganda in 1967 but became dissolved in 1977 following disputes between the partner states. With the new wave of regionalism partly prompted by reactions to globalisation, the EAC was revived with the adoption of a new founding Treaty in 1999. This Treaty was first amended in 2006 and later in 2007. With the accession of Burundi and Rwanda to the Treaty of the EAC, the Community now has five partner states. The Treaty of the EAC (as amended) is reproduced in S Ebovrah & A Tanoh (eds) *Compendium of African sub-regional human rights documents* (2007) 37.

⁷ See art 5 of the 1999 Treaty of the EAC as amended.

⁸ In 2010, the EAC adopted a Protocol to formally create a Common Market, thereby effectively moving into the second major phase of its existence.

⁹ Some would argue, based on the theory of 'new regionalism', that there is no need for such express statement of objective to enable a regional organisation to engage in human rights work.

that currently sustain EAC action in the field of human rights. By article 6(d) of the 1999 Treaty of the EAC (as amended), one of the fundamental principles governing the achievement of Community objectives is respect for the principle of:

good governance, including adherence to the principles of democracy; the rule of law; accountability; transparency; social justice; equal opportunities; gender equality; as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

By article 7(2) of the 1999 Treaty, EAC partner states further undertake 'to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally-accepted standards of human rights'. These and other provisions setting out rights-related objectives of the EAC¹⁰ constitute the legal foundation upon which a delicate EAC human rights regime is built. Relying on this foundation, in 2010, the EAC engaged in both the judicial and non-judicial realisation of human rights.

2.1 Non-judicial human rights developments

Non-judicial human rights developments as used in this contribution refers to all human rights-related activities undertaken by organs and institutions of the EAC other than the East African Court of Justice (EACJ). Such non-judicial human rights developments cover activities as diverse as standard setting, thematic meetings and activities aimed at strengthening democracy within the partner states of the EAC.

2.1.1 Standard setting¹¹

The East African Legislative Assembly (EALA), which is the legislative organ of the EAC, was fairly active in setting human rights and rights-related standards in 2010. In February 2010, the EALA adopted a resolution urging EAC partner states to 'take action against the practice of Female Genital Mutilation/Cutting (FGM/C) for non-medical reasons'.¹² It would be recalled that the scourge of FGM/C is one that the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) expressly

¹⁰ See, generally, art 5(3)(b), (d) (e) and (f) of the 1999 EAC Treaty as amended.

¹¹ Generally, the term 'standard setting' is associated with the adoption of treaties and, to a lesser extent, declarations by legislative and decision-making bodies of international organisations. However, owing to the limited scope of human rights standard setting in African sub-regional organisations, the term is liberally applied in this contribution to cover every activity that sets or re-affirms standards even in non-binding contexts.

¹² 'Resolution to urge partner states to fight FGM/C' press statement released by the Public Relations Department of the EAC.

addresses.¹³ This raises the question whether such a resolution by the EALA has any additional value for the protection of women and girls in the East African region. However, as noted by the EALA in the build-up to the resolution, the laws and policies against the practice of FGM/C in most EAC partner states are hardly implemented. Against this background, there is very little chance that the African Women's Protocol can be successfully invoked as a bulwark against the scourge. In this regard, and in view of the relatively high incidence of FGM/C still recorded in at least three partner states of the EAC, the resolution by the EALA is a significant effort to protect the rights of vulnerable girls and women.

Although the potentially persuasive effect of the resolutions of the EALA in EAC partner states cannot be denied, there is yet to be any concrete measurement of the effectiveness of such resolutions. Further, there is room for civil society organisations (CSOs) and non-governmental organisations (NGOs) to build active campaigns on such resolutions.

The adoption of a draft election observation manual by the EALA was another important rights-related development during 2010. It is important to note that both ECOWAS and SADC have previously adopted regional guidelines for the conduct of democratic elections. These guidelines, which apparently take global standards into account, are generally applied as a yardstick to measure the conduct of elections in member states of these organisations. Thus, the adoption of this manual by the EALA allows the EAC to catch up with the other two sub-regional bodies. This is particularly important considering that the AU-initiated Charter on Democracy, Elections and Governance is yet to enter into force.¹⁴ The EAC Election Observation Manual is seen by the EALA as an instrument that will 'enhance democracy, rule of law and governance, which is essential for political, social and economic development of the region'. Further, the EALA perceives the manual as one that 'sets a common standard to determine the credibility of electoral processes and the legitimacy of electoral outcomes in the five countries of the East Africa Community (EAC)'. Although the argument could be made that there is a risk of the creation of 'regional standards' that fall below accepted global and continental standards for conducting elections, the fact remains that the chances of enforcement of electoral standards are higher within sub-regional organisations in view of the potential risk that failed elections pose to neighbouring states.

By far the most important human rights standard-setting activity in the EAC during 2010 was the consolidation of the process for the

¹³ The African Women's Protocol was adopted in 2003 on the platform of the AU and entered into force in 2005. It is reproduced in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 61.

¹⁴ The African Charter on Democracy, Elections and Governance was adopted in 2007. It is yet to enter into force.

adoption of an EAC Bill of Rights. At a meeting of the National Human Rights Commissions (NHRCs) of EAC partner states that took place in June 2010, a draft copy of the EAC Bill of Rights was adopted for recommendation to the EAC Council of Ministers.¹⁵ The EAC Bill of Rights is an initiative of the EAC NHRCs and is facilitated by a regional CSO, the *Kituo cha Katiba* (Centre for Constitutional Development). The active involvement of civil society and the initiative by NHRCs gives a *prima facie* impression of transparency and local ownership rather than the imposition of standards by governments in the region. It remains to be seen how much governments of EAC partner states will be willing to accept from the draft Bill of Rights.

The EAC Bill of Rights proposes to set common standards in partner states and builds on municipal bills of rights in these states. Significantly, the Bill of Rights is expected to ‘support the development of the EAC Good Governance Protocol and its four pillars, namely, democracy and democratisation processes; human rights and equal opportunities; anti-corruption, ethics and integrity; and rule of law and access to justice’.¹⁶ Clearly, this process comes with a risk of conflicting standards *vis-à-vis* the African Charter on Human and Peoples’ Rights (African Charter) and other continental human rights standards. However, it cannot also be denied that the process leading up to the adoption of the EAC Bill of Rights is significantly inclusive and has the potential to be ‘owned’ by all stakeholders in the region. In order to address the risk of conflicting standards that would allow pariah states to claim competing loyalty, it is expected that the EAC Bill of Rights will make clear reference to the African Charter as a statement of the minimum standard upon which the Bill of Rights stands. It has to be noted further that the adoption of a bill of rights potentially opens room for the operationalisation of the express human rights jurisdiction of the EACJ.¹⁷

2.1.2 Thematic meetings

Thematic meetings targeted at specific human rights and rights-related issues featured in the activities of the EAC during 2010. One of the most prominent of such meetings was the EAC Conference on Persons with

¹⁵ ‘Heads of Human Rights Commissions Recommend Draft EAC Bill of Rights to Council of Ministers’, press release by the Public Relations Department of the EAC. As at the time of writing, the draft bill was still only with the EAC Secretariat.

¹⁶ The EAC Good Governance Protocol is currently undergoing review by stakeholders in EAC partner states. E-mail communications between the author and an official at the EAC Secretariat give the impression that it is only after the current round of consultations that the document would be released to the general public.

¹⁷ By art 27(2) of the 1999 EAC Treaty (as amended), the human rights jurisdiction of the EACJ is made subject to the adoption of a protocol to that effect by partner states.

Disabilities.¹⁸ The conference brought together policy makers in EAC partner states, EAC organs and institutions, national parliamentarians and the private sector to stimulate 'new thinking' on ways to positively impact on the lives of people living with disabilities.¹⁹ The conference adopted specific resolutions aimed at the different groups of stakeholders that participated. Thus, for instance, EAC partner states were implored to develop credible statistics on people with disabilities and to create disability focal points in key ministries. The private sector was encouraged to consider affirmative action for the employment of persons with disabilities, including through the use of quota systems. The EAC organs were challenged to establish a regional Disability Development Fund and to rally partner states to ratify the UN Convention on Disability as a regional block.

The EAC initiative on persons with disabilities is coming at a time when the AU, through the African Commission on Human and Peoples' Rights (African Commission), is still in the process of consulting for the purpose of developing a continental protocol to protect the rights of people with disabilities. Consequently, the EAC initiative fills an existing gap and engages actors at levels that continental and global initiatives would find difficult to access. Thus, there is some sense of a complementary role emerging from the region. Despite the positives, it is not clear whether any conscious effort is being made to feed the EAC initiative into the wider continental project of the AU.

In relation to conflict management, the EAC engaged in a meeting with the International Conference on the Great Lakes Region (ICGLR) that resulted in the signing of a Memorandum of Understanding (MoU) to enable both organisations to create synergy for the promotion of human rights-related concerns.²⁰ The MoU is said to aim at 'preventing, managing and resolving conflicts in the Great Lakes region; promote democracy and good governance; support measures aimed at the prevention of sexual violence against women and children and; promote measures aimed at improving protection of human rights and the environment, among others'.²¹ It would be noted that all partner states of the EAC are also members of the ICGLR. Accordingly, the signing of a MoU allows the states to avoid unnecessary duplication of responsibilities and encourage joint action that potentially saves scarce resources. Clearly, the scale of conflicts in the region creates the need for responses that continental organisations have yet to proffer solutions to. Thus,

¹⁸ 'Conference designs robust resolutions to guide PwD's engagement with EAC partner states, private sector, EAC organs and institutions and national parliaments', press release by the Public Relations Department of the EAC Secretariat.

¹⁹ As above.

²⁰ 'EAC, ICGLR sign MoU' press release by the Public Relations Department of the EAC Secretariat.

²¹ As above.

joint action by the EAC and ICGLR is likely to promote and protect the rights of the most vulnerable during regional conflicts.

It is significant to note that the ICGLR has adopted region-specific instruments that seek to address the human rights and other challenges that persons displaced by conflicts face in the Great Lakes region. In the absence of similar instruments in the EAC, joint action by both organisations would have far-reaching consequences for human rights protection in the region. This is especially so as the AU instruments on internally-displaced persons still have a long way to go before they come into effect.²²

2.1.3 Strengthening democracy

A significant addition to the human rights work of the EAC in 2010 related to activities aimed at strengthening democracy among partner states. During 2010, the EAC was involved in observing elections in two of its partner states. In July 2010, a 25-member EAC election observer team was sent to observe legislative elections in Burundi.²³ An outstanding feature of the team was that it comprised of diverse actors, including representatives of NHRCs of partner states. In including NHRCs in its election observer team, the EAC appeared to be affirming the link between human rights and democratic governance.

In October 2010, at the invitation of the National Electoral Commission of Tanzania, the EAC also sent an Election Observer Mission to observe elections. As was the case with the Mission to Burundi, the team to Tanzania was diverse and included representatives of NHRCs.²⁴ The listed objectives of the Mission to Tanzania include to 'assess whether conditions exist for free and fair elections ... assess consistency with the provisions of the African Charter on Human and Peoples' Rights, the AU Declaration on the Principles Governing Democratic Elections in Africa, the United Nations Declaration on Human Rights and the International Covenant on Civil and Political Rights' and to 'determine whether the results of the election reflect the wishes of Tanzanians'.²⁵

The EAC justifies its involvement in election observation by placing reliance on the provisions of articles 3(1)(b), 6(d) and 7(2) of the 1999

²² The AU Convention for the Protection and Assistance of Internally-Displaced Persons was adopted in 2009 and is yet to enter into force.

²³ 'EAC Election Observer Mission for legislative elections in Burundi', press release by the Public Relations department of the EAC Secretariat.

²⁴ 'EAC Election Observer Mission to the 2010 general elections in the United Republic of Tanzania', press release by the Public Relations department of the EAC Secretariat.

²⁵ See the interim statement released by the EAC Election Observer Mission (on file with author).

EAC Treaty (as amended) and also on article 123 of the Treaty.²⁶ It is noteworthy that the work of the election observation missions is hinged on continental and global standards rather than the more recent EAC draft guidelines adopted by the EALA. Apart from the fact that the newly-adopted guidelines are not binding, the reference to continental and global standards potentially ensures that lower standards are not applied in the assessment of elections. Against the fact that in some cases, election observation and monitoring missions have unwittingly legitimised fraudulent elections, the critical nature of the interim report of the EAC Mission to Tanzania creates expectations of objectivity that would be beneficial for the promotion of democracy in the EAC.

2.2 Judicial protection by the East African Court of Justice

The EACJ is the judicial organ of the EAC. The Court is divided into a First Instance Division and an Appellate Division. The jurisdiction of the EACJ, as set out in articles 23 and 27 of the 1999 EAC Treaty (as amended), is to interpret and apply the Treaty.²⁷ It is envisaged that the jurisdiction of the Court would be expanded by a protocol adopted by partner states to that effect to cover additional issues, including human rights.²⁸ As of 31 December 2010, no protocol had been adopted to expand the jurisdiction of the Court. Thus, during 2010, the EACJ did not have an express human rights jurisdiction, even though the Court had previously assumed an implied jurisdiction over human rights.²⁹ Consequently, the Court's five year strategic plan adopted in 2010 has very little reference to human rights.

Notwithstanding that the human rights jurisdiction of the EACJ is not yet a reality, in 2010 the EACJ entertained cases that touched on human rights. It is also significant to note that in one of these cases, for the first time, the EACJ moved away from its seat to hear a matter in the *locus*.³⁰ This is to the benefit of litigants who may be unable to travel to the Court. Despite the expectations raised by the Court after the initial case, only one decision with a human rights effect was handed down during 2010.

²⁶ See the press release announcing the Mission (on file with author). The first three provisions listed relate to 'good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality as well as the recognition, promotion and protection of human rights'.

²⁷ See art 27(1) of the 1999 EAC Treaty (as amended).

²⁸ Art 27(2) 1999 EAC Treaty (as amended).

²⁹ See the decision in *Katabazi & Others v The Secretary-General of EAC & Others* Ref 1 of 2007 (unreported) <http://www.saflii.org/ea/cases/EACJ/2007/3.html> (accessed 1 April 2011).

³⁰ See *AG Kenya v Anyang Nyong* Application 1.

2.2.1 *Ariviza and Another v AG, Kenya and Others*

In their (main) action before the EACJ, the claimants invited the Court to find that the process of the referendum and the promulgation of a new Constitution in Kenya amounted to a violation of the EAC Treaty. The claim was brought under articles 5(1), 6(c) and (d), 7(2), 8(1)(c), 27(1) and 29 of the EAC Treaty as well as articles 1, 3, 7(1) and 9(2) of the African Charter.³¹ As well, the claimants applied for an injunction to restrain any further action by Kenya while the action was pending before the EACJ. The respondents reacted by filing a preliminary objection challenging the competence of the EACJ to receive the claim. They alleged that it fell outside the scope of the jurisdiction conferred in article 27(1) of the EAC Treaty.

In its ruling on the preliminary objection, the EACJ considered the relevant provisions of the EAC Treaty dealing with its establishment and competence. The Court came to the conclusion that it could hear a claim brought by 'residents of the East African Community alleging that a partner state has committed acts that violate the provisions of the Treaty'.³² According to the Court, the question whether there is merit in the claim was separate from the question whether the Court had jurisdiction since, in its view, the question of jurisdiction had been settled. Consequently, the EACJ claimed jurisdiction despite the fact that the claimants sought relief based on the African Charter which should arguably fall under the envisaged human rights jurisdiction to be conferred on the Court. Effectively, the EACJ was following its earlier decision in the *Katabazi* case, that it would not shy away from interpreting and applying the Treaty merely because claims of a human rights nature were included in an action.³³ However, it would be noted that, unlike the *Katabazi* case, the claim in this action is not exclusively based on the EAC Treaty, but includes reliance on provisions of the African Charter. A fundamental question that the Court would have to face is whether under its present statement of competence, it can exercise jurisdiction over such African Charter-based claims.

Considering that the protocol required to expand the jurisdiction of the Court has been delayed for years, the EACJ appears to be taking a somewhat activist posture to claim jurisdiction in matters that touch on human rights issues. The EACJ currently stands as the only international court before which a claim such as this could be brought as Kenya is yet to make the relevant declaration that would grant direct individual access against it before the African Human Rights Court. In effect, if the Court had shut out the claim at this preliminary stage, the claimants would have been left with no credible judicial option outside

³¹ *Ariviza & Another v AG Kenya & Others* Application 3 of 2010 (arising out of Reference 7) 2.

³² *Ariviza* (n 31 above) 9.

³³ See the *Katabazi* case (n 29 above).

the municipal courts of Kenya.³⁴ One can venture to say that, if the proposed EAC Bill of Rights is passed, the competence of the EACJ over human rights would no longer be in debate and litigants may then focus their energies on the substances of their cases.

3 Economic Community of West African States

The original Treaty establishing ECOWAS was adopted in 1975.³⁵ In 1993, a revised Treaty was adopted by ECOWAS member states to replace the original 1975 Treaty. The main objective of ECOWAS under the 1993 Treaty is to establish an economic union in West Africa with a view to raising the living standards of its peoples, enhancing economic stability and contributing to the development of the African continent.³⁶ Although human rights as an issue area was hardly mentioned in the 1975 Treaty, the 1993 ECOWAS Treaty makes robust references to human rights and creates a suitable environment for the introduction of a human rights regime in the ECOWAS organisational framework.

Building on an initial reference to human rights in its Preamble, the 1993 revision of the ECOWAS Treaty contains commitments by ECOWAS member states to respect human rights as guaranteed under the African Charter. Thus, in their statement of fundamental principles, ECOWAS member states undertake to adhere to the principle of 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.³⁷ They further commit in article 56(2) of the Treaty to 'co-operate for the purpose of realising the objectives' of the African Charter. These commitments are reinforced by the adoption of other instruments with human rights implications within the ECOWAS Community framework. Together, the Treaty provisions and the other instruments have provided a legal foundation for ECOWAS to engage in human rights work. It is on this basis that the human rights activities of the judicial and non-judicial organs of ECOWAS were carried out in 2010.

³⁴ The African Commission is not a court and therefore cannot be a substitute for the EACJ, even though it is also an international forum for human rights litigation in Africa.

³⁵ The original member states of ECOWAS were Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Sierra Leone and Togo. With the accession of Cape Verde to the 1975 ECOWAS Treaty, membership of the Community grew to 16. In 2000, Mauritania withdrew its membership of the Community.

³⁶ Art 3(1) of the 1993 revised ECOWAS Treaty.

³⁷ See art 4 of the 1993 revised ECOWAS Treaty on the principles of ECOWAS.

3.1 Non-judicial human rights developments in ECOWAS

Non-judicial human rights activities in the organisational framework of ECOWAS occur within and outside the ECOWAS Commission.³⁸ This is because certain ECOWAS institutions operate outside the seat of the ECOWAS Commission. Owing to the challenge of access to primary materials from the ECOWAS institutions based outside the ECOWAS Commission, this contribution focuses on non-judicial developments that took place within the ECOWAS Commission during 2010. In this regard, no significant standard-setting activities were recorded. However, thematic meetings and activities to strengthen democracy in the West African region were visible in the work of the ECOWAS Commission during 2010.

3.1.1 Thematic meetings and programmes

During 2010, the scourge of human trafficking, especially in women and children, once again came under the spotlight in the work of ECOWAS. In February 2010, officials of ECOWAS concerned with tackling the crime of trafficking in persons within the region were involved in a crucial meeting with strategic partners, including the International Organisation on Migration (IOM), the United Nations Children's Emergency Fund (UNICEF), and the United Nations Office on Drugs and Crimes (UNODC).³⁹ The meeting was called to review the status of the implementation of the regional plan of action which was developed from the Palermo Protocol relating to the prevention, suppression and punishment for trafficking in persons, particularly women and children. One outcome of the meeting was a call for an ECOWAS Roadmap and Work Plan that focuses on counter-trafficking and the protection of children. In specific terms, the meeting proposed that the documents should 'focus on the four pillars of ensuring the development of appropriate institutional policy and legal framework; developing the methodologies and approaches for measuring and ensuring progress; ensuring adequate sensitisation on the twin issues and developing [links] between member states and stakeholders while building the capacity of member states for effectively combating the menace'.⁴⁰

Although trafficking in persons has received attention from the relevant UN agencies for a while, the AU response to trafficking is still in its infancy. Thus, direct co-operation between sub-regional bodies and UN agencies appears to have become the preferred approach to adequately tackle the threat. The intensity of ECOWAS action in

³⁸ The ECOWAS Commission is the Executive Secretariat of the Community and hosts most of the institutions and executive activities of the Community.

³⁹ 'Strategic partners call for roadmap and work plan to combat trafficking of women and children in West Africa' <http://news.ecowas.int/presseshow.php?nb=024&lang=en&annee=2010> (accessed 31 March 2011).

⁴⁰ As above.

co-operation with member states appears to have made global instruments against trafficking more effective in the region. In the face of known challenges regarding the implementation of international human rights instruments, the question arises whether smaller congregations of states proximate to each other should not be explored as options to create waves of pressure to ensure greater efficiency in the application of international human rights instruments.

In March 2010, ECOWAS collaborated with the AU to host another programme on combating trafficking in persons.⁴¹ The programme 'recommended a variety of initiatives under a three-tier arrangement that would enable countries of origin, transit and destination to address the dimensions of the menace, particularly as it affects women and children'. The collaboration is indicative of a greater sense of awareness on the part of the AU regarding the scourge of trafficking in persons on the continent. Hence, the 'joint programme was meant to evaluate the status of implementation of the plan and launch the ECOWAS phase of the African Union Commission Campaign Initiative against Trafficking (AU COMMIT), which seeks to galvanise the various stakeholders for a synergised and co-ordinated action in combating human trafficking'.⁴² The AU/ECOWAS programme was followed by another collaborative action, involving the AU, ECOWAS and IOM. This latter programme was aimed at launching 'a new two-pronged campaign to operationalise the continent's four year-old instrument to address the challenges of human trafficking, particularly women and children' through regional workshops.⁴³ Arguably, collaborations such as these are indicative of the acceptance of the role of sub-regional bodies in advancing the cause of human rights in Africa. Additionally, the risk of duplication of action and of potential competition will be reduced significantly to the benefit of all stakeholders.

During 2010, humanitarian concerns arising from ongoing and past conflicts in the region received the attention of the ECOWAS authorities. In March 2010, ECOWAS collaborated with the United Nations High Commission for Refugees (UNCHR) and the African Development Fund (ADF) to seek ways to implement the humanitarian dimension of the ECOWAS Peace and Development Project.⁴⁴ Cognisant of the increasing humanitarian concerns that regional conflicts have caused over the years, the collaboration focuses on 'issues ranging from social

⁴¹ 'African Union campaign against trafficking in persons launched for ECOWAS' <http://news.ecowas.int/presseshow.php?nb=050&lang=en&annee=2010> (accessed 31 March 2011)

⁴² As above.

⁴³ 'ECOWAS joins AU, IOM to extend fight against human trafficking' <http://news.ecowas.int/presseshow.php?nb=049&lang=en&annee=2010> (accessed 28 March 2011).

⁴⁴ 'ECOWAS, UNCHR, ADF explore issues on humanitarian dimension to regional peace and development project' <http://news.ecowas.int/presseshow.php?nb=038&lang=en&annee=2010> (accessed 31 March 2011).

reintegration of refugees, displaced and repatriated persons and economic recovery of local economies in the post-conflict period in member states'.⁴⁵ It would be noticed that some of the issues listed are those covered by the AU Convention for the Protection and Assistance of Internally-Displaced Persons. However, in view of the fact that the Convention, itself, is yet to come into force, sub-regional initiatives represent the best opportunity for protecting the rights of vulnerable people affected by conflict. Clearly, the benefits of such sub-regional interventions sufficiently weigh in favour of the regionalisation of human rights.

3.1.2 Strengthening democracy

As was the case in previous years, activities aimed at building and strengthening the democratic culture in ECOWAS member states featured prominently in the work of the organisation during 2010. Building on strategies from 2009, based on the 2001 ECOWAS Protocol on Democracy and Good Governance, the organisation continued to engage with national authorities in member states in which democratic governance has been disrupted.⁴⁶ Thus, in February 2010, the ECOWAS Heads of State and Government piled pressure on the military junta in Niger to show a greater commitment to the mediation process in order to return the country to constitutional democracy.⁴⁷ Similarly, the Heads of State and Government reviewed the progress towards resolving the political impasse in Guinea. By maintaining contact with the unconstitutional governments in these countries, ECOWAS keeps open a window of opportunity for the restoration of democracy in such states. This is significant in view of the twin facts that the African Charter on Democracy, Elections and Governance is yet to enter into force and the AU does not have a history of positive mediation of return to democracy. Overall, the results of ECOWAS mediation in these countries demonstrate the usefulness of peer pressure for the restoration of democracy in the sub-regions.

Another manifestation of ECOWAS initiatives to strengthen democracy in the West African sub-region came in the form of election observer missions. Hence, in February 2010, a 300-member ECOWAS Election

⁴⁵ As above.

⁴⁶ Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, adopted on 21 December 2001 and entered into force on 28 February 2008. By art 45 of the ECOWAS Protocol on Democracy and Good Governance, member states of ECOWAS are liable to sanctions in the event that a democratic government is overthrown.

⁴⁷ In late 2009, the military in Niger overthrew the civilian government of Mamadou Tandja following that government's attempt to amend the Constitution to extend its term of office.

Observer Mission was sent to monitor presidential elections in Togo.⁴⁸ The ECOWAS approach was to put together a team of civilian and military experts to assess different segments of the electoral process. Unlike the EAC model, members of NHRCs were not involved in the ECOWAS missions, although experts from civil society were included in the team. ECOWAS election observer missions were similarly sent to observe elections in Côte d'Ivoire in October 2010 and to Guinea and Burkina Faso in November 2010.

