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SUBMISSIONS

Please note that the editors will only consider submissions that have not already been submitted for publication or published elsewhere. Submissions should be no longer than 10 000 words (footnotes included).

For further information, see 'Guidelines for Contributors' following the last contribution in this *Journal*.

Editorial

This issue of the *Journal* appears at the same time as a significant landmark relating to human rights and democracy in Africa is reached – the entry into force of the African Charter on Democracy, Elections and Governance on 15 February 2012. The milestone of 15 ratifications was reached five years after the adoption of the Charter in January 2007. As is the case with any treaty, the entry into force of the Democracy Charter becomes meaningful only if its provisions are effectively domesticated and implemented in practice.

By engaging with human rights in the broader context of democracy and the rule of law, three contributions in this issue relate to the importance and potential role of the Democracy Charter. Appiagyei-Atua traces the way in which minority groups, including indigenous peoples, have benefited from the link between democracy and development in the post-colonial African state. Ibrahim evaluates how democracy has been valued in the decade since the Organisation of African Unity was replaced by the Africa Union. Mujuzi links these concerns to the jurisprudence of the African Commission on Human and Peoples' Rights related to the rule of law in Africa.

Following its first finding – against Kenya – in March 2011, the African Children's Rights Committee has become more prominent. For some time, children's rights have been comparatively high on the agenda of African governments. While focusing on the domestic legal protection of children, the contributions of Odongo and Moyo also underline the role of international human rights law in shaping national agendas, policies, laws and practices.

Although the *Journal* only exceptionally includes articles dealing with analyses of specific legal systems, Liebenberg's contribution is a good example of an article in which a specific legal development (the 'meaningful engagement' jurisprudence of the South African Constitutional Court) is placed in a wider context and made relevant to a broader audience.

In 2011 and so far in 2012, the judicial scene in Africa has witnessed a number of significant developments. By the time this *Journal* appears, in July 2012, the AU Assembly of Heads of State and Government should in all likelihood have considered the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. This Protocol aims to add a 'section' on international criminal justice to the African Court of Justice and Human Rights. In 2011, the

African Court on Human and Peoples' Rights adopted its most meaningful decision to date ('provisional measures' ordered against Libya) and much judicial activity has taken place within two regional economic communities, in particular, ECOWAS and EAC. The International Criminal Court remains a thorn in the flesh of some African leaders and a source of conflict within the AU. All these developments, as well as relevant case law, are discussed in a trio of contributions, covering developments in 2011 in respect of the AU and human rights; the regional economic communities; and human rights and international criminal justice in Africa.

Last year, having celebrated 30 years since the adoption of the African Charter, the African human rights family remains in a celebratory mood in 2012 – the year in which the African Commission marks 25 years of existence. The editors of the *Journal* extend their congratulations and encouragement to the members of the Commission and its Secretariat.

We acknowledge with appreciation and sincerely thank the independent reviewers who gave their time and talents to ensure the consistent quality of the *Journal*: Horace Adjolohoun, Atangcho Akonumbo; Melhik Bekele; Gina Bekker; David Bilchitz; Lilian Chenwi; Fernand de Varennes; Bonolo Dinokopila; Carina du Toit; Edmund Foley; Balarabe Haruna; Christof Heyns; Dan Kuwali; Cephass Lumina; Koos Malan; Remember Miamingi; Nkatha Murungi; Charles Ngwena; Godwin Odo; Anthony Okorodas; Joe Oloka-Onyango; Marius Pieterse; Ally Possi; Ben Saul; Nahla Valji; Harmen van der Wilt; and Sisay Yesheanew.

Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of ‘meaningful engagement’

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Summary

This article examines the disjunctures between the universal aspiration of human rights norms and the complexity of their interpretation and application in diverse and pluralistic contexts. It examines the extent to which a deliberative model of democracy can assist in promoting a more dialectical relationship between the universal and particular in human rights constitutional adjudication. The article further evaluates the potential of the mechanism of meaningful engagement employed by the South African Constitutional Court in the context of evictions jurisprudence to negotiate the tension between the universal normative values and purposes of human rights, and the democratic ideal of popular participation in the making of decisions which affect people's daily lives.

1 Introduction

Over centuries national and international struggles have sought to protect certain values and interests regarded as fundamental to

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human thriving in widely diverse political, economic, social and cultural contexts. Values which today lie at the heart of human rights law – individual and collective self-determination, human compassion and solidarity, human dignity, equality and freedom – have inspired great revolutions, social movements and liberation struggles against colonialism, apartheid and other forms of domination.¹ For all its imperfections, its false starts, and the dashed hopes when it fails to deliver on its lofty promises, human rights remain a significant discursive and mobilising force against systemic forms of marginalisation and structural injustice.²

International human rights law, particularly as it developed post-1945, aspires to universal validity and application. Thus, the great founding document of the protection of human rights under the auspices of the United Nations (UN), the Universal Declaration of Human Rights (1948) (Universal Declaration), proclaims the concepts of ‘inherent dignity’ and ‘the equal and inalienable rights of all members of the human family’, and calls on member states of the UN ‘to secure their universal and effective recognition and observance’.³ In the African context, the African Charter on Human and Peoples’ Rights (African Charter) recognises the universal impulses of fundamental human rights ‘that stem from the attributes of human beings’, whilst alluding to the need to develop a particular conception of human and peoples’ rights informed by the ‘historical tradition and values of African civilisation’.⁴

At national level, a bill of rights incorporating a greater or lesser number of the human rights norms recognised under international human rights law is a common (although not universal) feature of established and new constitutional democracies. Courts are given a significant role in interpreting and enforcing all or some of the provisions of the relevant bills of rights with varying remedial powers.⁵

1 On the evolution of human rights as a political and cultural construct, see L Hunt *Inventing human rights: A history* (2007); S Moyn *The last utopia: Human rights in history* (2010).

2 Young describes ‘structural injustice’ as a situation in which ‘social processes put large categories of persons under a systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time as these processes enable others to dominate or have a wide range of opportunities for developing and exercising their capacities’. IM Young ‘Responsibility and global justice: A social connection model’ (2006) 23 *Social Philosophy and Policy* 102–114. For a recent account of the mobilising potential of human rights against various forms of structural injustice in Africa, see LE White & J Perelman (eds) *Stones of hope: How African activists reclaim human rights to challenge global poverty* (2011).

3 Universal Declaration of Human Rights, 10 December 1948, General Assembly Resolution 217 A (III), UN Doc A/810, Preamble.

4 African Charter on Human and Peoples’ Rights, 1520 UNTS 217, concluded 27 June 1981; entered into force 21 October 1986, Preamble.

5 See generally R Gargarella *et al* (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006).

On the African continent, South Africa, along with a number of other African states, are examples of this trend in transitional constitutional democracies.⁶

But these international, regional and national claims of human rights law to universal normative validity and application does not come without a cost. One of these costs is the reduction and oversimplification of the complexity of the particular.⁷ The abstract, broadly-formulated normative commitments of human rights are not self-evidently equipped to respond well to the shifting, intertwined and diverse power relations, socio-economic needs and cultural identities encountered in contemporary societies. The result can be that these power relations, needs and identities are either ignored or receive only a superficial exploration and response. The outcome is frequently an entrenchment of the *status quo* and disillusionment with the unfulfilled emancipatory and transformative claims of human rights discourse.⁸ This is what Brown describes as the fundamental paradox of rights, namely, 'the paradox between the universal idiom and the local effect of rights'.⁹

The article grapples with the question of how can we can make sense of the aspiration of human rights law (in its broadest sense) to embody a set of universal normative prescripts and the myriad particular contexts and realities in which those norms must be interpreted and enforced by judicial bodies. Is it possible to identify conceptions of rights, understandings of democracy, and strategies of adjudication that may be better suited to generating a more creative dialectic between the ideals of universal human rights and the particularity and determinate character of needs and identities of persons in various contexts?

I start by considering how the institutionalisation of human rights norms, through their enforcement by judicial and quasi-judicial

6 For an overview, see S Gloppen *et al* (eds) *Courts and power in Latin America and Africa* (2010) ch 5.

7 Other critiques of rights expose how the claims of human rights law and practices to ideological neutrality obscure how particular interpretations of rights advance distinct ideological projects. See IG Shivji *The concept of human rights in Africa* (1989), ch 1 & 2; M Mutua *Human rights: A political and cultural critique* (2008).

8 There exists a vast literature traversing critical legal studies, legal anthropology, and development studies which engages the critique of rights and exposes and engages the tension between universalism and particularism in human rights discourse and law. A small sample of this literature includes M Tushnet 'An essay on rights' (1984) 62 *Texas Law Review* 1363; PJ Williams 'Alchemical notes: Reconstructing ideals from deconstructed rights' (1987) 22 *Harvard Civil Rights – Civil Liberties Law Review* 401; J Kirkemann Boesen & HO Sano 'The implications and value added of a human rights-based approach' in BA Andreassen & SP Marks (eds) *Development as a human right: Legal, political and economic dimensions* (2010) 45; AA An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002); M Goodale & S Engle Merry (eds) *The practice of human rights: Tracking law between the global and the local* (2007).

9 W Brown *States of injury: Power and freedom in late modernity* (1995).

bodies, frequently operates to deepen the tension between the universalist impulse of human rights norms, and initiatives to develop tailored solutions to particular problems through the participation of those directly affected. Thereafter I explore the implications of situating constitutional adjudication of human rights norms within a deliberative model of democracy, and explore its potential to bridge the gap between universal and particularism in human rights adjudication. The final part of the article considers the recent adjudicative strategy of meaningful engagement developed by the South African Constitutional Court in the context of eviction disputes. I evaluate the potential and limits of meaningful engagement to generate transformative responses to the paradox of the 'universal idiom' and the 'local effect' of rights. It is hoped that some of the benefits as well as the pitfalls of meaningful engagement identified in this article will contribute to current debates within the African context on effective judicial mechanisms for enforcing socio-economic rights.

2 The 'paradox of institutionalisation'

The broader paradox of universality and particularism referred to by Brown is compounded by what Baynes refers to as 'the paradox of institutionalisation'.¹⁰ Broadly formulated human rights norms have to be interpreted and applied by institutions such as domestic courts, UN human rights treaty bodies and, within the African context, the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court).¹¹ But the interpretation and enforcement of indeterminate human rights norms create the well-known tension between human rights and democracy.

In the context of this article, I focus on the relationship between the exercise of judicial power and the concept of participatory democracy, rather than the familiar 'counter-majoritarian dilemma' with its narrower focus on the relationship of courts to the legislative and executive institutions of representative democracy.¹² In this context, a number of critiques can be levelled against courts assuming an

10 K Baynes 'Rights as critique and the critique of rights: Karl Marx, Wendy Brown, and the social function of rights' (2000) 28 *Political Theory* 451 457.

11 The coming into force of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998), OAU/LEG/EXP/AFCHPR/PROT (III) in 2004 has created renewed impetus for the project of developing the normative content and effective enforcement of the rights in the African Charter.

12 On the distinction between direct and representative democracy, see J Cohen & C Sabel 'Directly-deliberative polyarchy' (1997) 3 *European Law Journal* 313 320-321.

overly activist or managerial role in human rights adjudication.¹³ The following four interrelated critiques are particularly relevant to the themes addressed in this article.

First, the judicial and quasi-judicial bodies widely charged with enforcing human rights norms domestically or internationally risk being perceived as 'paternalistic' institutions which curtail the opportunities of 'the people' to determine the fundamental norms by which they will govern themselves and their communities.¹⁴ Second, participatory decision making is arguably more capable of achieving just and sustainable solutions to particular problems because the participants are more attuned to local needs and identities.¹⁵ A rejoinder would be that judges are nonetheless suited in human rights adjudication to laying down broad normative principles based on fundamental human interests or values that should guide decision making.¹⁶ While this is a valid conception of judicial competencies, the practical implications of these broad normative pronouncements in a diversity of different circumstances are nonetheless likely to remain deeply contested.¹⁷

A third critique, emanating particularly from the critical legal studies tradition, points out that courts are traditionally unresponsive to the more far-reaching political, social and economic reforms required to remedy the underlying conditions which generate systemic injustices. The tendency towards stability and preservation of the *status quo* in adjudication has a 'depolicising' effect on fundamental contestations concerning deeply-entrenched distributions of political and social

13 On the distinction between strong and weak forms of judicial review and managerial versus other forms of judicial role conceptions, see M Tushnet *Weak courts, strong rights* (2008) 18-42; KG Young 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review' (2010) 8 *International Journal of Constitutional Law* 385.

14 See, eg, Habermas's critique of Dworkin's conception of the judge as Hercules operating within 'the solitude of monologically conducted theory construction'. J Habermas *Between facts and norms: Contributions to a discourse theory of law and democracy* (1998, trans W Rehg) 223-225; See also the analysis of critics of judicial review by C Zurn *Deliberative democracy and the institutions of judicial review* (2007) 4-6 141-161.

15 Cohen & Sabel (n 12 above) 324.

16 See, eg, A Sachs 'The judicial enforcement of socio-economic rights: The *Grootboom* case' (2003) 56 *Current Legal Problems* 579 587-589 (locating the courts' institutional capacity to adjudicate socio-economic rights in the capacity of judges to pronounce on conditions of life undermining human dignity).

17 See Dixon's critique of a strong judicial role in determining the 'minimum core' of socio-economic rights. R Dixon 'Creating dialogue about socio-economic rights: Strong-form versus weak-form judicial review revisited' (2007) 5 *International Journal of Constitutional Law* 391 401-402 416-417.

power.¹⁸ This can have a delegitimising effect on community struggles aimed at radical social change.

Finally, judicial procedures, interpretive methods and doctrinal categories are blunt instruments for dealing with particularity and difference. Some of the accepted categories of human rights law – ‘vulnerable groups’, ‘prohibited grounds of discrimination’, ‘the poor’ – create and entrench fixed identity patterns which sit uncomfortably with fluid and shifting identities and allegiances. This makes it notoriously difficult for court-centred human rights law to respond effectively to multiple and intersecting forms of disadvantage experienced by various groups on grounds such as race, gender and class.¹⁹

Underlying each of these critiques of adjudication is the interrelationship between substantive human rights norms and procedural norms of democratic participation. In other words, how should the institution of judicial review be conceptualised in a system which values democratic participation in resolving social disputes? Is it possible to develop adjudicative strategies which can mitigate the concerns of judicial paternalism, enhance responsiveness to local needs, create space for radical social mobilisation, and better negotiate the complexities of difference? Fundamental to this endeavour is the model of democracy within which the institution of judicial review of fundamental rights is embedded. It is this broader theoretical issue to which I turn in the following section before returning to the questions posed above in the context of the adjudicative strategy of meaningful engagement in socio-economic rights disputes.

3 Rights within a deliberative democratic paradigm

A strongly representative model of democracy creates a strong opposition between aggregative decision making²⁰ by elected

¹⁸ See Baynes (n 10 above) 457; D Brand ‘The “politics of need interpretation” and the adjudication of socio-economic rights claims in South Africa’ in AJ van der Walt (ed) *Theories of social and economic justice* (2005) 17.

¹⁹ For accounts of the difficulties which legal normative frameworks and mechanisms encounter in responding to the complexity of intersecting forms of disadvantage, see K Crenshaw ‘Demarginalising the intersection between race and sex: A black feminist critique of anti-discrimination doctrine, feminist theory and antiracist politics’ (1989) *University of Chicago Legal Forum* 139; J Conaghan ‘Intersectionality and UK equality initiatives’ (2007) 23 *South African Journal on Human Rights* 317.