With respect to Togo, although the Observer Mission gave a general pass mark on the elections, it challenged the Electoral Commission of Togo to seek a more independent and permanent structure in order to enhance its performance. Against the background that 'diplomatic speak' is a common feature of the report of electoral missions, the call made by the ECOWAS team to Togo could almost read as an indictment, since the 2001 ECOWAS Protocol on Democracy and Good Governance requires states to set up electoral commissions that are independent.⁴⁹ Concerning the elections in Côte d'Ivoire, the summary of the report of the ECOWAS Mission was that 'the ECOWAS Observer Mission did not observe any major irregularities likely to taint the freedom, credibility and transparency of the 31 October 2010 presidential election in Côte d'Ivoire'.⁵⁰ The summary of the report of the Mission to Guinea stated that '[t]here were no major irregularities or incidents likely to taint the freedom, credibility and transparency of the 7 November 2010 presidential election in Guinea'.⁵¹ Such similarity of language creates room for questioning the authenticity of the reports of electoral missions.

By observing, monitoring and reporting on the electoral process, the ECOWAS missions provide materials for the organisation to append its mark of approval on such elections. The approval given by sub-regional organisations rates very high since the perception and support of neighbouring leaders provide the impetus that newly-elected leaders require to claim legitimacy at home and in front of the international community. Thus, the credibility of such reports needs to be maintained and any temptation to provide unwarranted peer protection of incumbent heads of states needs to be avoided. Arguably, activities aimed at strengthening democracy have a strong potential to impact on other human rights developments within the ECOWAS institutional frame.

⁴⁸ 'ECOWAS deploys an observation mission to monitor the 2010 presidential elections in Togo' <http://news.ecowas.int/presseshow.php?nb=024&lang=en&annee=2010> (accessed 31 March 2011).

⁴⁹ See art 3 of the 2001 ECOWAS Protocol on Democracy and Good Governance.

⁵⁰ 'The 31st October 2010 presidential election in Côte d'Ivoire was held in a peaceful environment' <http://news.ecowas.int/presseshow.php?nb=024&lang=en&annee=2010> (accessed 31 March 2011).

⁵¹ 'ECOWAS welcomes the proper conduct of the second round of the presidential elections in Guinea' <http://news.ecowas.int/presseshow.php?nb=024&lang=en&annee=2010> (accessed 31 March 2011).

3.2 Judicial protection of human rights by the ECOWAS Community Court of Justice

Although the ECOWAS Community Court of Justice (ECCJ) came into being in 1991, it was not until the early part of the new millennium that it became active.⁵² Following challenges that the Court faced in the early years of its existence, including the issue of a lack of individual access, internal and external pressure was mounted on ECOWAS authorities resulting in the adoption in 2005 of a Supplementary Protocol on the Court.⁵³ Some of the high points of the 2005 Supplementary Protocol on the ECOWAS Court were the conferment of a clear human rights competence on the Court and the liberalisation of individual access to the Court. Since the coming into force of the 2005 Supplementary Protocol, ECCJ has been very active in the field of human rights protection. During 2005, several cases with huge implications for human rights passed through the doors of ECCJ and these are briefly dealt with below.

3.2.1 *Garba v Benin*⁵⁴

In February 2010, ECCJ delivered its decision in this action brought by a Nigerian national alleging that he had been brutalised by officials of the Beninese Immigration Service for his refusal to pay a bribe demanded by a Beninese immigration officer. The Nigerian applicant was travelling from Nigeria through Benin to Burkina Faso in the company of a colleague when the events leading to the action allegedly occurred. In the action before ECCJ, the applicant claimed that the acts of the Beninese officials amounted to a violation of his right to dignity and his right to free movement as guaranteed in articles 2, 4, 5 and 12 of the African Charter. The applicant relied on article 1(1) of the ECOWAS Protocol on the Definition of a Community Citizen, article 10(c) of the 2005 Supplementary Protocol of the Court as well as article 4 of the 1993 Revised Treaty as the legal foundation for his action.

Upon the facts and on the basis of the instruments cited, the applicant invited ECCJ *inter alia* to declare that the demand for money without receipt before the stamping of his passport was a violation of his right to free movement as protected by ECOWAS Protocol A/PP1/5/79 on Free Movement of Persons, Right of Residence and Establishment as well as article 12 of the African Charter. The applicant also sought a declaration that the physical assault on him and the wounds

⁵² Originally established in the 1975 ECOWAS Treaty, the ECCJ was operationalised by Protocol /P1/7/91 of 6 July 1991 on the ECOWAS Community Court of Justice adopted by ECOWAS member states in 1991.

⁵³ Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 relating to the Community Court of Justice adopted in 2005.

⁵⁴ Gen List ECW/CCJ/APP/03/09; judgment ECW/CCJ/JUD/01/10, judgment delivered 17 February 2010.

he sustained violated his right to dignity protected by article 5 of the African Charter. Consequently, the applicant asked for US \$300 000 as general damages.

For its part, the state of Benin argued that the action was in violation of article 33(a)⁵⁵ of the Rules of the ECOWAS Court and article 10(d) of the 2005 Supplementary Protocol.⁵⁶ Essentially, the state's position was that the applicant had failed to comply with certain procedural requirements and, therefore, the Court lacked the competence and jurisdiction to hear the matter. Thus, the Court was faced with an action on merit and the preliminary objection. Both aspects were argued together and the Court elected to address both aspects in a single decision.

In its analysis on the preliminary objection, ECCJ rightly emphasised that 'the mere absence of the citation of the applicant's address on his application cannot constitute an obstacle to the admissibility of the application'.⁵⁷ Further, the Court took the view that the 'anonymity of an application presupposed that the author is not identified: That implies that neither the name nor status nor profession or nationality of the applicant is known.'⁵⁸ Against this background and on the basis that the applicant was represented by counsel, the Court held that the application was not anonymous. As simple as this decision may appear, the fact cannot be ignored that it is possible for an international court to unnecessarily defer to states and prioritise procedural requirements to the detriment of justice. Decisions such as the present one characterise ECCJ as a court which does not unduly insist on technicalities.

With regard to the merits of the case, the Court took the view that the applicant had not proved his case as the burden of proof lay on him as the person who made the allegation. The Court was convinced that, as the applicant did not link the event alleged to any particular officer, did not show any evidence that any report was made to any national police authority and did not call any witness, no case had been proved against the state. Accordingly, the claim was dismissed.

A point to be made is that the issue of evidence was crucial before ECCJ because the Court was the forum of first instance in this case. In so far as ECCJ continues to find itself in the role of a court of first instance, issues of evidence and proof will remain critical. This has not been the case with the African Commission and is not likely to be the case with the African Court since such cases requiring evidence are often first

⁵⁵ Art 33 of the Rules relates to the form of applications before the ECCJ. Subpara 1 requires the name and address of an applicant to be included on the processes filed.

⁵⁶ Art 10(d) of the 2005 Supplementary Protocol grants individual access in human rights cases in so far as the application is not anonymous and had not instituted before another international court.

⁵⁷ Para 26 of the judgment in the *Garba* case (n 54 above).

⁵⁸ Para 28.

brought before national courts. Thus, lawyers appearing before the ECCJ may need to condition their minds to the need for evidence of the type that would be adduced before municipal tribunals.

3.2.2 *Habré v Senegal (ruling on preliminary objection)*⁵⁹

It would be recalled that Hissène Habré, who ruled Chad from 1982 until 1990 (when he was overthrown in a military *coup*), brought an action against Senegal before the ECCJ in 2008. In his action, Mr Habré claimed that Senegal, by amending its laws to accommodate the possibility of trying him for offences of an international character allegedly committed by him during his term in office, had violated ECOWAS law, generally, and his rights specifically.⁶⁰ According to Mr Habré, Senegal violated the principle of non-retroactivity of penal law (article 11(2) of the Universal Declaration of Human Rights (Universal Declaration) and article 7(2) of the African Charter); the right to an effective remedy (article 8 of the Universal Declaration and article 3 of the International Covenant on Civil and Political Rights (ICCPR)); and the principle of equality before the law (articles 7 and 10 of the Universal Declaration; articles 14 and 26 of ICCPR; article 3 of the African Charter; and article 7(4) of the Constitution of Senegal). Mr Habré claimed further that Senegal's actions were in violation of the principles of *res judicata*,⁶¹ separation of powers and the independence of the judiciary as well as the right to a fair trial.

Following service of the court processes on Senegal, the state was heard and a preliminary objection was raised regarding the competence of ECCJ to entertain the matter and the admissibility of the case. After analysing the issues, the Court held that it had the competence to hear the case and that the matter was admissible. No significant issues emerged from the ruling. The judgment on the merits is discussed below in 3.2.5.

3.2.3 *David v Uwechue*⁶²

A significant feature of this case is that it is one between two individuals and involves no state parties. The applicant, a Nigerian national and an officer in the Nigerian police force, brought this action against the defendant, another Nigerian national and a former special representative of the Executive Secretary of ECOWAS.⁶³ Alleging that the

⁵⁹ Gen List ECW/CCJ/APP/07/08; judgment ECW/CCJ/APP/02/10, ruling delivered 14 May 2010.

⁶⁰ See Ebobrah (n 4 above).

⁶¹ The French term *chose jugée* has been roughly translated here as *res judicata*.

⁶² Suit ECW/CCJ/APP/04/09; judgment ECW/CCJ/RUL/03/10, ruling delivered 11 June 2010.

⁶³ Under the original structure, the head of administration in ECOWAS was known as the Executive Secretary rather than the President of the ECOWAS Commission as the office is now known.

defendant did not pay him the complete sum of money released by ECOWAS as his salary and allowances during his service as a security orderly attached to the defendant, the plaintiff claimed a violation of his right to property, his right to work under equitable and satisfactory conditions and his right to respect and freedom from discrimination under articles 1, 14, 15 and 28 of the African Charter.⁶⁴

The plaintiff's action was brought under article 10(c) of the 2005 Supplementary Protocol instead of the more common article 10(d).⁶⁵ The plaintiff invited ECCJ to declare that the non-payment of his allowances was unlawful and to make an order compelling the defendant to pay the outstanding sum of US \$80 470. The plaintiff further sought general damages and the payment of his solicitors' fees. The thrust of defendant's case was that the plaintiff was not owed any dues and further that as a co-employee of ECOWAS, he was not liable to the plaintiff.

Although neither party questioned the competence of the Court, ECCJ placed reliance on article 88 of its Rules of Procedure and invited the parties to present legal arguments on the question of its competence.⁶⁶ Contrary to the positions taken by the parties, the Court focused on the question whether it could 'adjudicate on cases of human rights violations brought by an individual against another individual'. ECCJ also sought to know whether actions between individuals qualify as 'disputes relating to the Community and its officials' or whether actions for damages relating to an act of a Community institution or official could be entertained without the Community being sued as defendant.⁶⁷

The questions raised *suo moto* by ECCJ are fundamental questions that ought to have been addressed in a previous case.⁶⁸ These issues touch on the status and character of ECCJ as an international court. While international human rights law and international humanitarian law may have catapulted individuals into international courtrooms, for now, individuals can only be defendants in international criminal jurisdictions rather than human rights courts. In its analysis of the questions it raised, ECCJ acknowledged the ambiguous nature of article 9(4) of the 2005 Supplementary Protocol regarding who can be

⁶⁴ See paras 1 to 6 of the *Uwechue* ruling (n 62 above).

⁶⁵ Art 10(c) is open to challenges to acts and inactions of a Community official which violate the rights of an individual or corporate body.

⁶⁶ Paras 24 to 34 of the *Uwechue* ruling (n 62 above).

⁶⁷ Para 34 of the *Uwechue* ruling (n 62 above).

⁶⁸ In the earlier case of *Ukor v Layele* (2005), unreported Case ECW/CCJ/APP/01/04, the ECCJ entertained a case involving only individuals even though the case was dismissed on some other grounds. See ST Ebobrah 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 7 *African Human Rights Law Journal* 307-321-322 for an initial critique of the Court's decision to receive cases between individuals.

a defendant in a human rights claim before the Court.⁶⁹ ECCJ reasoned (correctly in my view) that an unrestricted reading of article 9(4) could lead to an unimaginable situation where the Court would ‘replace the ... domestic courts which would become redundant’ and the Court ‘would metamorphose itself from an international jurisdiction into a domestic one’.⁷⁰ In the Court’s opinion, this would result in ECCJ being ‘overwhelmed by a flood of all kinds of disputes coming from all member states’.⁷¹ Should the Court allow itself to be dragged into such a role, not only will it find itself in competition with national courts, but it will lose the hegemonic position and the respect of state parties and municipal courts alike.

Perhaps, in demonstrating the importance the Court attached to the questions, it went further to emphasise that neither the drafters nor ECOWAS states could have intended ‘such a result and unrealistic task’ which had ‘never [been] conferred on any international or regional body of a similar nature’.⁷² ECCJ made a point to re-emphasise the canons of interpretation, indicating a preference for contextual interpretation even though it made no reference to the Vienna Convention on the Law of Treaties (VCLT), which other international tribunals would have referred to.⁷³ Hence, in this decision, ECCJ appears to have departed from general practice, a direction that will determine further claims before it.

To further buttress its point that it is an international court, ECCJ made other crucial pronouncements that are likely to shape the future litigation in the budding ECOWAS human rights regime. The Court took pains to stress that it was the practice of international courts to rely ‘essentially on treaties to which states are parties as the principal subjects of international law’.⁷⁴ A quick point to note is that ECCJ had previously never indicated whether it would only apply treaties that a state respondent before it is party to. Consequently, the present *dicta* could be interpreted as a clear statement that only ‘relevant treaties ratified by the state concerned’ can be applicable against a given state.⁷⁵ However, the *dicta* could also merely be a restatement of the practice amongst international tribunals aimed at emphasising that ECCJ is an

⁶⁹ Paras 35 to 38 of the *Uwechue* ruling (n 62 above).

⁷⁰ Para 37 of the *Uwechue* ruling.

⁷¹ As above.

⁷² Para 38 of the *Uwechue* ruling (n 62 above).

⁷³ See para 39.

⁷⁴ Paras 41 to 43.

⁷⁵ See the formulation in art 3 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, reproduced in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 41. Professors Laurence Helfer and Karen Alter, at a meeting in Abuja, March 2010, confirm that there is already a growing feeling among some stakeholders that by *dicta* such as the present one, the ECCJ is taking a position that it will only apply treaties ratified by states before it.

international court. The latter is supported by the fact the claim that the Court was analysing did not involve any state party and, further, was based on the African Charter which all ECOWAS member states have ratified. This would mean that there was no dispute as to whether an unratified treaty could be applicable against a state. Despite the debate as to the motivation for the *dicta*, ECCJ will align more with the practice in international law if it applies relevant treaties that a respondent state has ratified.

Other important issues are present in the *Uwechue* ruling. For instance, in contrast with its previous practice, ECCJ made clear references to continental institutions such as the African Court and the African Commission as examples of institutions with which the human rights practice of ECCJ can be compared.⁷⁶ It is open to debate whether this is one of the fruits of increasing acceptance of the human rights role of sub-regional bodies as evidenced by the participation of such institutions at the 2010 colloquium hosted by the African Court.⁷⁷ It was also significant that ECCJ went further to emphasise that, although individuals could not be defendants in an international tribunal like ECCJ, victims of violations by individuals could have resort to municipal courts, thus emphasising the possibility of the horizontal applicability of human rights.⁷⁸

A final point to highlight is that ECCJ emphasised that, in the event of an ineffective or unavailable domestic remedy, action could lie vicariously against a state.⁷⁹ This aligns with the position of the Inter-American Court in the *Velasquez Rodriguez v Honduras* decision.⁸⁰ However, it also tempers the Court's earlier position that it stands in an integrated relationship with national courts in the sense that ECCJ may have to 'sit on appeal' on certain decisions from national courts. The Court's current position may also make it impracticable to insist against the exhaustion of local remedies since, by necessary implication, a cause of action can only arise against a state where it has failed to provide proper domestic remedies.

3.2.4 *Tandja v Djibo and Another*⁸¹

Following the overthrow of former Niger President Mamadou Tandja by a military *coup* in the early part of 2010, Mr Tandja was arrested and detained without trial. The present action was brought on behalf Mr Tandja against General Salou Djibo, head of the military junta and

⁷⁶ See paras 42 and 43 of the *Uwechue* ruling (n 62 above).

⁷⁷ See n 2 above.

⁷⁸ Para 46 of the *Uwechue* ruling (n 62 above).

⁷⁹ As above.

⁸⁰ (1988) Ser C No 4.

⁸¹ Role Gen No ECW/CCJ/APP/05/09; Arret No ECW/CCJ/JUD/05/10, judgment of 18 November 2010.

the state of Niger. In the action, it was claimed that Mr Tandja's arrest and detention without trial or indictment amounted to a violation of his rights by the defendants. It was further claimed that the refusal to allow Mr Tandja to proceed abroad for treatment amounted to a violation of his rights. Consequently, Mr Tandja alleged a violation of articles 4 and 5 of the 1993 revised ECOWAS Treaty; articles 1, 2, 3, 5, 6 and 18 of the African Charter; articles 2, 3, 8 and 26 of ICCPR, articles 5, 7, 8, 9, 13 and 25 of the Universal Declaration; and a domestic statute. He also claimed that he had been subjected to torture. Mr Tandja invited ECCJ to declare that his rights had been violated and to order the defendants to send him for treatment abroad at the expense of the state.

Although Niger was under sanctions by way of its suspension from political activities of ECOWAS, it entered appearance and defended the action. The defendants argued that ECCJ lacked jurisdiction since the matter for which Mr Tandja was being detained was of a political nature. It was argued further that the matter was inadmissible because neither defendant had been served as required by article 32(4) of the Court's Rules of Procedure. Subsequently, the defendants also contended that the action was incompetent because it had emerged by an affidavit allegedly signed by Mr Tandja that he had not briefed or authorised any one to file an action on his behalf.⁸² Overall, the defendants denied that any violations had occurred.

In its analysis, ECCJ once again raised the crucial question whether it could exercise jurisdiction over General Salou Djibo, who was the first defendant since the general is an individual. The Court raised the issue even though neither party had raised it. Making reference to its earlier decision in *David v Uwechue*⁸³ and citing the example of *Koraou v Niger*,⁸⁴ ECCJ concluded that an individual could not be a defendant before it. Coming soon after the decision in *David v Uwechue*, there was little or no surprise that ECCJ came to such a quick conclusion. By so doing, it is hoped that it shut the door to further actions involving individuals as defendants.

On the argument that political detention did not fall within the jurisdiction of ECCJ conferred by article 9(4) of the 2005 Supplementary Protocol, the Court pointed out that no distinction between political and other violations could be found in its Protocol. The Court stressed that merely alleging the existence of a human rights violation triggered its jurisdiction. Thus, the Court nipped in the bud an untenable distinction between political and other forms of detention. The Court also had no difficulty in ruling that the failure to serve process on one defendant could not be a ground for inadmissibility.⁸⁵ Perhaps the more signifi-

⁸² Paras 16 & 17 of the *Tandja* decision (n 81 above).

⁸³ See n 62 above.

⁸⁴ Suit ECW/CCJ/APP/08/08, judgment ECW/CCJ/JUD/06/08, judgment delivered on 27 October 2008.

⁸⁵ See p 13 of the *Tandja* decision (n 81 above).

cant decision made by the Court on the preliminary objections was the decision not to dismiss the action based on the affidavit alleging that Mr Tandja had not authorised the action.⁸⁶ Considering that Mr Tandja was in the custody of the defendants at the time of the application, it could have been easy for state officials to compel him to make the affidavit or even to forge the affidavit. Thus, by refusing to accept such a request, the Court may have prevented other pariah states from adopting similar methods in cases before the Court.

On the merits, ECCJ returned to address the attempt to justify detention without trial on the grounds that it was political. The Court emphasised that arrest and detention had to be founded on recognised legal and judicial grounds.⁸⁷ The Court's analysis regarding the allegation of torture left lots to be desired. The Court lumped 'torture, cruel, inhuman and degrading treatment' together without regard to the distinction that exists between these terms under international law.⁸⁸ While it rejected the preliminary objection that was based on an alleged affidavit by Mr Tandja, the Court based its decision to reject the claim on torture on a report allegedly made by a human rights NGO that was said to have visited Mr Tandja. It leaves open the question whether the Court was consistent in its admission of evidence in this case. A further point that is worth noting is the Court's position that persons in detention are under state care and have a right to proper health care. However, such right to health care while in detention does not result in a duty to transfer a detained person abroad for treatment.⁸⁹ In the final analysis, ECCJ made an order for the release of Mr Tandja.

It should be noted that the processes in this matter were filed in July 2010 along with an application for an accelerated hearing.⁹⁰ By November 2010, a final decision on the matter was made. By any standard, this was an excellent turnover. Set against the delay that is commonly associated with a procedure before the African Commission, there exists a sure motivation for prospective litigants in West Africa to approach ECCJ rather than the African Commission. This is notwithstanding the provisional measure procedure of the African Commission. In cases where there is some urgency, the African Commission could create room for applications for accelerated hearings similar to the ECCJ practice. From another angle, this decision allows for an evaluation of the influence of ECCJ in the West African region in the sense that it calls into question the impact that the Court has in states that have been suspended from mainstream ECOWAS activities.

⁸⁶ See pp 11 & 12 of the *Tandja* decision.

⁸⁷ p 17 of the *Tandja* decision.

⁸⁸ As above. See the definition of torture and cruel, inhuman and degrading treatment as set out in the reports of the UN Special Rapporteur on Torture, Cruel, Inhuman and Degrading Treatment.

⁸⁹ p 18 of the *Tandja* decision (n 81 above).

⁹⁰ p 2 of the *Tandja* decision.

Simply put, it poses the question whether military juntas and other unconstitutional governments facing sanctions would feel compelled to comply with the decision of an ECOWAS Court. It remains to be seen how this will pan out.

3.2.5 *Habré v Senegal* (main judgment)⁹¹

After disposing of all the preliminary applications in this case, ECCJ delivered its final judgment on the merits of the case in November 2010.⁹² In its analysis, ECCJ set out five main headings upon which to address the claim. These include whether criminal proceedings are ongoing against Mr Habré; what the proper interpretation of the 2001 ECOWAS Protocol on Democracy and Governance is; what constitutes an effective remedy as guaranteed in international human rights law; what the principles of separation of powers and independence of the judiciary entail; and what is entailed in the prohibition of retroactive application of criminal law.⁹³

In relation to the existence of ongoing proceedings, the Court took the view that the claims regarding equality before the law, the operation of *res judicata* and the right to a fair hearing cannot be raised and applied *in vacuo*. According to the Court, such claims cannot be hypothetically applied but should relate to actual proceedings. Consequently, the Court found no violation. This is consistent with the Court's earlier position in the *Koraou* case where ECCJ emphasised that it is a court of law and that it does not deal with hypothetical cases. The Court also failed to find a violation regarding the Protocol on Democracy and Good Governance as it considered that individuals were not entitled to enforce ECOWAS Community obligations under the Protocol. This could set a precedent for states to formulate instruments in manners that create state obligations without conferring individual rights and thereby limit the enforceability of such instruments. For instance, there are obligations in the African Democracy Charter that do not appear to confer corresponding rights on individuals. Approaches such as this could potentially make such instruments or those specific provisions redundant.

While it found no violation as regards the claims on the right to a fair hearing and non-respect for the principles of separation of powers and independence of the judiciary, the Court found a violation of the prohibition of retroactive application of criminal law.⁹⁴ This decision has huge implications for AU initiatives to bring Mr Habré to justice

⁹¹ Role Gen ECW/CCJ/APP/07/08; Arret ECW/CCJ/JUD/06/10, judgment delivered on 18 November 2010. The decision was delivered in French.

⁹² The main aspects of the claim are summarised in the section on the *Habré* ruling (n 59 above).

⁹³ Para 27 *Habré* case (main judgment) (n 91 above).

⁹⁴ Paras 51 to 58 *Habré* case.

for alleged violations of human rights perpetuated during his term as President of the Republic of Chad. It is a setback for the plan to try Mr Habré within the African continent and apparently amplifies the perception of a need to establish a tribunal with international criminal jurisdiction in Africa.

3.2.6 *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria and Another (SERAP case)*⁹⁵

Perhaps the most popular judgment of ECCJ in 2010, the *SERAP* case, was brought by a Nigerian NGO, the Socio-Economic Rights and Accountability Project (SERAP) against Nigeria and the government agency responsible for basic primary education in Nigeria. The action was founded on a report of a Nigerian anti-corruption agency indicating that certain funds set aside for primary education in Nigeria had been mismanaged. Hence, SERAP sought the intervention of the ECCJ on the grounds that article 4 of the ECOWAS Treaty and articles 1, 2, 17, 21 and 22 of the African Charter had been violated by the defendants.

In the action, the plaintiffs sought a declaration that every Nigerian child is entitled to free and compulsory education; a declaration that the diversion of the sum of 3,5 billion naira⁹⁶ from the Universal Basic Education fund was illegal and a violation of rights; an order that the defendants make adequate provisions for the compulsory and free education of every Nigerian child; an order compelling the Nigerian government to recognise the freedoms of a primary school teachers' union and to solicit their views in educational planning and policy formulation; and an order that the Nigerian government assesses the progress of the realisation of the right to education with emphasis on universal basic education.

For their part, the defendants rejected the claim and argued, *inter alia*, that the Court lacked jurisdiction over the claim, the plaintiff failed to establish the claim, the second defendant is not a competent body to answer to the claim and that the proper parties were not before the Court.⁹⁷ In a ruling in October 2009, ECCJ disposed of the preliminary objections raised and therefore declined to revisit similar grounds raised by the defendants.

In its analysis of the case on the merits, the Court took the view that the second defendant — a non-state party and a non-community official or institution, an agency of the first defendant — was the bearer of obligations under a given national statute and was therefore a proper

⁹⁵ Suit ECW/CCJ/APP/12/07; judgment ECW/CCJ/JUD/07/10, judgment delivered 30 November 2010. It would be recalled that in 2009, the ECCJ overruled the preliminary objection raised by the defendants in this case. See Ebobrah (n 4 above).

⁹⁶ The exchange rate of the Nigerian Naira to the US dollar is currently \$1-N150.

⁹⁷ See paras 10 to 11 of the *SERAP* case (n 95 above).

party before it. This position appears to contradict two of the Court's earlier decisions in which it held categorically that only states were proper defendants before it. There is also the question whether ECCJ ought to delve into national statutes considering that it is an international body. It is doubtful if continental institutions such as the African Commission would take a similar position.