²⁰ Aggregative, representative models are premised on determining majority preferences of elected representatives through mechanical methods such as counting votes. See, eg, the account by Zurn (n 14 above) 73-76 of the differences between aggregative and deliberative models of democracy. According to Cohen & Sabel (n 12 above) 321, the essential distinction between representative and more direct models of democracy lies, not only in the level of participation, but the topic on the agenda: ‘Direct democracy requires decision on substance, whereas representative democracy involves choice on legislators who decide on

representatives of the people and the enforcement of human rights norms by unelected judges. On this conception rights will remain constraints on the democratic process.²¹ Such a conception of democracy faces a number of obstacles in attempting to bridge the chasm between universalism and particularism in human rights adjudication. The aspiration of people to participate in determining the content and application of the fundamental norms that govern their lives is diluted through the institutions of the judiciary and representative institutions such as the legislature, executive and administration. In what follows I argue that a deliberative model of democracy holds greater promise in reconciling the tension between broadly-formulated, universal human rights norms, and the value of democratic participation in resolving particular disputes.²²

There are three features of deliberative democracy which make it particularly suiting to fulfilling this role. First, the deliberative model of democracy is, as Benhabib points out, based on a discourse theory of ethics which supply the general moral principles from which human rights norms may be derived.²³ The first principle is described by Benhabib as the principle of 'universal moral respect' and is derived from the fundamental presupposition of discourse ethics which considers the participants 'to be equal and free beings, equally entitled to take part in those discourses which determine the norms that are to affect their lives'.²⁴ The second principle of discourse ethics described by Benhabib is that of 'egalitarian reciprocity'. This principle vests in each individual 'the same symmetrical rights to various speech acts, to initiate new topics, to ask for reflection about the presuppositions of the conversations, and so on'.²⁵ As Benhabib argues, the step to

substance.'

21 There have been numerous attempts to explain and justify the 'counter-majoritarian' dilemma of constitutional review within systems of representative democracy. For a review of the major theoretical positions, see Zurn (n 14 above) 31-67.

22 S Benhabib 'Towards a deliberative model of democratic legitimacy' in S Benhabib (ed) *Democracy and difference: Contesting the boundaries of the political* (1996) 69 explains the key premises and features of a deliberative democratic model as follows: 'According to the deliberative model of democracy, it is a necessary condition for attaining legitimacy and rationality with regard to collective decision-making processes in a polity, that the institutions of this polity are so arranged that what is considered in the common interest of all results from processes of collective deliberation conducted rationally and fairly among free and equal individuals. The more collective decision-making processes approximate this model the more increases the presumption of their legitimacy and rationality.' Zurn (n 14 above) 70 places 'reasons-responsiveness' at the core of deliberative conceptions of democracy. He goes on to note that 'deliberative democracy does not just stress reasoned civil discussion – it stressed *politically relevant and effective* reasoned discussion.'

23 Benhabib (n 22 above) 69.

24 Benhabib (n 22 above) 78.

25 As above.

deriving a system of basic rights and liberties from the recognition of these two moral principles is not very wide.²⁶

Basically it would involve a hypothetical answer to the question, if it is plausible for individuals to view one another as beings entitled to universal moral respect and egalitarian reciprocity, which most general principles of basic rights and liberties would such individuals also be likely to accept as determining the conditions of their collective existence?

Thus, a system of rights based on respect for human dignity, autonomy and equality are intrinsic to the deliberative model of democracy. They enable its proper functioning as opposed to being constraints on its operation.²⁷

However, the precise content, application and implications of these principles and the rights they give rise to are neither self-evident nor self-executing. They must be worked out through processes of democratic deliberation and debate.²⁸ This is consistent with the reality of modern constitutional democracies in which the content and implications of basic human rights such as freedom of speech are constantly subject to public debate and contestation. As Benhabib observes, 'although we cannot change these rights without extremely elaborate political and juridical procedures, we are always disputing their meaning, their extent, and their jurisdiction'.²⁹ Human rights norms are thus fundamental to a deliberative conception of democracy whilst allowing ample space for dialogic engagement with their concrete entailments in a range of different contexts.³⁰

A common criticism at this juncture is to point to a circularity problem in that deliberative democracy presupposes the mutual recognition of basic rights by all participants whilst, on the other hand, insisting that participants in a political system should play a significant role in giving content to such rights through deliberative engagement.³¹ However, theorists of deliberative democracy point out that this is not a vicious

26 As above. See also Zurn (n 14 above) 229–232; R Alexy 'Discourse theory and human rights' (1996) 9 *Ratio Juris* 209-235.

27 See Habermas (n 14 above) 118-131.

28 Thus Benhabib (n 22 above) 79 notes that 'the precise meaning and entailment of the norms of universal moral respect and egalitarian reciprocity are subject to discursive validation'.

29 Benhabib (n 22 above) 79.

30 As Baynes (n 10 above) 463 observes, in Habermas's discourse theory 'the system of rights is universal, not in the sense that it specifies a pre-given set of natural rights, but rather in the sense that it presents a general schema or "unsaturated placeholder" that legal subjects must presuppose if they want to regulate their living together by positive law. It is thus constitutive of the legal medium, yet at the same time, it is not fixed or determinate. The system of rights must be developed "in a politically-autonomous manner" by citizens in the context of their own particular traditions and history.' Baynes refers in this context to Habermas (n 14 above) 125 128-129.

31 T Roux 'Democracy' in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2006) ch 10, 14-15 18.

circle. It accurately depicts the reflexive or recursive relationship between rights and democracy – both presuppose each other for their proper functioning. While the circle exists at a theoretical level, it has critical bite in practice. It invites first-order claims for the recognition and fulfilment of human rights, as well as second-order claims about whether the procedures and institutions through which such first-order claims are determined allow for full and equal participation by all affected.³² In other words, the relationship between democracy and human rights need not be a zero-sum game. A general framework of rights is essential to ensure processes of fair democratic deliberation based on mutual respect. At the same time, there is significant scope for the concrete implications of these general rights norms to be worked out by the beneficiaries through democratic deliberation in a variety of different contexts. The implications of this reciprocal relationship between rights and democratic participation for the institution of judicial review are explored further below and in part 4.

The second feature that makes deliberative democracy suited to mediating between the universal and the particular is that it takes seriously value pluralism in contemporary democracy. It emphasises the institutional procedures and practices for decisions on matters that would be binding on all by requiring parity of participation³³ and public reasoning³⁴ as a basis for reaching agreements (even if only partial and provisional) on the norms that are to govern people's collective lives. Parity of participation requires that the social, economic and political barriers which create subordinated groups or classes of people be redressed. These groups or classes are denied the social recognition or access to the economic resources to participate as equals in the diverse array of institutions which wield power over people's lives in society. Whilst the reality of diverse world views and value systems are recognised, deliberative democratic theorists do not presume that people's prior value-systems and views are fixed and immutable, but rather that they are capable of adjustment (or even transformation) through deliberative engagement with other perspectives and world

32 See Benhabib (n 22 above) 78-79; N Fraser 'Social justice in the age of identity politics: Redistribution, recognition and participation' in N Fraser & A Honneth *Redistribution or recognition? A political-philosophical exchange* (2003) 7 44-45.

33 One of the most sophisticated analyses of the intersecting axes of participatory parity – redistribution, recognition and political participation – in contemporary capitalist societies is provided by Fraser (n 32 above) 7 229-223; see also N Fraser 'Social exclusion, global poverty, and scales of (in)justice: Rethinking law and poverty in a globalising world' (2011) 3 *Stellenbosch Law Review* 452.

34 According to Cohen, 'a deliberative conception puts public reasoning at the centre of political justification'. He describes the public reasoning that distinguishes deliberative democracy as the advancement of reasons in deliberation which 'others have reason to accept, given the fact of reasonable pluralism and the assumption that those others are reasonable'. See J Cohen 'Procedure and substance in deliberative democracy' in Benhabib (n 22 above) 95 100.

views.³⁵ However, its ultimate legitimacy and application does not depend on requiring people to change their prior preferences, values or world views.³⁶ Feminist theorists, in particular, have contributed to a critique of traditional versions of 'the common good' in deliberative democratic theory which have tended to suppress deep conflicts of value and interests. Young has developed a sophisticated account of deliberative democracy which explores the possibilities of co-operation on fundamental questions of governance across differences:³⁷

A discussion is liable to break down if participants with deep conflicts of interest and value pretend they have common interests, because they are unable to air their differences. If, on the other hand, they mutually acknowledge their differences, and thereby mutually acknowledge that co-operation between them requires aiming to make each understand the others across those differences, then they are more likely to maintain co-operation and occasionally arrive at rough-and-ready provisional agreement.

Finally, modern accounts of deliberative democracy are not premised on the impractical and even possibly undesirable notion of a single deliberative assembly. Rather, these accounts emphasise that deliberative democracy should operate at a variety of different levels and through a range of institutions. It coexists with the mechanisms for citizen participation in the institutions and processes of representative democracy. However, deliberative democracy enriches and deepens representative democracy by expanding the opportunities for people's active participation in a broad range of decision-making processes. It thus represents a more substantive conception of democracy than participating in periodic elections and in the formal mechanisms created for allowing citizens input in the institutions of representative democracy. Through creating multiple sites of dialogue and avenues of participation, the aim is to encourage greater participation in the public and private institutions which affect various aspects of people's lives.³⁸

Most theorists of deliberative democracy would accord courts an important role as deliberative forums. They do more than simply resolve disputes between parties on the basis of legal norms, but also shape and are shaped by broader political discourses. This is particularly evident when they interpret and enforce broadly-formulated and frequently contested human rights norms. In the context of United States constitutional law, Benhabib points out that

35 Benhabib (n 22 above) 73; IM Young *Inclusion and democracy* (2000) 24.

36 See Cohen (n 34 above) 100.

37 Young (n 35 above) 44.

38 See Benhabib (n 22 above) 81-82. Fraser refers to a heterogeneous, dispersed network of many publics as well as 'subaltern counterpublics'. See N Fraser 'Rethinking the public sphere: A contribution to the critique of actually existing democracy' in C Calhoun (ed) *Habermas and the public sphere* (1992) 109 121-123.

rights are never really 'off the agenda' of public discussion and debate even in the face of authoritative interpretations by the US Supreme Court on questions of abortion, free speech and affirmative action. The content and implications of these rights remain contested and contestable. Rights are 'constitutive and regulative institutional norms of debate in democratic societies that cannot be transformed and abrogated by simple majority decisions'.³⁹ Although constitutional rights are generally entrenched and cannot be altered without extremely elaborate political and juridical procedures, their meaning, scope and application are always being contested and debated. This aligns with what was stated above, that human rights norms constitute general controlling principles, but their concrete implications in various contexts are always subject to debate and frequently struggles between contesting social groups.

Within a deliberative model of democracy, courts potentially play a valuable role in protecting the vital interests and values which human rights norms seek to protect. In addition, they seek to preserve the conditions for fair and equitable participation in decision-making processes through which human rights are given concrete effect (for instance through legislation and policy processes).⁴⁰ Many of the rights in the South African Bill of Rights, ranging from freedom of association, freedom of expression, access to information and just administrative action, enable and facilitate people's involvement in a range of decision-making processes which define and affect their rights. The Bill of Rights thus protects a set of substantive values and interests as well as people's right to participate in fundamental decisions that affect these values and interests. In this way, we can make sense of the description of the Bill of Rights in section 7(1) of the Constitution as 'a cornerstone of democracy in South Africa', enshrining the rights of all people in our country and affirming 'the democratic values of human dignity, equality and freedom'. This expresses the interdependence between human rights and democratic participation, and reinforces Justice Sachs's insight that 'the procedural and substantive aspects of justice and equity cannot always be separated'.⁴¹

At their best, courts can become an institutionalised site for hearing marginalised voices and according deliberative attention to their human rights claims. Through the public, institutional character of litigation, these voices can be amplified and channelled into the formal structures of political decision making and policy formulation.⁴² Ideally, the adjudication of human rights norms can facilitate participatory parity in all spheres of political, economic, social and cultural decision

39 Benhabib (n 22 above) 79.

40 See generally Zurn (n 14 above).

41 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 39 (*Port-Elizabeth Municipality*).

42 Zurn (n 14 above) 242.

making where power is wielded and decisions are made which have a profound impact on people's lives.

However, it is equally possible for courts to develop interpretations of rights which are insensitive to the contextual realities and power-relationships in which various groups experience rights violations. Courts may also be insufficiently sensitive to the reasonable diversity of ways in which rights can be interpreted and realised in practice without undermining their normative purposes and values.⁴³ These manifestations of the 'paradox of institutionalisation' discussed above create an inescapable tension between the substantive and procedural dimensions of justice in human rights litigation. Courts may either be too weak in developing the substantive normative content of rights, deferring instead to democratic decision-making processes.⁴⁴ At the other end of the spectrum, they may be overly prescriptive at the rights definition, review or remedial phases of human rights litigation, thereby foreclosing appropriate democratic participation in rights definition and implementation. Depending on the circumstances of particular cases, such participation may be more capable of achieving just and sustainable solutions to human rights problems and issues. Without broad-based, continual human rights dialogue and engagement, human rights are likely to have only a very superficial purchase in society and are unlikely to be implemented in an effective, sustained manner.⁴⁵

This tension between substantive and procedural justice in the adjudication of human rights norms tracks the tension between universalism and particularism in adjudication. An overly weak assertion of the universal values of human rights may result in arbitrary, localised decision making over questions of fundamental rights. Conversely, too strong an assertion of general universal prescripts may result in vague, broad statements of values which are not responsive to the unique needs and circumstances of particular cases.

This creates particular challenges for adjudication. Courts must endeavour to craft an appropriate response in the context of particular cases which does not amount to an abdication of judicial

43 For a discussion of these tendencies in the context of socio-economic rights adjudication, see S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 39-42.

44 Reliance on the doctrines of separation of powers and deference are common judicial strategies for deferring to the institutions of representative democracy. See K McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009); D Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 22 *Stellenbosch Law Review* 614.

45 For accounts of how rights emerge from and in turn influence community and social processes, see S Mnisi Weeks & A Claassens 'Tensions between vernacular values that prioritise basic needs and state versions of customary law that contradict them' (2011) 22 *Stellenbosch Law Review* 823; J Perelman & KG Young, with the participation of M Ayariga 'Freeing Mohammed Zakari: Rights as footprints' in White & Perelman (n 2 above) 122.

responsibility for interpreting rights and articulating their normative values and purposes. At the same time, conceiving rights as integral to a deliberative democratic paradigm requires that courts strive to foster (or at least avoid foreclosing) democratic participation in working out the concrete implications of these norms in a variety of different circumstances. As Sachs J observes, if adjudication is to respect both the substantive and procedural aspects of justice, '[t]he managerial role of the courts may need to find expression in innovative ways'.⁴⁶

The following part of this article considers the potential of the adjudicative strategy of 'meaningful engagement' deployed by the South African Constitutional Court to mediate these tensions in the context of its jurisprudence pertaining to the eviction of impoverished occupiers from their homes. As will be seen, the Court has made use of orders of 'meaningful engagement' at both the review and remedial stages of evictions cases. The potential and pitfalls of this turn to engagement in social rights adjudication will be analysed and evaluated.