In relation to the alleged corruption, ECCJ declined to be drawn into issues it considered to be within the realm of criminal law. The Court emphasised that its jurisdiction could only be triggered to 'hold a state accountable if it denies the right to education to its people'.⁹⁸ While it conceded that mismanagement and embezzlement of funds could negatively impact on the right to education in a state, the Court took the view that it took more than 'mere mismanagement to amount to a denial of the right to education'.⁹⁹ This case presented a rare opportunity for an international tribunal in Africa to pronounce on the link between corruption and the denial of human rights. Perhaps ECCJ could have done a little more to set the right tone for the development of its jurisprudence. Looking at the bigger picture, ECCJ appears to be faced with situations where it needs to adjudicate on human rights issues beyond the regular run-of-the-mill issues.

In the final analysis, ECCJ issued the declaration sought by SERAP to the effect that every Nigerian child is entitled to free basic education. This was easy as the defendants did not contest this general fact, even though the right is not a justiciable right under the Nigerian Constitution. In relation to the request for 'an order directing the defendants to make adequate provision for the compulsory and free education of every child forthwith', the Court took time to explain that the alleged acts of theft and mismanagement may well have led to a shortage of allotted funds to the basic education sector. Consequently, ECCJ went further to say that¹⁰⁰

[w]hilst steps are being taken to recover the funds or prosecute the suspects ... it is in order that the defendant should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme ...

ECCJ concluded as follows: 'In conclusion, subject to reliefs 1 and 3 which the court grants in terms as stated above ...'¹⁰¹ From the perspective of civil society and human rights advocates, ECCJ had granted the order sought, thereby probably becoming the first international court to make an order to implement rights of a socio-economic nature. However, at closer scrutiny, it would be noticed that the Court was careful to present its decision in a manner that suggests that it was

⁹⁸ Para 21 *SERAP* case (n 95 above).

⁹⁹ Para 19.

¹⁰⁰ Para 28.

¹⁰¹ Para 31.

imploing the state to replenish funds that the state had consciously elected to allocate to the basic education sector. It would also be noted that the order follows the language in the International Covenant on Economic, Social and Cultural Rights (ICESCR) in that it invites the state to ‘take the necessary steps’ instead of making an immediate order for the allocation of funds to the sector. This raises the question whether the state would be in contempt if it spreads the allocation of funds over several financial years subject to the approval of legislative authorities. Overall, the order calls into focus the challenges associated with judicial decisions directing the allocation of resources — an accepted preserve of the legislative and executive authorities of a state. A big challenge relates to the enforcement of this part of the decision.

3.2.7 *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The President of the Federal Republic of Nigeria and Eight Others (SERAP case 2)*¹⁰²

This ruling, which also involves SERAP, was brought against Nigeria, the Nigerian state-owned oil corporation and five multinational oil companies with operations in the Niger Delta region of Nigeria. Alleging abuse arising from decades of unwholesome corporate practices in the region, the applicant claimed violations of the rights to food, work, health, water, life, human dignity, a clean and healthy environment and to economic and social development.¹⁰³ In their preliminary objections, most of the defendants argued that ECCJ lacked jurisdiction over the non-state-actor defendants. It was also argued that SERAP lacked both the capacity and the *locus standi* to institute the action.¹⁰⁴

Although ECCJ found that SERAP was a legal entity, had not brought the action in a representative capacity and could claim *locus standi* based on the nature of the dispute, the Court declined jurisdiction on the grounds that the defendants that were before it were not states.¹⁰⁵ In seeking to justify its liberal rules on standing, ECCJ had to resort to a ‘convention on access to information, public participation in decision making and access to justice in environmental matters’ which it acknowledged was not binding on African states. This calls to question the attitude of the Court to instruments not ratified by a state concerned, despite the impression that the Court is tilting towards such a position. It remains unclear why the Court did not restrict itself to the jurisprudence of the African Commission to which institution liberal

¹⁰² Suit ECW/CCJ/APP/08/09; Ruling ECW/CCJ/APP/07/10, ruling delivered on 10 December 2010.

¹⁰³ Para 3 *SERAP case 2* (n 102 above).

¹⁰⁴ Para 26 *SERAP case 2* (n 102 above).

¹⁰⁵ Paras 52 to 64 & 71 *SERAP case 2* (n 102 above). It is worth noting that no appearance was entered on behalf of the state. Hence, all the parties before it were non-state actors.

standing has been frequently attributed.¹⁰⁶ It would appear that the present action was aimed at extending the gains of the *SERAC*¹⁰⁷ decision of the African Commission by getting non-state actors to be held responsible by an international court. While ECCJ acknowledged the challenges associated with the human rights responsibility of multinationals, the apparent goal was not realised in this case.

3.2.8 *Saidykiian v The Gambia (Saidykiian case)*¹⁰⁸

In the *Saidykiian* case, the applicant, a Gambian national and former editor of a Gambian newspaper, alleged that he had been arrested, detained and tortured by Gambian state officials contrary to the ECOWAS Treaty and the African Charter. The applicant claimed a violation of article 4 of the ECOWAS Treaty and articles 1, 2, 5, 6, 7(b) and (d) of the African Charter. Following the state's complete denial of the facts claimed by the applicant, the applicant was compelled to adduce evidence to support his case. At the end of the applicant's case, ECCJ distilled four main questions for determination, including whether the applicant had actually been arrested and detained by agents of the state; whether the applicant had been tortured and whether the applicant was entitled to compensation.¹⁰⁹

At the close of the proceedings, ECCJ found and declared that the state had violated articles 5, 6 and 7 of the African Charter to the extent that the applicant's right to dignity, a fair hearing and personal liberty had been violated. The Court declined to grant a fourth relief concerning the protection of the applicant's family. Based on its findings, including the finding that the applicant had been tortured, ECCJ awarded damages in the applicant's favour to the tune of US \$200 000 as opposed to the US \$2 million sought by the applicant.

Owing to the nature of the case, ECCJ had to deal with evidence in a manner similar to what domestic courts would do. In these peculiar circumstances, the applicant could only call two witnesses — himself and a medical doctor — as expert witnesses. It is not clear who bore the cost of bringing the expert witnesses to testify at the proceedings. Although there has been talk about the possibility of legal aid in the African human rights system, ECOWAS is yet to have a dedicated legal aid scheme. This creates a sense of inequality of arms as states are more likely to be able to afford witnesses to the detriment of individual applicants.

¹⁰⁶ The ECCJ referred to the popular *SERAC v Nigeria* decision of the African Commission to support the 'usefulness of *actio popularis*'.

¹⁰⁷ *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

¹⁰⁸ Suit ECW/CCJ/APP/11/07; judgment ECW/CCJ/JUD/08/10.

¹⁰⁹ Para 27 *Saidykiian* case (n 108 above).

In the build-up to its decision, ECCJ looked at the facts without engaging in a definitional analysis to determine if the facts amounted to torture or cruel, inhuman and degrading treatment. It is also important to note that the Court referred to principles that it had laid down to guide the award of damages.¹¹⁰ No other human rights mechanism seems to have 'codified' principles in this regard.

Overall, in 2010, ECCJ was relatively busy in the realm of human rights realisation. The Court appears to be getting bolder and more comfortable with its role as a human rights court. Consequently, its practice is being shaped in its case law.

4 Southern African Development Community

SADC came into existence in 1992, following the dissolution of the Southern African Development Co-ordination Conference (SADCC). In 2001, the 1992 SADC Treaty was amended and this resulted in an increase of Community objectives to include the promotion of¹¹¹

sustainable and equitable economic growth ... that will enhance poverty alleviation ... enhance the standard of living and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.

Under its amended Treaty, SADC and its member states undertake to proceed in accordance with principles which include human rights, democracy and the rule of law.¹¹² It is on this basis that SADC has developed its human rights regime. During 2010, the human rights foundations of SADC were challenged, especially in relation to the judicial protection of rights. However, other activities to promote human rights and democracy took place on the platform of SADC.

4.1 Non-judicial human rights developments

Within the SADC framework, non-judicial human rights activities were not so pronounced in 2010. However, there were a few events and developments that related to the promotion and protection of human rights or had implications for the realisation of human rights. These were mostly in the realm of thematic meetings and activities aimed at strengthening a democratic culture in the SADC region.

4.1.1 Thematic meetings

In April 2010, Ministers responsible for employment and labour issues in SADC member states engaged SADC social partners at a meeting in

¹¹⁰ Paras 43 to 44.

¹¹¹ See art 5(1)(a) of the Consolidated SADC Treaty. The Treaty is available at <http://www.sadc.int/index> (accessed 31 March 2011).

¹¹² Art 4(c) SADC Treaty as amended.

Maputo, Mozambique, to address issues touching on labour rights.¹¹³ Targeted at enhancing labour relations and improving working conditions in the SADC region, the meeting set five broad priority areas for implementation between 2010 and 2011.¹¹⁴ Some of the objectives of the meeting included ‘cushioning children workers and their families from economic hardships of poverty and social workplace ills such as child labour, poor working conditions’.¹¹⁵ Although a number of these issues are commonly addressed by the International Labour Organisation, sub-regional initiatives such as the SADC meeting have the potential for realising better results.

Around June 2010, Ministers responsible for gender and women’s affairs in SADC member states also held a meeting in Kinshasa, Democratic Republic of the Congo. The meeting discussed the SADC Regional Gender Programme, particularly the status of the SADC Gender Protocol. The meeting named Namibia, Tanzania and Zimbabwe as states that have ratified the Protocol, thereby putting pressure on others to follow. Importantly, the meeting set a target of adequate ratification by the end of 2010. Gender issues were also in the top burner when the SADC Gender Unit, in July 2010, hosted a SADC business trade fair for women with support from the United Nations Development Fund for Women (UNIFEM), United Nations Development Programme (UNDP) and the United Nations Economic Commission for Africa (UNECA).

The SADC Gender Unit has been one of the most consistent SADC institutions working in the field of human rights. In the absence of a robust gender unit or office in the AU, the outreach programmes of SADC fill a gap that would otherwise have resulted in a denial of rights.

4.1.2 Strengthening democracy

During the last few years, conflicts arising from unwholesome and undemocratic practices have plagued certain SADC member states.¹¹⁶ Accordingly, efforts and activities aimed at restoring and strengthening democracy have become a common feature in the SADC framework. As early as January 2010, SADC leaders met to discuss the state of affairs in Madagascar and Zimbabwe and urged the international community to reject plans by the current leadership of Madagascar to reject a power-sharing arrangement aimed at resolving the crisis. SADC further released a statement to reject ‘any attempt to use democratic means, institutions and processes to legitimise governments that came

¹¹³ Inside SADC, Issue 2, May 2010.

¹¹⁴ As above.

¹¹⁵ As above.

¹¹⁶ Madagascar and Zimbabwe are examples.

to power through unconstitutional means'.¹¹⁷ SADC's reaction was apparently triggered by moves by the junta in Madagascar to engage in elections.

During 2010, SADC was also busy with the events in Zimbabwe where, as a result of SADC intervention, a power-sharing arrangement had been put in place. Acting through its facilitator on the Zimbabwe coalition government, SADC expressed its unwillingness to support elections in that country until there is 'a clear roadmap for peaceful, free and fair elections'.¹¹⁸ Increasingly, the task of defending democracy and democratic culture is being regionalised. Both the wider international community and the AU appear to defer to the sub-regional bodies like SADC to lead the way for international responses to disruption of the constitutional order in states. In order to avoid bloody conflicts, SADC appears to favour power-sharing arrangements between the main antagonists in a state. This is not provided for in the AU instruments on democracy and elections. However, the immediate threat of bloodshed is tackled by such arrangements. So far, SADC has not been too successful in its attempt to resolve the crisis in Madagascar.

4.2 Judicial protection of human rights by the SADC Tribunal

As the judicial organ of the SADC, the SADC Tribunal carries the responsibility for the judicial protection of human rights within the SADC framework. The Tribunal is established by articles 9 and 16 of the 1992 SADC Treaty (as amended). The composition, powers and functions of the SADC Tribunal are set out in the Protocol on the Tribunal and the Rules of Procedure thereof.¹¹⁹ While no express human rights competence is conferred on the Tribunal, since 2007, the Tribunal has understood its power to interpret and apply the SADC Treaty as sufficient to adjudicate on claims that human rights have been violated in an SADC member state contrary to the provisions of the SADC Treaty.¹²⁰

Following the celebrated decision of the SADC Tribunal in 2008, the SADC Community was faced with the dilemma of enforcing the judgment against Zimbabwe or subjecting the Tribunal and, by extension the entire SADC legal regime, to ridicule. During 2010, the SADC Tribunal faced what could turn out to be its biggest challenge ever as it

¹¹⁷ See report at <http://www.reuters.com/article/2010/01/15/idUSLDE60E005> (accessed 31 March 2011).

¹¹⁸ *The Zimbabwean* 'No elections unless free and fair' http://www.thezimbabwean.co.uk/index.php?option=com_content&view=article&id=36161:no-elections-unless-free-and-fair-says-sadc&catid=69:sunday-top-stories&Itemid=30 (accessed 31 March 2011).

¹¹⁹ Adopted in 2000 and entered into force without the originally required number of ratifications as the Protocol was annexed (or understood to be annexed) to the amended SADC Treaty in 2001.

¹²⁰ See *Campbell & Another v Zimbabwe (Campbell interim 2007)* SADC (T) Case 2/2007, ruling of 13 December 2007 2. Also see SADC (T) Case 2/2007 in which judgment was delivered on 28 November 2008.

found itself not only struggling to retain legitimacy and relevance, but also fighting to survive a threat to its existence. Prompted by some of the applicants in the *Campbell* case, the Tribunal found that Zimbabwe had failed to comply with the judgment against it.¹²¹ Hence, the Tribunal referred the fact of Zimbabwe's non-compliance to the Summit of SADC for action in accordance with article 32(4) of the Protocol of the SADC Tribunal.¹²² This triggered a chain of events that culminated in Zimbabwe's submission of a legal opinion challenging the legality of the SADC Tribunal on the grounds that the Protocol on the Tribunal never entered into force.¹²³ At a meeting in April 2010, Ministers of Justice and Attorneys-General of SADC deliberated on Zimbabwe's non-compliance and submitted their advice to the Summit. While all this was going on, the Tribunal made another ruling in July 2010 to establish further acts of non-compliance. The cumulative effect was that in August 2010, acting on the advice of the SADC Council of Ministers, the SADC Summit decided not to reappoint judges or appoint replacements for retiring judges of the Tribunal. The remaining members of the Tribunal were allowed to hear and conclude cases already pending, but the Tribunal was instructed not to accept any new cases.¹²⁴

The action taken by the Summit raises several legal issues beyond the scope of this contribution (some of which have been eloquently canvassed by the many reactions of civil society to the 'suspension' of the Tribunal). In recognition of the challenge it faced, the SADC Summit commissioned a study on the jurisdiction and functioning of the Tribunal. This series of events naturally had an impact on the judicial protection of rights in the SADC framework. Despite this challenge, the SADC Tribunal concluded a few cases, some touching on labour relations in the SADC institutional framework. The cases selected here are those with relatively clear links to human rights.

4.2.1 *Tanzania v Cimexpan (Mauritius) Ltd*¹²⁵

Cimexpan Ltd, the respondent in the present application, had brought an action against Tanzania claiming a violation of rights and seeking to have a deportation order made against the third respondent rescinded. The third respondent, a natural person and servant of the first and second respondents, had claimed before the Tribunal that he had been detained by Tanzanian immigration authorities and detained

¹²¹ According to art 32 of the SADC Tribunal Protocol, the state where a decision of the Tribunal is to be enforced has the responsibility to enforce such a decision in accordance with its foreign judgment enforcement rules.

¹²² The SADC Summit consists of the heads of state and government of the SADC member states and is the supreme policy-making organ of the organisation. The referral to the Summit by the Tribunal took place in July 2008.

¹²³ The legal opinion submit by Zimbabwe is on file with the author.

¹²⁴ Record of the August 2010 meeting (on file).

¹²⁵ Case SADC (T 01/2009), ruling delivered 11 June 2010.

in jail for one week, during which time he was allegedly subjected to ill-treatment bordering on torture. In the present application, Tanzania contended that the Tribunal did not have the jurisdiction over the matter on the grounds that the respondents did not have any standing before the Tribunal and had not exhausted local remedies.¹²⁶ It was also contended that there had been no disclosure of an international delinquency to warrant an action under international law.¹²⁷ Overall, Tanzania contended that the original action did not fall within the ambit of articles 14 and 15 of the Protocol of the SADC Tribunal.

After affirming that it had jurisdiction over actions involving legal and natural persons against state parties, the Tribunal addressed the issue of exhaustion of local remedies. It was not disputed that the exhaustion of local remedies is a vital precondition for action before the Tribunal. The crucial question was whether, within the context of the local statute, and in view of the deportation of the third respondent, it was still necessary to exhaust local remedies. In other words, the Tribunal had to decide whether the facts could support an exception to the requirement to exhaust local remedies. According to the Tribunal, the mere fact of physical absence from a state did not amount to a denial of access to the courts in Tanzania. Hence, it was decided that local remedies had not been exhausted. While there may be differences in the specific facts, the Tribunal may have benefited from the African Commission's jurisprudence in this regard.¹²⁸ In some cases where an applicant is a fugitive away from the territory of a state, the African Commission had relaxed the requirement to exhaust local remedies.

The Tribunal had no qualms accepting the state's argument that it retained the right to determine whether to allow or deny any alien admission into its territory. However, the Tribunal suggested that the process of deporting a non-national could be open to scrutiny. Consequently, at this preliminary stage, the Tribunal sought evidence to sustain the claim that the third respondent had been subjected to torture. An important question that arises is whether a tribunal should enter into issues on the merit at the preliminary stage of an inquiry. In the opinion of the SADC Tribunal, the applicant's objection was sustainable and it accordingly dismissed the original action.

4.2.2 *Fick and Four Others v Zimbabwe*¹²⁹

This action is one of the fall-outs of the *Campbell* case concluded in 2008. Following Zimbabwe's refusal to comply with and implement the judgment of the Tribunal and the various acts and statements of Zim-

¹²⁶ p 4 *Cimexpan* ruling (n 125 above).

¹²⁷ As above.

¹²⁸ See, eg, *Africa Legal Aid v The Gambia* (2000) AHRLR 119 (ACHPR 2000); *Abubakar v Ghana* (2000) AHRLR 124 (ACHPR 1996).

¹²⁹ Case SADC (T) 01/2010.

babwean state officials, the present action was brought under article 32(4) of the Protocol of the Tribunal. The action aimed at prompting the SADC Tribunal to report Zimbabwe's failure to the SADC Summit for possible action.

In furtherance of the notice to the Tribunal by the Zimbabwean Ministry of Justice, the state refused to take part in the present proceedings. Thus, the Tribunal only had to consider the evidence adduced by the applicants to reach its decision. Naturally, the Tribunal concluded that the 'existence of further acts of non-compliance with the decision of the Tribunal had been established'.¹³⁰ The Tribunal decided to once again report non-compliance to the Summit.

Considering that Zimbabwe's non-compliance was already before the Summit at the instance of the Tribunal, it is not clear what use the present proceedings served other than to perpetuate the impression of the impotence of the Tribunal. However, from another perspective, a second report of non-compliance against the same state may have piled some pressure on the Summit to take some action. Overall, the entire affair amplifies the weakness of the SADC enforcement and implementation regime. In some ways, the current challenge could be a window into the future as it may be representative of enforcement challenges an institution such as the African Human Rights Court may face. An important question would then be whether the relevant authorities are following these events and developing strategies to tackle challenges such as this, if and when they occur. It is also a crucial test for the SADC Community leadership and its dedication to the rule of law as envisaged in the SADC Treaty.

5 Conclusion

If there were lingering doubts regarding the place of sub-regional human rights regimes in the overall African human rights system, events in 2010 should have laid these to rest. At judicial and non-judicial levels, AU institutions appear to have embraced the involvement of sub-regional institutions in human rights promotion and protection. Global institutions working in the field of human rights in Africa also seem to have warmed to sub-regional human rights mechanisms. Hence, collaborations between UN agencies and African sub-regional bodies for the promotion of human rights apparently intensified during 2010. Clearly, these are positive signs as they are likely to consolidate the gains of previous years.

While external actors were warming to sub-regional regimes, mixed signals emerged from within the sub-regions. In the EAC, little but certain steps were taken to improve the Community's collective human rights presence. In the judicial sector, EACJ continued to demonstrate

¹³⁰ n 129 above, 4.

unusual courage by accepting human rights-related cases even though the protocol to expand its jurisdiction was yet to be adopted. In the ECOWAS regime, thematic meetings and activities to consolidate a regional democratic culture continued. ECCJ's growing presence as a human rights court continued, especially with firm statements that will shape its practice. It is only in SADC that negative trends were experienced, leading to concerns regarding the continuation of its budding human rights regime. While non-judicial human rights work continued, it appears that the future of the Tribunal's human rights work is uncertain.

Overall, the human rights developments that took place in the sub-regions reinforce the need for greater attention to be paid to these emerging regimes. Up until now, a hugely negative conflict has arisen as between these regimes and the continental structures. Apart from this, the gains of the sub-regional involvement in human rights can only be beneficial for the most vulnerable in Africa.

Developments in international criminal justice in Africa during 2010

Wambui Mwangi*

Legal Officer, United Nations, New York, USA

Summary

2010 was a significant year in the development of international criminal jurisprudence in Africa. The continent is approaching the closure of two of its greatest champions in this area of international law – the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). The article provides an overview of the ICTR’s successor, the Residual Mechanism, as well as the complexities of the transition. With regard to the SCSL, a brief analysis is given of the Charles Taylor trial and the contribution of its ‘infamous’ witnesses. In relation to the International Criminal Court, the Review Conference and the Situations in the Democratic Republic of Congo, Darfur, Sudan and Kenya dominate the discussion, which focuses primarily on the enforcement of ICC warrants of arrest, the amendments to the Rome Statute and the practical application of the principle of complementarity. Developments related to the international community’s responsibility to combat piracy off the coast of Somalia are also reviewed.

1 Introduction

In this, the third review of developments in international criminal justice in Africa, we witness the implementation of international criminal law against a backdrop of dramatic political events. This is particularly evident in the investigations by the Prosecutor of the International Criminal

* LLB (Bristol), LLM (Liverpool), Barrister-in-Law (England & Wales); wambui.mwangi@gmail.com. The views expressed are personal to the author and do not necessarily reflect those of the United Nations or of any other particular organisation.

Court (ICC).¹ In 2010, there was limited judicial development in ICC cases concerning the Situation in the Central African Republic and no progress in the situation concerning Uganda. This paper focuses its attention on the results of the landmark ICC Kampala Review Conference, the developments in the ICC situations in the Democratic Republic of the Congo and Darfur, Sudan, and concludes with the implications of the dramatic events surrounding the officials allegedly responsible for the 2008-2009 post-election violence in Kenya.

The implementation of international criminal law in the area of piracy gained momentum in 2010 with the appointment of a Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia. This article seeks to briefly examine a few of the 25 proposals presented by the Special Advisor in his report to the Secretary-General including, *inter alia*, the establishment of specialised Somali 'piracy' courts in Somaliland and Puntland, as well as in a third state, to prosecute those suspected of acts of piracy.

Strategies aimed at the completion of the Special Court for Sierra Leone (SCSL)² and the International Criminal Tribunal for Rwanda (ICTR)³ were centre stage in 2010. This year marked the beginning of the last leg for the SCSL with the trial of Charles Taylor drawing to a close, signifying the end of a hybrid tribunal that has significantly contributed to the development of international law. The review of the ICTR briefly examines the establishment of a so-called Residual Mechanism, a significant first in international law, where the Security Council has created a body to take over the residual and legacy issues of the ICTR.

In brief, this review summarises some of the main developments pertaining to the ICTR (section 1); and to the SCSL (section 2); before examining developments in the ICC (section 3); the proceedings in the situations in the Democratic Republic of the Congo (section 4); Darfur, Sudan (section 4); and Kenya (section 5). In view of the significance of the prosecution of pirates, the review also summarises developments in this burgeoning area of international criminal law (section 6).

¹ The Statute of the International Criminal Court was adopted in Rome in July 1998 (often referred to as the 'Rome Statute') by 120 states and entered into force in 2002, triggering the temporal jurisdiction of the ICC. The Court is competent for war crimes, crimes against humanity and genocide, as defined in its Statute, and, since June 2010, also the crime of aggression.

² The Special Court for Sierra Leone was set up by an agreement between the government of Sierra Leone and the UN to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. This was further to Security Council Resolution 1315 (2000) of 14 August 2000 which requested the Secretary-General 'to negotiate an agreement with the government of Sierra Leone to create an independent special court consistent with this resolution ...' (para 1).

³ The International Criminal Tribunal for Rwanda was established pursuant to Security Council Resolution 955 (1994) of 8 November 1994.

2 Rwanda

2.1 Judicial developments at the ICTR

While the judicial developments at the ICTR are of significant importance, the focus of the article is on the Residual Mechanism, as well as issues for consideration such as the continuity of trials, the protection of witnesses and victims, and the legacy of this *ad hoc* tribunal.⁴ In summarising, in 2010 the ICTR concluded five trials at first instance and two cases on appeal. This included the re-trial of Tharcisse Muvunyi, convicted for direct and public incitement to commit genocide and sentenced to 15 years' imprisonment. By January 2011, of the 75 indictments issued by the ICTR Prosecutor, the trials of 54 accused have been concluded, eight of which were acquittals. Twenty-one cases are in the process of being tried in the first instance or judgment is pending. Judgments in three leading cases involving several ministers (in the so-called 'Government II' case), high-ranking military officers (in the so-called 'Military II' case) and in the Butare case, involving the only female defendant, are expected in 2011. Four cases concerning five accused, which include the cases of the former Minister of the Interior and the former Director-General for the Ministry of Foreign Affairs, remain unresolved, with judgments expected in the latter half of 2011.⁵ As of January 2011, ten fugitives remained at large.⁶

Of the accused who are detained while awaiting the commencement of their trials in 2010, one is Jean Bosco Uwinkindi, a former pastor and fugitive who was arrested in Uganda on 30 June 2010, and transferred to the ICTR on 2 July 2010.⁷ In November 2010, the Prosecutor filed a request to transfer the Uwinkindi case to the Rwandan authorities for trial in the High Court of Rwanda pursuant to rule 11*bis* of the ICTR Rules of Procedure and Evidence.⁸ Following the submission in early 2011 of *amici* briefs by the government of Rwanda, Human Rights Watch and the International Criminal Defence Attorneys' Association,

⁴ For a comprehensive examination of the judicial developments at the ICTR, see K Margetts & P Hayden 'Current developments at the *ad hoc* international criminal tribunals' (2010) 8 *Journal of International Criminal Justice* 649–693; K Margetts & K Kappos 'Current developments at the *ad hoc* international criminal tribunals' (2010) 8 *Journal of International Criminal Justice* 1333–1380; and K Margetts & K Kappos 'Current developments at the *ad hoc* international criminal tribunals' (2011) 9 *Journal of International Criminal Justice* 481–518.