4 Meaningful engagement

4.1 Constitutional and legislative context

Disputes relating to the eviction of persons from their homes directly implicate section 26(3) of the Constitution, which provides:⁴⁷

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

In addition, in terms of sections 26(1) and (2), the state is required to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the right of everyone to have access to adequate housing. This means that all state action in relation to an eviction of persons from public or private land must conform to the criteria of reasonableness developed in the Court's major socio-economic rights jurisprudence.⁴⁸

A range of legislation has been enacted to give effect to this right in different contexts, including the significant Prevention of Illegal

⁴⁶ *Port Elizabeth Municipality* (n 41 above) para 39.

⁴⁷ In *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 para 34 (*Grootboom*), the Constitutional Court drew attention to the close interrelationship between the three subsections of sec 26.

⁴⁸ For an analysis of these criteria, see Liebenberg (n 43 above) 146-163. The Constitutional Court has confirmed that the duty of relevant organs of state (such as local authorities) to ensure the provision of temporary alternative accommodation applies even when occupiers are evicted by private parties. See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC).

Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). This legislation vests in courts a broad discretion based on 'justice and equity' in considering whether, and under which conditions, unlawful occupiers may be evicted from public or private land.⁴⁹ Early in its jurisprudence on PIE, the Constitutional Court held that a key factor in determining the fairness of an eviction is whether 'proper discussions, and where appropriate, mediation have been attempted'.⁵⁰ The Court held that in seeking to resolve the conflict between property and housing rights in eviction cases, 'the procedural and substantive aspects of justice and equity cannot always be separated'.⁵¹ This signalled an affirmation by the Court that the housing rights protected in section 26 of the Constitution, in addition to conferring substantive benefits, entitle unlawful occupiers to participate in the process of finding a just solution to what often appears as the intractable conflict between their housing rights and the property rights of landowners.⁵²

4.2 Turn to engagement: The *Olivia Road* case

The participatory dimension of resolving rights conflicts was substantially expanded on in *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg*⁵³ (*Olivia Road*). This case concerned an attempted eviction by the City of Johannesburg of a number of impoverished residents of so-called 'bad buildings' from the inner city where the circumstances of their occupation were deemed to constitute a threat to their health and safety in terms of, *inter alia*, the National Building Regulations and Standards Act 103 of 1977 (NBRSA). The eviction proceedings were part of a broader strategy to evict an estimated 67 000 people from 235 allegedly unsafe properties in the inner city of Johannesburg as part of the Council's Inner City Regeneration Strategy. After the hearing of the application for leave to appeal and argument in the matter, the Constitutional Court issued an interim order requiring the City and occupiers to:⁵⁴

engage with each other meaningfully ... in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.

49 On the development of evictions law under the influence of sec 26(3), see AJ van der Walt *Constitutional property law* (2006) 410-419; Liebenberg (n 43 above) 268-311.

50 *Port Elizabeth Municipality* (n 41 above) para 43.

51 *Port Elizabeth Municipality* (n 41 above) para 39.

52 The significance of participation was grounded in respect for the human dignity and 'personal moral agency' of occupiers. *Port Elizabeth Municipality* (n 41 above) para 41.

53 2008 3 SA 208 (CC).

54 *Olivia Road* (n 53 above) para 5 (interim order para 1).

The parties were ordered to report back to the Court on the results of the engagement.⁵⁵ The Court indicated further that account would be taken of the contents of the report in the preparation of the judgment or in issuing further directions should this become necessary.⁵⁶

The outcome of this meaningful engagement order was a comprehensive settlement agreement between the parties. This agreement included steps for rendering the buildings safer and more habitable, as well as detailed provisions relating to the relocation of the occupiers to alternative accommodation in the inner city. The latter included the identification of relevant buildings, the nature and standard of the accommodation to be provided, and the calculation of the rental to be paid.⁵⁷ The agreement further stipulated that this alternative accommodation was being provided pending the provision of suitable permanent housing solutions being developed by the City 'in consultation' with the occupiers concerned.⁵⁸ This settlement agreement was endorsed by the Court on 5 November 2007.⁵⁹

In its subsequent judgment, the Court elaborated on its reasons for making the engagement order, and the purposes and nature of such engagement. It affirmed the basic principle is that in situations where people face homelessness due to an eviction, public authorities should generally engage seriously and in good faith with the affected occupiers with a view to finding humane and pragmatic solutions to their dilemma. The Court derived the legal basis for the requirement of meaningful engagement directly from a range of constitutional provisions, but particularly from section 26 which, as noted above, entrenches the right of access to adequate housing, and imposes the obligation on the state to act 'reasonably' in realising this right.⁶⁰ Whether there has been meaningful engagement is furthermore one of the 'relevant circumstances' to be taken into account in terms of section 26(3) of the Constitution.⁶¹

The Court described the objectives of such engagement to include ascertaining what the consequences of an eviction might be, whether

55 *Olivia Road* (n 53 above) para 5 (interim order para 3).

56 *Olivia Road* (n 53 above) para 5 (interim order para 4).

57 Rent was to be calculated at 25% of the occupiers' income and the occupiers were allowed to stay in the property until permanent accommodation became available to them.

58 Settlement agreement between City of Johannesburg and the Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg dated 29 October 2007 (copy on file with author). The terms of the engagement order are summarised by the Court in *Olivia Road* (n 53 above) paras 24-26.

59 *Olivia Road* (n 53 above) para 27.

60 In *Grootboom* (n 47 above) para 17, the Court held: 'Every homeless person is in need of housing and this means that every step taken in relation to a potentially homeless person must also be reasonable if it is to comply with section 26(2).'

61 *Grootboom* (n 47 above) paras 18 & 22.

the City could help in alleviating any dire consequences, whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period, whether the City had any obligations to the occupiers in the prevailing circumstances, and when and how the City could or would fulfil these obligations.⁶²

A number of the key features of meaningful engagement in the context of an eviction can be distilled from the judgment, including serious consideration of the alternative accommodation needs of the particular occupiers.⁶³ The Court emphasised that the nature and extent of the engagement must depend on the context. Thus 'the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement' involving 'competent sensitive council workers skilled in engagement'.⁶⁴ In a small municipality where the numbers of people affected by evictions are much smaller, *ad hoc* engagement may be appropriate.⁶⁵ The Court went on to observe:⁶⁶

Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.

Meaningful engagement requires that the parties engage with each other reasonably and in good faith. Intransigent attitudes or the 'making of non-negotiable, unreasonable demands' undermines the deliberative process.⁶⁷ Proactive solutions must be pursued and civil society organisations should facilitate the engagement process in every possible way.⁶⁸ Finally, the engagement process must be characterised by transparency as secrecy would be counter-productive to the process of engagement.⁶⁹ In any eviction proceedings, a municipality would be required to provide 'a complete and accurate account of

62 *Olivia Road* (n 53 above) para 14.

63 *Olivia Road* (n 53 above) para 18.

64 *Olivia Road* (n 53 above) para 19.

65 As above.

66 *Olivia Road* (n 53 above) para 15.

67 *Olivia Road* (n 53 above) para 20.

68 As above.

69 *Olivia Road* (n 53 above) para 21. This gives expression to transparency as a relevant criterion in the assessment of reasonable action by the state in realising socio-economic rights. See *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 123.

the process of engagement including at least the reasonable efforts of the municipality within that process'.⁷⁰ Should this record show that the municipality had failed to engage with the affected community, or had behaved unreasonably during the engagement process, this fact would constitute 'a weighty consideration against the grant of an ejectment order'.⁷¹

The Court concluded that the Supreme Court of Appeal should not have granted the eviction order in the circumstances of the case in the absence of meaningful engagement between the parties.⁷² The Court also held that, by failing to affirm the relevance of the availability of alternative accommodation in the decision by the City to issue notices to vacate, the Supreme Court of Appeal had not fully appreciated the interrelationship between section 12(4)(b) of the Act and section 26(2) of the Constitution.⁷³ Finally, the Court held that section 12(6) of the NBRSA, which imposes criminal liability for a failure to comply with a notice to vacate without provision for judicial oversight of the eviction, was inconsistent with section 26(3). By way of remedy, the Court read appropriate wording into the section to provide for judicial oversight of evictions in terms of section 12(4)(b) of the NBRSA.⁷⁴

The description by the Court of the requirements of 'meaningful engagement' exhibit many of the key features of a deliberative conception of democratic participation described in part 3 above. The interim order of meaningful engagement resulted in a settlement agreement between the occupiers and the City of Johannesburg which substantially met all the occupiers' concerns regarding the location, quality and affordability of the alternative accommodation to be provided upon their eviction from the buildings.⁷⁵ The order facilitated a participatory, contextualised solution to the impasse which had developed around the City's concern to avoid habitation of buildings which posed a danger to health and safety, and the residents' interest in having access to adequate alternative accommodation in proximity to the places where they pursued their livelihoods. As indicated, the Court proceeded to deal in its judgment with a number of legal issues pertaining to the importance of meaningful engagement as a constitutional requirement in eviction disputes as well as the constitutionality of the NBRSA.

70 *Olivia Road* (n 53 above) para 21.

71 As above.

72 *Olivia Road* (n 53 above) para 23.

73 *Olivia Road* (n 53 above) para 45.

74 *Olivia Road* (n 53 above) para 54 (order para 6).

75 For a detailed account of the engagement process by the skilled public interest lawyer representing the occupiers, see S Wilson 'Planning for inclusion in South Africa: The state's duty to prevent homelessness and the potential of "meaningful engagement"' (2011) 22 *Urban Forum* 1.

Nevertheless, it failed to deal with a number of other legal issues which are of systemic significance to those who find themselves in a similar position to the occupiers in the broader Johannesburg as well as the country as a whole. These issues were expressly raised by the applicants and elaborated on by the *amicus curiae* submissions.⁷⁶ Thus, the Court failed to engage the issue whether the issuing of the ‘notice to vacate’ notices by the City in terms of section 12(4)(b) of the NBRSA constituted administrative action, thereby attracting the hearing or public inquiry procedures in terms of the right to just administrative action as given effect by the Promotion of Administrative Justice Act 3 of 2000 (PAJA).⁷⁷ Similarly, the Court declined to decide whether the eviction was subject to the requirements laid down in section 6 of PIE.⁷⁸ Perhaps most significantly, the Court declined to deal with the systemic question raised by the occupiers regarding whether the City had put in place a reasonable plan for the permanent housing of the occupiers and the many other poor people resident in the inner city.⁷⁹ It was estimated that approximately 69 000 other residents of the Johannesburg inner city were similarly facing eviction and the applicants and their legal representatives also sought to represent this broader class of persons. The Court stated that it had no reason to doubt that the City would also negotiate in good faith with other similarly-placed occupants.⁸⁰ In addition, the Court expressed its reservations about acting as the ‘court of first and last instance’ in an abstract and generalised evaluation of whether the City’s housing plan was reasonable in relation to the entire class of similarly-placed occupiers.⁸¹ If necessary, particular occupiers could bring a case to the High Court making specific allegations concerning the compliance of the City with its housing obligations in relation to them.⁸²

In many respects, the Court’s judgment is a welcome affirmation of the principle of participatory, deliberative democracy in resolving conflicts involving constitutional rights such as housing. A failure to engage meaningfully is to be treated by courts as a weighty

76 The Community Law Centre (UWC) and Centre on Housing Rights and Evictions (COHRE) were joint *amici curiae* in both the Supreme Court of Appeal and the Constitutional Court. See their *amicus curiae* submissions on-line at <http://www.constitutionalcourt.org.za/Archimages/10661.PDF> (accessed 15 May 2012).

77 *Olivia Road* (n 53 above) paras 7, 9 & 39. See G Quinot ‘An administrative law perspective on “bad building” evictions in the Johannesburg inner city: *City of Johannesburg v Rand Properties (Pty) Ltd* (2007) 1 *ESR Review* 25.

78 *Olivia Road* (n 53 above) para 38. A court may grant an order for the eviction of unlawful occupiers in terms of PIE at the instance of organs of state if it is in the public interest to do so (sec 6(1)(b)). The public interest is defined as including ‘the interest of the health and safety of those occupying the land and the public in general’ (sec 6(2)).

79 *Olivia Road* (n 53 above) paras 32-36.

80 *Olivia Road* (n 53 above) paras 34-35.

81 As above.

82 *Olivia Road* (n 53 above) para 35.

consideration against the grant of an eviction order. Those directly affected by decisions impacting on their housing rights are given an opportunity to participate in exploring the implications of these rights in their particular, localised circumstances. In this way, the Court avoids imposing top-down solutions that may not be attuned and responsive to local contexts and needs.

However, there is a real danger that meaningful engagement as an adjudicatory strategy may descend into an unprincipled, normatively-empty process of local dispute settlement.⁸³ This would undermine the normative underpinnings of deliberative democracy discussed in part 3 above.⁸⁴ It should also be borne in mind that in *Olivia Road*, the Court scrutinised and endorsed the agreement reached pursuant to its engagement order. It did so because meaningful engagement had been specifically ordered by it upon the conclusion of the parties' argument.⁸⁵ However, it emphasised that the process of engagement should take place before litigation commences unless it is not possible or reasonable to do so because of urgency or some other compelling reason.⁸⁶ The implication is that not all engagement processes will be subjected to the judicial scrutiny and approval which took place in *Olivia Road*. There is no guarantee that the process or outcome of engagement between communities and authorities will respect and vindicate relevant constitutional rights. This is a particular concern given the power imbalance which exists between deeply disadvantaged groups facing homelessness in an eviction situation, and local authorities or private landowners. Communities who lack the support of non-governmental organisations (NGOs) or public interest lawyers are particularly vulnerable in this context, and may not be in a position to secure the effective protection of their housing and other rights in an engagement process. Meaningful engagement would thus fail to meet Fraser's criterion of 'participatory parity' for just deliberative fora.⁸⁷

Regulatory measures and the allocation of appropriate resources could assist in redressing skewed power relations in the encounter between officials and impoverished communities in engagement

83 These dangers are evident in the manner in which the Constitutional Court applied meaningful engagement in the matter of *Mamba v Minister of Social Development* CCT 65/08, Court Order dated 21 August 2008. See B Ray 'Proceduralisation's triumph and engagement's promise in socio-economic rights litigation' (2011) 27 *South African Journal on Human Rights* 107 111 122.

84 See nn 24-27 above and accompanying text.

85 *Olivia Road* (n 53 above) paras 27-30.

86 *Olivia Road* (n 53 above) para 30.

87 See n 33 above and accompanying text.

processes.⁸⁸ However, equally important for ensuring the protection of the rights of marginalised communities is the need for a substantively-reasoned interpretation of the obligations imposed by socio-economic rights such as the right of access to adequate housing in section 26 of the Constitution.⁸⁹ Judgments which elaborate on the nature and implications of housing rights in an eviction context provide the constitutional normative framework within which the search for particular solutions through meaningful engagement between the parties must take place.⁹⁰ Such a normative framework is essential for enabling the parties, the public and the courts (if engagement ultimately breaks down) to assess whether the processes and outcomes of the engagement are consistent with the Constitution.

Such normative parameter setting is also important for guiding human rights-compliant responses and policy setting in other contexts where similar problems are faced. It is arguable that the Court in *Olivia Road* missed an important opportunity to sketch normative markers for the resolution of a widespread systemic problem facing a large group of highly vulnerable people facing eviction from sub-standard accommodation in South Africa's urban areas. Normative guidance is essential given the authorities' preference for requiring evicted city-dwellers to relocate to townships and informal settlements situated at the periphery of towns and cities, thereby reinforcing the deeply-entrenched legacy of apartheid spatial planning in South Africa. It is only through taking both process and substance seriously that engagement as an adjudicatory strategy in the context of human rights can successfully negotiate the tensions between universalism and particularism.

88 See, in this regard, the discussion by Ray of the proposals emerging from a Roundtable Discussion on Meaningful Engagement in the Realisation of Socio-Economic Rights. Ray (n 83 above) 107 116-120; B Hepple 'Negotiating social change in the shadow of the law' (2012) 139 *South African Law Journal* 248 256 (forthcoming). Bishop cautions, in this context, that the institutionalisation of engagement processes may serve to undercut more radical forms of participatory democracy. M Bishop 'Vampire or prince? The listening constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*' (2009) 2 *Constitutional Court Review* 313 361-364.

89 On the importance of substantive reasoning in the interpretation of rights guarantees within a deliberative democracy conception of transformative constitutionalism, see Liebenberg (n 43 above) 44-51.

90 Housing rights scholars have emphasised the importance of these substantive normative markers in the context of meaningful engagement. See L Chenwi "'Meaningful engagement" in the realisation of socio-economic rights: The South African experience' (2011) 26 *South African Public Law* 128 152-154; K McLean 'Meaningful engagement: One step forward or two back? Some thoughts on *Joe Slovo*' 223 238-239.

4.3 Diluting the potential of meaningful engagement: The *Joe Slovo* case

A subsequent case which invoked meaningful engagement as a strategy, primarily in a remedial context, is the judgment of the Constitutional Court in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*⁹¹ (*Joe Slovo I*). This case concerned an application in terms of PIE by organs of state to evict and relocate a large, settled community of approximately 20 000 people from their homes in the Joe Slovo Informal Settlement on the outskirts of Cape Town in order to facilitate a major housing development, the so-called N2 Gateway Project. It was argued that the eviction and relocation of the community to 'temporary resettlement units' (TRUs) located in Delft, some 15 kilometres away from their present homes, was required to enable the upgrading and building of formal housing in terms of the N2 Gateway Project. A decision was taken that *in situ* upgrading of the Joe Slovo site was not feasible and the community should accordingly be relocated to Delft. An initial commitment that 70 per cent of those relocated would be able to return to low-income housing in the upgraded development did not materialise in phase 1 of the project.⁹²

The trust between communities and organs of state was further eroded by the fact that rentals in the development were pitched substantially higher than initially envisaged and greater emphasis was placed on bonded housing. This rendered the housing opportunities inaccessible to the vast majority of the families in the Joe Slovo community.⁹³ Moreover, many residents feared that the relocation to Delft would destroy their already fragile livelihood and communal networks, and that they would lack access to the schools, transport and other facilities on which they depended in the Joe Slovo settlement. Following resistance by the residents to their eviction and relocation, the housing authorities applied for and obtained an eviction order from the Western Cape High Court in terms of PIE.⁹⁴ The residents of Joe Slovo appealed to the Constitutional Court and judgment was handed down on 10 June 2009.

The Court agreed on the outcome and a common order.⁹⁵ However, five different judgments were delivered by Yacoob J, Moseneke

91 2010 3 SA 454 (CC).

92 The other 30% was to be reserved for residents of backyard dwellings in Kwa-Langa.

93 The income of the majority of the families in the Joe Slovo settlement was below R3 500 per month. See *Joe Slovo I* (n 91 above) paras 31-34 (*per* Yacoob J); para 307 (*per* O'Regan J); paras 371-376 (*per* Sachs J).

94 *Thubelisha Homes & Others v Various Occupiers & Others* Case 13189/07 (C) (10 March 2008).

95 The Court summarised the grounds on which all the justices agreed that the order should be made. *Joe Slovo I* (n 91 above) paras 1-10.

DCJ,⁹⁶ Ngcobo J,⁹⁷ O'Regan J, and Sachs J.⁹⁸ Each of these judgments provided different reasoning in support of the order. The outcome was that the eviction order was upheld, but the Court subjected the implementation of the order to detailed conditions. Thus, the eviction was made conditional on the applicants being relocated to TRUs situated in Delft or another appropriate location.⁹⁹ The Court's order contains detailed specifications regarding the nature and quality of the alternative accommodation which the authorities were obliged to provide.¹⁰⁰ It also obliged the respondents to ensure that 70 per cent of the new homes to be built on the site of the Joe Slovo informal settlement were allocated to Joe Slovo residents.¹⁰¹ Significantly, the order requires an ongoing process of meaningful engagement between the residents and respondents concerning various aspects of the eviction and relocation process.¹⁰² The parties were directed to report to Court on the implementation of the order and the allocation of permanent housing opportunities to those affected by the order.¹⁰³

However, a major point of concern in this judgment is how quickly the Court retreated from the substantive promise of meaningful engagement in *Olivia Road* as a key consideration in determining whether an eviction order was justifiable in the particular case. A clearly perfunctory, inadequate engagement process regarding the need for the community to be evicted (with all the accompanying disruption to lives and livelihoods this implied), as opposed to the *in situ* upgrade argued for by the community, was essentially condoned. The flawed nature of the engagement between the officials and community is described as follows by Sachs J in his judgment:¹⁰⁴

There can be no doubt that there were major failures of communication on the part of the authorities. The evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision making itself.

96 Sachs J concurred in the judgment by Moseneke DCJ.

97 Langa CJ and Van der Westhuizen J concurred in the judgment of Yacoob J.

98 Moseneke DCJ and Mokgoro J concurred in the judgment of Sachs J.

99 *Joe Slovo I* (n 91 above) para 7 (Order para 4).

100 *Joe Slovo I* (n 91 above) para 7 (Order paras 9–10). As Mbazira observes, the detailed prescriptions in the Court's order concerning the nature and standard of alternative accommodation to be provided stands in stark contrast to other cases where the Court has been unwilling to engage with the substance of what adequate housing entails, even at a minimal level. C Mbazira 'Grootboom: A paradigm of individual remedies versus reasonable programmes' (2011) 26 *South African Public Law* 60 79.

101 *Joe Slovo I* (n 91 above) para 7 (Order para 17).

102 *Joe Slovo I* (n 91 above) para 7 (Order paras 5 and 11).

103 *Joe Slovo I* (n 91 above) para 16.

104 *Joe Slovo I* (n 91 above) para 378 (*per* Sachs J, footnotes omitted).

This top-down form of engagement represents a retreat from the structured and reciprocal deliberative process which the Court endorsed in *Olivia Road*.¹⁰⁵ The acknowledged inadequacies in the engagement process did not vitiate the ultimate decisions taken concerning the Joe Slovo community. Essentially, the Court held that the greater good which the N2 Gateway project sought to achieve along with the need for 'realism and practicality'¹⁰⁶ outweighed the defects in the engagement process.

In *Olivia Road*, the Court appeared to lay down the principle that the absence of meaningful engagement should ordinarily be a weighty consideration against the grant of an eviction order.¹⁰⁷ Meaningful engagement, on this interpretation, constitutes a substantive normative criterion derived from section 26 of the Constitution. *Joe Slovo* represents a retreat from this principle. Instead of playing the role of a normative principle, meaningful engagement is deployed in the remedial phases to ensure participation in the nuts and bolts of the implementation of the eviction order. In this context, meaningful engagement is used in a manner similar to the type of participatory structural interdicts described by scholars of public interest litigation in the US context.¹⁰⁸ As McLean argues, the Court essentially found an eviction to be just and equitable even in the absence of meaningful engagement, thereby retreating to 'an even narrower conception of reasonableness in section 26(2) of the Constitution'.¹⁰⁹ The judgment is thus normatively weak,¹¹⁰ but contains strong remedial safeguards in respect of the implementation of the eviction order.

On 31 March 2011, after various extensions of the original order had been sought and granted, the Court handed down a judgment

105 *Olivia Road* (n 53 above) para 19.

106 See *Joe Slovo I* (n 91 above) para 117 (*per* Yacoob J). In a similar vein, O'Regan J writes that fair process 'should not result in unnecessary and prolix requirements that may strangle government action' (para 296).

107 See n 71 above and accompanying text.

108 See CF Sabel & WH Simon 'Destabilisation rights: How public law litigation succeeds' (2004) 117 *Harvard Law Review* 1016. The African Commission on Human and Peoples' Rights has also required participation or dialogue between states and communities in implementing its recommendations in certain communications relating to socio-economic rights and the right to development. See *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 71; *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 229; *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 251.

109 McLean (n 90 above) 241.

110 Apart from its own previous jurisprudence in *Olivia Road*, important normative criteria could have been derived, eg, from the UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, developed under the auspices of the UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living. See UN Doc A/HRC/4/18, 5 February 2007 (Annex 1).

discharging the eviction order it had granted in *Joe Slovo I*.¹¹¹ The engagement reports to the Court by the Minister for Human Settlements (the second respondent) and the MEC for Human Settlements, Western Cape (the third respondent) eventually indicated the feasibility and intention of the respondents to pursue an *in situ* upgrading of Joe Slovo rather than relocation. The Court held that, although orders of the Court ought not to be discharged lightly, it had a discretion to discharge orders evicting people from their homes where the change was necessitated by exceptional circumstances and considerations of justice and equity.¹¹² In this particular case, these criteria were met as it was common cause that the most likely course for the redevelopment of the Joe Slovo settlement area would be *in situ* development.¹¹³ Many aspects of the original order could and would no longer be complied with, such as the relocation to TRUs, the original timetable, and the 70/30 split in the allocation of homes in the final development.¹¹⁴ In addition, there had been little or no engagement in relation to the relocation process, nor was there likely to be any engagement in relation to relocation in future.¹¹⁵ The Court's original order contemplated that the relocation process was to commence about two months after the order was made and any agreement concerning amendments to the timetable was to be placed before the Court less than a month after the date of its order. The supervised eviction order did not contemplate the commencement of execution over a year and a half after the order was made.¹¹⁶ In effect, there had been a fundamental change in circumstances since the original order was made, and the original order was no longer necessary or implementable. In this regard, the Court pointed out that it would not have granted the original eviction order had it 'not found that the relocation could not be said to be unnecessary'. It went on to state:¹¹⁷

Indeed had it not been necessary to relocate the residents for the purpose of housing development or any other compelling reason, the application [for eviction] would probably have been dismissed.

The irony is inescapable. Had the necessity of evicting 20 000 people to a temporary resettlement area a substantial distance from their homes been properly explored by the authorities through meaningful engagement with the community and their expert advisors, the costly and time-consuming litigation might have been avoided. The

111 *Residents of Joe Slovo Community v Thubelisha Homes* 2011 7 BCLR 723 (CC) (*Joe Slovo II*).

112 *Joe Slovo II* (n 111 above) para 28.

113 *Joe Slovo II* (n 111 above) para 30.

114 As above.

115 As above.

116 *Joe Slovo II* (n 111 above) para 36.

117 *Joe Slovo II* (n 111 above) para 29.

time and energy of all role-players could rather have been invested in the actual process of redeveloping and upgrading of Joe Slovo. Although meaningful engagement does not, as Ngcobo J noted, require the parties 'to agree on every issue', it does require 'good faith and reasonableness on both sides and the willingness to listen and understand the concerns of the other side'.¹¹⁸ There should be a serious and sustained effort to reach mutual accommodations in relation to the disputed issues. There are telling indications that the engagement that took place prior to the decision to embark on an eviction exercise did not conform to the basic principles of structured interaction, an exchange of public reason-giving, mutual listening,¹¹⁹ and a joint exploration of solutions to accommodate the concerns of the other.¹²⁰ As discussed in part 3 above, these represent the key features of processes of deliberative decision making.¹²¹

The extent to which the Court was prepared to condone the defective engagement process in *Joe Slovo* can also be contrasted with its more robust affirmation of what the impact of a lack of meaningful engagement on the granting of an eviction order should be in *Abahlali baseMjondolo Movement SA v Premier of KwaZulu-Natal*¹²² (*Abahlali*). The majority and minority judgment differed only on whether it was possible to interpret the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 consistently with section 26(2) of the Constitution, including the requirement of meaningful engagement prior to evictions. The minority judgment of Yacoob J held that section 16 of the Act could be read as requiring meaningful engagement prior to the institution of eviction proceedings. He held:¹²³

If it appears as a result of the process of engagement, for example, that the property concerned can be upgraded without the eviction of the unlawful

118 *Joe Slovo I* (n 91 above) para 244.

119 On the significance of listening (as opposed to merely 'hearing') in participatory and deliberative democratic processes, see Bishop (n 88 above) 323.

120 One would ideally have wished to have a more detailed description and analysis of the engagement process with the Joe Slovo community regarding the upgrading of the settlement, specifically in relation to the decision to relocate the residents as opposed to pursuing an *in situ* upgrade. Nevertheless, some of the abovementioned defects in the engagement process can be gleaned from the following paragraphs in the judgment: *Joe Slovo I* (n 91 above): paras 28-34; para 109 (*per* Yacoob J); paras 166-167 (*per* Moseneke DC); paras 245-247 (*per* Ngcobo J); paras 297-304 (*per* O'Regan J); paras 378-384 (*per* Sachs J).

121 See Muller's characterisation of meaningful engagement as a deliberative democratic partnership drawing on Arnstein's ladder of citizen participation. G Muller 'Conceptualising "meaningful engagement" as deliberative democratic partnership' (2011) 3 *Stellenbosch Law Review* 742 753-756.

122 2010 2 BCLR 99 (CC). This decision was handed down less than a month before judgment in *Joe Slovo I* was handed down.

123 *Abahlali* (n 122 above) para 69.

occupiers, the municipality cannot institute eviction proceedings. This is because it would not be acting reasonably in the engagement process.

The majority *per Moseneke DCJ* held that this reading of section 16 was not reasonably plausible and that section 16 was unconstitutional in that it did not give effect to the constitutional and legislative requirements of meaningful engagement and the principle that evictions may only be resorted to as a measure of last resort.¹²⁴

It could be argued that the engagement required on the implementation of the eviction order in *Joe Slovo I*, coupled with the detailed specifications concerning the standard of alternative accommodation to be provided, contributed to the eventual resolution of the dispute between the community and the authorities. This argument may hold more than a grain of truth, but it does not detract from the criticism of the dilution of meaningful engagement as a substantive normative criterion in determining whether an eviction is consistent with section 26 of the Constitution and the justice and equity requirements of PIE. The structured order handed down by the Court may have contributed to a localised solution to the Joe Slovo dispute, but at the expense of affirming the normative purposes and values underpinning the constitutional protection of housing rights. *Joe Slovo* represents a dilution of meaningful engagement's potential to promote deliberative participation by citizenry in decisions affecting their rights within clearly-articulated normative parameters.

4.4 Meaningful engagement: Conceptualising the courts' role

The mechanism of meaningful engagement developed in cases such as *Olivia Road*, *Joe Slovo* and *Abahlali* has the potential to promote localised, contextual solutions to human rights conflicts. It can also stimulate systemic administrative and political reforms to facilitate participation by communities in resolving rights conflicts and implementing policies and programmes to give effect to rights.¹²⁵ The court's role within this model is not to develop comprehensive specifications of constitutional rights, but rather to prod and stimulate communities and public and private institutions to develop tailored policies and programmes informed by constitutionally-grounded reasons. As described by Cohen and Sabel:¹²⁶

[T]he responsibility of constitutional courts ... is to require that problem solvers themselves make policy with express reference to both constitutional and relevant policy reasons. You might describe this as a genuine fusion of constitutional and democratic ideals: a fusion, inasmuch as the conception

124 *Abahlali* (n 122 above) paras 113-115.