⁵ Security Council *Report on the completion strategy of the International Criminal Tribunal for Rwanda* 5 November 2010, UN Doc S/2010/574) para 34.

⁶ n 5 above, para 27.

⁷ n 5 above, para 21. Idelphonse Nizeyimana was also detained and awaiting trial in 2010. His trial commenced on 17 January 2011, <http://www.unict.org/Portals/0/Case/English/Nizeyimana/minutes/2011/01-110117.pdf> (accessed 31 March 2011).

⁸ *Prosecutor v Jean-Bosco Uwinkindi* Case ICTR-2001-75-I, Prosecutor's request for the referral of the case of Jean-Bosco Uwinkindi to Rwanda pursuant to Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence, 4 November 2010.

the Trial Chamber in this case is expected to give its decision on the Prosecutor's request in 2011.⁹ It is also of note that on 4 November 2010, the Prosecutor instituted a second round of requests to refer the cases of fugitives Fulgence Kayishema, a former Inspector Police, and Charles Sikubwabo, a former Bourgmestre, to the authorities of Rwanda.¹⁰

2.2 ICTR Residual Mechanism

The Security Council in Resolution 1503 (2003) of 28 August 2003 called upon the ICTR to take all possible measures to complete its investigations by the end of 2004, to complete all trials by the end of 2008 and to complete its work in 2010. It was at this stage that the Council requested that the President and Prosecutor of the ICTR report on a bi-annual basis on the implementation of what came colloquially to be known as the 'completion strategy'.¹¹ However, over the last seven years, the ICTR did not appear to gain the necessary momentum on the road to closure envisaged by the Council when it drafted and adopted Resolution 1503 (2003). In a previous review of developments of international criminal justice in Africa in 2009, the authors indicated that the completion of the remaining ICTR cases, including those on appeal, would signal time for the closure of the ICTR.¹²

In 2010, however, important legislative changes marked the end of the ICTR with the adoption of Security Council Resolution 1966 (2010) of 22 December 2010. The Resolution also heralded the establishment of the temporary International Residual Mechanism for Criminal Tribu-

⁹ See *Uwinkindi* Case ICTR-2001-75-R11bis; Human Rights Watch: Request for leave to appear as *amicus curiae* pursuant to Rule 74 of the ICTR Rules of Procedure and Evidence, 3 December 2010; *Uwinkindi* Case ICTR-2001-75-R11bis, Invitation to the government of Rwanda to make submissions as *amicus curiae*, pursuant to Rule 74 of the ICTR Rules of Procedure and Evidence, on the Prosecution's 11bis motion, 18 January 2011; *Uwinkindi*, Case ICTR-2001-75-R11bis, Request for permission to file an *amicus curiae* brief by the International Criminal Defence Attorneys Association (ICDAA), concerning the Prosecutor's request for referral of the case of Jean-Bosco Uwinkindi to Rwanda pursuant to Rule 11bis of the Rules (Rule 74 of the Rules of Procedure and Evidence) 21 January 2011.

¹⁰ See *Prosecutor v Fulgence Kayishema* Case ICTR-01-67-R11bis, Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence 4 November 2010; *Prosecutor v Charles Sikubwabo* Case ICTR-95-1D-R11bis, Prosecutor's Request for the Referral of the Case of Charles Sikubwabo to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 4 November 2010.

¹¹ Security Council Resolution 1503 of 28 August 2003, paras 6 & 7.

¹² For a discussion on the status of the ICTR's completion strategy in 2009, see C Aptel & W Mwangi 'Developments in international criminal justice in Africa during 2009' (2010) 10 *African Human Rights Law Journal* 267-268.

nals (Mechanism) to carry out the outstanding functions of, *inter alia*, the ICTR as of 1 July 2012.¹³

Briefly, in 2009 the Secretary-General issued a report to provide the Security Council with options for the location of the ICTR's archives and the seat of the Residual Mechanism.¹⁴ In this report, the Secretary-General recommended several other areas for consideration, including (a) the maintenance of jurisdictional and structural continuity during and after the transition to the Mechanism;¹⁵ (b) the necessity of adequate support for future trials conducted by the Mechanism;¹⁶ (c) the preservation, security and access procedures for the Tribunal's archives, including their use by the Mechanism;¹⁷ (d) various options for the geographical location of the Mechanism and its archives;¹⁸ and (e) the continued enforcement of existing international agreements and contracts and of witness protection orders.¹⁹

The establishment of the Mechanism raises several questions that could potentially impact the development of international criminal law in Africa, a few of which are addressed below. The Mechanism consists of two branches: one in Arusha to house the Rwanda residual issues; the other in The Hague for the International Tribunal for the former Yugoslavia (ICTY). The Mechanism mirrors the structural architecture of the ICTR, but is expected to share a President, Prosecutor and Registrar with the ICTY. It is not yet clear from the Statute how this structure will operate in practice. The fusion of the three heads of the various organs of the Mechanism will require the Residual Mechanism to address unique challenges that have proven to be intrinsic to the individual *ad hoc* tribunals. These include issues related to archives; the pursuit of fugitives; correlating the political landscape in the Horn of Africa; the

¹³ See Security Council Resolution 1966 of 22 December 2010. For purposes of clarity, it is important to distinguish the functions of the ICTR Residual Mechanism from completion strategy and subsequent legacy issues. The Residual Mechanism will carry out the ICTR's functions that will persist after the ICTR has been formally terminated, such as the enforcement of sentences and issues relating to protected witnesses. The completion strategy refers to the tasks that the ICTR must complete prior to its closure, such as the conclusion of trials. These are long-term projects continuing the ICTR's previous outreach functions and include the management and preservation of archives.

¹⁴ Security Council Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals of 21 May 2009 (S/2009/258).

¹⁵ n 14 above, sec V.

¹⁶ n 14 above, sec VI.

¹⁷ n 14 above, secs 12-14, 22, 30-35 & 43.

¹⁸ n 14 above, sec VII.

¹⁹ n 14 above, secs 11, 18-19, 23, 42 & sec VI.B.

continued use of *ad litem* judges that have already served over three years; and the referral of cases.

The issue of jurisdiction raises its own particular challenges. The Mechanism will have the power to prosecute those whom the ICTR has indicted and who are among the most senior leaders suspected of being responsible for the crimes outlined in articles 1 to 7 of the ICTR Statute. In addition, the Mechanism may prosecute those not considered senior leaders provided that it has exhausted all reasonable efforts to refer the cases to national jurisdictions. The Mechanism is also expected to assist national authorities who seek assistance in the investigation, prosecution and trial of suspects as well as providing assistance in the tracking of fugitives whose cases have been referred. As we watch the developments in the proposed referral of the *Uwin-Kindi*, *Kayishema* and *Sikubwabo* cases to Rwanda, the emphasis on referrals to national jurisdictions raises some significant questions. In recent years, Africa has witnessed the rise of various transitional mechanisms, including prosecutions, to address post-conflict situations. It is also significant that, as of December 2010, 31 out of 53 African nations are state parties to the Rome Statute. This illustrates, at the very least, a political commitment to advance the development of international criminal law in Africa. If African nations were in a position to seriously consider offering their assistance in accepting referrals from the ICTR or the Mechanism, it could serve to fast-track the development of international criminal law in the domestic sphere. However, without a clear understanding of the assistance that may or could be provided, the lack of the appropriate judicial tools and mechanisms to conduct trials of an international character may perpetuate a reluctance to accept such cases.

First, in his report, the Secretary-General states that, of the ten fugitives still at large, it is likely that the Mechanism would conduct only four trials. The rest are targeted for referral to national jurisdictions. Considering the unique character of criminal prosecutions, while certain jurisdictions have experience in carrying out prosecutions of this nature, in Africa only Rwanda appears to be willing and able to accept cases referred to it from the ICTR. The reluctance of many African states to accept such cases may be attributable to, for example, a lack of resources, a lack of the relevant domestic statutory instruments to carry out such prosecutions or an aversion to the political implications of holding such trials, particularly if the defendants were to be acquitted. Similarly, outside the continent, other jurisdictions have been reluctant to accept referrals for political reasons and due to statutory limitations related to the enforcement of sentences that may not be commensurate with the crimes charged. The ICTR Prosecutor previously has attempted without much success to transfer five cases to Rwanda pursuant to Rule 11 *bis* of the ICTR's Rules of

Evidence and Procedure.²⁰ The Trial Chamber dismissed his requests for various reasons, including concerns over the application of the death penalty for crimes of genocide, the adequacy of protection for defence witnesses and ethnic bias potentially affecting the impartiality of the trials.²¹ If the ICTR Trial Chamber continues to dismiss the Prosecutor's requests to transfer cases to Rwanda, the new Prosecutor of the Mechanism will be faced with the challenge of identifying states who are both willing and able to accept referrals of at least six of the cases involving fugitives pending before the ICTR.

It is also possible that the above challenges will be increased by issues of a lack of co-operation. The ICTR has faced significant challenges to obtain co-operation of member states when attempting to gain access to witnesses or evidence or to those allegedly harbouring fugitives, even through a subsidiary organ of the Security Council.²² While the Resolution calls for co-operation by member states with the Mechanism, it stops short of calling for member states to co-operate with national jurisdictions tracking fugitives or carrying out investigations or prosecutions. The very nature of the ICTR as a subsidiary organ of the Council enables it to put pressure on 'un-co-operating' states, in the knowledge that, at least theoretically, it has the weight of the Council behind it. Practice in the *ad hoc* tribunals demonstrates that efforts by states who are willing to wield their combined political, diplomatic and economic clout can effect substantial results in the arrest and surrender of fugitives. For example, the direct diplomatic pressure linked to the prospective accession to the European Union (EU) led Serbia in

²⁰ See *Prosecutor v Michel Bagaragaza* Case ICTR-2005-86-11bis, Prosecutor's Request for Referral of the Indictment to the Kingdom of Norway, 15 February 2006; *Prosecutor v Fulgence Kayishema* Case ICTR-01-67-R11bis, Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 11 June 2007; *Prosecutor v Yussuf Munyakazi* Case ICTR-97-36-R11bis, Prosecutor's Request for the Referral of the Case of Yussuf Munyakazi to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *Prosecutor v Gaspard Kanyarukiga* Case ICTR-2002-78-R11bis, Prosecutor's Request for the Referral of the Case of Gaspard Kanyarukiga to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 7 September 2007; *Prosecutor v Ildephonse Hategekimana* Case ICTR-00-55B-R11bis, Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda Pursuant to Rule 11bis of the Tribunal's Rules of Procedure and Evidence, 7 September 2007.

²¹ *Bagaragaza*, Decision on Rule 11bis Appeal, 30 August 2006; *Munyakazi*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis (AC), 8 October 2008; *Kanyarukiga*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis (AC), 30 October 2008; *Hategekimana*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis (AC), 4 December 2008; and *Kayishema*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda (TC), 16 December 2008.

²² Eg, in June 2010, the Security Council took note of the ICTR Prosecutor's report concerning Kenya's lack of co-operation in the case of the ICTR fugitive Felicien Kabuga. See also Security Council Resolution 1963 (2010) of 29 June 2010 (S/RES/1963 (2010)).

2005 to surrender 20 indicted persons to the ICTY and two indictees in 2007 and 2008, which included the former Bosnian Serb leader Radovan Karadzic. In Africa, international pressure in 2006 played a critical role in the surrender and transfer of former Liberian president Charles Taylor to the SCSL.

In the absence of such a provision, or clear assurances of assistance from member states willing to accept referrals of cases from the ICTR, a lack of co-operation or a lack of appropriate political/economic leverage, may serve to discourage states from stepping forward to assist in the investigation, prosecution and trials of the remaining cases.

The protection of witnesses and victims remains a grave concern. In order to be able to conduct effective investigations and prosecutions, national jurisdictions will need to be assured of unfettered access to the public and confidential documents and archives held by the ICTR. While public documents do not present a significant problem, it is not yet clear how the Mechanism or the ICTR will provide access to confidential material held by the ICTR, including that of protected witnesses and victims. In the specific example of requests for transfer of cases to Rwanda, the protection of defence witnesses raises specific concerns.

As indicated above, the ICTR's transition to the Residual Mechanism remains vague and intangible. The next year will give the opportunity for Security Council members and the United Nations (UN) to iron out the problems that could hamper a smooth transition. It is also the opportunity for African nations, with the appropriate assistance, to assume the responsibility for the tracking, investigation and prosecution of fugitives. After all, whatever the Mechanism becomes is, in effect, part of the ICTR's legacy.

3 Sierra Leone

As the ICTR battles with the weight of completion and hand-over to the Residual Mechanism, the SCSL is ending its work. All trials and appeals in Freetown have been concluded. During 2010, the UN and the Management Committee that oversees the financial aspects of the Court commenced discussions related to the handing over of the SCSL premises and archives to the Sierra Leonean government.

In the trial of Charles Taylor, former President of Liberia, in The Hague, the defence's case was replete with dramatic events such as the re-opening of the prosecution's case to include the testimony of Naomi Campbell.

Previously, the development of international criminal justice in Africa in 2009 and 2010 was examined, as well as the concept of Joint Criminal Enterprise and the significant emphasis by the Prosecutor on

this concept in the Taylor trial.²³ Since its beginning in 2009 when giving evidence for a period of 13 weeks, the defence in the Charles Taylor case has maintained its strategy that Taylor had no control over the Revolutionary United Front (RUF), to undermine the prosecution's allegations that Taylor commanded and assisted the RUF during the indictment period.

The Trial Chamber addressed several important legal issues concerning the re-opening of the prosecution's case to call three new witnesses, the exclusion of evidence that the defence claimed fell outside the scope of the indictment and a request for an investigation into the prosecution's conduct during its investigations.

In an unprecedented move, the Trial Chamber allowed the prosecution to re-open its case to call three new witnesses to provide evidence on an issue central to the prosecution of Taylor — his participation in a joint criminal enterprise that involved the sale of diamonds to fund the RUF and its purchase of arms used in the commission of crimes in Sierra Leone. This evidence was necessary to contradict Taylor's evidence in 2009 that he had never possessed diamonds. Despite the fanfare and theatrics leading to the appearance of these three witnesses, the prosecution was able to demonstrate in the evidence given by Mia Farrow and Carole White that, contrary to Naomi Campbell's public utterances and evidence, Campbell was aware that Taylor was going to give her diamonds, a matter she discussed with Taylor's Minister of Defence, before they were delivered to her hotel room.²⁴

Of interest was also the Prosecutor's use of inconsistent statements that had been illegally obtained from Issa Sesay²⁵ when he was apprehended in 2003, to illustrate Sesay's delivery of diamonds to Taylor. The defence filed a motion to object to the introduction of these statements, in view of the decision of the Trial Chamber in *Prosecutor v Sesay and Others*, which had previously deemed them inadmissible. The prosecution argued that Sesay's rights as an accused during his trial were distinguishable from his status as a witness. The Trial Chamber, Ssebutinde J dissenting, interestingly fixated on procedure as opposed to the substance in its decision. It held that, as the prosecution had not filed a specific request to use the statements, the defence's objection was premature. In its view, the prosecution was merely advising the Chamber that it would eventually use the statements in cross-exam-

²³ For the development of this notion and the way it has been formulated before the SCSL, see C Aptel & W Mwangi 'Developments in international criminal justice in Africa during 2008' (2009) 9 African Human Rights Law Journal 274; and Aptel & Mwangi (n 12 above) 269-270.

²⁴ *Prosecutor v Taylor* Case SCSL-03-01-T, Trial Transcript 5, 9-10 August 2010.

²⁵ Issa Sesay is the former interim leader of the Revolutionary United Front (RUF) rebel group. He was convicted and sentenced to 52 years' imprisonment by the SCSL for war crimes and crimes against humanity. Further to an enforcement of sentence agreement between the SCSL and Rwanda, he is currently serving his sentence in Kigali.

ination. In her dissenting opinion, Ssebutinde J held that there was a distinction between statements obtained in 'legally-acceptable circumstances and which may legitimately be used' and those 'obtained in illegal or illegitimate circumstances rendering their admission into evidence and/or use in cross-examination an embarrassment to the administration of justice'. In her opinion, Sesay's statements fell into the latter category.²⁶ This opinion was to be reiterated the following day when the defence attempted to cross-examine Sesay on his inconsistent statements. In a unanimous decision, the Trial Chamber found that the introduction of the statement would constitute 'fresh evidence' and ruled that, in view of the fact that the statement had been involuntarily taken from Sesay, and went to proving Taylor's guilt, its would violate Taylor's right to a fair trial. The Chamber reiterated that 'fresh evidence' that contained probative evidence of the guilt of the accused was permissible only in circumstances where (i) it was in the interests of justice; (ii) did not violate the fair trial rights of the accused; and (iii) the prosecution could establish 'exceptional circumstances' for admitting the new evidence.²⁷

It is difficult, however, to ascertain how much weight will be attributed to Sesay's evidence in the Taylor trial. Most of his evidence appeared to corroborate Taylor's account of events, primarily that he was not the commander of the RUF and therefore not responsible for the crimes committed by the RUF or Armed Forces Revolutionary Council (AFRC) during the Sierra Leone civil war; that he only met with Taylor once on the issue of the release of the UN peacekeepers; that after the withdrawal of the National Patriotic Front of Liberia (NPFL) fighters in Sierra Leone, Taylor cut off all contact with the RUF until the peace talks in 1999; and that the war in Sierra Leone was not about diamonds. However, he also contradicted the testimony he gave at his own trial, particularly in relation to his subsequent travels to Monrovia, and contradicted Taylor's evidence concerning his relationship with Foday Sankoh.²⁸

Financial resources have been a consistent area of concern for the SCSL and, in December 2010, following a request from the Secretary-General, the General Assembly agreed to supplement the SCSL's

²⁶ *Taylor*, Decision on Defence Motion to Exclude Custodial Statements of Issa Sesay, 12 August 2010.

²⁷ *Taylor*, Trial Transcript, 13 August 2010 62 (22-28), citing *Taylor*, Decision on prosecution motion in relation to the applicable legal standards governing the use and admission of documents by the Prosecution during cross-examination of 30 November 2009.

²⁸ *Taylor*, Trial Transcript, 16-26 August 2010. Foday Sankoh was the former leader of the Revolutionary United Front (RUF). He was indicted by the SCSL on counts of war crimes and crimes against humanity. Sankoh died of natural causes whilst in custody on 29 July 2003. The SCSL prosecutor withdrew the indictment on 3 December 2003. For further information, visit the Special Court for Sierra Leone website <http://www.sc-sl.org/CASES/FodaySankoh/tabid/187/Default.aspx> (accessed 31 March 2011).

voluntary contributions to enable it to continue to function until the end of its mandate in February 2012.²⁹ However, as the final trial before the SCSL comes to a close, the Court's completion strategy remains in the balance. As the UN exits from Sierra Leone, efforts to ensure that the legacy of the Special Court is preserved are underway. In October 2010, the SCSL Registrar advised the Secretary-General that the security provided by the UN Mission in Liberia (UNMIL) would not be required beyond January/February 2011 as the sensitive 'evidence and archives would be completely transferred from the Special Court to The Hague in December 2010, and its international staff would be reduced accordingly.'³⁰

However, by December 2010, several residual issues had not yet been completed and handed over to the appropriate authorities. These include matters concerning: the continued protection of witnesses, particularly those considered vulnerable; the maintenance and management of its archives which are an important record of the crimes that were committed in Sierra Leone during the civil war and, together with records of the Truth and Reconciliation Commission, are of important educational and heritage value; the supervision of the enforcement of sentences of the convicted persons and issues concerning the provisional release of its convicted prisoners, if applicable; and what role the site upon which the SCSL was built could play in Sierra Leone's future. These questions, while being discussed at various levels, will need to be finalised prior to the conclusion of the Taylor case to ensure that the legacy of this Court is not relegated to obscurity.³¹

4 International Criminal Court: General comments

As of 2010, the ICC conducted investigations and prosecutions in five situations: three situations referred to the ICC by the states themselves – Uganda, the Democratic Republic of the Congo and the Central African Republic; the situation in Darfur, Sudan, referred to the ICC by the UN Security Council; and the situation in Kenya, where the Prosecutor sought and was granted authorisation to initiate an investigation

²⁹ See General Assembly Request for a subvention to the Special Court for Sierra Leone: Report of the Secretary-General of 11 November 2010 (A/65/570); General Assembly, Press Release 'Fifth Committee takes up first performance report for 2010-2011 Budget Cycle – Increased Regular Budget Funding for Sierra Leone Tribunal' of 13 December 2010 (GA/AB/3976).

³⁰ Security Council 'Letter dated 11 February 2011 from the Secretary-General addressed to the President of the Security Council' of 15 February 2011 (S/2011/74).

³¹ Special Court for Sierra Leone: Completion Strategy, June 2009, <http://www.sc-sl.org/LinkClick.aspx?fileticket=33ry0RsKMj%3D&tabid=176> (accessed 31 March 2011). See also Special Court for Sierra Leone Seventh Annual Report of the President of the Special Court for Sierra Leone of June 2009 to May 2010, <http://www.sc-sl.org/LinkClick.aspx?fileticket=33ry0RsKMj%3D&tabid=53> (accessed 31 March 2011).

concerning crimes against humanity committed between 1 June 2005 and 26 November 2009. In addition, the ICC has been conducting preliminary examinations in, *inter alia*, Côte d'Ivoire and Guinea.³² In the above situations under investigation, the Prosecutor has brought charges against 14 individuals — all for crimes committed on the African continent. Of these, only four of the accused are detained by the ICC. Of the arrest warrants issued for the situation in Darfur, Sudan, only three of those accused have voluntarily appeared before the ICC. The arrest warrants in the situation in Uganda remain outstanding for four accused — Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen.

In 2010, save for the start of the trial of Jean-Pierre Bemba Gombo on 22 November 2010, there was limited judicial development in the ICC Situation in the Central African Republic and none in the Situation in Uganda.

One significant development, however, was the first ever ICC Review Conference held in Kampala, where state parties took advantage of the unique opportunity to re-affirm their commitments and obligations to the Court. Overlooking the shores of Lake Victoria, the Review Conference took stock of the last eight years, examining primarily the issues and challenges related to co-operation, complementarity, war crimes and the codification of the crime of aggression.

One of the important developments at the Review Conference was the amendment to the Rome Statute so as to include a definition of the crime of aggression and the jurisdictional conditions for prosecution.³³ The crime of aggression falls under article 5 of the Rome Statute. Although the ICC has been able to exercise jurisdiction over war crimes, genocide and crimes against humanity, the crime of aggression was previously beyond its jurisdictional grasp due to the absence of a definition of the crime or the applicable conditions. In essence, the new amendment seeks to address this vacuum.

Under the amendment, the UN Security Council may refer a situation in which an act of aggression appears to have occurred, under chapter VII of the UN Charter, irrespective of whether the situation involves a state party of the Rome Statute or not.³⁴ Interestingly, however, the ICC will be required to seek a Security Council resolution under chapter VII to bring aggression charges against a national of a state that is

³² UN General Assembly, 65th session Report of the International Criminal Court to the United Nations for 2009/10, 19 August 2010 (A/65/313).

³³ See ASP Doc Report of the Working Group on other amendments: The definition of the crime of aggression (ICC-ASP/8/Res.6/Anx.II) <http://www.icc-cpi.int/Menus/ASP/ReviewConference/Rome+Statute+amendment+proposals.htm> (accessed 31 March 2011).

³⁴ ICC Review Conference of the Rome Statute, 31 May-11 June 2010, <http://www.kampala.icc-cpi.info/> (accessed 31 March 2011).

not party to the Rome Statute.³⁵ In the event that the Security Council fails to make this determination within six months, it is within the ICC Prosecutor's authority to commence an investigation *proprio motu* or further to a request from an ICC state party. The Security Council still retains the power to suspend such an investigation by resolution. However, this resolution would have to be annually re-instated. State parties may exempt themselves from jurisdiction over the crime of aggression by submitting a declaration of non-acceptance to the ICC, but only if the Security Council has not determined that a crime of aggression has occurred. Non-state parties do not fall under the ICC's jurisdiction in the event that the Prosecutor commences an investigation. It is not expected that this amendment will come into force before 2017. This amendment was the product of considerable discussion and compromise, amid concerns on the implementation of the amendment, its impact on the use of force, and whether the Security Council should have oversight over the ICC's application of the crime.³⁶

Also of note is the adoption by the Review Conference of an amendment to article 8 of the Rome Statute, to insert three new war crimes in armed conflicts not of an international character, namely, the use of poison or poisoned weapons; the use of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and the use of bullets that expand or flatten in the body.³⁷ In view of the changing nature of contemporary conflict from the international to the domestic, this 'weapons amendment' heralds a significant move in the harmonisation of international humanitarian law as well as the protection of civilians and combatants.

The Review Conference was also a unique opportunity for the ICC to forge stronger links with African state parties and observers, as well as victims in the region. Despite the absence of the inclusion of the request by the ICC to open a liaison office in Addis Ababa in the decisions of the African Union (AU) Summit that was also held in Kampala the following month, discussions are ongoing, signifying this as an important step in improving the co-operation and relationship between African states and the ICC.

³⁵ T Lindberg 'Aggression in the Court: The International Criminal Court's newest authority' 22 August 2010 2 <http://www.foreignaffairs.com/articles/66579/tod-lindberg/aggression-in-the-court> (accessed 31 March 2011).

³⁶ For a comprehensive overview of the discussions, consultations and agreements made during the Kampala Review Conference, see the blog 'The ICC Review Conference: Kampala 2010' <http://iccreviewconference.blogspot.com/> (accessed 31 March 2011).

³⁷ The use of the listed weapons was previously included under art 8.2(b) of the Statute in cases of international armed conflict. See Report of the Working Group on other amendments: Amendment to article 8 of the Rome Statute (ICC-ASP/8/Res 9/Anx. VIII) <http://www.icc-cpi.int/Menus/ASP/ReviewConference/Rome+Statute+amendment+proposals.htm> (accessed 31 March 2011).