125 For a nuanced exploration of the systemic potential of meaningful engagement, see B Ray 'Extending the shadow of the law: Using hybrid mechanisms to develop constitutional norms in socio-economic rights cases' (2009) 3 *Utah Law Review* 797.

126 Cohen & Sabel (n 12 above) 335.

of democratic process includes a requirement that constitutional reasons be taken into account, as such. The aim is a form of political deliberation in which citizens themselves are to give suitable weight to constitutional considerations, and not leave that responsibility to a court.

However, meaningful engagement as a mechanism to facilitate constitutionally-informed deliberation remains inadequate without the Court exercising its responsibility to articulate what would constitute acceptable 'constitutional reasons' in the context of the various rights in the Bill of Rights. This requires developing the purposes and values which the various rights seek to advance together with relevant criteria for assessing whether particular policies or practices are consistent with these purposes and values. A substantive interpretation of the rights in the Bill of Rights is not only essential for the setting of the engagement agenda, but it should also provide an evaluative framework for assessing the outcomes of the engagement exercise. In the end, all participants should have to account for the consistency of any provisional agreements emerging from engagement with the normative commitments of the Bill of Rights. In this way, the normative framework serves as a safeguard against negotiated settlements which simply reflect the interests of the more powerful party in the engagement process.

In essence, therefore, the courts should not abdicate their role to articulate and enforce the normative parameters within which engagement processes on socio-economic rights such as housing should occur. This indeed represents an affirmation of universal standards beyond the particular context. At the same time (as noted above) there is broad scope for deliberative participation on precisely which legislative or policy measures and institutional responses would be consistent with these normative standards.¹²⁷ This space between broadly-formulated human rights standards and their particular applications should be used by courts to encourage and, in certain contexts, require deliberative engagement between relevant stakeholders. At the review stage of human rights enforcement, a court could adopt the position that, in the absence of such prior engagement, they will be slow to grant relief to the defaulting party. This is in effect what the Constitutional Court affirmed in *Olivia Road*, but failed to give effect to in *Joe Slovo*. At the remedial stage, there is much untapped potential in the structural interdict remedy to facilitate engagement on the concrete measures required to give effect to the human rights goals set by a court at the review stage of a socio-economic rights case. Through the reporting-back requirements and

¹²⁷ In *Grootboom* (n 47 above) para 41, the Court held, in adopting the reasonableness model of review for positive socio-economic rights, that 'it is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations'. See also art 8(4) to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN General Assembly Resolution A/RES/63/117 (5 March 2009) (not yet in force).

the exercise of supervisory jurisdiction, a court can exercise control over the process and outcome of deliberative engagement between the parties to ensure that agreements reached are consonant with the normative parameters and goals initially set by the court.¹²⁸ In so doing, adjudication can facilitate deliberative democracy in giving effect to human rights norms in particular contexts.

The mechanism of meaningful engagement has thus far been deployed by the South African courts primarily in the adjudication of eviction disputes.¹²⁹ As the above analysis of the case law suggests, there is still much work to be done by activists, government officials, scholars and courts before meaningful engagement begins to play a significant role in human rights adjudication in South Africa.

5 Conclusion

In evaluating the contribution of Lefort¹³⁰ to the challenges of the universal and particular in human rights law, Baynes observes as follows:¹³¹

For Lefort, by contrast, the universal and the particular are not simply opposed to one another, nor is democracy defined over against (individual) rights. Rather, democracy and rights mutually suppose one another in a way that leaves the relation between the universal and the particular open to contestation and continuous revision or reformulation.

In this article I have sought to explore how the universal normative standards represented by human rights can be rendered more responsive to people's particular needs and unique circumstances. I have argued that a deliberative democratic understanding of constitutionalism and judicial review offers the most hopeful theoretical underpinnings for this enterprise. Finally, I have explored a concrete adjudicative strategy adopted by the South African Constitutional Court which attempts to prod communities, state officials and private landowners to find tailored solutions to the myriad complex issues which arise in eviction disputes through

128 For a more in-depth exploration of the potential of structural interdicts, see generally Sabel & Simon (n 108) above; Liebenberg (n 43 above) 424-438.

129 See, however, its appearance in a recent case concerning education rights, *Governing Body of the Juma Masjid Primary School v Essay NO 2011 8 BCLR 761* (see particularly paras 63-65 and para 76, including the Order of the Constitutional Court dated 25 November 2010 replicated at footnote 87 of the judgment). There are also unresolved questions regarding the relationship between meaningful engagement and procedural fairness in administrative law. See Quinot (n 77 above); Muller (n 121 above) 745-752.

130 C Lefort 'Human rights and the welfare state' in C Lefort (ed) *Democracy and political theory* (1988) 39; C Lefort 'Politics and human rights' in JB Thompson (ed) *The political forms of modern society: bureaucracy, democracy, totalitarianism* (1986) 250.

131 Baynes (n 10 above) 460.

deliberative engagement.¹³² The Court has generally tended to avoid comprehensive, final prescriptions on what the housing rights enshrined in section 26 of the Constitution entail. In so doing, it has created the space for the stakeholders in evictions disputes to explore the implications of these rights in the context of their particular circumstances.

As I have sought to demonstrate, however, the pendulum has swung too far in the direction of promoting localised settlement negotiations, and too far away from developing the normative guidelines within which deliberative engagement between the stakeholders should occur. A too narrow focus on the particular can result in an undermining of the potential of human rights adjudication to pose an ethical challenge to systemic forms of social injustice. Despite these shortcomings, there is much to be gained through continuing experimentation with mechanisms to promote dialogic engagement on the concrete entailments of human rights in various contexts.

The constitutional adjudication of human rights in South Africa will have achieved much if it succeeds in deepening both deliberative democracy and the integration of human rights norms in policy-making processes. The African Commission and African Court and national courts across the continent can gain valuable insights from the South African experience in experimenting with deliberative mechanisms at the review and remedial stages of human rights adjudication.

¹³² See in this regard Sachs J's eloquent description of the unique dynamics of each eviction dispute in *Port Elizabeth Municipality* (n 41 above) para 31.

Evaluating a decade of the African Union's protection of human rights and democracy: A post-Tahrir assessment

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Summary

When the African Union was established, replacing the Organisation of African Unity, many were enthusiastic that it would champion the cause of human rights and democracy, one of the areas in which its predecessor had failed. Among the reasons for optimism was the fact that the African Union's Constitutive Act was a lot more empathetic for the cause of human rights and democratic ideals. This article contends that, while the Constitutive Act might be potentially important, it is but one among many conditioning factors for the Union's actions. The article argues that the most important determining factor for the Union's success or failure is the human rights track record of member states and the perceived or real dependence of elites within these states on human rights violations. Other conditioning factors, such as international legal obligations created by the Constitutive Act and other treaties, pressure from pan-African sentiment within the AU, and pressure from the AU's human rights organs play only a secondary and a comparatively minor role in affecting the AU's behaviour.

1 Introduction

In July 2002, the Organisation of African Unity (OAU) was terminated and replaced by the African Union (AU). One of the stated reasons for the establishment of the AU was to open a new chapter in the history of Africa; a chapter in which peace, security, stability, sustainable

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development, democracy and human rights would be ensured.¹ By ratifying the Constitutive Act of the AU, the Heads of State and Government made an undertaking to ensure respect for democracy and human rights.² A decade has passed since these undertakings, and numerous opportunities have presented themselves for the AU to work towards realising this promise. During this period, armed conflicts and peace, election-related violence and democratic transitions, *coups d'état* and constitutional restoration, international crime and international justice, have all visited the continent. Most recently, it was in Africa and under the guard of the AU that the momentous events described as the 'Arab Spring' occurred.³

The article takes stock of these events and whether and to what extent the AU has fulfilled its promise of a new Africa. In so doing, the article employs the policy-oriented or New Haven jurisprudential method initially developed by Yale Professors Harold D Lasswell and Myres S McDougal.⁴ Based on a broad conception of law as an ongoing social process of authoritative and controlling decision, the article attempts to map a developmental construct of the AU's human rights practice. The practical output of such an approach is a capacity to

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- 1 The Durban Declaration in Tribute to the Organisation of African Unity and on the Launching of the African Union ASS/AU/Decl 2 (I), Durban, South Africa, 10 July 2002; see paras 8 & 16, http://www.africa-union.org/Official_documents/Decisions_Declarations/durban%202002/Durban-Ass-AU-decl2.pdf (accessed 31 January 2012). However, scepticism has been expressed about whether a change in the institution's constitutive document and name (dropping the 'O' from the OAU they teased) would guarantee that the AU would clean up the former's untidy practice in the protection and promotion of human rights. See eg the reaction of African press outlets, who are rather unconvinced, that the new AU is any different from its predecessor; 'Africa's press sceptical about Union' *BBC* 9 July 2002, <http://news.bbc.co.uk/2/hi/africa/2117997.stm> (accessed 14 December 2009); E Harsch 'African Union: A dream under construction. Planners of new continental organisation ponder design, encounter skepticism' (2002) 16 *Africa Recovery* 1 <http://www.un.org/ecosocdev/geninfo/afrec/vol16no1/161afun.htm> (accessed 12 January 2010).
 - 2 See arts 3(f), (g), (h), (j), (k) & (n) of the AU Constitutive Act.
 - 3 Ben Ali of Tunisia, Hosni Mubarak of Egypt and Gaddafi of Libya were in power for 23, 30 and 40 years respectively before they were removed from power. See M Eltahawy 'Tunisia's jasmine revolution' *Washington Post* 15 January 2011; M Slackman 'A brittle leader, appearing strong' *New York Times* 11 February 2011; Y Saleh & B Rohan 'Libya declares nation liberated after Gaddafi death' *Reuters* 23 October 2011.
 - 4 Since this article is not a jurisprudential piece, it does not attempt to defend or explain the policy-oriented method. For a comprehensive statement of the policy-oriented method, see HD Lasswell & MS McDougal *Jurisprudence for a free society: Studies in law, science and policy* (1992); also generally see WM Reisman *et al* 'The New Haven school: A brief introduction' (2007) 32 *Yale Journal of International Law* 575; S Wiessner & AR Willard 'Policy-oriented jurisprudence and human rights abuses in internal conflict: Toward a world public order of human dignity' (1999) 93 *American Journal of International Law* 316. In this author's opinion, a very brief but one of the best expositions of the policy-oriented approach is contained in JN Moore 'Prolegomenon to the jurisprudence of Myres McDougal and Harold Lasswell' (1968) 54 *Virginia Law Review* 662.

methodically distinguish the determining factors for present and future trends in the decisions of the AU. The ultimate end of the endeavour, however, is not a mere ability to accurately determine future outcomes of authoritative decision making. A grasp of determining factors and possible future outcomes should allow the researcher, policy maker or activist to be able to make sensible recommendations so as to pursue an international order of human dignity.

The article looks at the positive/written legal undertakings made by African states in the different treaties, and the actual decision-making history of the political and judicial organs of the organisation. Accordingly, the second part of the article briefly introduces the AU's positive normative and institutional system in relation to human rights and democracy. The second part of the article analyses the continuum of past trends in decision making of the OAU and the AU. It then identifies the common and distinguishing conditioning factors for their successes and failures in protecting human rights and democracy. Analysing past trends and relevant conditioning factors, the third part of the article constructs possible future trends in the AU's decisions. Finally, solutions are outlined which may help in ensuring the AU's progress in the practice and promotion of human rights and democracy.

2 African Union's positive human rights system

At the core of the AU's human rights normative framework lies the African Charter on Human and Peoples' Rights (African Charter), which is supplemented by the following: the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol); the AU Convention Governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention); and the African Charter on the Rights and Welfare of the Child (African Children's Charter) and the Cultural Charter for Africa.⁵ At the time of writing, the African Charter on Democracy, Elections and Good Governance had been ratified by 12 states. This Charter became part of the normative framework on 15 February 2012.⁶

5 These documents are available at <http://www.africa-union.org/root/AU/Documents/Treaties/treaties.htm>; see R Murray 'International human rights: Neglect of perspectives from African institutions' (2006) 55 *International and Comparative Law Quarterly* 193-203 (describing the potential for these instruments and the jurisprudence under them for mainstream international human rights law).

6 List of Countries that have Signed, Ratified/Acceded to the African Charter on Democracy, Elections and Governance 21 May 2012, <http://www.au.int/en/treaties/status>.

The African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) are the main human rights organs of the region.⁷ Additionally, the Assembly of Heads of State and Government of the African Union and the Pan-African Parliament are political organs of the institution with important powers that affect the human rights practice of the AU. The African Peace and Security Council generally functions as a decision-making organ of the AU with important powers that have a bearing on human rights and democracy.⁸

The AU, which succeeded the OAU in 2002,⁹ is comparable to the Council of Europe and the European Union¹⁰ in that its main aim is to promote regional integration and the co-operation of member states in their international relations.¹¹ One of the main objectives of the AU is the 'promotion and protection of human rights'. The Constitutive

7 VO Nmeielle *The African human rights system: Its laws, practice and institutions* (2001) 170-183; also U Essien 'The African Commission on Human and Peoples' Rights: Eleven years after' (2000) 6 *Buffalo Human Rights Law Review* 93; see also A Lloyd & R Murray 'Institutions with responsibility for human rights protection under the African Union' (2004) 48 *Journal of African Law* 165; also generally see GJ Naldi 'The role of the human and peoples' rights section of the African Court of Justice and Human Rights' in A Abass (ed) *Protecting human security in Africa* (2010) 286.

8 The PSC was established by the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (9 July 2002).

9 The overarching aim of the OAU Charter was the liberation and continued protection of African states from colonialism and neo-colonialism in addition to regional integration, while only one reference is made to human rights, where it is declared that one of the purposes of the OAU is to 'promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'. The Charter's concern with self-determination and apartheid stems from political concerns of the time rather than from a concern for human rights. Compare the Preamble and the second and third articles of the constituting documents of the OAU and the AU. For a discussion of the pan-African context of the OAU Charter and the reasons for the unwillingness to emphasise human rights, see AM Adejo 'From OAU to AU: New wine in old bottle?' paper prepared for CODESRIA's 10th General Assembly on 'Africa in the New Millennium', Kampala, Uganda, 8-12 December 2002, http://www.codesria.org/Archives/ga10/Abstracts%20Ga%206-11/Regionalism_Adejo.htm; see also E Baimu 'The African Union: Hope for better protection of human rights in Africa?' (2001) 1 *African Human Rights Law Journal* 299; for more information on the drafting process, see KD Magliveras & GJ Naldi 'The African Union – A new dawn for Africa?' (2002) 51 *International and Comparative Law Quarterly* 424.

10 See generally art 1 of the Statute of the Council of Europe and art A of the Treaty on European Union (Maastricht Treaty), both of which emphasise European integration.

11 See the Preamble and art 2 of the Constitutive Act of the AU. The Organization of American States (OAS) is different from the other continental intergovernmental organisations in that it is concerned neither with human rights nor with regional economic integration. According to art 1 of the Charter of the Organization of American States, the organisation is established 'to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence'.