The enforcement of arrest warrants, however, remains a significant challenge for the ICC. The ICC's success in this regard is directly related to the co-operation it receives from state parties to fulfil its mandate. In the absence of its own enforcement mechanism, the ICC is dependant on the co-operation of states. However, discussions in early 2010 illustrate that the ICC may have found a solution to this obstacle. In an enlightening interview in March 2010 on Christine Amanpour's 'Seeking Global Justice', the United States noted that, whilst it was not intent on signing the Rome Statute, it was, however, very interested in working more closely with the ICC, including by assisting in the enforcement of its arrest warrants.³⁸ At first glance, this relationship would be of benefit to state parties in view of the absence of an ICC enforcement mechanism and the complete reliance on state co-operation in such matters. However, the implications of developing and cementing this relationship could potentially reflect negatively on the impact and the credibility of the work of the ICC in Africa and, more generally, on that of international criminal law on the continent.

It is not, however, enough to relegate the enforcement and execution of arrest warrants to the ICC or the military force of one or more states (whether a state party or not to the Rome Statute). As the ICC begins to spread its net further afield, the circumstances facing the current situations before the ICC could easily be replicated. State parties should consider sharing this burden as a key component of their co-operation obligations, working hand-in-hand with inter-governmental and regional organisations. As commented on by one human rights group, 'where a territorial state in which ICC suspects are located is unable to carry out arrests, it cannot simply become no one's responsibility at all. Instead, responsibility must be shared between state parties.'³⁹

5 International Criminal Court: Democratic Republic of the Congo

Of note with respect to the situation in the Democratic Republic of the Congo was the arrest in Paris in October 2010 and subsequent transfer in early 2011 of Callixte Mbarushimana — a case that highlights the crucial importance of state co-operation to enable the ICC to fulfil its mission. Mbarushimana was arrested and charged under article 25.3(d)

³⁸ HH Koh 'The Obama administration and international law' at the Annual Meeting of the American Society of International Law, 25 March 2010, <http://www.state.gov/s/l/releases/remarks/139119.htm#> (accessed 31 March 2011); and CNN's Amanpour 'Seeking global justice' interviewing the US Ambassador-at-Large for War Crimes Issues and the Special Advisor to the Prosecutor at the ICC, 24 March 2010, <http://archives.cnn.com/TRANSCRIPTS/1003/24/ampr.01.html> (accessed 31 March 2011).

³⁹ Human Rights Watch Making Kampala Count: Advancing the Global Fight against Impunity at the ICC Review Conference (2010), <http://www.hrw.org/fr/node/90282/section/2> (accessed 31 March 2011) 26.

of the Statute with war crimes (attacks against the civilian population, destruction of property, murder, rape, inhumane treatment and torture) and crimes against humanity (torture, rape, inhumane treatment and persecution) committed in 2009 in the eastern part of the DRC.⁴⁰ As the leader of an ethnic-Hutu rebel group with alleged links to the 1994 Rwandan genocide, Mbarushimana was previously investigated by the ICTR for crimes committed in the 1994 Rwandan genocide, but the case was closed in 2002 without indictment. In April 2001, a request for his extradition by the Rwandan authorities was denied by international judges in Kosovo, on the basis that Rwanda still applied the death penalty as well as the weakness of the indictment.⁴¹ This case is bound to be of interest to those who have followed the various proceedings that have attempted to bring Mbarushimana to justice within the last decade.

In the case against Thomas Lubanga Dyilo, the defence began the presentation of its evidence in January 2010. However, in July 2010, as a result of the prosecution's refusal to comply with an order to disclose the relevant identifying information for an intermediary, the Trial Chamber, for the second time in the history of this case, stayed the proceedings and ordered the release of the accused. In its decision, the Trial Chamber found that the Prosecutor could not be 'allowed to continue with this prosecution if he seeks to reserve to himself the right to avoid the Court's orders whenever he decides they are inconsistent with his interpretation of his obligations'. In this regard, the Trial Chamber decided it was 'necessary to stay these proceedings as an abuse of process ... because of [(a)] material non-compliance with the Chamber's Orders of 7 July 2010 ... [and, (b)] the Prosecutor's clearly evinced intention not to implement the Chamber's orders'. The Trial Chamber found that 'the fair trial of the accused was no longer possible and justice cannot be done' and therefore issued a stay of proceedings.⁴² On 15 July 2010, the Trial Chamber rendered an oral decision ordering the unconditional release of the accused.⁴³ Upon

⁴⁰ For warrants of arrest and charges, see 'Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana' 11 October 2010 (ICC-01/04-01/10-1) and 'Warrant of Arrest for Callixte Mbarushimana' 11 October 2010 (ICC-01/04-01/10-2).

⁴¹ See United Nations Administrative Tribunal Judgment 1192 2-3. See also Hiron-delle 'ICTR/Mbarushimana — File of Former UN Official Suspected of Genocide Transferred to Rwanda' 9 March 2005, <http://www.hirondellenews.com/content/view/2119/1182/> (accessed 31 March 2011); and Radio Netherlands Worldwide International Justice Tribune Archive: Proceedings in Kosovo of 1 June 2001, http://www.rnw.nl/international-justice/article/proceedings-kosovo?quicktabs_1=0 (accessed 31 March 2011).

⁴² *Prosecutor v Thomas Lubanga Dyilo*, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with VWU, 8 July 2010, paras 28 & 31 (ICC-01/04-01/06-2517-Red).

⁴³ *Lubanga*, Transcript of 15 July 2010 17 (ICC-01/04-01/06-T-314-ENG).

appeal by the prosecution, the Appeals Chamber in October reaffirmed the authority of the Trial Chamber, finding that the failure of the Prosecutor to comply with judicial orders could undermine a fair trial. However, the Appeals Chamber reversed the stay of proceedings and decision to release Lubanga, finding that the Trial Chamber should first have imposed sanctions on the Prosecutor to bring about compliance before imposing a stay of proceedings.

In 2010, Human Rights Watch reported that Bosco Ntaganda, the alleged Deputy-Chief of the General Staff with the Patriotic Forces for the Liberation of Congo (FPLC) was implicated in the assassination of, *inter alia*, at least eight persons and the arrests of another seven in Eastern Congo and Rwanda. Bosco remains at large and efforts to capture him, real or otherwise, have thus far proven ineffective.⁴⁴

6 International Criminal Court: Darfur, Sudan

On 15 June 2010, the ICC unsealed the summons of appearance for two suspects in the situation in Darfur, Sudan, Abdallah Banda and Saleh Mohammed Jerbo Jamus.⁴⁵ Banda and Jamus made their first appearance voluntarily before the ICC on 17 June 2010 and were charged with committing war crimes during an attack on African Union Mission to Sudan (AMIS) peacekeepers in September 2007, which resulted in the deaths of 12 AMIS soldiers.

Together with Bahar Idriss Abu Garda, whose charges were examined in the 2009 review of the developments of international criminal justice in Africa,⁴⁶ the accused were charged with three counts of war crimes under article 25(3)(a) of the Rome Statute, namely, (a) violence to life, in the form of murder, whether committed or attempted, within the meaning of article 8(2)(c)(i) of the Statute; (b) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission, within the meaning of article 8(2)(e)(iii) of the Statute; and (c) pillaging, within the meaning of article 8(2)(e)(v) of the Statute.⁴⁷ In November 2010, the Pre-Trial Chamber

⁴⁴ Human Rights Watch 'DR Congo: ICC-Indicted War Criminal Implicated in Assassinations of Opponents' 13 October 2010, <http://www.hrw.org/en/news/2010/10/12/dr-congo-icc-indicted-war-criminal-involved-assassinations-opponents> (accessed 31 March 2011).

⁴⁵ *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Summons to Appear for Abdallah Banda Abakaer Nourain, 15 June 2010 (ICC-02/05-03/09-3); Summons to Appear for Abdallah Banda Abakaer Nourain, 15 June 2010 (ICC-02/05-03/09-2).

⁴⁶ See Aptel & Mwangi (n 12 above) 278.

⁴⁷ For charges, see, *Nourain and Jamus*, Summons to Appear for Abdallah Banda Abakaer Nourain, 15 June 2010 (ICC-02/05-03/09-3); Summons to Appear for Abdallah Banda Abakaer Nourain, 15 June 2010 (ICC-02/05-03/09-2).

granted the suspects' request that the confirmation hearing be held in their absence, waiving their rights to be present.⁴⁸

Of particular interest in this case is the Prosecutor's application in December 2010, which objected to the representation of two victims by counsel whom he alleged also represent the interests of two groups, the Sudan International Defence Group (SIDG) and the Sudan Workers Trade Unions Federation (SWTUF). In his application, the Prosecutor alleged that these groups had publicly affirmed support for the government of Sudan and acted as its proxies and, furthermore, that counsel was attempting to use these proceedings to express the views of a government that has refused to recognise the authority and jurisdiction of the ICC. Concerns raised by the prosecution include the potential leaking of confidential material posing risks to persons and the proceedings. Noting that the ICC had previously dismissed interventions by these groups, the Prosecutor requested that the Pre-Trial Chamber terminate the representation of these victims by counsel or, in the alternative, limit the scope of observations that counsel may make on behalf of victims.⁴⁹ Both Banda and Jamus supported the Prosecutor's objections on the basis of the two groups' affiliations with the government of Sudan.⁵⁰ Counsel challenged the allegations that the groups were 'proxies' of the government of Sudan and that no conflict of interest had been demonstrated by the Prosecutor or the accused. In addition, counsel maintained that clients should be entitled to choose their own legal representation.⁵¹ This is not the first case in which counsel has attempted to intervene in cases concerning the situation in Darfur, Sudan, on behalf of these two groups. It will therefore be interesting to see if the Trial Chamber chooses to address the questions

⁴⁸ *Nourain and Jamus* 'Decision on issues related to the hearing on the confirmation of charges, 17 November 2010 (ICC-02/05-03/09); Decision on the confirmation of charges', 7 March 2011 (ICC-02/05-03/09-121-CORR-RED). The Pre-Trial Chamber confirmed the charges against the Banda and Jamus on 7 March 2011.

⁴⁹ See *Nourain and Jamus* 'Prosecution Objection to the Continued Representation of Victims a/1646/10 and a/1647/10 by Messrs Geoffrey Nice and Rodney Dixon', 6 December 2010 (ICC-02/05-03/09). Previous applications on behalf of these groups include 'Application on behalf of Citizens' Organizations of The Sudan in relation to the Prosecutor's Applications for Arrest Warrants of 14 July 2008 and 20 November 2008' 11 January 2009 (ICC-02/05-170), in which the Pre-Trial Chamber dismissed the Application finding that the issues were unrelated to the matters before the Chamber; Decision on Application under Rule 103' 4 February 2009 (IC-02/05-185). The Appeal of the decision was also dismissed on the grounds that neither group was a party in the proceedings and therefore lacked standing. See Decision on the Application for Leave to Appeal the Decision on Application under Rule 103, 19 February 2009 (ICC-02/05-192).

⁵⁰ *Nourain and Jamus* 'Defence application to restrain legal representatives for the victims a/1646/10 & a/1647/10 from acting in proceedings and for an order excluding the involvement of specified intermediaries' 6 December 2010 (ICC-02/05-03/09).

⁵¹ *Nourain and Jamus* 'Submission by Legal Representatives for Victims a/1646/10 and a/1647/10 in light of Urgent Prosecution Objection' 7 December 2010 (ICC-02/05-03/09-115).

that these applications raise, namely, any implications to the principle of victim participation, and if the ICC can dictate the choice of a victim's legal representation.

In the case of Omar Al-Bashir, the Prosecutor appealed the decision of the Pre-Trial Chamber not to issue a warrant of arrest in respect of the crime of genocide on 4 March 2009. In its decision dated 3 February 2010, the Appeals Chamber reversed the Trial Chamber's decision on the basis that an erroneous standard of proof was applied and remanded the matter back to the Pre-Trial Chamber 'for a new decision, using the correct standard of proof'. Of particular note, the Appeals Chamber clarified that 'the standards of "substantial grounds to believe" and "beyond reasonable doubt" are higher standards of proof than "reasonable grounds to believe"' and, therefore, when considering an application for an arrest warrant pursuant to article 58.1 of the Rome Statute, the Pre-Trial Chamber 'should not require a level of proof that would be required for the confirmation of charges or for conviction'. Accordingly, the Appeals Chamber found that the Pre-Trial Chamber had acted erroneously when it denied 'to issue a warrant of arrest under article 58.1 of the Statute on the basis that "the existence of ... genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution"'.⁵²

Subsequently, on 12 July 2010, the Pre-Trial Chamber issued its Second Decision on the Prosecution's Application for a Warrant of Arrest, finding that there was sufficient evidence to establish reasonable grounds to believe that Bashir was 'criminally responsible under article 25.3(a) of the Statute as an indirect perpetrator or as an indirect co-perpetrator, for those charges of genocide under articles 6(a), 6(b) and 6(c) of the Statute'. On this basis, the Pre-Trial Chamber issued a second self-executing warrant of arrest for Bashir's alleged criminal responsibility under article 25.3(a) of the Statute for (a) genocide by killing, within the meaning of article 6(a) of the Statute; (b) genocide by causing serious bodily or mental harm, within the meaning of article 6(b) of the Statute; and (c) genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction within the meaning of article 6(c) of the Statute'.⁵³

The issuing of this second warrant of arrest was not met with universal acceptance. At the AU Summit in Kampala in July 2010, the AU reiterated its commitment in the fight against impunity, but expressed its disappointment that the Security Council had not acted

⁵² *Prosecutor v Omar Hassan Ahmad Al Bashir* Judgment on the appeal of the Prosecutor against the Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir 3 February 2010 (ICC-02/05-01/09-73) paras 30, 33 & 34-39.

⁵³ *Bashir* Second Decision on the Prosecution's Application for a Warrant of Arrest 12 July 2010 (ICC-02/05-01/09-94) para 43.

on the request to defer the proceedings against Bashir and reiterated its request for deferral pursuant to article 16 of the Rome Statute. It further stressed its concern over the conduct of the ICC Prosecutor for making 'egregiously unacceptable, rude and condescending statements on the case of President Omar Hassan El-Bashir of Sudan and other situations in Africa'.⁵⁴ On 3 August 2010, the Intergovernmental Authority on Development (IGAD) issued a statement stating its concerns that the issuing of the second warrant of arrest for Bashir would have a 'negative impact on the progress in the democratic transformation of Sudan following the April 2010 general election and the ongoing smooth implementation of the Comprehensive Peace Agreement (CPA) facilitated by IGAD in 2005'.⁵⁵ IGAD went further to state that the allegations of genocide were unsupported by the 'United Nations International Commission of enquiry, the former AU Mission in Sudan (AMIS) and the AU/UN Hybrid Operation in Darfur (UNAMID)'.⁵⁶ In conclusion, IGAD called on the Security Council to act on the calls by the AU and IGAD to defer the indictment against Bashir, in the 'interests of peace, justice, reconciliation and stability in Sudan and the entire Horn of Africa region'.⁵⁷ Despite the opening remarks by the Chairperson of the AU at the AU Summit in July 2010, that the arrests warrants against Bashir threatened African security, 'undermining African solidarity and African peace and security',⁵⁸ it could be argued that the statements emanating from this Summit were remarkably less hostile in comparison to those made in Sirte the year before. The cracks in the seams of the previously united front behind Bashir appear to be widening. For example, after considerable debate, two significant draft paragraphs seeking (a) non-co-operation with the ICC in the arrest and surrender of President al-Bashir; and (b) an attack on the ICC Prosecutor, were eliminated from the final draft of the Summit's conclusions. It would appear that the political environment has shifted, illustrating that the position of African nations on whether or not to co-operate with the ICC with respect to Bashir is no longer as rigid.

Despite the issuing of the second warrant of arrest, the difficulty of enforcing ICC warrants of arrest was starkly illustrated when Bashir

⁵⁴ African Union 'Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec 270(Xiv) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)' 25-27 July 2010 (Assembly/AU/Dec 296(XV)).

⁵⁵ Intergovernmental Authority on Development (IGAD) 'ES Statement on Chamber of the International Criminal Court' 3 August 2010, http://igad.int/index.php?option=com_content&view=article&id=234:es-statement-on-chamber-of-the-international-criminal-court&catid=61:statements&Itemid=150 (accessed 31 March 2011).

⁵⁶ As above.

⁵⁷ As above.

⁵⁸ Institute for Security Studies 'The International Criminal Court that Africa Wants' 17 <http://www.issafrica.org/uploads/Mono172.pdf> (accessed 31 March 2011).

travelled to Kenya, a state party of the Rome Statute, to attend celebrations for the promulgation of the new Kenyan Constitution. In its decision dated 27 August 2010, the Pre-Trial Chamber noted Kenya's obligation to co-operate with the ICC in the enforcement of the two warrants of arrest that were yet to be executed further to Security Council Resolution 1593 (2005) of 31 March 2005, and requested that the Security Council and the Assembly of State Parties take whatever action they deemed appropriate.⁵⁹ Bashir's presence in Kenya in August 2010 was a blatant reminder that an international court with no enforcement powers other than the co-operation of state parties has implications for the credibility of that court as well as the fight against impunity. Despite criticism from various member states, civil society and human rights groups, Kenya was unapologetic, officials stating that 'Kenya's obligations under the Court were not the only factors that influenced the country's policy regarding Sudan'.⁶⁰ Interestingly, Kenya's official line was that 'Bashir was invited to the constitution celebrations in Nairobi "as the head of a friendly, neighbouring country"', citing Kenya's 'legitimate and strategic interest in ensuring peace and stability in the sub-region and promoting peace, justice and reconciliation in Sudan'.⁶¹ Following an application by the Prosecutor notifying the Court of the possible travel of Bashir to Kenya for an IGAD summit on 30 October 2010, on 25 October 2010, the Pre-Trial Chamber sought observations of the impending visit from Kenya, requesting information on any impediment that would prevent Kenya from carrying out its obligations under the Statute. Kenya simply advised that the meeting would not be held in Kenya.⁶² In December 2010, the Prosecutor brought to the Court's attention the possibility of Bashir travelling to Senegal and Zambia — both state parties to the Rome Statute.⁶³ As the dust settles,

⁵⁹ Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, 27 August 2010 (ICC-02/05-01/09-107).

⁶⁰ Voice of America 'Kenya Defends Bashir Visit as Necessary for Regional Peace' 29 August 2010 <http://www.voanews.com/english/news/africa/Kenya-Defends-Bashir-Visit-as-Necessary-for-Regional-Peace--101753813.html> (accessed 31 March 2011).

⁶¹ See CNN News 'Kenya, African Union defend Bashir visit' 31 August 2010, http://articles.cnn.com/2010-08-31/world/kenya.bashir.visit_1_al-bashir-new-constitution-president-mwai-kibaki?s=PM:WORLD (accessed 31 March 2011). See also Global Security 'Kenya Defends Bashir Visit as Necessary for Regional Peace' 29 August 2010, <http://www.globalsecurity.org/military/library/news/2010/08/mil-100829-voa03.htm> (accessed 31 March 2011).

⁶² See *Prosecutor v Bashir* 'Prosecution notification of possible travel to a State Party in the case of *The Prosecutor v Omar Al Bashir*' 22 October 2010 (ICC-02/05-01/09-116); 'Decision requesting observations from the Republic of Kenya' 25 October 2010 (ICC-02/05-01/09-117); 'Transmission of the reply from the Republic of Kenya' 29 October 2010 (ICC-02/05-01/09-119).

⁶³ See *Prosecutor v Bashir*, 'Prosecution notification of possible travel to a State Party in the case of *The Prosecutor v Omar Al Bashir*' 8 December 2010 (ICC-02/05-01/09-122).

it is not clear what repercussions, if any, will be visited upon Kenya or any other African state as a result of their lack of co-operation.

7 International Criminal Court: Kenya

The review of Kenya in the 2010 analysis of developments in international criminal justice in Africa, the focus was on the dramatic failure of the Kenyan authorities in 2009 to establish a national mechanism to examine the crimes committed during the post-election violence in 2007-2008, in accordance with the recommendations of the Commission of Inquiry into the Post-Election Violence (CIPEV), commonly referred to as the Waki Commission.⁶⁴ This review, however, will concentrate on the launch by the ICC Prosecutor of an ICC investigation into crimes against humanity with respect to Kenya, and ensuing developments over the course of 2010.

The situation in Kenya is a prime example of the principle of complementarity. On 29 November 2009, pursuant to article 15 of the Rome Statute, the Prosecutor had previously sought authorisation, *proprio motu*, to commence an investigation into the situation in Kenya in relation to the post-election violence of 2007-2008.⁶⁵ On 11 January 2010, two professors submitted an application seeking to file observations on the Prosecutor's submission and to appear as *amici curiae*.⁶⁶ Considering the precedent-setting nature of the Prosecutor's request, they wished to address the ICC on, *inter alia*, the parameters 'for the exercise of jurisdiction in circumstances where a state with a functioning judicial system has not referred a situation' to the ICC. Although the Pre-Trial Chamber was not of the view that the submissions would assist it in reaching 'a proper determination on the Prosecutor's request', it is clear that this is an issue that will resurface in the course of these proceedings before the ICC.⁶⁷

The Pre-Trial Chamber appeared to have taken a cautious approach to the Prosecutor's request and in February 2010 requested additional information and clarification in two specific areas from the Prosecutor. First, the Pre-Trial Chamber sought clarity on the acts that were carried out in furtherance of a state and/or organisational policy as required

⁶⁴ CIPEV investigated the violence following the contested results of the Kenyan presidential elections in December 2007. A copy of its final report is available at <http://www.communication.go.ke/media.asp?id=739> (accessed 31 March 2011). See also Aptel & Mwangi (n 12 above) 283-285.

⁶⁵ Situation in Kenya, Prosecutor's Request for Authorisation of an Investigation pursuant to Article 15, 26 November 2009 (ICC-01/09-3). See also Aptel & Mwangi (n 12 above) 284.

⁶⁶ Situation in Kenya, Request by Professors Max Hilaire and William A Cohen to Appear as *Amicus Curiae*, 11 January 2010 (ICC-01/09-8).

⁶⁷ Situation in Kenya, Decision on Application to Appear as *Amicus Curiae* and Related Requests, 3 February 2010 (ICC-01/09-14).

under article 7.2(a) of the Rome Statute. Secondly, in accordance with regulation 49.2(c) of the Regulations of the Court, the Pre-Trial Chamber requested that the Prosecutor indicate the persons or groups of persons involved, and, pursuant to regulations 33 and 34 of the Regulations of the Office of the Prosecutor, identify the incidents that would be the focus of the investigation and the person or group of persons who appeared most responsible. In addition, the Prosecutor was requested to provide further information on any domestic investigations with respect to the potential cases.⁶⁸

The Pre-Trial Chamber on 31 March 2010 granted by majority the Prosecutor's request to commence investigations. The Pre-Trial Chamber authorised the investigation covering a period from 1 June 2005 (the date that the Rome Statute came into force in Kenya) to 26 November 2009 (the date of the filing of the Prosecutor's request). While the threshold applicable at this stage of proceedings is relatively low, the powerful dissenting opinion by Judge Hans-Peter Kaul raises interesting questions. Judge Kaul found that the crimes committed in Kenya did not meet the statutory threshold of crimes against humanity. He disagreed with the majority on the requirements of the 'state or organisational policy' under article 7.2(a). In his view, such a policy would have to have been adopted by a state or at the policy-making level of a state-like organisation. Most striking was his analysis of the potential negative effects of this decision on the efficacy of international criminal justice. Some of the concerns he raised included the possible (a) infringement on 'state sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute'; (b) broadening almost indefinitely the 'scope of possible ICC intervention'; and (c) conversion of the ICC into a 'hopelessly overstretched, inefficient international court, with related risks for its standing and credibility'. His concerns culminated in the view that the potential inability of the ICC to tackle all the situations which could fall under its jurisdiction would result in an arbitrary selection of situations to investigate 'to the dismay of the numerous victims in the situations disregarded by the Court who would be deprived of any access to justice without any convincing justification'.⁶⁹

Between March and early December 2010, political tensions in Kenya steadily heightened in advance of the Prosecutor's applications for a summons to appear against six named individuals: William Samoei Ruto; Henry Kiprono Kosgey; Joshua Arap Sang; Francis Kirimi

⁶⁸ Situation in Kenya, Decision Requesting Clarification and Additional Information, 18 February 2010 (ICC-01/09-15).

⁶⁹ 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, 31 March 2010 (ICC-01/09-19).

Muthaura; Uhuru Muigai Kenyatta; and Mohammed Hussein Ali.⁷⁰ On 13 December 2010, Kenya's cabinet met to consider the implications of the summons to appear, raising speculations that the Kenyan authorities may fail to co-operate with the ICC as promised. According to a presidential press service statement, the Cabinet agreed to move forward to create a 'local tribunal' to conduct the necessary prosecutions.⁷¹ Subsequently, a local MP issued a notice of motion to have Kenya withdraw as a state party to the Rome Statute by repealing the International Crimes Act.⁷² However, while a state party may technically withdraw from the Rome Statute pursuant to article 27, this would take effect only a year following the written notification to the Secretary-General. In respect of investigations commenced prior to the withdrawal of a state becoming effective, they remain valid after that date. Although the motion to repeal the International Crimes Act (2008) was rejected on 21 December 2010, the following day Kenya's Parliament passed a motion urging the government to withdraw from the Rome Statute. This was accompanied by diplomatic efforts to enlist the support of other African nations in calling for a Security Council deferral of the Kenyan cases pursuant to article 16 of the Rome Statute. The move was dismissed by the Prime Minister as futile.⁷³

In an attempt to suspend the issuing of the summons, on 1 December 2010 Ruto filed observations on the Prosecutor's investigations into the situation in Kenya.⁷⁴ In brief, he questioned the independence and impartiality of the Prosecutor's investigation, the validity of the reports by the Waki Commission and Kenya National Commission for Human Rights reports as relied upon by the Prosecutor.