Act makes numerous explicit references to human rights, including its declaration that the AU has the right to interfere in the internal affairs of states where gross violations, such as war crimes, genocide and crimes against humanity, occur.¹² Furthermore, among the novelties of the Constitutive Act (when compared to the OAU Charter) is that it creates the possibility whereby the AU's Assembly could impose sanctions 'such as the denial of transport and communications links with other member states, and other measures of a political and economic nature' where a member state fails to comply with the decisions and policies of the AU on human rights.¹³

As signs or symbols of authoritative communication, these statements of the AU's Constitutive Act authoritatively indicate what the AU is going to strive for in the future. However, the fact that these statements are contained in the Constitutive Act is not a definitive guarantee that the AU is going to be a champion of human rights in the years and decades to come. The Constitutive Act also contains provisions that are the negation of these pro-human dignity aims. Article 4(g) of the Constitutive Act declares that one of the principles in accordance with which the AU is to function is '[n]on-interference by any member state in the internal affairs of another'. According to article 3(b), one of the objectives of the AU is the defence of the sovereignty of member states. From this, one can see that studying the 'objective' indices¹⁴ of the communication of the AU Constitutive Act will not yield an objective result of the interpretation of the Act.¹⁵ This underlines the importance of studying the 'subjective' indices of the AU Constitutive Act in order to be able to understand the genuine shared expectations of Africa's political elites.

Merely studying the provisions of the AU's Constitutive Act does not present a complete picture of what the prevailing authoritative decisions on the place of human rights are, and what impact the AU is going to have on the human rights conditions of everyday Africans. It is only when one has studied the whole process of authoritative and controlling decisions that one can begin to understand the impact of the AU on the practice of human rights. Therefore, it is imperative to study how Africa's authoritative decision makers apply the Constitutive Act and how they reconcile the contradictions between

12 Art 4(h) AU Constitutive Act. Art 4(j) also provides that member states may request the intervention of the African Union 'in order to restore peace and security'. See the Preamble; arts 3(e), (h) & (g), arts 4(c), (h), (l), (m), (o) & (p), art 23(2) and art 30 of the Constitutive Act of the AU emphasise the importance of human rights which, when compared to the OAS Charter, is considerable.

13 Art 23(2) AU Constitutive Act.

14 MS McDougal *et al* *The interpretation of international agreements and world public order: Principles of content and procedure* (1994) 38-39.

15 However, see Magliveras & Naldi (n 9 above) 415 418, arguing that the reading of the Constitutive Act indicates that there is an obvious inclination towards limiting sovereignty.

the regional protection of human rights and the protection of their sovereignty.

Note that, although this article mostly uses ‘states’ and ‘political elites’ interchangeably, the latter word is purposefully used to connote a meaning beyond the legal/political fiction of statehood whereby the state is deemed a legitimate representative of a certain population. ‘Political elite’ is used in places where the use of the word ‘state’ would conceal the fact that a certain decision or move might not express the interest everyone implied by ‘state’, and represents the interest of the usually-undemocratic political elite.¹⁶

3 Past trends in decision and controlling factors

If anything shows the potential of African states to act as a collective force in the defence of human dignity, it is their successful effort to end the apartheid regime of South Africa that stands out.¹⁷ The evidence suggests that if international action is effective at all, the international campaign of African states against apartheid was the most effective. The first ordinary session of the Assembly of Heads of State and Government outlines the strategy of the organisation that would see to it that apartheid was declared an international crime.¹⁸

¹⁶ Such use was preferred especially because of the undemocratic nature of most African states as even in fully developed or mature democracies, the notion of representativeness (of the people *versus* the elite) is highly questionable. See S Chambers ‘Deliberative democratic theory’ (2003) 6 *Annual Review of Political Science* 307 308-309; C Pateman *Participation and democratic theory* (1979) 2-3; EL Rubin ‘Getting past democracy’ (2001) 149 *University of Pennsylvania Law Review* 711 733-744. The article, eg, would avoid the use of ‘state’ or ‘state interest’ when a ruler such as Gaddafi or Mugabe declares that something is in the interest of the state or the people to avoid the aura of legitimacy that is created by the statehood fiction.

¹⁷ Another achievement that would not have been realised without the constant efforts of African states is the ascendance of what have come to be known as ‘third generation of human rights’ to international recognition. See generally UO Umzurike *The African Charter on Human and Peoples’ Rights* (1997) 51-62. Although taking note of this fact is important, the interest of this part of the study is to show the potential of African states’ collective capacity to enforce already existing standards. Therefore, a detailed description of Africa’s role in the development of third generation rights jurisprudence is unnecessary.

¹⁸ Resolutions adopted by the 1st ordinary session of the Assembly of Heads of State and Government held in Cairo, UAR, from 17 to 21 July 1964, ‘Apartheid in South Africa’ AHG/Res 6 (I) <http://www.africa-union.org/root/au/Documents/Decisions/decisions.htm#19631969>. (The Resolution outlines the intention of state parties to have apartheid outlawed and to make pressure to tighten the noose on South Africa politically and economically.) Apartheid is now accepted without much ado as an international crime by major international documents; see the Preamble and art 1 of the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted and opened for signature, ratification by GA Res 3068 (XXVIII), 28 UN GAOR Supp (No 30) 75, UN Doc A/9030 (1974); see also art 7 of the Rome Statute of the International Criminal Court (1998/2002).

Although the United Nations (UN) was initially indifferent to these gross violations,¹⁹ it was forced to reverse its policy following the filling of the Assembly's seats with the newly-independent states of Africa.²⁰

The activism of the Africa Group has altered the perception of the place of human rights in the international community. This is especially true as this group has left a permanent mark on the human rights mechanisms and practices of the Economic and Social Council (ECOSOC). Although decision makers in the UN originally considered neither the General Assembly nor the Security Council to have the mandate to monitor human rights, both organs were forced by the African Group to pass an embargo against South Africa and Rhodesia.²¹ The actions of the General Assembly, in 1962, and the Security Council, in 1963, represented a major shift in patterns of decision making.²² What is worthy of note is that the Security

19 See JF Green *The United Nations and human rights* (1958) 779-793, reporting that India, followed by Pakistan, were the first states that protested the practices of the apartheid regimes in South Africa and Rhodesia, though their calls were for the better part ignored. The arguments of India and Pakistan would not have made sense if made in the name of human rights at that time, so they had to make their case by arguing that the apartheid regime was a threat to international peace and security.

20 What followed was the longest and most intensive human rights campaign ever by the General Assembly, which was not hampered even by the Cold War. The African Group was, through the General Assembly, successful in alienating South Africa from UNESCO, the ECA, the International Bank for Reconstruction and Development (IBRD), IMF, WHO and ILO; J Carey *UN protection of civil and political rights* (970) 27-33; see also Green (n 19 above) 779-783. Note that South Africa was either outright expelled or forced to resign from membership of these institutions. It also made numerous attempts to expel it from the UN Conference on Trade and Development (UNCTAD) and even from the membership of the General Assembly itself. The Assembly also established the Special Committee against Apartheid (1962), called for the boycott of South Africa from the Olympics; P Jackson & M Faupin 'The long road to Durban: The United Nations role in fighting racism and racial discrimination' *UN Chronicle* 2007; see also S Rosner & D Low 'The efficacy of Olympic bans and boycotts on effectuating international political and economic change' (2009) 11 *Texas Review of Entertainment and Sports Law* 27 60. The UN also adopted the Convention on the Suppression and Punishment of the Crime of Apartheid and labelled the constitutional order of South Africa a crime against humanity. See Apartheid Convention (n 18 above).

21 GA Res 1761 (XVII); Security Council Decision 181 (1963) Resolution of 7 August 1963 and 182 (1963) Resolution of 4 December 1963. The activities of the African Group were not limited to fighting apartheid, of course; the OAU's efforts also encompassed the ending of colonialism on the continent. See MA El-Khawas 'Southern Africa: A challenge to the OAU' (1977) 24 *Africa Today* 25.

22 From the positivistic point of view, the former does not have formal power to pass embargos, while the latter does not have the power to do the same where there was no threat to international peace and security. A non-binding call for the cessation of trade with the Rhodesian *de facto* government (*de facto* because its declaration was void by virtue of SC Res 217 (1965)) was made in 1965; SC Res 217(1965). A similar resolution was made in the same year authorising the United Kingdom to search ships to ascertain if they were transporting oil to Rhodesia. See SC Res 221 (1966), also on (1966) 60 *American Journal of International Law*. The

Council imposed sanctions, not because South Africa caused a threat to international peace and security, but because of the threat coming from the anti-apartheid sentiment of member states of the OAU.²³ The United Nations Commission on Human Rights was compelled to widen its mandate because of pressure from African states in alliance with other developing states. With the pressure of the African Group, the notorious 'no power'²⁴ doctrine was reversed to allow the establishment of what used to be known as the 1235 and 1503 human rights procedures of the UN.²⁵

3.1 Pre-Banjul trends in decision

In stark contrast to overwhelming activism mounted by OAU member states against institutionalised racism and apartheid, African elites stayed aloof from the idea of making similar decisions regarding the human rights of their own citizens. Their numerical strength in the General Assembly and the Human Rights Commission ensured that their domestic jurisdictions would not be disturbed by concerns for

Security Council did, however, impose its first binding decision in the form of a trade embargo under art 41 of the UN Charter against Rhodesia in 1966 (SC Res 232 (1966)); see FL Kirgis 'The Security Council's first fifty years, the United Nations at fifty' (1995) 89 *American Journal of International Law* 506-512, reflecting on how the Security Council's first decision was later taken as the norm in the interpretation of the Charter. The second-ever such binding decision was also taken after a decade, but under similar circumstances against South Africa (Security Council Resolution 418 (1977)).

- 23 Carey hypothesises that the threat to peace and security is from other African states that might militarily intervene in the apartheid regimes; Carey (n 20 above) 25; P Malanczuk (ed) *Akehurst's modern introduction to international law* (1997) 394. (Since there was no apparent threat that the racist regimes did not pose a threat to the peace, he hypothesises that the threat might come from the nature of the regimes that invite sub-regional revolution.) Others have hypothesised that, since the apartheid system itself is described as a threat to the peace in the relevant resolutions, the Security Council's actions should be seen as an attack on the regimes rather than a formalistic finding of a threat to the peace. See V Gowlland-Debbas 'Security Council enforcement action and issues of state responsibility' (1994) 43 *International and Comparative Law Quarterly* 64-65; CG Fenwick 'When is there a threat to the peace? Rhodesia' (1967) 61 *American Journal of International Law* 753.
- 24 See H Tolley Jr 'The concealed crack in the citadel: The United Nations Commission on Human Rights' response to confidential communications' (1984) 6 *Human Rights Quarterly* 426-429, explaining how this 'procedural breakthrough' was a result of the Third World's independence and describes the evolution of the 1503 and 1235 procedures.
- 25 The 1503 procedure was created as a result of objections by states who claimed that the non-confidential 1235 procedure could not use confidential communications to the UN as an input. The 1503 procedure was passed to allow confidential communications to pass to the 1235 procedure. See Tolley (n 24 above) 450. The accidental effect was the creation of a two-tiered process in which the 1503 superseded the 1235 process in its frequent use as it was preferred by states for its confidentiality. See HJ Steiner & P Alston *International human rights in context: Law, politics and morals* (2000) 612.

human rights, at least until the end of the Cold War changed the dynamics of international politics.²⁶

Ever since its establishment, a distinct trait of the OAU has been to respect and defend the *domain reserve* of its member states and the autocratic elites that ruled them.²⁷ For that reason, the 'domestic affairs' clause of the OAU Charter was followed to the letter.²⁸ Not only did member states make sure that the African Commission would be under strict political scrutiny, but they also made sure that the OAU would tolerate and turn a blind eye to the human rights excesses of member states.²⁹

How tolerant the OAU was towards domestic excesses can be glimpsed from reactions to consecutive *coups d'état* and the execution of its founding fathers. It was not odd for the OAU to acknowledge 'the right of any member state to change its government in any way it sees fit', when appealing to Sergeant Samuel Doe not to execute the cabinet members of the previous elected government.³⁰ Dacko, Kasa-Vubu, Nkrumah, Haile Selassie, Olympio, Tolbert, Rawlings, Diallo Telli and Lumumba, some of the leaders who had confronted colonialism face to face, were being slowly killed off and replaced by

26 J Donnelly 'Human rights at the United Nations 1955-85: The question of bias' (1988) 32 *International Studies Quarterly* 297, describing how, except for South Africa, Chile and Israel, who obtained universal and protracted condemnation, no Third World or African country received any negative attention unless it was a Western state or an ally thereof; also W Weinstein 'Africa's approach to human rights at the United Nations' (1976) 6 *A Journal of Opinion* 14 15-16. Immediately following the success of establishing the Human Rights Commission procedures, the procedure turned its attention to the violations of African states, thus leading them to rally to limit its ambit to the apartheid regime in South Africa.

27 CE Welch Jr 'The African Commission on Human Rights and Peoples' Rights: A five-year report and assessment' (1992) 14 *Human Rights Quarterly* 43, explaining that this was caused by the fact that its newly-independent state parties had independence in their focus and not human rights protection; UO Umozurike 'The domestic jurisdiction clause in the OAU Charter' (1979) 78 *African Affairs* 197 202-203, explaining the importance of the domestic jurisdiction clause, but also noting that apartheid was agreed to be an exception to this rule; JD Boukongou 'The appeal of the African system for protecting human rights' (2006) 6 *African Human Rights Law Journal* 268 293, finding the evidence for this not only in the failure of African leaders to establish a regional court, but in their espousal of a notion of non-litigious African (ie culturally relative) system of human rights.

28 See arts 2(1)(c) & 3(2) & (3) of the OAU Charter.

29 See IG Shivji *The concept of human rights in Africa* (1989) 104, reporting that the original draft of the Banjul Charter had envisaged a restriction on the appointment of government employees or diplomats of states, though that proposal was dropped. He also reports the subsequent appointment of partisan politicians to the post.

30 NJ Udombana 'Can the leopard change its spots? The African Union treaty and human rights' (2002) 17 *American University Law Review* 1177, arguing that only 'the presence of a threat of foreign intervention' could prompt the OAU to act.

coups d'état while the OAU followed a hands-off policy.³¹ Following Idi Amin's ascent to power, a Ugandan delegate aptly explained the lack of enthusiasm of Africa's political elite to take up the cause of human rights and democracy when he argued:³²

The question of a change in government in one country is purely an internal matter which is not the concern of the OAU. Twenty member states of the OAU which are now taking their seats in the OAU conference have had changes of government through coups and counter-coups. We strongly feel that if the OAU tries to involve itself in the internal affairs of member states, it is going to destroy itself.

Gross violations and unusually repressive regimes that today fill the shameful history pages of Africa were neither prevented nor condemned by the OAU. Among the pre-Banjul cases in which the OAU remained mute include the repression of the Tutsi minority and the massacre of more than 10 000 Tutsi in Rwanda (1964); the massacre of more than 150 000 Hutu in Burundi (1973); Ghana's mass expulsion of 100 000 aliens;³³ Bokassa's murderous regime;³⁴ and Mobutu Sese Seko's bloody military junta.³⁵ The most notorious Chairpersons of the OAU included Mengistu Haile Mariam, who masterminded the 'Red Terror' campaign which saw the 'liquidation' of a generation of Ethiopian youth,³⁶ and Idi Amin Dada; who was responsible for the perishing of 400 000 Ugandans and the robbery and exile of some 100 000 members of the Asian community.³⁷

31 As above. See PC Aka 'The military, globalisation, and human rights in Africa' (2002) 18 *New York Law School Journal of Human Rights* 361 386-389, branding the political style prevalent on the continent as 'politics by the gun', describing the Nigerian civil war, which took three million lives (mostly Igbos) as one of 'genocidal proportions'; T O'Toole & JE Baker *The historical dictionary of Guinea* (2005) ixiii, stating that Telli was executed by the orders of Amadou Sekou Toure.

32 Quoted by CE Welch Jr 'The OAU and human rights: Towards a new definition' (1981) 19 *Modern African Studies* 401 404.

33 Weinstein (n 26 above) 17-18, describing the Rwandan, Burundian and Ghanaian expulsions and violations of human rights.

34 Welch (n 27 above) also describes the lavish coronation party and Amnesty International's report of how in one incident in which 500 students were killed in a crackdown against the students' demonstration against a requirement that they wear uniforms that they could not afford – allegedly the uniforms were to be distributed and sold by a relative of Bokassa's.

35 B Baker 'Twilight of impunity for Africa's presidential criminals' (2004) 25 *Third World Quarterly* 1587 1496, describing the Mobutu regime as the longest surviving and most corrupt regime, reporting that Mobutu had collected for himself a fee of \$5 billion for his disservices.

36 GA Aneme 'Apology and trials: The case of the Red Terror trials in Ethiopia' (2006) 6 *African Human Rights Law Journal* 66-67.

37 C Legum *Behind the clown's mask* (1997) 250 252 253, stating that many states could have objected to his nomination (which is distributed on a rotation basis). African leaders were forced to accept Amin's chairmanship and the holding of the 1975 ordinary session in Kampala because he had strong supporters and so as to keep cohesion within the organisation; Baker (n 35 above) 1493, describing the atrocities of Amin; Amnesty International estimates that the number of his killings

3.2 Post-Banjul trends in decision

The entry into force of the African Charter and the consequent establishment of the African Commission do not seem to have had much of an impact on the practice of human rights on the continent. There is evidence that Africa's political elites were, and still are, unwilling to establish an institution that would examine their human rights practices and effectively put their human rights practices on trial when necessary. Further, the reaction of these elites to the gross violations that have taken place since the establishment of the African Commission shows that the establishment of the African Charter by itself did not make much of a difference.

The lack of intent on the side of African political elites to be bound by a human rights treaty that significantly limits their domestic prerogative can be seen in how blunt the African Charter was originally designed to be. To begin with, the African Charter gives a blank check when it comes to the limitation of rights. The only limitation that it purports to impose on states is that they should provide the limitation by law.³⁸ Additionally, the wording of the Charter indicates not only that the Commission was intended to be a predominantly promotional mechanism with little or no enforcement powers.³⁹ Even when declaring the obligation to submit periodic reports, the African Charter is sensitive to state parties' jurisdiction because it merely asks them to 'undertake to submit' periodic reports on 'legislative or other

might reach 500 000; Human Rights Watch 'Uganda: Idi Amin dies without facing justice' (2003) <http://www.hrw.org/en/news/2003/08/18/uganda-idi-amin-dies-without-facing-justice> (accessed 31 January 2012); also see NJ Udombana 'Between promise and performance: Revisiting states' obligations under the African Human Rights Charter' (2004) 40 *Stanford Journal of International Law* 105 106, criticising among other things the inability of the OAU to prevent Amin from ascending the chairmanship of the OAU.

- 38 Eg, art 6 of the African Charter states that '[e]very individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions *previously laid down by law*. In particular, no one may be arbitrarily arrested or detained' (my emphasis). See R Gittleman 'The Banjul Charter on Human and Peoples' Rights: A legal analysis' in CE Welch & RI Meltzer (eds) *Human rights and development in Africa* (1984) 286. For a detailed discussion of the issue of limitations and derogations at the international and European level, see R Pati 'Rights and their limits: The constitution for Europe in international and comparative legal perspective' (2005) 23 *Berkeley Journal of International Law* 223.
- 39 See art 45 of the African Charter. Rather than a duty to 'respect and ensure' and to provide an 'effective remedy', state parties are only required to 'allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter' (my emphasis). Compare art 2 of ICCPR to art 26 of the African Charter.

measures'.⁴⁰ Furthermore, what has evolved to become the individual communications mechanism of the Commission was never actually intended or designed to be an individual mechanism. Originally, individual communications were intended only to be input for the Commission to determine whether there are serious and massive patterns of violations.⁴¹

Although the conclusion of the Cold War had raised expectations of a more peaceful continent, Africa did not take the road to lasting peace and prosperity. The OAU had the dishonour of not being able to prevent or put a stop to conditions such as those in Liberia, Sierra Leone, Rwanda, Democratic Republic of Congo, Northern Uganda, Somalia and Southern Sudan.⁴² The OAU was not able to offer more than a 'handful of pious declarations', partly because of the institution's decision to respect domestic jurisdiction,⁴³ and a dire lack of resources, including military means.⁴⁴ In addition to acknowledging the role played by a lack of resources, the OAU's International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events reproached the OAU and its heads of state whose silence and inaction before and during the Rwandan genocide it found a 'shocking moral failure'.⁴⁵

One very interesting post-Banjul trend in the decisions of the OAU that continues to date is that, while the political organs of the OAU have shown little willingness to establish a strong and professional human rights mechanism, the mechanisms that have been established

40 Art 62 African Charter, compared with art 40 of ICCPR, which requires state parties to submit reports on a wider category of 'measures'; see TS Bulto 'Beyond the promises: Resuscitating the state reporting procedure under the African Charter on Human and Peoples' Rights' (2006) 12 *Buffalo Human Rights Law Review* 57-60-61, arguing that it is was not logical to focus on legislative measures at a time when Africa was seeing its most serious violations, therefore suggesting that reporting should have focused on situations on the ground.

41 Arts 55-58 African Charter. Thus, the individual communication procedure was intended to be more like the UN Human Rights Commission 1503 procedure.

42 BT Nyanduga 'Conference paper: Perspectives on the African Commission on Human and Peoples' Rights on the occasion of the 20th anniversary of the entry into force of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 255-257-258, reasoning that the failure of the Commission to probe into the human rights abuses in these circumstances is mainly due to its financial disability. For a detailed look at the OAU's role in Rwanda, see A Tekle 'The OAU: Conflict prevention, management and resolution' in H Adelman & A Suhrke (eds) *The path of a genocide: The Rwanda crisis from Uganda to Zaire* (2000) 118-124.

43 PM Munya 'The Organisation of African Unity and its role in regional conflict resolution and dispute settlement: A critical evaluation' (1999) 19 *Boston College Third World Law Journal* 537-578, criticising the OAU's distinction between internal and international conflicts in Africa.

44 Udombana (n 30 above) 1224.

45 R Murray 'The Report of the OAU's International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events' (2001) 45 *Journal of African Law* 123-130.

have proven to be more effective than originally intended. Primarily through its professionalism and the assertiveness of its members, the African Commission has been able to overcome many of its structural difficulties. For instance, while the 'individual communications' mechanism was designed only as an information-input system to show the existence of gross violations, the Commission has in practice turned it into an individual complaints mechanism.⁴⁶ While the African Charter was phrased to give states a nearly unlimited right to decide what limitations can be imposed on human rights, the Commission has taken an assertive step of interpreting the Charter to require the standards of legitimate aim, proportionality, absolute necessity as essential conditions for the limitation of rights.⁴⁷ Among other things, the Commission's attempts to overcome its structural deficiencies include its publication of a strong condemnation of non-compliance with its decisions, making binding 'decisions' in place of 'recommendations', the appointment of Special Rapporteurs and the initiation of *in loco* visits, in addition to a plethora of jurisprudential innovations.⁴⁸

Despite the assertiveness of the African Commission, and its jurisprudential and substantive achievements, the fact remains that

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- 46 According to the Commission, this practice is justified as 'a single violation still violates the dignity of the victim and is an affront to international human rights norms'. The African Commission Human and Peoples' Rights, Information Sheet 2, Guidelines of the Submission of Communications, Organisation of African Unity 6; also see CA Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law and Contemporary Problems* 359-378, discussing the legal basis of the individual communications procedure under the African Charter; R Murray 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 412-413, arguing that the individual complaints mechanism of the Commission does not have positive legal support within the treaty system; CA Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: The development of its non-state communication procedures (1998)' 20 *Human Rights Quarterly* 235-240-244, arguing that individual communication has enough positive conventional basis.
- 47 VO Nmeihelle 'Development of the African human rights system in the last decade' (2004) 11 *Human Rights Brief* 6-7; JH Knox 'Horizontal human rights law' (2008) 102 *American Journal of International Law* 1-17; GJ Naldi 'The African Union and the regional human rights system' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 27-28.
- 48 J Harrington 'Special Rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 247-248-249; also see F Ougergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy* (2003) 626-627, discussing its jurisprudence of presuming that the evidence provided by an applicant will be presumed true if the state does not respond to an application; R Murray, 'Evidence and fact-finding by the African Commission' in Evans & Murray (n 47 above) 112-115; Odinkalu (n 46 above) 377; R Murray 'Recent developments in the African human rights system 2007' (2008) 8 *Human Rights Law Review* 356-366-370, discussing the most recent jurisprudential contribution of the Commission on the exhaustion of local remedies.

these developments have not been encouraged by member states of the AU.⁴⁹ A study conducted by Viljoen and Louw on the implementation of the decisions of the African Commission shows that full compliance with its individual complaints decisions stands at only 14 per cent.⁵⁰ Since the formation of the Commission, states have been persistent in not co-operating with its decisions, have generally not provided it with sufficient financial support, and have nominated ineligible or barely eligible individuals to Commission membership.⁵¹ Additionally, despite the Commission's efforts to establish sound reporting procedures and guidelines, the periodic mechanism has not been able to assert its significance as state parties have been reluctant to submit their

49 See CE Welch 'The Organisation of African Unity and the promotion of human rights' (1991) 29 *Journal of Modern African Studies* 535 543-45; also see N Loum 'The African system of human rights: Institutional mechanisms and their interconnections' and SS Thompson 'The African human rights system: Comparison, context, and opportunities for future' in M Wodzicki (ed) *The fight for human rights in Africa: Perspectives on the African Commission on Human and Peoples' Rights* (2008) 24-26 38-39.

50 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 1 5.

51 As above. See also F Viljoen 'Recent developments in the African regional human rights system' (2004) 4 *African Human Rights Law Journal* 344 345, explaining that the lack of adherence to the Commission's decisions is due to the fact that the OAU annual session does not put to public discussion (shame) state parties that do not comply with Commission decisions and is therefore easy to get away with violations; also Bulto (n 40 above) 69, concluding that the failure and delay in submitting periodic reports has been the 'chronic problem' plaguing the Commission's work; also see Odinkalu (n 46 above) 398-400, going through the reports of the Commission, pleading for resources, qualified staff, office equipment and money to at least pay for telephone bills and reports one ex-commissioner's complaint regarding 'a lack of money, lack of funds, lack of ability to act; see K Quashigah 'The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' (2002) 2 *African Human Rights Law Journal* 261 277, arguing that the whole state reporting mechanism is not taken seriously by states and the Commission itself pointing, among other things, to the fact that state representatives simply do not show up for reports and when they do, they do not stay for more than an hour and a half; also see GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 465 466-467, observing that 'the attitude of state parties, since the Commission's inception ... by and large has been generally to ignore [its] recommendations, with no attendant consequences'; C Beyani 'Recent developments in the African human rights system 2004-2006' (2007) 7 *Human Rights Law Review* 582 587-588, noting that the Commission has unofficially pointed out that member states are not always complying with the eligibility criteria and that there are serious issues with budgeting.

reports.⁵² Even where states have submitted reports, they have not included adequate and relevant information so as to preclude the Commission from making sense of their human rights situations.⁵³ That states have not followed the Commission's guidelines, have refrained from participating in the presentation of reports,⁵⁴ and have not given publicity to the reporting process and its results, have also contributed to the ineffectiveness of the reporting mechanism.⁵⁵

3.4 Trends in decision since the formation of the African Union

3.4.1 Critical institutional analysis

A textual reading of its Constitutive Act suggests that the AU would be nothing like the sovereignty-centric OAU. Not only does the Constitutive Act place human rights and democracy on a pedestal among its priorities, but it makes them actionable.⁵⁶ The latter point is unique to the AU in that, in addition to promising to impose economic sanctions on states that grossly violate the principles of human rights and democracy, and excluding them from participation in its activities, the AU is given the power to intervene in a way reminiscent of the powers of the UN's Security Council.⁵⁷ The shift in the rhetoric of the AU Constitutive Act is certainly indicative of the emergence of an international intergovernmental institution with a constitutive mandate to take steps for the greater protection of human rights.⁵⁸

52 As at May 2010 (note that the African Charter came into force in 1986), 13 states had not yet submitted any report, while 16 had only made their initial reports. Rwanda stands out for submitting the most number of reports, totalling five reports, whereas, according to art 62 of the African Charter, it ought to have submitted 12 reports by 2010; African Commission on Human and Peoples' Rights, Status on Submissions of State Initial/Periodic Reports to the African Commission (updated: March 2008) http://www.achpr.org/english/_info/statereport_considered_en.html (accessed 4 October 2008).

53 C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Penn State Law Review* 696; Welch (n 49 above) 555.

54 Although the African Commission was for a long time prevented from considering state reports because states did not appear before the Commission for a consideration of their own situation, it has since 2006 (at its 39th ordinary session) been considering state reports in the absence of the states concerned; L Stone 'The 38th ordinary session of the African Commission on Human and Peoples' Rights, November 2005, Banjul, The Gambia' (2006) 6 *African Human Rights Law Journal* 225 227.

55 F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the south' (2000) 44 *Journal of African Law* 111.

56 See generally the 7th paragraph of the Preamble and arts 3(g), 4(c), (h), (j) & (l) and 9(g) of the AU Constitutive Act.

57 See arts 4(h), 23(2) & 30 of the AU Constitutive Act.

58 See T Maluwa 'From the Organisation of African Unity to the African Union: Rethinking the framework for inter-state co-operation in Africa in the era of globalisation' (2007) 5 *University of Botswana Law Journal* 5 36-37.

Nevertheless, there are some glitches in this mechanism that lead to a great deal of scepticism.

The first source of scepticism is the identity of the AU Assembly: the fact that the identity of its members remains the same as that of the previous Union.⁵⁹ This raises the question as to why the same states with pretty much the same domestic political composition would now want to impose on themselves greater intergovernmental supervision. One's scepticism is not helped by the fact that one of the longest-standing despots of the continent, the self-styled 'international leader, the dean of the Arab rulers, the king of kings of Africa and the *imam* of Muslims',⁶⁰ Muammar al-Gaddafi, was at the forefront of the initiative to establish the AU. One can speculate that Libya's human rights record, or that of any other state with a comparably alarming human rights record, is not going to be a cause for concern for the AU Assembly. The Assembly has, in the process of thanking the Libyan leader's sponsorship of the process of forming the AU, chosen to reiterate the Libyan regime's international relations rhetoric stating that⁶¹

the persistent attempts to destabilise the Great Libyan Arab Jamahiriya and thereby divert the attention of its leader from reasserting the dignity and

59 CS Martorana 'The new African Union: Will it promote enforcement of the decisions of the African Court on Human and Peoples' Rights?' (2008) 40 *George Washington International Law Review* 583 595-596, arguing that if member states of the African Union are to allow the Commission to do its job and co-operate with it in enforcing human rights on other states, other states would do the same, and this is exactly why they do not wish to be co-operative in condemning violations; AE Anthony 'Beyond the paper tiger: The challenge of a human rights court in Africa' (1997) 32 *Texas International Law Journal* 511 517, questioning whether the states who control who becomes a member of the Commission would have independent experts appointed.