In November 2010, the Pre-Trial Chamber decided to set in advance the substantive and procedural framework for the participation of victims, in view of the divergence of approaches taken by different chambers and the absence of guidance from the Appeals Chamber to possible scenarios that could lead to such participation. Accordingly,

⁷⁰ Situation in Kenya, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010 (ICC-01/09-31-Red) and Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (ICC-01/09-30-Red), both dated 15 December 2010.

⁷¹ *The Standard* 'Fresh plan to block Ocampo' 14 December 2010, <http://www.standardmedia.co.ke/InsidePage.php?id=2000024647&cid=4&ttl=Fresh%20plan%20to%20block%20Ocampo> (accessed 31 March 2011).

⁷² The International Crimes Act was gazetted on 5 June 2009. In the *Kenya Gazette* notice, the Act came into force on 1 January 2009, http://www.kenyalaw.org/Downloads/Acts/The_International_Crimes_Act_2008.pdf (accessed 31 March 2011).

⁷³ DPA 'Kenyan premier dismisses move to block ICC trials' 23 December 2010 http://www.monstersandcritics.com/news/africa/news/article_1607639.php/Kenyan-premier-dismisses-move-to-block-ICC-trials (accessed 31 March 2011).

⁷⁴ Situation in Kenya, Application for Leave to Submit Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 1 December 2010 (ICC-01/09-32-Anx-A).

the Pre-Trial Chamber issued a set of three different hypotheses to assist the Chamber in its assessment of the merits of the victim's applications, and whether the issue raised is linked to the judicial proceedings.⁷⁵

On 15 December 2010, the Prosecutor submitted the two applications. In the event that the applications are granted, it is his intention to request that the cases are joined and tried by the same Trial Chamber. If the applications are joined, this will be the biggest multi-accused trial the ICC has conducted since its inception. At this embryonic stage, it can only be assumed that the ICC will have learned from the lessons and challenges the ICTR laboriously witnessed over the last decade in its trials with multiple defendants.

In his application for summons against Ruto, Kosgey and Sang, the Prosecutor submits that there are reasonable grounds to believe that these individuals bear criminal responsibility under article 25 of the Statute for murder, torture, deportation or forcible transfer and persecution as crimes against humanity.⁷⁶ Interestingly, these charges are based purely on political affiliation and not ethnicity. Both Ruto and Kosgey are MPs and prominent leaders of the Orange Democratic Movement (ODM) political party. Sang, a prominent supporter of ODM, is the host of a call-in programme on a radio station, Kass FM.⁷⁷ In brief, the Prosecutor submits that these three individuals prepared a criminal plan to attack supporters of the Party of National Unity (PNU) in a uniform fashion to gain power in the Rift Valley Province, and ultimately in Kenya, and to punish and expel from the Rift Valley Province those perceived to support the PNU.

In relation to Muthaura, Kenyatta and Ali, the Prosecutor alleges that in response to Ruto, Kosgey and Sang's planned attacks on PNU supporters, as well as to deal with protests by the ODM, Muthaura, Kenyatta and Ali developed and executed a plan to attack perceived ODM supporters in order to keep PNU in power.⁷⁸ This plan included the deployment of administration police into ODM strongholds where they used excessive force against civilian protestors, indiscriminately

⁷⁵ Situation in Kenya, Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, 3 November 2011 (ICC-01/09-24). By 29 March 2010, the Victims Participation and Reparations Section had received 396 representations from individual victims and victim communities. See Situation in Kenya, Of Corrigendum to the Report on Victims' Representations (ICC-01/09-17-Conf-Exp-Corr) and Annexes 1 and 5, 29 March 2010 (ICC-01/09-17-Corr-Red).

⁷⁶ Situation in Kenya, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 15 December 2010 (ICC-01/09-30-Red).

⁷⁷ Ironically, the case against Sang bears stark similarities to the ICTR *Media* case. See *The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* (Judgment and Sentence), ICTR-99-52-T, 3 December 2003, <http://69.94.11.53/ENGLISH/cases/Ngeze/judgement/mediatoc.pdf> (accessed 31 March 2011).

⁷⁸ Situation in Kenya, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010 (ICC-01/09-31-Red).

killing over 100 ODM supporters. In addition, Muthaura and Kenyatta met with the Mungiki criminal organisation in order to retaliate against the attacks of PNU supporters, which killed over 150 ODM supporters. The Prosecutor submitted that there were reasonable grounds to believe that these individuals bore criminal responsibility under article 25 of the Rome Statute for murder, deportation or forcible transfer, rape and other forms of sexual violence, persecution and other inhumane acts as crimes against humanity. Similarly, these charges are based purely on political affiliation and not ethnicity.

Considering the political shenanigans that dominated the discussion on whether anyone would be held accountable for the crimes committed during the 2007-2008 post-election violence in Kenya, it is a significant step that in the coming months, charges will be confirmed for six individuals alleged to have been the most responsible for the crimes committed. While this does not promise to be an easy prosecution, of the multiple challenges that the prosecution will face, of the most immediate concern appears to be the protection of witnesses. It is worth noting that threats against witnesses have increased since the Prosecutor announced his intention to open a Kenya investigation. In 2010, the government enacted amendments to the Witness Protection Act (2006), an important element in reforming the Kenyan witness protection system.⁷⁹ As part of Kenya's co-operation with the ICC, such a system will go a long way to ensuring the security of victims and witnesses in this case. However, considering that the newly-established witness protection agency will require considerable resources in order to be fully operational, it is doubtful that it will be of much assistance to the ICC in the coming months.

8 Piracy

The increase in piracy off the coast of Somalia has resulted in the phoenix-like resurrection of what had become an almost obsolete area of international law. With visible consequences on the international maritime trade and the global economy as a whole, the international community has been grappling with what action to take to stem the increase of piracy and to institute a long-term solution to the problem.

It was in this vein that on 27 April 2010, the Security Council, in Resolution 1918 (2010) of 27 April 2010, requested that the Secretary-

⁷⁹ Witness Protection (Amendment) Bill, 2010. See also *Christian Science Monitor* 'Threat to Kenya's ICC witnesses: Traitors will be dealt with 'ruthlessly'' 15 December 2010, <http://www.csmonitor.com/World/Africa/2010/1215/Threat-to-Kenya-s-ICC-witnesses-Traitors-will-be-dealt-with-ruthlessly> (accessed 31 March 2011). United Nations Office of Drugs and Crime 'One step closer to witness protection in Kenya' 14 January 2010, <http://www.unodc.org/unodc/en/frontpage/2010/january/one-step-closer-to-witness-protection-in-kenya.html> (accessed 31 March 2011).

General draft a report on the possible options for the prosecution and imprisonment of those suspected of acts of piracy and armed robbery at sea off the coast of Somalia, specifically exploring options for creating either special domestic chambers possibly with international components, a regional tribunal or an international tribunal, and corresponding imprisonment arrangements. In July 2010, the Secretary-General presented the Security Council with a detailed report, without drawing any conclusions, that addressed the possible options to combat the problem of piracy off the coast of Somalia, covering three main areas: (a) the enhancement of the UN's current efforts to build the capacity of regional states to prosecute and imprison those responsible for acts of piracy; (b) the establishment of a Somali court or special chamber within the national jurisdiction of another state, with or without the participation of the UN; (c) the establishment of an international or regional tribunal for piracy either via an international agreement or under chapter VII of the UN Charter, with UN participation. The report also stressed that, irrespective of the option adopted by the Security Council, the key to sustaining any long-term results in this regard would necessitate long term assistance to Somalia and its regions to develop the requisite capacity.⁸⁰

In his report, the Secretary-General explored the possibility of amending the statutes of the ICC, the International Tribunal for the Law of the Sea, and the African Court on Human and Peoples' Rights. However, this option was considered unsatisfactory in view of the fact that the matter was not addressed by state parties at the ICC Review Conference in June 2010, and both the latter two judicial entities lack criminal jurisdiction.

Following discussions of the report and its options on 25 August 2010, the Security Council welcomed the Secretary-General's proposal to appoint a Special Advisor on the legal issues related to piracy off the coast of Somalia, whose role was to identify any additional steps that could be adopted to assist member states, especially those in the region, to prosecute and incarcerate those who engaged in piracy, and to explore the willingness of states in the region to serve as potential hosts for any of the options that proposed the establishment of a judicial mechanism.⁸¹

⁸⁰ Security Council, Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results, 26 July 2010 (S/2010/384).

⁸¹ See Security Council Presidential Statement, 25 August 2010 (UN Doc S/PRST/2010/16).

In January 2011, the Secretary-General circulated the report of the Special Advisor to members of the Security Council for their consideration.⁸² The report of the Special Advisor made 25 proposals that could be adopted to improve on the current solutions, covering four main areas: (a) *operational*, including greater self-protection measures, strengthening naval operations, monitoring the coastline and increased co-operation with authorities in Somaliland and Puntland; (b) *jurisdictional*, including incorporation of the UN Convention of the Law of the Sea (UNCLOS) into domestic laws, increasing the number of states willing to conduct prosecutions, the adoption of universal jurisdiction over acts of piracy, the adoption of a legal framework for detention at sea, guidelines for the collection of evidence, issues concerning witnesses, the transfer of suspects and convicted persons, and increasing correctional capacities in the region; (c) *preventative*, including by giving Somaliland and Puntland greater economic autonomy, investigating allegations of illegal fishing and maritime pollution, development of a land-based coastguard function, building the capacity of the regional police, and applying sanctions on instigators; and (d) *suppression*, including by improving the legislative framework to counter piracy, building Somalia's correctional capacity, strengthening the rule of law in Somalia, and establishing an *ad hoc* 'extraterritorial' Somali court in a third state.

Under proposal 25 in his report, the Special Advisor advocates the establishment of specialised courts in the Somali regions of Puntland and Somaliland, as well as an *ad hoc* 'extraterritorial' Somali court in a third state, that would eventually be transferred to Mogadishu.⁸³ This proposal, he explains, is expected to reduce the 'legal corpora' to be dealt with by the naval forces patrolling the regional seas and ensure consistency in the handling of suspects. In the author's view, proposal 25 is also of particular interest considering it suggests a solution to the burden of the prosecution of suspected pirates being borne primarily by one state, Kenya. Further, the mechanisms in Puntland and the third state would enjoy universal jurisdiction, but Somaliland would (by choice) limit its jurisdictional basis to acts committed on its territorial waters or by persons from that region. The report argues that this proposal would serve to strengthen the rule of law in Somalia and the 'extraterritorial' court would be the vehicle for the international support to achieve this goal. Not surprisingly, the report proposes

⁸² Security Council, Report of the Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, 24 January 2011 (S/2011/30).

⁸³ n 82 above, 38–45. In his report, the Special Advisor notes that, of the 738 individuals transferred to 13 national jurisdictions for trial in the past four years, 75% were in Africa (Somalia 372; Kenya 136; Seychelles 47; Tanzania 1), with 16% (120) in Yemen. While just under half of the cases appear to have been transferred to Somalia (Somaliland and Puntland specifically), there is insufficient information about these trials, and the judicial and correctional capacities in these regions, to provide readers with an accurate analysis of their efficacy and application of international law.

establishing an 'extraterritorial' court in Arusha, in view of the ICTR winding down its operations, leaving a vacuum that could be filled by a judicial mechanism of this nature. Such an arrangement, the report concludes, could exist without the participation of the UN, its *ad hoc* nature making it less costly and more flexible.

The suggestions made by the Special Advisor raise several concerns related to implementation, a few of which are addressed below. These include the number and length of the prosecutions that these bodies will be expected to handle, the applicability of universal jurisdiction, and the adherence to certain conditions of transfer, such as the treatment of suspects, and respect for human rights and due process. In his report, the Special Advisor notes that since December 2008, over 2 000 suspects were apprehended by the naval forces off the coast of Somalia.⁸⁴ Of these, some 738 have been transferred to national jurisdictions for prosecution. Although proposal 25 is an important step in the right direction, it is clearly insufficient to handle the volume of prosecutions without a considerable financial injection from the international community and a sustainable political commitment to build the requisite capacities in the region. At this stage in the fight against piracy, it is not clear whether such a commitment would be forthcoming. Furthermore, it is difficult to ascertain how the judicial and correctional systems in Somaliland and Puntland will be upgraded to the necessary levels in such a relatively short period to handle these cases. It is also important to note that proposal 25 would be competing for funds with other initiatives to combat piracy, such as those set up by the International Maritime Organisation and the Contact Group on Piracy off the Coast of Somalia, as well as states' own national efforts in the region and elsewhere.

The Special Advisor also estimates that the cumulative funding required for a period of three years for the legal, jurisdictional and correctional component would be in the region of \$25 million. However, he also advises that the establishment of an extraterritorial mechanism could exist without the participation of the UN — a luxury that the ICTR and, to a certain extent the SCSL, enjoyed — to reduce costs and increase flexibility. In his view, the Court in the third state would operate on a needs basis. In view of current estimates, this remains a short-term fix to a long-term problem. Based on the lucrative nature of this crime, it is difficult to assume that the volume of arrests will significantly drop in the coming years. Moreover, judging from other hybrid tribunals created in the past decade, a significantly larger budget than that suggested would be required to adequately resource a judicial entity that would be expected to handle at a minimum 1 000 piracy suspects a year, not accounting for the systems in Somaliland and Puntland.

⁸⁴ n 82 above, 21.

While the report of the Special Advisor makes some reasonable suggestions on how to address the problem of piracy off the coast of Somalia, considering the challenges associated with Kenya and its prosecution of pirates, some difficult questions would need to be answered before the international community embarks on a path that will prove unsustainable in the future.⁸⁵

9 Concluding remarks

As the ICTR prepares to change into the Residual Mechanism and the SCSL closes its doors, it is necessary to say a few words on the contribution these two judicial bodies have made to the development of international criminal law in general, and particularly in Africa. The ICTR pioneered the development of international jurisprudence on the crime of genocide: adhering to the definition of genocide in the 1948 Genocide Convention and being the first judicial body to ever apply it in an international criminal law context. It was also the first time that concepts such as war crimes were addressed in the context of an internal conflict — spearheading the way for the indictments subsequently witnessed at the ICC. Other important elements in ICTR jurisprudence include the development of the concept of individual criminal responsibility, the broadening of international criminal law to include rape and sexual violence, and the application of its case law on crimes against humanity to crimes committed against UN peacekeepers. Although some may take issue with some of the pronouncements made by the SCSL, this Court undeniably made an important contribution to the law of war crimes. In its comparably short life, the SCSL has made international criminal law history with the development of law on the conscription and enlistment of child soldiers. It further broadened the prosecutorial scope of gender-based crimes by categorising forced marriage as a crime against humanity. Its jurisprudence also includes extensive discussion on the prohibition of collective punishments, attacks against peacekeepers and the taking of hostages. By taking judicial notice in their cases, both Courts have left a legacy: a historical account of the atrocities that occurred in Rwanda and Sierra Leone.

The milestones created in international criminal law the past year have demonstrated the complexity, interdependence and evolution of this body of law, particularly in Africa. The ICC Review Conference was no different with its adoption of two significant breakthrough

⁸⁵ Kenya currently accounts for over 76% of universal jurisdiction prosecutions of suspected pirates captured by other member states. Some of the challenges include the length of proceedings; the availability of witnesses; and the practical implementation of obligations contained in the piracy prosecution bilateral agreements, which include clauses on the conditions of imprisonment and treatment of prisoners.

amendments to its Statute on the Crime of Aggression and the insertion of three additional war crimes. At present, the amendment of the Rome Statute concerning the crime of aggression rather mystifyingly gives the Security Council primacy in the initiation of a prosecution while allowing the Prosecutor to go against what we would assume would be specific instructions of the very same council.

It is difficult to examine the events of the past year without casting an eye on the ripple effects the developments above will have. The political landscape is shifting, and with that come different challenges for the international criminal justice landscape in Africa. Little did Kenya understand that, by ratifying the ICC Statute, five years later its citizens will witness the confirmation of charges against the prominent 'Ocampo Six' accused of being most responsible for the crimes committed in the 2007-2008 post-election violence in Kenya. The ICC Prosecutor will also address the situation in Libya, Libya joining Darfur, Sudan in its previously infamous spot as the only state to have been referred to the ICC by the Security Council.⁸⁶ The phoenix-like highlighted this aspect of international criminal law. Such is the engagement of the international community on this issue that, despite general apathy for all things tribunal, the idea of creating a special tribunal to try those suspected of piracy is being seriously discussed. In Senegal we see a complete change of heart in the government, which asserts that it is ready to create an African Union Special Tribunal, on the heels of the Special Court for Sierra Leone, to try Hissène Habré.⁸⁷ This extraordinary move comes in the wake of the 2009 matter brought before the International Court of Justice by Belgium over Senegal's failure to prosecute the former Chadian head of state. Another important development in West Africa was a recent application brought before the ECOWAS Court of Justice for an injunction to restrain the ECOWAS Heads of State and Government from employing military force against Laurent Gbagbo in Côte d'Ivoire.⁸⁸

⁸⁶ See ICC 'Situation in the Libyan Arab Jamahiriya' (ICC-01/11) <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/ICC0111/> (accessed 31 March 2011).

⁸⁷ The Court of Justice of ECOWAS, in the matter of *Hissène Habré v the Republic of Senegal*, 18 November 2010, judgment ECW/CCJ/JUD/06/10. In this judgment, the Court of Justice of ECOWAS held that Habré could only be tried in an 'ad hoc special tribunal of an international character'. The African Union drew up a set of proposals for discussion with the Senegalese authorities. The next review of international criminal justice will examine these proposals to set up the special tribunal and the developments in 2011 in setting up the Special Court. See also Human Rights Watch 'Senegal: Accept AU plan for Hissène Habré case' 22 March 2011, <http://www.hrw.org/fr/news/2011/03/22/senegal-accept-au-plan-hiss-ne-habr-case> (accessed 31 March 2011).

⁸⁸ Community Court of Justice of ECOWAS, in the matter of *Godswill Mrapor v Authority of Heads of State and Government of the ECOWAS and UNOCI*, 5 January 2011 (ECW/CCJ/APP/17/10). See also African Diplomacy 'Côte d'Ivoire: Laurent Gbagbo sues ECOWAS' 15 February 2011, http://www.africandiplomacy.com/index.php?option=com_content&view=article&id=502%3Acote-divoire-laurent-gbagbo-sues-ecowas&catid=73%3Abridge-the-gap&Itemid=55&lang=en (accessed 31 March 2011).

The gigantic strides that have been made in Africa in the last decade have borne remarkable fruit and yet also herald even more complex challenges ahead. Despite the sparse and selective application of international justice, it is evident that there is momentum in the right direction. It is important to remember that the prize at the end of this particular rainbow remains the fight against impunity and for accountability.

31 March 2011).

The right to water in Botswana: A review of the *Matsipane Mosetlhanyane* case

*Bonolo Ramadi Dinokopila**

Doctoral Candidate, Centre for Human Rights, University of Pretoria,
South Africa; Lecturer, Department of Law, University of Botswana

Summary

The Botswana Court of Appeal has recently pronounced on the right of the Basarwa, resident in the Central Kalahari Game Reserve, to water. This case note looks at this decision of the Court of Appeal pertaining to the refusal of the government to allow the Basarwa to recommission, at their own expense, an existing borehole. It examined the arguments that were placed before both the High Court and the Court of Appeal by the parties as well as the decisions of the courts. The note provides insight into the possible implications of the decision on the judicial enforcement of socio-economic rights in Botswana.

1 Introduction

On 27 January 2011, the Court of Appeal of Botswana handed down judgment in the case of *Matsipane Mosetlhanyane v The Attorney-General of Botswana*.¹ The appellants emerged victorious after their challenge to a decision by the government to deny them access to water. However, the victory was not theirs alone. It was a victory for the rule of law, the protection of human rights in Botswana and, most importantly, the judicial enforcement of socio-economic rights within a legal framework that does not adequately provide for the protection of such rights.

* LLB (Botswana), LLM (Human Rights and Democratisation in Africa) (Pretoria);
dinoksbr@yahoo.com

¹ *Matsipane Mosetlhanyane & Others v The Attorney-General of Botswana*, Court of Appeal, CALB-074-10 (unreported).

The Court observed that the case was ‘a harrowing story of human suffering and despair caused by a shortage of water in the harsh climatic conditions of the Kalahari Desert where the appellants and their Basarwa community live’.² The decision has since been described by the international media as a step in the right direction and as a historic legal case against the Botswana government.

Events preceding this decision can best be described as dramatic and torturous to the appellants. Whilst the appellants and their families were suffering from thirst because of the government, the government was engaged in lengthy debates with Survival International (SI), a London-based international non-governmental organisation (NGO). SI called on tourists to boycott Botswana, hoping that a call for a tourism boycott of Botswana would pressure government to reverse its decision. The Khama administration was not moved and accused SI of ‘embarking upon a campaign of lies and misinformation’, calling the organisation ‘modern day highway robbers’.³ The government strongly denied that cutting off the only water supply of the appellants in the Central Kalahari Game Reserve (CKGR) was one of the many tactics used by the Botswana government to stop the Basarwa from returning to the CKGR.

This commentary traces this case from the High Court to the highest court in Botswana, the Court of Appeal. It starts by highlighting the arguments that were raised by both parties at the High Court and the judgment by the High Court. This is followed by a discussion of the Court of Appeal’s decision. It is through a brief critique of the decision that I highlight why it should be celebrated. This discussion ends with a few concluding remarks on the issues highlighted.

2 *Matsipane Moselethanyane and Others v The Attorney-General of Botswana*⁴

2.1 Applicants’ case

The applicants in the case sought, among others, an order declaring that the refusal by the government to permit them to recommission, at their own expense, the borehole in the CKGR, was unlawful and unconstitutional.⁵ The borehole was dismantled and sealed by the government following the relocation of the Basarwa from the CKGR and the decision

² *Moselethanyane* (n 1 above) para 4.

³ *The Botswana Gazette* ‘SI accuses Khama of racism’ 15 December 2010 http://www.gazettebw.com/index.php?option=com_content&view=article&id=8299:si-accuses-khama-of-racism&catid=19:northcast&Itemid=2 (accessed 24 March 2011); *Afrol News* ‘Botswana outraged over diamond tourism boycott’ <http://www.afrol.com/articles/36983> (accessed 24 March 2011).

⁴ *Matsipane Moselethanyane & Others v The Attorney-General of Botswana* High Court decision MAHLB–000393-09 (unreported).

⁵ *Moselethanyane* (n 4 above) para 1.

of the Botswana High Court that the government was under no obligation to provide essential services to those Basarwa who opted to remain in the Reserve in the *Sesana and Others v The Attorney-General* case.⁶ The applicants also sought an order declaring as unlawful and unconstitutional the refusal by the government to confirm that on the payment of the specified fees it would issue permits under the Regulation of National Parks and Game Reserve Regulations 2009, allowing reputable contractors appointed by the applicants to enter the CKGR to recommission the borehole for their domestic use.⁷ The applicants further sought an order declaring that the refusal by the government to confirm that they had the right to sink a borehole at their own expense and use water therefrom for domestic purposes in accordance with section 6 of the Water Act, was unlawful and unconstitutional.⁸

The presiding judge, Walia J, stressed that he aligned himself with the majority decision in the *Sesana* case, in particular that the termination by the government of basic and essential services within the CKGR was neither unlawful nor unconstitutional and that the government was under no obligation to restore the provision of such essential services to the applicants in the CKGR.⁹ He further acknowledged that the case was in essence a sequel to the decision of the High Court in the *Sesana* case.

The upshot of the litigation in the *Mosethanyane* case was that the applicants suffered a great deal of shortages of water during the dry season as melons and other succulents did not provide sufficient water. Further, that even in the rainy season, little rain fell in the Reserve. It was the applicants' argument that alternative sources of water were highly inconvenient as they were almost 40 kilometres from where the applicants stayed. The applicants contended that, even though the water could be transported into the Reserve from the outside, the journey to fetch water was exhausting as it could only be done over 'harsh, desolate, rugged and difficult terrain', likely to result in 'frequent breakdowns'.¹⁰ It was also argued that the case was about the applicants' fundamental right to have access to water and their right to human dignity, as access to a reliable source of water was bound to enormously improve both their physical and mental state of health, particularly of the young, the elderly and the infirm, all of whom are citizens of Botswana whose well-being must be of concern to the government.¹¹

Another argument was that the government's refusal (tacit or express) to permit the applicants to use the borehole indicated a

⁶ *Roy Sesana & Others v The Attorney-General* MISCA 52 of 2002, reported as *Sesana & Others v The Attorney-General* 2002 1 BLR 452 (HC). For the purpose of the present article, reference will be made to the original judgment.

⁷ *Mosethanyane* (n 4 above) para 2.

⁸ *Mosethanyane* (n 4 above) para 3.

⁹ *Mosethanyane* (n 4 above) paras 9-10.

¹⁰ *Sesana & Others* (n 6 above) 761.

¹¹ Para 12 of the applicants' written submissions (on file with author).

pattern of behaviour in which the government has shown itself ready to use any means at its disposal to prevent them from exercising their legal and constitutional right to live in the Reserve.¹² This was in light of the fact that the applicants were willing and able — without taxing Government resources — to recommission the borehole.¹³ It was also argued that the government's refusal to permit the applicants to use the existing borehole violated their constitutional right not to be subjected to inhuman or degrading treatment.¹⁴ With respect to this argument, the applicants relied on section 7 of the Constitution, which provides that 'no person shall be subjected to torture or to inhuman or degrading punishment or other treatment'. The applicants argued that when melons are scarce, they spend a lot of time looking for roots from which to extract a few drops of water, and that a lack of water makes them prone to sickness. They suffer from constipation, headaches or dizzy spells. They lack energy and spend many hours in their huts. Mothers lack milk to feed their children. Often they do not have water with which to clean themselves.¹⁵ In an attempt to show how inhuman and degrading the refusal by the government to allow them to sink the borehole was, the applicants pointed out that¹⁶

[t]he government takes active steps to ensure that animals in the Reserve are given the water they require at the same time as [*sic*] it refuses to allow the applicants to make their own arrangements to the same end. They are expected to grub for roots or beg from passing tourists while animals use watering holes. This is to lower in estimation or dishonour the applicants, both in their own eyes and in the eyes of others. Their need for water is regarded as less deserving of respect than that of wild animals. This constitutes degrading treatment because the applicants are thereby humiliated or debased. No respect is shown for their human dignity.

To support this assertion, reference was made by the applicants to several international instruments¹⁷ as well as several foreign decisions¹⁸ that sought to elaborate on the normative content of this right.

¹² *Mosetlhanyane* (n 4 above) para 30.

¹³ *Mosetlhanyane* (n 4 above) para 31.

¹⁴ *Mosetlhanyane* (n 4 above) para 63.

¹⁵ Para 80 of the applicants' written submissions (on file with author).

¹⁶ Paras 83–84 of the applicants' written submissions (on file with author).

¹⁷ UN General Assembly Resolution 54/175; General Comment 15 of the UN ESCR Committee; art 24(2) UN Convention on the Rights of the Child (CRC); art 9 International Law Association Rules on the Equitable and Sustainable Use of Waters, 9th Draft <http://www.ilahq.org/pdf/Water%20Resources/Draft%20Rules9November2003.pdf> (accessed 31 March 2011); art 14(2)(h) UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); art 1(2) International Covenant on International Civil and Political Rights (ICCPR).

¹⁸ *V v United Kingdom* [1999] 30 EHRR 121 175; *Tyrer v United Kingdom* [1979-80] 2 EHRR 1 11; *McNab & Others v Minister of Home Affairs* [2007] NAHC 50; *The City of Johannesburg & 2 Others v Lindiwe Mazibuko & 4 Others* (489/08) [2009] ZASCA 20; 2009 3 SA 592 (SCA); 2009 8 BCLR 791 (SCA).

It is worth noting that, central to the applicants' case, were the provisions of the Water Act,¹⁹ in particular sections 6 to 9 of the Act.²⁰ The applicants argued that the totality of the sections — with greater weight placed on section 6 of the Water Act — conferred upon them the unfettered right to sink one or more new boreholes in the CKGR and to abstract and use water therefrom for domestic purposes without having to obtain water rights from the Water Apportionments Board (Board).²¹

2.2 Respondent's case

The respondent's case was stated in brief terms. Any inconvenience caused by the distance between the settlements and the nearest water source outside the CKGR was because of the applicants' choice 'to live that kind of life since they have chosen to stay where there is no water'²² and that 'whatever hardships the applicants are likely to face in the exercise of their choice, such hardships are of the applicants' own making'.²³ The respondent further submitted that the government was neither indifferent nor callous in its policies, as it made water, clinics, schools and other essential services available outside the Reserve and that nothing prevented the applicants from utilising these facilities and services.²⁴ It was also argued that 'those resources that are provided outside the CKGR enable the government to meet both its obligations to respect the rights of its people, while still realising its conservation objectives'.²⁵

All in all, the respondent's case was that the applicants had become victims of their own foolhardiness by deciding to settle an inconveniently long distance from the services and facilities provided by the government.²⁶

¹⁹ Cap 34:01.

²⁰ Sec 6(1) of the Act appears in Part II of the Act and provides that '[s]ubject to the provisions of this Act and of any other written law, the owner or occupier of any land may, without a water right – (a) sink or deepen any well or borehole thereon and abstract and use water therefrom for domestic purposes, not exceeding such amount per day as may be prescribed in relation to the area where such well or borehole is situated by the Minister after consultation with any advisory board established in pursuance of section 35 in respect of that area'. Sec 9(1) provides that '[s]ubject to the foregoing provisions, no person shall divert, dam, store, abstract, use or discharge any effluent into public water, or for any such purpose construct any works, except in accordance with a water right granted under this Act'.

²¹ *Mosetlhanyane* (n 4 above) para 32; paras 22-38 of the applicants' written submissions (on file with author).

²² *Mosetlhanyane* (n 4 above) para 34.

²³ As above.

²⁴ *Mosetlhanyane* (n 4 above) para 47.

²⁵ *Mosetlhanyane* (n 4 above) para 53.

²⁶ *Mosetlhanyane* (n 4 above) para 48.

The respondent further contended — in their papers — that section 6 of the Water Act does not give the applicants an absolute right to be given water rights, since the granting of water rights under section 6 is subject to the provisions of the Water Act itself and any other written law. However, during final submissions in court, counsel for the respondent concurred with the applicant’s counsel that, in terms of section 6 of the Water Act, any owner or occupier of land is entitled, without holding a water right, to sink boreholes or otherwise abstract water.²⁷

2.3 Court *a quo*’s response

After restating the arguments raised by the parties, Walia J came to the conclusion that it was indeed easy to resolve the applicants’ argument that the government’s refusal to permit the applicants to use the existing borehole violates their constitutional right not to be subjected to inhuman or degrading treatment. His Lordship concluded this on the basis that the aforesaid argument did not form part of the case that the respondent was required to meet. This was because — the learned judge highlighted — the orders sought in the notice of motion made no mention whatsoever of the government being in violation of the applicants’ constitutional rights relating to the protection from inhuman treatment, enshrined in section 7 of the Constitution of Botswana. To that end, the respondent was not given a proper opportunity to respond to the issue of inhuman and degrading treatment. Citing an earlier decision by Masuku J,²⁸ the learned judge came to the conclusion that it was undesirable pleading practice to spring on one’s opponent in motion proceedings, at the stage of submissions, what was not properly canvassed in the notice of motion and founding affidavits. Hence, the issue of inhuman and degrading treatment was an afterthought and, bound by their pleadings, the applicants could not seek to establish what had not been pleaded.

Further, it was pointed out by the Court that there was another compelling reason why the argument on inhuman and degrading treatment should fail. This, according to the Court, was because the applicants in their arguments ignored altogether their unequivocal acknowledgment that the government is under no obligation to provide any essential service to them.²⁹ The Court held that such an acknowledgment on the part of the applicants meant that the government was under no obligation to provide an essential service, *a fortiori*; the government was under no obligation to facilitate any such service.

²⁷ *Mosetlhanyane* (n 4 above) para 49.

²⁸ *Ikgopoleng Shabane & 25 Others v Kereng Solly Mogami & The Attorney-General* 2005 (1) BLR 343 345.

²⁹ *Mosetlhanyane* (n 4 above) para 49.

The Court pointed out that it was indeed sympathetic to the respondent's argument that, having chosen to settle at an uncomfortably long distant location, the applicants have brought upon themselves the hardships they were now facing. The learned judge went on to point out that, since the applicants enjoyed the right to reside in the CKGR, their right to reside was not confined to a specified area. Hence, there was no reason why they could not opt to reside in an area closer to where water and other services were available. The Court then proceeded to duly acknowledge the literature and authorities cited in support of the right to water, but highlighted that same would have had validity if there was an obligation on the part of the government to provide water where the applicants chose to stay in the CKGR.³⁰ The learned judge concluded that the government was under no such obligation and that it had met its obligations as regards accessibility to water by providing adequate supplies outside the CKGR.³¹ The inconvenience suffered by the applicants in accessing that supply could not, in the Court's view, be described as inhuman or degrading treatment.³²

The learned judge then went on to discuss the issue of water rights in Botswana under the Water Act. After considering the various provisions of the Water Act, the Court came to the conclusion that the provisions of sections 9 and 6 were clearly mutually contradictory.³³ According to the findings of the Court, if section 6 of the Act is construed as contended by the applicants, section 9 becomes superfluous.³⁴ Accordingly, the interpretation of section 6 by the applicants was clearly inconsistent with the requirement of authorisation provided for in section 9 of the same Act.³⁵ It is on that basis that the Court rejected both parties' counsel's submissions that the applicants had an unfettered right to abstract water. The Court then resolved to apply the rules of interpretation to address the inconsistency between the two sections. In the end, the 'obvious' result was that section 9 prevailed. Hence, in the Court's opinion, any person wishing to abstract water could do so only by authorisation as provided for in section 9 as read with section 15 of the Water Act.³⁶

³⁰ *Mosethanyane* (n 4 above) para 77.

³¹ As above.

³² *Mosethanyane* (n 4 above) 19.

³³ *Mosethanyane* (n 4 above) para 92.

³⁴ As above.

³⁵ *Mosethanyane* (n 4 above) para 102.

³⁶ *Mosethanyane* (n 4 above) para 104.

3 Court of Appeal's decision³⁷

When the matter finally reached the Court of Appeal, the five-man court was unanimous in its judgment. In a judgment that has been described in some quarters as 'brilliantly' progressive, the Court of Appeal made several findings that may bring relief to the appellants.

The three main issues that were put before the Court of Appeal by the appellants were that the court *a quo* erred in holding that the appellants required the grant of an appropriate 'water right' by the Water Apportionment Board under the Water Act (Cap 34:01) before they can sink one or more boreholes in the Central Kalahari Game Reserve;³⁸ secondly, that the appellants required the grant of a water right under the same Act to abstract water from a borehole that already existed at a place inside the Reserve, called Mothomelo;³⁹ and further that the Court erred in holding that the respondent's attempts to deny them access to the borehole did not amount to inhuman or degrading treatment prohibited by the Constitution of Botswana.⁴⁰

In relation to the appellants' water rights under the Water Act, in particular the application of sections 6 and 9 of the Act, the Court held that, whilst it was clear that section 6 was subject to the provisions of the Act, section 9 was plainly subject to the provisions of section 6. Thus, the provisions of section 6 overrode those of section 9. The appellants' submission was therefore that, according to the scheme of the Act, any person who lawfully occupies or owns land has a right to sink a borehole in it under section 6(1)(a), by virtue of his occupation or ownership of that land. The Court accepted the appellants' submissions with respect to the issue and pointed out that the applicants were not requesting that they be granted a water right. Instead, they were asking for permission to use the existing or alternative borehole at their own expense and not at government's expense.

The respondent further argued that the borehole at Mothomelo was in fact not a borehole but a 'prospecting hole', which fell outside the definition of a borehole as per section 2 of the Water Act.⁴¹ To that extent, the argument continued, the water extracted from the 'prospecting hole' qualified as public water because it was underground water. The Court rejected both arguments and proceeded to hold that water being a 'premium' in Botswana, lawful occupiers of the land, such as the appellants, must be able to get underground water for domestic purposes. That, in the Court's opinion, was the rationale behind the provisions of section 6 of the Water Act. With respect to the

³⁷ *Mosetlhanyane* (n 1 above).

³⁸ *Mosetlhanyane* (n 1 above) para 1.

³⁹ As above.

⁴⁰ As above.

⁴¹ Sec 2 provides that 'a "borehole" does not include any borehole constructed in prospecting for minerals'.

second argument raised on behalf of the respondent, the Court held that it was common cause that prospecting for minerals had ceased a long time ago and that the borehole had been closed thereafter. It underscored the fact that the borehole was converted to use for domestic purposes for the benefit of the appellants and other communities residing at Mothomelo.

The Court was thus able to conclude, without hesitation, that the appellants, being the lawful occupiers of the land, did not require a water right for the use of the borehole.⁴² The inescapable conclusion was therefore that the government's refusal to allow the appellants to use the borehole for domestic purposes was devoid of any legal basis.

It is at this point necessary to point out that the respondent further argued that the *Sesana* case held that the government had complied with its constitutional obligations towards the Basarwa resident in the CKGR; further, that the government was thus under no obligation to restore the provision of basic and essential services to the residents of the CKGR. This was in fact a point which the appellants conceded. The Court highlighted three issues or factors that made this assertion by the respondent untenable. Firstly, in the *Sesana* case, the Court did not deal with the issue that the Court was tasked with, namely, the appellants' right to water for domestic purposes in terms of section 6 of the Water Act at their own expense. Secondly, there was no finding in the *Sesana* case that the government was, notwithstanding section 6, entitled to seal the Mothomelo borehole as it did. Thirdly, and most important, was the fact that, as the Court had held that the appellants did not need a water right to use the borehole at Mothomelo, the appellants were thus in the same position as the original applicants in the *Sesana* case.

I have argued elsewhere that the *Sesana* case may be used as authority for the proposition that economic, social and cultural rights (socio-economic rights) are not justiciable in Botswana.⁴³ Indeed, the argument that was raised by the respondent in the *Mosetlhanyane* case, that the government was under no obligation to provide the Basarwa living in the CKGR with water or essential services, fortifies that assertion. Through the Court's findings in that case, the respondent argued that the government was under no obligation to provide the appellants with water services.

Perhaps the most interesting constitutional issue placed before the Court was the appellants' third and last ground of appeal, namely, that the Court erred in holding that the respondent's attempts to deny

⁴² *Mosetlhanyane* (n 1 above) para 18.

⁴³ BR Dinokopila 'The judicial enforcement of socio-economic rights in Botswana and the case of Basarwa in the Central Kalahari Game Reserve (CKGR)', paper presented at the ANCL-RADC Annual Conference 'The Internationalisation of Constitutional Law' Rabat, Morocco, 20 January 2011 <http://www.ancl-radc.org.za/annual-ancl> (accessed 21 March 2011).

them access to the borehole did not amount to inhuman or degrading treatment prohibited by the Constitution of Botswana. With respect to this issue, the Court highlighted the fact that the appellants' account of the human suffering due to a lack of water was uncontested;⁴⁴ further, that the appellants and other members of the various communities in the Reserve did not have enough water to meet their needs,⁴⁵ and that the absence of water frequently made them 'weak and vulnerable to sickness'.⁴⁶

Rejecting the court *a quo's* finding that the issue was not pleaded and as such could not be addressed by the Court, Ramodibedi J, writing the judgment on behalf of the Court, held that the issue relating to section 7(1) of the Constitution was sufficiently raised and referred to in the pleadings to justify consideration by the Court. It was argued on behalf of the appellants that the government's refusal to grant the appellants to use, at their own expense, the Mothomelo borehole, or any other borehole in the CKGR for that matter, for domestic purposes, amounts to inhuman and degrading treatment. It was the appellants' argument, therefore, that the actions of the government were contrary to the provisions of section 7 of the Constitution. Section 7(1) of the Constitution provides that 'no person shall be subjected to torture or to inhuman or degrading punishment or other treatment'. The inhuman or degrading treatment that the appellants complained of was the government's refusal to allow them to make their own arrangements to recommission the Mothomelo borehole. According to the appellants, that was part of the larger scheme of things as the government was convinced that the refusal to grant them access to water would compel them to leave the Reserve.⁴⁷ The Court in the main noted that the appellants' account of the human suffering at Mothomelo was not contested by the respondent.⁴⁸

In particular, the Court noted that it was not contested that very often the appellants and other members of the various communities resident in the Reserve did not have enough water to meet their needs. As a result, they depended on water melons which were either scarce or non-existent. The Court further noted that the appellants and those communities resident in the Reserve spent a great deal of their time in the bush looking for a root or other edible matter from which they could extract a few drops of water.⁴⁹ Further to the above, the Court came to the conclusion that the absence of water frequently made the appellants and those living in the Reserve weak and vulnerable to sicknesses as some of them suffered from constipation, headaches or

⁴⁴ *Mosethanyane* (n 1 above) para 21.

⁴⁵ *Mosethanyane* (n 1 above) para 8.

⁴⁶ As above.

⁴⁷ Para 27 appellants' heads of argument.

⁴⁸ *Mosethanyane* (n 1 above) para 8.

⁴⁹ As above.

bouts of dizziness. It was also concluded that children often did not sleep well and cried a great deal, that they did not have enough water to cook or clean themselves with, and that an official report described them as 'very dirty, due to lack of adequate water for drinking and other domestic use'.⁵⁰

In reaction to the above, the Court firstly accepted the appellants' submissions that, unlike other rights contained in section 3 of the Constitution, the right contained under the section 7 was absolute, unqualified and was not subject to any limitations. The judge then proceeded to hold that:⁵¹

I approach this matter on the basis of the fundamental principle that, whether a person has been subjected to inhuman or degrading treatment, involves a value judgment. It is appropriate to stress that in the exercise of a value judgment, the Court is entitled to have regard to international consensus on the importance of access to water.

It was in light of this statement that the learned Judge proceeded to make reference to the United Nations (UN) Committee on Economic, Social and Cultural Rights Report on Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In essence, the report underscored the importance of the human right to water to the dignity of a person and the fact that it is indeed a prerequisite to the realisation of other human rights.⁵² It was also highlighted that, on 10 July 2010, the UN General Assembly recognised the right to safe and clean drinking water as a fundamental human right that is essential for the full enjoyment of life and all human rights.⁵³ The UN Resolution on the right to a safe and clean environment was followed by the Human Rights Council's Resolution on the Right to Water and Sanitation, affirming that water and sanitation are human rights.⁵⁴ The Human Rights Council's Resolution essentially linked the right to drinking water and sanitation to existing treaty provisions, and thus to General Comment 15 on the right to water that was adopted by the ESCR Committee, defining the implicit right to water under ICESCR.

4 Critique

The decision of the Court of Appeal is indeed a welcome development in Botswana and should be celebrated in at least three major respects.

⁵⁰ As above.

⁵¹ *Mosethanyane* (n 1 above) para 16.

⁵² *Mosethanyane* (n 1 above) para 16.

⁵³ *Mosethanyane* (n 1 above) para 19; UN Resolution A/RES/64/292 on the Human Right to Water and Sanitation.

⁵⁴ UNHRC Resolution (A/HRC/15/L.14) on Human Rights and Access to Safe Drinking Water and Sanitation.

Firstly, it should be highlighted that the decision is important in so far as it indicates the independence of the judiciary in Botswana. It is beyond doubt that the issue of the Basarwa living in the CKGR is heavily contested, pitting the government of Botswana against local NGOs, such as Ditshwanelo — The Centre for Human Rights (Ditshwanelo), and international NGOs, such as Survival International (SI). The government feels strongly regarding the relocation of the Basarwa from the Reserve and the provision of essential services within the Reserve. It is indeed laudable that the Court has taken this stance with regard to the issue of access to water by communities residing within the CKGR. By its decision it has shown that, indeed, the judiciary in Botswana is committed to the protection of human rights as enshrined in the Constitution.

Secondly, the decision may be celebrated for the reason that it may have brought succour not only to the appellants, but also to the Basarwa who are resident in the CKGR. As noted above, the appellants suffered a great deal as a result of the decision by the government to seal the borehole that they used as their only source of water. To that extent, the decision is a restatement of the sanctity of the appellants' rights. However, the relief mentioned above will only materialise in the event that the litigants are able to find the funds to recommission the borehole at issue. This is because the Court held that the applicants should, at their own expense, be allowed to have access to the borehole. Perhaps the most important feature of the Court's decision is the fact that it authoritatively states that the right to water is indeed an internationally recognised fundamental right.

The decision could have benefited from the jurisprudence of other jurisdictions,⁵⁵ and was an opportunity for the Court to have further explained the normative content of the right to water in Botswana. Making reference to only two non-binding documents was insufficient and is likely to portray the decision as hurried. Decisions such as the present one no doubt serve many functions and, in particular, are meant to provide redress to the parties that have approached the court for redress.⁵⁶ However, it should always be noted by the learned justices that such decisions should strive and endeavour to bring certainty to a particular area of law. This they should do by effectively, decisively and eloquently elaborating on the principles of the law in the process of settling a particular legal dispute. It is admitted that the decision

⁵⁵ Eg *City of Johannesburg* (n 18 above); *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR 625 (W); *Sawhoyamaxa Indigenous Community v Paraguay*; *Subhash Kumar v State of Bihar* AIR 1991 SC 420; *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802.

⁵⁶ See CM Fombad 'Highest courts departing from precedents: The Botswana Court of Appeal in *Kweneng Land Board v Mpofo & Nonong*' (2005) 1 *University of Botswana Law Journal* 128, highlighting that '[a]ppellate decision making has at least two main functions: firstly, to dispose of the case at hand, and secondly to affirm and shape the law for future cases in the course of disposing of the case in hand'.

has achieved its first and, perhaps, main purpose by affording relief to the litigants. However, the same cannot be said about the aforementioned duty of the Court to elaborate and develop its jurisprudence in so far as the right to water is concerned. It is therefore regrettable that the Court failed to elaborate, perhaps by way of making reference to judicial decisions on the issue, on the value judgment that it adopted in deciding the present appeal. Ramodibedi J pointed out that he was inclined to have regard to international consensus on the importance of access to water. Unfortunately, the Court did not take advantage of this opportunity to discuss the matter in the light of international instruments and decisions on the right to water aforementioned. To that end, it is impossible to pass off this decision, as regards the right to water, as one that finds its basis in international human rights law and as applicable to every citizen in Botswana whose right to water is curtailed or threatened. What the Court did was to ascertain the consensus of the international community and did not proceed to apply international law providing for the right to water. The Court did not even elaborate on the approach of the value judgment it had adopted. Notwithstanding that, the decision remains to be celebrated because of its international relevance.

Thirdly, and most importantly, the decision uses civil and political rights to enforce socio-economic rights. That is, the appellants' right to water was judicially enforced through section 7 of the Constitution which proscribes inhuman and degrading treatment. Apart from the fact that the Court held that the appellants had a water right by virtue of them being lawful occupants in the CKGR, the Court was prepared, and indeed held, that government's decision amounted to inhuman and degrading treatment. This is a welcome development, considering that Botswana falls in the category of states with no constitutionally-guaranteed socio-economic rights. The practice in other jurisdictions has been to use civil and political rights to achieve the judicial enforcement or protection of socio-economic rights. Rights, such as the right to life, dignity, freedom from inhuman and degrading treatment, as well as the right to non-discrimination, have been used to imply socio-economic rights.⁵⁷ The position in such countries is thus similar to the one adopted by Justice Dow in her dissenting opinion in the *Sesana* case,⁵⁸ and by the Court of Appeal in the present case. In her dissenting judgment, Justice Dow held that the termination of services within the Reserve endangered life and was tantamount to a violation of the applicants' right to life;⁵⁹ further, that the government was under an

⁵⁷ R Miamingi 'Inclusion by exclusion? An assessment of the justiciability of socio-economic rights under the 2005 interim Constitution of the Sudan' unpublished LLM dissertation, University of Pretoria, 2008 17.

⁵⁸ *Sesana* (n 6 above) para H13.

⁵⁹ As above.

obligation to restore basic and essential services to those residents who were in the Reserve.⁶⁰

In light of the aforesaid, one can safely conclude that there remains hope for the judicial enforcement of socio-economic rights in Botswana. The approaches adopted by Justice Dow in the *Sesana* case and Justice Ramodibedi in this case are not only progressive, but in conformity with international human rights standards, in particular Botswana's obligations under the African Charter on Human and Peoples' Rights (African Charter). This is so, especially considering that the Vienna Convention on the Law of Treaties requires that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith',⁶¹ and that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.⁶² Further, The UN General Assembly has stated that '[s]tates shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations'.⁶³

5 Concluding remarks

The government of Botswana seems to plan to comply with the decision. However, it remains to be seen whether the implementation of the orders of the present case will be without difficulties. This general ambivalence is borne by the problems faced by the Basarwa in the implementation of the *Sesana* case. That notwithstanding, one cannot lose sight of the fact that the victory of the appellants in the present case entails that, funds permitting, they will be saved from the harsh conditions of the Kalahari Desert. Further and most importantly, their human dignity will have been restored.

One can happily conclude that that the Botswana courts will henceforth be mindful to interpret cross-cutting rights to protect socio-economic rights. Until a constitutional amendment that will see the inclusion of socio-economic rights, the solution to problems that impede the judicial enforcement of such rights in Botswana may be solved by using civil and political rights to enforce socio-economic rights. The Court of Appeal in the present case has shown that the Botswana courts are more than willing to adopt this approach.

⁶⁰ *Sesana* (n 6 above) para H16.

⁶¹ Vienna Convention on the Law of Treaties, art 26, 1155 UNTS 331, entered into force 27 January 1980.

⁶² Vienna Convention (n 61 above) para 27.

⁶³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by UN General Assembly, Resolution 60/147, UN Doc A/RES/60/147 (21 March 2005).

Making sense of the Rwandan Law Relating to Serving Life Imprisonment with Special Provisions

Jamil Ddamulira Mujuzi*

Post-Doctoral Fellow, Faculty of Law, University of the Western Cape, South Africa

Summary

In October 2010, the Rwandan Law Relating to Serving Life Imprisonment with Special Provisions came into force. As the name suggests, the law is applicable to offenders sentenced to life imprisonment with special provisions. This article highlights the gaps in that law and suggests ways through which those gaps could be eliminated.

1 Introduction

When Rwanda abolished the death penalty for heinous offences, it substituted it with life imprisonment with special provisions. Article 4 of the Organic Law Relating to the Abolition of the Death Penalty¹ defines life imprisonment with special provisions to mean '(1) a sentenced person is not entitled to any kind of mercy, conditional release or rehabilitation, unless he or she has served at least twenty (20) years of imprisonment; (2) a sentenced person is kept in prison in an individual cell ...' reserved for people convicted of serious crimes such as genocide and crimes against humanity. The human rights implications of the sentence of life imprisonment with special provisions have been discussed elsewhere

* LLB (Hons) (Makerere), LLM (Human Rights and Democratisation in Africa) (Pretoria), LLM (Human Rights Specialising in Reproductive and Sexual Health Rights) (Free State), LLD (Western Cape); djmujuzi@gmail.com. I am indebted to the anonymous referees for their constructive comments. The usual *caveats* apply.

¹ Organic Law Relating to the Abolition of the Death Penalty 31/2007 of 25 July 2007.

and will not be repeated here.² It is precisely because of those human rights concerns that the International Criminal Tribunal for Rwanda (ICTR), amongst other reasons, refused to transfer some of the accused to stand trial in Rwanda. This would later force the Rwandan government to amend its relevant legislation to specifically provide that life imprisonment with special provisions shall not be applicable to those people transferred from the ICTR to serve their sentences in Rwanda or those transferred from the ICTR to stand trial in Rwanda.³ The sentence of life imprisonment with special provisions still applies to those convicted of heinous crimes by Rwandan courts. In order to presumably address the concerns by human rights activists and academics about the human implications of life imprisonment with special provisions, in October 2010 the Rwandan government enacted a specific law relating to serving life imprisonment⁴ that 'provides for specific modalities of enforcement and serving the sentence of life imprisonment with special provisions'.⁵

The purpose of this article is to show the gaps in the October 2010 law relating to life imprisonment with special provisions as they relate to the rights of prisoners and to argue that, in order to cure some of its defects, the law should either be amended or should be read in conjunction with the Law Establishing and Determining the Organisation of the National Prison Service.⁶ Although the Law Relating to Serving Life Imprisonment with Special Provisions was enacted pursuant to the Law Establishing and Determining the Organisation of the National Prison Service,⁷ it provides under article 15 that '[a]ll prior legal provisions inconsistent with this Law are hereby repealed'. Article 15 does not expressly repeal the relevant provisions of the Law Establishing and Determining the Organisation of the National Prison Service that appear to conflict with the Law Relating to Serving Life Imprisonment with Special Provisions. The discussion that follows should thus be seen against the background that it is possible for one to argue that either that the Law Relating to Serving Life Imprisonment with Special Provisions repealed those provisions of the Law Establishing and Determining the Organisation of the National Prison Service by invoking the later-in-time rule, or that it did not repeal those provisions because it does not expressly say so. Before discussing the gaps as they relate to

² See JD Mujuzi 'Issues surrounding life imprisonment after the abolition of the death penalty in Rwanda' (2009) 9 *Human Rights Law Review* 329-338.

³ See JD Mujuzi 'Steps taken in Rwanda's efforts to qualify for the transfer of accused from the ICTR' (2010) 8 *Journal of International Criminal Justice* 237-248.

⁴ Law Relating to Serving Life Imprisonment with Special Provisions, Law 32/2010 of 22 September 2010, *Special Official Gazette* 14 October 2010.

⁵ n 4 above, art 1.

⁶ Law 38/2006 of 25 September 2006 Establishing and Determining the Organisation of the National Prisons Service.

⁷ See Preamble, para 5.

the rights of the offenders, I will first illustrate the first weakness of the Law Relating to Serving Life Imprisonment with Special Provisions.

2 Offences that attract life imprisonment with special provisions

Article 2 of the Law Relating to Serving Life Imprisonment with Special Provisions provides as follows:

Life imprisonment with special provisions shall be applicable to persons sentenced for the following inhuman or recidivism crimes: (1) torture resulting into death; (2) murder or manslaughter with dehumanising acts on the dead body; (3) the crime of genocide and other crimes against humanity; (4) child sexual abuse; (5) sexual torture; (6) forming or leading criminal gangs.

The above crimes are indeed serious. However, the challenge associated with the law is that it does not define what recidivism is.⁸ Put differently, it does not give a criterion that should be used by the sentencing judge in determining that the offender is a recidivist or not. This leaves two important questions unanswered: one, how many such offences should a person have committed for him or her to be categorised as a recidivist? Two, what should be the time frame between the first offence and the second or third offence before someone is considered a recidivist? In other words, if a person were convicted of child sexual abuse in 2010 and a sentence other than life imprisonment with special provisions was imposed, and that same person, 20 years later — in 2030 — commits the same offence, should that person be considered a recidivist? Before someone is punished in terms of article 2, there is a need for a definition of recidivism so that sentencing officers have a clear understanding of the kind of person they should consider a recidivist.

3 Rights of offenders sentenced to life imprisonment with special provisions

This section deals with the various rights of offenders that are likely to be sentenced in terms of the Law Relating to Serving Life Imprisonment with Special Provisions. The author highlights the weaknesses in the law as far as they relate to these rights and make recommendations on how those weaknesses may be eliminated.

⁸ For a discussion on the meaning of recidivism, see G Hallevy 'The recidivist wants to be punished: Punishment as an incentive to reoffend' (2009) 5 *The International Journal of Punishment and Sentencing* 120-145. See also MD Maltz *Recidivism* (1984).

3.1 Right to freedom from torture, cruel, inhuman and degrading treatment

Article 4 provides that '[t]he rights of the sentenced person to life imprisonment with special provisions under this Law shall be respected all the time and the sentenced person shall be protected against any form of torture and cruel, inhuman and other degrading treatment'. Although Rwanda ratified the United Nations (UN) Convention Against Torture (CAT), it is yet to enact legislation giving effect to that treaty. This means that torture is not defined under any Rwandan domestic law. Therefore, although torture is prohibited under Article 4 of the Law Relating to Serving Life Imprisonment with Special Provisions, torture is not defined under that law. It is recommended that the relevant authorities (such as courts and prison officials) should refer to the definition of torture under Article 1 of CAT⁹ in their definition of torture under article 4 of the Law Relating to Serving Life Imprisonment with Special Provisions.¹⁰ There are two reasons for this: One, Rwanda ratified CAT without making any reservation or declarative interpretation to article 1 which defines torture.¹¹ It is thus under a duty to adopt the definition of torture under article 1 of CAT *verbatim* or to adopt a definition of torture that does not differ substantially from the one under article 1 of CAT.¹² Two, the defi-

⁹ Art 1 of the CAT defines torture to mean 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.' For the drafting history of art 1, see M Nowak & E McArthur *The United Nations Convention Against Torture: A commentary* (2008) 27-86.

¹⁰ In some African countries, such as Uganda and South Africa, where the respective states ratified CAT without making reservations on art 1, courts have relied on the definition of torture under art 1 although these countries are yet to domesticate CAT. See *Attorney-General v Susan Kigula & 17 Others* (Constitutional Appeal 3 of 2006) UGSC 6 (21 January 2009) (Supreme Court of Uganda); *S v Mthembu* [2008] 4 All SA 517 (SCA) para 30 (South Africa Supreme Court of Appeal).

¹¹ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations Treaty Series Vol 1465 85 Ratification Status http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (accessed 1 March 2011).

¹² The CAT Committee has recommended that '[s]erious discrepancies between the Convention's definition [of torture] and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases although a similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each state party to ensure that all parts of its government adhere to the definition set forth in the Convention for the

nition of torture under CAT is now widely considered to have attained the status of customary international law.¹³

As is the case with torture, the Law Relating to Serving Life Imprisonment with Special Provisions does not define the meaning of cruel, inhuman and degrading treatment. These terms are also not defined in CAT because '[d]uring the drafting of article 16 [of the Convention], it ... soon became clear that a proper definition of the terms cruel, inhuman or degrading treatment or punishment was impossible to achieve'.¹⁴ It is against that backdrop that the CAT Committee has adopted a case-by-case analysis to conclude whether or not an individual was subjected to cruel, inhuman and degrading treatment or punishment or whether state parties have put in place measures to effectively prevent cruel, inhuman and degrading treatment or punishment.¹⁵ It is recommended that the Rwandan authorities, especially judges and prison authorities, should rely, *inter alia*, on the jurisprudence of the CAT Committee in determining whether the alleged conduct amounts to cruel, inhuman and degrading treatment. Related to the above, CAT prohibits cruel, inhuman or degrading treatment or punishment. This jurisprudence is freely available on the internet, so the issue of accessibility does not arise. However, article 4 of the Law Relating to Serving Life Imprisonment with Special Provisions does not prohibit degrading punishment. The drafting history of CAT shows that the drafters of the Convention appear to have held the view that there is a distinction between degrading treatment, on the one hand, and degrading punishment on the other.¹⁶ This explains why the conjunctive 'or' was placed between 'treatment' and 'punishment'. Jurisprudence emanating from the CAT Committee shows that the Committee has in most cases found that a person was subjected to inhuman and degrading punishment when such a person had been convicted of an offence and that a person was subjected to inhuman and degrading treatment when such a person was in detention illegally or legally awaiting trial.¹⁷

Jurisprudence emanating from the Human Rights Committee also shows that the Human Rights Committee draws a distinction between

purpose of defining the obligations of the state. At the same time, the Committee recognises that broader domestic definitions also advance the object and purpose of this Convention so long as they contain and are applied in accordance with the standards of the Convention, at a minimum.' See CAT Committee General Comment 2 (implementation of art 2 by state parties) CAT/C/GC/2/CRP 1/Rev 4, 23 November 2007, para 9.

¹³ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vokovic* Case IT-96-23 and IT-96-23/1-A (judgment of 12 June 2002) para 146.

¹⁴ Nowak & McArthur (n 9 above) 540.

¹⁵ See generally Nowak & McArthur (n 9 above) 540-576.

¹⁶ Nowak & McArthur (n 9 above) 539-540. The USSR delegates, during the drafting of the definition of 'torture' under CAT, argued that '... the institution of punishment is legally applicable to persons who have committed an offence'. See Nowak & McArthur (n 9 above) 32.

¹⁷ Nowak & McArthur (n 9 above) 540-576.

degrading treatment, on the one hand, and degrading punishment on the other. In state reports and in individual communications, the Human Rights Committee has in most cases found that a person was subjected to inhuman treatment when that person was in detention or awaiting trial before his or her conviction and that a person's right not to be subjected to degrading punishment was found to have been violated when such a person had been convicted.¹⁸ Practice by the CAT Committee shows that in most cases the Committee has used the word 'punishment' instead of 'treatment' in cases where capital punishment and corporal punishment have been discussed.¹⁹ The drafting history of article 7 of the International Covenant on Civil and Political Rights (ICCPR) illustrates that the drafters were clear that 'the term "treatment" ... [was] broader than "punishment"'.²⁰ This is indicative of the Committees' understanding, at least by implication, that treatment and punishment are not synonymous.

The above discussion shows that there is room to argue that degrading treatment is more relevant to those who have not been convicted – although even those who have been convicted could be treated in a degrading manner which either relates or does not relate to the sentence they are serving. However, inhuman and degrading punishment is more relevant to those who have been convicted. The inquiry focuses on the nature of the punishment that has been imposed to answer the question of whether such punishment is degrading or inhuman. In other words, as philosophers have consistently and convincingly argued, one of the essential elements of punishment is the fact that it can only be imposed on someone who has been found guilty of breaking the law.²¹ Therefore, the word punishment in CAT is not redundant. State parties have an obligation not only to prevent degrading treatment, but also degrading punishment. Against that background it is argued

¹⁸ M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005) 157-192.

¹⁹ Nowak & McArthur (n 9 above) 543-448. See also Nowak (n 18 above) 167-172.

²⁰ Nowak (n 18 above) 159.

²¹ Hart, eg, was of the view that for any treatment to qualify as punishment, it must have the following five elements: (i) It must involve pain or other consequences normally considered unpleasant. (ii) It must be for the offence against legal rules. (iii) It must be for an actual or supposed offender for his offence. (iv) It must be intentionally administered by human beings other than the offender. (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed. See HAL Hart *Punishment and responsibility: Essays in the philosophy of law* (1968) 4-5. Pincoffs is of the view that legal punishment is an institution with the following three features: (i) There must be a system of threats, officially promulgated, that should given legal rules be violated, given consequences regarded as unpleasant will be inflicted upon the violator. (ii) The threatened unpleasant consequences must be inflicted only upon persons tried and found guilty of violating the rules in question, and only for the violation of those rules. (iii) The trial, finding of guilt, and imposition and administration of the unpleasant consequences must be by authorised agents of the system promulgating the rules. See EL Pincoffs *The rationale of legal punishment* (1966) 55-56.

that article 4 of the Law Relating to Serving Life Imprisonment with Special Provisions should be read as prohibiting degrading treatment and punishment, otherwise it would be in conflict with CAT. In the light of the fact that in 2007 the Rwandan Minister of Justice said that those sentenced to life imprisonment with special provisions be subjected to solitary confinement,²² which is referred to as single cells in the legislation, the question is whether detaining a person in a single cell for 20 years, which in practice is the same thing as solitary confinement, does not amount to inhuman punishment.²³

3.2 Freedom from discrimination

Article 4 also provides that '[a]ny form of discrimination against the sentenced person based on ethnicity, colour, sex, language, religion, political opinion, nationality, social and economic status, birth or any other ground is prohibited'. Unlike article 11(2) of the Constitution of Rwanda, article 4 of the Law Relating to Serving Life Imprisonment with Special Provisions, which is admittedly not exhaustive, leaves out some grounds upon which a person may not be discriminated against. Article 11(2) of the Constitution provides that '[d]iscrimination of whatever kind based on, *inter alia*, ethnic origin, tribe, clan, colour, sex, region, social origin, religion or faith, opinion, economic status, culture, language, social status, physical or mental disability or any other form of discrimination is prohibited and punishable by law'. Some of the grounds on which a person may not be discriminated against that appear in the Constitution but do not expressly appear in the Law Relating to Serving Life Imprisonment with Special Provisions are culture, region of origin, and physical or mental disability. This means that the implementers of the Law Relating to Serving Life Imprisonment with Special Provisions will have to read it in conjunction with article 11(2) of the Constitution so that the grounds that are not expressly mentioned in the Law Relating to Serving Life Imprisonment with Special Provisions but mentioned in the Constitution are

²² See F Kimenyi 'Death penalty: Recidivist to have special imprisonment' 27 January 2007 <http://allafrica.com/stories/200701250767.html> (accessed 30 March 2011).

²³ The African Commission on Human and Peoples' Rights held that 'prolonged ... solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment'. See *Zegveld & Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003) para 55. See also *Malawi African Association & Others v Mauritania* (2000) AHRLR 194 (ACHPR 2000) para 124, where the African Commission held that holding people in solitary confinement in a manner that deprives them of their right to see their family members violates art 18(1) of the African Charter. See also *Achutan & Another (on behalf of Banda & Others)* (2000) AHRLR 143 (ACHPR 1994), where the African Commission held that some forms of solitary confinement violate art 5 of the African Charter. For a discussion of the UN bodies and the European of Human Rights jurisprudence on solitary confinement, see UNVFVT *Interpretation of torture in the light of the practice and jurisprudence of international bodies* http://www.ohchr.org/Documents/Issues/Interpretation_torture_2011_EN.pdf (accessed 24 March 2011) 10-12.

considered to be part of article 4 of the Law Relating to Serving Life Imprisonment with Special Provisions.

3.3 Physical exercise and religious beliefs

Article 5 of the Law Relating to Serving Life Imprisonment with Special Provisions provides for the following as some of the ‘basic needs’ of the person sentenced to life imprisonment with special provisions: the offender ‘shall be afforded a minimum standard of living to enable him or her to maintain a healthy life and personal hygiene’ and the offender ‘shall be entitled to time to perform physical exercises and act according to his or her religious beliefs’. The above are indeed some of the rights that any offender is entitled to irrespective of the offence he or she has committed. Article 5 is not detailed on how the rights it provides for shall be enjoyed, but it provides that ‘[m]odalities for the implementation [of the above] provisions ... shall be determined by internal rules and regulations of prisons’. It is possible that such rules and regulations could be drafted in a manner that makes it almost impossible for the offenders sentenced to life imprisonment with special provisions to enjoy the above rights. It is recommended that in drafting such rules and regulations, regard should be had to the spirit of the Constitution, which protects the right to freedom of religion and worship, and to the internationally-accepted standards such as those laid down in the international Standard Minimum Rules for the Treatment of Prisoners. At the time of writing, the author was unable to establish whether such regulations or rules had been drafted.

Article 6 of the Law Relating to Serving Life Imprisonment with Special Provisions provides that a person sentenced to life imprisonment with special provisions shall have the right to medical care. Although that provision makes it incumbent upon the prison authorities to put the necessary measures in place to ensure that that person receives medical care, the law does not expressly state that medical care shall be at the expense of the state. Although it could be argued that in practice the state has a duty to provide free medical care to prisoners,²⁴ for the avoidance of doubt it would be better for that to be expressly included in the legislation as has been the case in some African countries, such

²⁴ As is the case in Rwanda, in some African countries such as Uganda and Ghana, the laws do not specifically stipulate that a prisoner will be entitled to medical treatment at the state’s expense. See sec 35(1)(e) of the Ghanaian Prisons Service Act 1972, NRCD 46, which provides that ‘[t]he Director-General shall ensure that a prisoner is promptly supplied with the medicines, drugs ... or any other things prescribed by a medical officer of health as necessary for the health of the prisoner’. Sec 57(f) of the Uganda Prisons Act 17 of 2006 provides that ‘... a prisoner is entitled to the following ... (f) have access to the health services available in the country without discrimination of their legal status’.

as South Africa²⁵ and Malawi.²⁶ This is because, although states know or are expected to know that it is their responsibility to provide medical care for those in detention, jurisprudence emanating from the African Commission on Human and Peoples' Rights (African Commission) shows that there have been cases where states have failed to do so.²⁷ It is recommended that article 6 be amended to expressly provide that such an offender shall have the right to medical care at the state's expense.

3.4 Right to be visited

Article 7(1) of the Law Relating to Serving Life Imprisonment with Special Provisions provides that 'a person serving life imprisonment with special provisions may be visited by his or her parents, his or her spouse, his or her children and his or her members of the family'. The aforementioned provision is conspicuously silent on whether such an offender can be visited by his or her friends, who could include religious leaders. This should be contrasted with article 28(1) of the Law Establishing and Determining the Organisation of the National Prison Service, which provides that '[e]very prisoner has the right to be visited by his or her family members and friends'. It is clear that under article 28(1) of the Law Establishing and Determining the Organisation of the National Prison Service, the prisoner has a right to be visited by the enumerated groups of people, whereas in terms of article 7(1) of the Law Relating to Serving Life Imprisonment with Special Provisions, the prisoner 'may be' visited by those people. The Law Relating to Serving Life Imprisonment with Special Provisions does not explain why a prisoner serving life imprisonment with special provisions does not have a right to receive visitors and why his or her friends are not included in the category of people allowed to visit him or her. One could argue

²⁵ Sec 35(2)(e) of the South African Constitution provides that '[e]veryone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including ... the provision, at state expense, of ... medical treatment'.

²⁶ Sec 9(3) of the Malawi Prison Bill 2003 provides that '[e]very prisoner shall at the expense of the state be given adequate medical treatment for potentially life-threatening conditions and care where possible for other medical conditions that are not life threatening'.

²⁷ Eg, in *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998), where Mr Ken Saro-Wiwa was denied medical care by the Nigerian government while in detention, the African Commission held, amongst other things, that 'the responsibility of the government is heightened in cases where an individual is in its custody and therefore someone whose integrity and wellbeing is completely dependent on the actions of the authorities. The state has a direct responsibility in this case. Despite requests for hospital treatment made by a qualified prison doctor, these were denied to Ken Saro-Wiwa, causing his health to suffer to the point where his life was endangered. The government has not denied this allegation in any way. This is a violation of article 16 [of the African Charter on Human and Peoples' Rights]'. See para 112. See also *Achutan* (n 23 above), where the African Commission found that the prisoners had been denied adequate medical care (paras 3 & 7).

that this is discrimination on the ground of social status, which is prohibited by article 11 of the Constitution. This is because those serving life imprisonment with special provisions are grouped in a particular status group that does not have the same rights as other prisoners not serving life imprisonment with special provisions.

Related to the above is the issue of the offenders serving life imprisonment with special provisions being visited or not visited by their lawyers. Article 7(2) of the Law Relating to Serving Life Imprisonment with Special Provisions provides that 'a person serving life imprisonment with special provisions shall have the right of being visited by his or /her lawyer during working hours and they shall be allowed to communicate orally or in writing in the presence of a prison guard or any other competent prison staff'. This provision should be contrasted with article 28(3) of the Law Establishing and Determining the Organisation of the National Prison Service, which provides that '[t]he detainee²⁸ shall be entitled to the right of being visited by his or her lawyer during working hours and they shall be allowed to communicate in speech or in writing with no hindrance'. Everyone with an elementary knowledge of prison matters knows that one of the greatest hindrances to proper communication between an inmate and an outsider, be it a lawyer or a relative, is for the inmate to know that the discussion between him or her and the outsider is being listened to by the prison authorities. This could be through using electronic devices or the physical presence of a prison warder. Therefore, a detainee can rightly argue that the presence of a prison warder could hinder his or her communication with his or her lawyer.

An inmate communicating with his or her lawyer in the presence of a prison warder not only risks the real danger of reprisals should he or she, for example, allege that the prison administration mistreats him or her, but his or her right to communicate with a lawyer confidentially is also violated. Whereas a detainee has the right to communicate with his or her lawyer in private, a person serving a sentence of life imprisonment with special provisions does not have that right. It could also be argued that this is discrimination on the ground of social status which is contrary to article 11 of the Constitution. There are three ways to cure the defects in article 7 of the Law Relating to Serving Life Imprisonment with Special Provisions. One, it should be amended to rectify the discriminatory issues highlighted above; two, it should be read in conjunction with article 28 of the Law Establishing and Determining the Organisation of the National Prison Service; or three, its constitutionality should be challenged before a relevant court.

²⁸ 'Detainee' is defined in art 3(7) of the Establishing and Determining the Organisation of the National Prisons Service to mean 'any person incarcerated in a prison in accordance with a legal decision taken by a court but who has not been tried for a definitive sentence'.

3.5 Right to appeal against corrective measures

Article 13(1) of the Law Relating to Serving Life Imprisonment with Special Provisions empowers the prison authorities to take corrective measures against prisoners serving life imprisonment with special provisions in cases where they have transgressed prison rules or regulations. Article 13(2) provides that such corrective measures 'shall in no way degrade the person or jeopardise the fundamental rights guaranteed to him or her by this Law'. Article 13(3) provides that the person sentenced 'to life imprisonment with special provisions or his or her family may request the Commissioner-General of National Prisons Service to review any disciplinary action taken against him or her in accordance with provisions of the internal rules and regulations of prisons'. Article 13(3) is based on at least one assumption: that the offender or his family has access to and is well acquainted with prison rules and regulations. Prison rules and regulations are sometimes voluminous and not readily available to the prisoner or members of the public unless requested from prison authorities, and some of them may not be willing to make these available to the prisoners or their family members. Even in cases where such rules and regulations are accessible to prisoners and their families, they may be reluctant to invoke them to challenge a sentence imposed by prison authorities for fear of reprisals against the prisoner. It is thus important that article 13 be amended to allow the prisoner's lawyer to act on behalf of the prisoner in challenging such corrective measures. It has to be recalled that article 33 of the Law Establishing and Determining the Organisation of the National Prison Service allows the prisoner, his or her family or his or her lawyer to challenge any disciplinary measure imposed against a prisoner before the relevant authorities or before a court of law. Article 13 of the Law Relating to Serving Life Imprisonment with Special Provisions should be amended to also allow the prisoner's lawyer to challenge a prisoner's disciplinary action not only before the prison authorities, but also before a court of law. Otherwise one could strongly argue that prisoners serving life imprisonment are being discriminated against.

4 Conclusion

This note has highlighted the challenges likely to be encountered in implementing the Rwandan Law Relating to Serving Life Imprisonment with Special Provisions. One should recall that offences that attract the sentence of life imprisonment with special provisions are serious and should attract serious punishments. However, the fact that they are serious offences does not mean that the sentences imposed on those convicted of such offences should be contrary to Rwanda's national and international human rights obligations. Put differently, in punishing heinous offences, Rwanda should not turn a blind eye to its national

and international human rights obligations. It could be argued that had Rwanda not abolished the death penalty, those found guilty of these callous offences would have been sentenced to death and therefore, with that in mind, life imprisonment with special provisions is a lenient sentence compared to the death penalty. In my opinion, this argument misses the point that what is in issue here is not whether the sentence of life imprisonment with special provisions is more lenient than the sentence of death. What is in issue here is whether the sentence of life imprisonment with special provisions complies with Rwanda's national and international human rights obligations. As the discussion above has shown, the sentence of life imprisonment with special provisions is contrary to Rwanda's national and international human rights obligations. It is on that basis that it has been suggested that many provisions of the Rwandan Law Relating to Serving Life Imprisonment with Special Provisions need to be amended to bring them in line with the Constitution and Rwanda's international human rights obligations. In cases where those amendments are not possible, it has been suggested that, where practicable, the Law Relating to Serving Life Imprisonment with Special Provisions should be read in conjunction with the Law Establishing and Determining the Organisation of the National Prison Service.

Another argument that could be advanced in support of the sentence of life imprisonment with special provisions as it is currently provided for in the Law Relating to Serving Life Imprisonment with Special Provisions is that it is in the community's interest for the government to be seen coming up with serious punishments for those who commit callous offences, especially in the light of the fact that the death penalty has been abolished. Many genocide survivors, and understandably so, would expect the government to seriously punish those who murdered their relatives and friends. Many of them were indeed opposed to the abolition of the death penalty and this could explain why the government introduced the sentence of life imprisonment with special provisions to convince them that those convicted of genocide and crimes against humanity will not be treated lightly by the criminal justice system. While addressing a Rwanda-based newspaper, *The New Times*, in January 2007 the Rwandan Minister of Justice, Tharcisse Karugarama, reportedly said that those sentenced to life imprisonment with special provisions 'will regret not having been hanged' as they will be subjected to 'solitary confinement' and have 'less frequent visits'.²⁹ When it comes to the question of punishment, there are different factors that have to be taken into consideration, such as the interests of the community, the rights of the offenders and Rwanda's duty to comply with its national and international human

²⁹ See Kimenyi (n 22 above). See also 'Rwanda death penalty: Recidivist to have special imprisonment' <http://www.afrika.no/noop/page.php?p=Detailed/13399.html&print=1&d=1> (accessed 30 March 2011).

rights obligations. Therefore, although the government is expected to ensure that the punishments that are provided for in the law for serious offences answer some of the concerns of its citizens so that they do not lose confidence in the criminal justice system and possibly start to take the law into their own hands, the government also has to ensure that those punishments do not violate its Constitution and its international human rights obligations. Therefore, a delicate balance has to be drawn to ensure that the punishments provided for serious offences meet citizens' reasonable expectations, but at the same time those punishments must fully comply with Rwanda's Constitution and international human rights obligations. Put differently, constitutional and international human rights obligations cannot be sacrificed at the altar of community's interest.

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- Words such as ‘article’ and ‘section’ are written out in full in the text.
- Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; sees. No full stops should be used. Words in a foreign language should be *italicised*. Numbering should be done as follows:
 - 1
 - 2
 - 3.1
 - 3.2.1
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than 30 words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use ‘&’: eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes): 28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms ‘constitution’, but when a specific country’s constitution is referred to, capitals are used ‘Constitution’ .
- Official titles are capitalised: eg ‘the President of the Constitutional Court’ .
- Refer to the *Journal* or www.chr.up.ac.za for additional aspects of house style.

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The Director
Centre for Human Rights
Faculty of Law, University of Pretoria
PRETORIA 0002
Tel: (012) 420-3810/3034
Fax: (012) 362-5125
chr@up.ac.za

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CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 December 2010

Compiled by: I de Meyer

Source: <http://www.africa-union.org> (accessed 30 April 2011)

	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	26/05/10
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	10/08/10		
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		03/01/11		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	10/01/11	
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	06/09/10
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	06/10/10	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
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	09/07/10
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	24/12/10
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	46	26	30	8

* Additional declaration under article 34(6)
Ratifications after 31 July 2010 are indicated in bold