60 'I'm the king of kings: Gaddafi storms out of Arab summit and labels Saudi king "a British product"' *Mail on Line News* 31 March 2009, <http://www.dailymail.co.uk/news/worldnews/article-1165858/Im-king-kings-Gaddafi-storms-Arab-summit-labels-Saudi-king-British-product.html#ixzz0c2Y4tBK2> (accessed 31 January 2012); 'Gaddafi: Africa's "king of kings"' *BBC News* <http://news.bbc.co.uk/2/hi/africa/7588033.stm> (accessed 31 January 2012), reporting that his ultimate intention in gathering African traditional leaders and conferring this title to himself is to push African political leaders by creating a grass-roots movements for African unification.

61 'Special Motion of Thanks to the Leader of the Great Socialist Libyan Jamahiriya Brother Muammar Al Ghaddafi' adopted by the 5th extraordinary session of the Assembly of Heads of State and Government, Decisions adopted by the 5th extraordinary session of the Assembly of Heads of State and Government of the OAU/AEC, 1-2 March 2001, Sirte http://www.au2002.gov.za/docs/key_oau/sirterep.htm (accessed 31 January 2012); see H Richardson 'The danger of oligarchy within the pan-Africanist authority of the African Union' (2003) 13 *Transnational Law and Contemporary Problems* 266-269, speculating that Ghaddafi's Libya, alongside South Africa and Nigeria, may be emerging as a regional hegemon due to its capacity to finance an under-funded AU; a similar view is expressed by B Müller 'The African Union as security actor: African solutions to African problems?' *Crisis States Working Papers Series 2* (Working Paper 57 August 2009).

freedom of his people as well as undermining the important role that our Brother and his people have been playing in our continent.

The mere fact that the Assembly would go as far as echoing the international relations ideology of one of the most repressive regimes in the world draws a picture of how unwilling the Assembly might be to interfere with the human rights and democracy affairs of member states.

There are two more details in the AU's Constitution that underscore a call for caution. While the establishment of a regional court *per se* calls for optimism, there is evidence in the Court's design of how African political elites are unwilling to allow the Court to probe into how they treat their citizens. The Court looks well designed on most counts, but for its exclusion of individuals and non-governmental organisations (NGOs) from the list of regular applicants. According to the treaties establishing both the African Court on Human and Peoples' Rights and the African Court of Justice and Human Rights, individuals and NGOs are allowed to petition the Court only if the relevant state has made an explicit declaration to that effect.⁶² Without such a declaration, the only regular customers of the Court are envisaged to be state parties to the Protocol, the African Commission and other African intergovernmental organisations. Although this fact does not necessarily deal either court a fatal blow, it certainly indicates the unwillingness of state parties to allow the establishment of any court that has a real potential to hold them accountable.⁶³

There has been doubt as to whether African states would make a declaration to allow a genuine individual complaints mechanism to flourish when the African Court on Human and Peoples' Rights was being established.⁶⁴ Even though the prohibition of direct access to individuals was one of the preconditions under which states

62 See arts 5, 6(2) & 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III); and also read cumulatively art 30 of the Statute of the African Court of Justice and Human Rights and art 8 of the Protocol on the Statute on the African Court of Justice and Human Rights.

63 As the law currently stands, the chances that the Court will deal with enough cases to make itself relevant depend on whether the African Commission will refer cases to it.

64 D Juma 'Access to the African Court on Human and Peoples' Rights: A case of the poacher turned gamekeeper' (2007) 4 *Essex Human Rights Review* 14, arguing that the assumption behind such a construction, that states and state institutions and inter-governmental organisations would submit cases, is a false one.

agreed to sign the Protocol, ratification remains very slow.⁶⁵ Only five states had made a declaration accepting individual complaints.⁶⁶ Interestingly enough, before a significant number of states could ratify the Protocol, the whole process was restarted, when the states decided to merge the African Court on Human and Peoples' Rights with the African Court of Justice, to establish the African Court of Justice and Human Rights. As of January 2012, only three states (Libya, Mali and Burkina Faso) have ratified the Protocol on the Court of Justice and Human Rights.⁶⁷

At the core of the discussion about the lack of individual complaints in a judicial mechanism is the assumption that a judicial mechanism is primarily fit for individual complaints. Africa's political leaders must have been aware of the fact that the Inter-American Court, apparently an institution which had a similar predicament, considered its first case seven years after its inauguration and its second case after ten years.⁶⁸ Thomas Buergenthal, one of the first justices of the Court, reported the frustration with waiting in vain for the Commission to send it its first contentious case, which led the Court to express its frustration to the public.⁶⁹ The Court noted that, since states were not going to submit cases to the Court, the Commission 'alone is in a position, by referring a case to the Court, to ensure the effective functioning of the protective system established by the Convention'.⁷⁰ One should expect that, since member states of the AU will not normally have any incentive to make a declaration allowing individual communications, the Court is going to be getting its cases from the African Commission.

65 Only 26 states had ratified it by the end of March 2011, List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (11/03/2011) <http://www.au.int/en/sites/default/files/992achpr.pdf> (accessed 31 January 2012).

66 As above.

67 List of Countries which have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights (08/11/2011) <http://www.au.int/en/treaties> (accessed 31 January 2012).

68 T Buergenthal 'Remembering the early years of the Inter-American Court of Human Rights' Center for Human Rights and Global Justice Working Paper, NYU School of Law, New York (1, 2005) 10 <http://www.chrgj.org/publications/docs/wp/s05buergenthal.pdf> (accessed 31 January 2012), explaining that the Court opened its doors in 1979, received its first case in 1986 and its second in 1989.

69 As above.

70 Para 10 of Declaration of Judge Maximo Cisneros, Compulsory Membership in an Association Prescribed by Law, IACHR Ser A, OC-5/85 (13 November 1985).

The second matter that underscores a call for caution is the mushrooming of institutions under the AU, despite a known lack of resources.⁷¹ It is known that the African Commission did not have enough resources to pay even its telephone bills.⁷² Costs of an additional court have not been prepared for, and it is unlikely that the AU will be able to fulfil its financial obligations any time soon.⁷³ In 2008, the AU Assembly authorised a sizable sum to the Commission based on the logic that the Commission might fall under the influence of external funding institutions.⁷⁴ However, it did not follow through with the budgetary hike the following year and cut it in half, making it difficult, and the Commission is complaining not only that it is unable to pay the honorarium and allowances of commissioners, but decided to make up for the budgetary deficit by resorting back to external sources of funding.⁷⁵ This trend is apparent in the fact that the AU Assembly recently started a push towards burdening the Commission and Court with criminal jurisdiction, matching that of the International Criminal Court (ICC), in an apparent attempt to foil the ICC's conspiracy to 'abuse of the principle of universal jurisdiction' in Africa.⁷⁶ Thus, a valid critique of the African political elite is that it is creating unnecessary confusion with multiple mechanisms that it

71 The institutions that deal with human rights have been discussed in sec 3.1.

72 See below n 139 and accompanying text.

73 F Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 1 63, having reported in previous publications that the Commission is deficient in resources, staff, paper, printers, buildings and infrastructure, argues that '[i]nstitutional mechanisms and procedures are only words on paper'.

74 From \$1,2 million in 2007, it raised the budget to \$6 million in 2008; see J Biegon & M Killander 'Human rights developments in the African Union during 2008' (2009) 9 *African Human Rights Law Journal* 295 297; also see J Biegon & M Killander 'Human rights developments in the African Union during 2009' (2010) 10 *African Human Rights Law Journal* 212 214, concluding that the African Commission was able to hold two extraordinary sessions because of the increased budget.

75 Although the budget was increased in 2008 to 6 million, it came down to 3,5 million in 2009, Executive Council 15th ordinary session 24-30 June 2009, Sirte, Libya, EX CL/529(XV) paras 125-130 (27 May 2009); 28th Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) EX CL/600(XVII) paras 57 (iv) & 192 (2010), reporting that the Commission ought to find alternative financial resources and that the staffing situation 'has reached critical levels'.

76 Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC), Doc Assembly/AU/13(XIII) (July 2010); Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc Assembly/AU/3 (XII) Assembly/AU/Dec.213 (XII) adopted by the 14th ordinary session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010; also see Coalition for an Effective African Court on Human and Peoples' Rights (CEAC) *et al*, Implications of the African Court on Human and Peoples' Rights Being Empowered to Try International Crimes such as Genocide, Crimes Against Humanity, and War Crimes: An Opinion 6-8, http://www.soros.org/initiatives/justice/news/africa_20091217/africa_20091217.pdf (accessed 31 January 2012).

cannot pay for and establishing new mechanisms without allowing previous mechanisms to take off.⁷⁷

3.4.2 African Union in action: Case studies

Despite the fact that the AU was conservative in establishing institutions that seriously challenge domestic practices, the AU's activities do show some positive transformation in the areas of dealing with conflicts and *coups d'état*. The AU cannot be credited for preventing conflicts on the continent. Nevertheless, it is increasing its unilateral involvement in peace brokering and peacekeeping activities. For instance, the AU is credited for acting in a timely manner in sending its first peacekeeping force to Burundi, which was able to stabilise the country.⁷⁸ The African Mission in Somalia is also playing an important role in stabilising Somalia and preventing a rebel takeover.⁷⁹

Even more impressive was the AU Peace and Security Council's ability to impose sanctions and suspend from AU activities states whose regimes were replaced by unconstitutional means (*coups d'état*). The AU's framework for responding to *coups* was established by the OAU's Lomé Declaration of July 2000, and was put to practice after the AU was established.⁸⁰ Following the unconstitutional transfer of power in

77 S Gutto 'The reform and renewal of the African regional human and peoples' rights system' (2001) 1 *African Human Rights Law Journal* 178-179, describing the duplication of mechanisms as 'unfortunate and disturbing', explicating how the mechanisms related to the African children's and refugee conventions do not add any value to the whole African system other than its running cost; Heyns (n 53 above) 679-702, critiquing how the NEPAD African Peer Review Mechanism was launched before the courts had been firmly established). A good picture of the situation in which the Commission is striving can be seen in its 2007/2008 report. In this report, the Commission disclosed that it did not have the resources to lease an office while it was being forced to relocate its offices. Though it has been able to have an office at all, mainly due to the generosity of the Gambian government, its financial constraints prevented it from conducting *in loco* visits and from conducting seminars, and it was not able to hire the necessary staff and had to rely on non-budgetary resources that covered 43% of its expenditure. See paras 45-48, 65 & 112 and annex II of Executive Council 13th ordinary session 24-28 June 2008 Activity Report of the African Commission on Human and Peoples' Rights, Submitted in Conformity with Article 54 of the African Charter on Human and Peoples' Rights, http://www.achpr.org/english/_info/index_activity_en.html (accessed 31 January 2012).

78 See E Svensson 'The African mission in Burundi: Lessons learned from the African Union's first peace operations' (2008) http://www.foi.se/upload/projects/Africa/FOI2561_AMIB.pdf (accessed 31 January 2012); JD Rechner 'From the OAU to the AU: A normative shift with implications for peacekeeping and conflict management, or just a name change?' (2006) 39 *Vanderbilt Journal of Transnational Law* 568.

79 See 'Somalia Islamists al-Shabab "driven out of Mogadishu"' *BBC News Africa* <http://www.bbc.co.uk/news/world-africa-15246093> (accessed 31 January 2012); also generally see T Murithi 'The African Union's evolving role in peace operations: The African Union mission in Burundi, the African Union mission in Sudan and the African Union mission in Somalia' (2008) 17 *African Security Review* 70-81.

80 See Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl 5 (XXXVI)).

Togo, Mauritania, Guinea, Madagascar, Niger and Mali, the AU Peace and Security Council imposed economic, military and travel sanctions on these states, and suspended their participation in the AU's activities.⁸¹ In the case of the Union of the Comoros, the African Union went even further than imposing sanctions on Mohamed Bacar and his associates who took over the Comoros island of Anjouan.⁸² Between November 2007 and March 2008, the AU troops established a naval blockade and finally seized the island in a raid that was named Operation Democracy in the Comoros.⁸³

The AU also continuously monitored the progress that was being made by these states towards the re-establishment of a constitutional government.⁸⁴ It is clear that the AU's actions have succeeded in depriving *coup d'état* regimes of international legitimacy. The AU removed its sanctions from the Comoros, Togo, Guinea, Mauritania and Côte d'Ivoire only after it was satisfied that elected governments had replaced the juntas.⁸⁵ Here, however, lies one problem: a lack of concern for the quality and accuracy of elections.

After reacting to *coups d'état* and pressuring the re-establishment of constitutional order, the AU has failed to ensure that democratic elections, through which constitutional governments are installed, are free and fair. For example, in the case of Togo, the AU had no complaints when the leader of the same *coup* won highly-controversial elections

81 JI Levitt 'Pro-democratic intervention in Africa' (2006) 24 *Wisconsin International Law Journal* 785-813; 'Sanctions put on Mauritania junta' *BBC News* 6 February 2009, <http://news.bbc.co.uk/2/hi/7874066.stm> (accessed 31 January 2012); also AA Qadar 'The OAU's role in the consolidation of democracy in Africa' (2000) 4 *DePaul International Law Journal* 37-63-65; Peace and Security Council 181st Meeting, 20 March 2009 PSC/PR/COMM.(CLXXXI); Peace and Security Council 216th Meeting, 19 February 2010 PSC/PR/COMM.2(CCXVI); see also 'African Union bars Guinea on *coup*' *BBC News* <http://news.bbc.co.uk/2/hi/7802803.stm> (accessed 31 January 2012). The AU might have found a precedent for this sort of action in the interventions and involvements of sub-regional organisations such as ECOWAS (in Liberia, Sierra Leone, Guinea-Bissau, and Côte d'Ivoire) and SADC (Lesotho). Peace and Security Council 315th Meeting, 23 March 2012 PSC/PR/COMM (CCCXV).

82 *BBC News Africa*, Comoros profile, <http://www.bbc.co.uk/news/world-africa-13231758>; *AFP*, 'African Union slaps sanctions on rebel Comoran Isle leaders', afp.google.com/article/ALeqM5guu-gW6VQp2KyXIZSyPJCSibuUFG (accessed 31 January 2012).

83 As above; E Svensson 'The African Union's operations in the Comoros: MAES and Operation Democracy, FOI Swedish Defence Research Agency' <http://www.foi.se/upload/projects/Africa/foir2659.pdf> (accessed 31 January 2012).

84 See, eg, Peace and Security Council 221st Meeting, 17 March 2010 PSC/PR/COMM.(CCXXI); Peace and Security Council 220th Meeting, 11 March 2010 PSC/PR/BR.1(CCXX); Peace and Security Council 216th Meeting, 19 February 2010 PSC/PR/COMM.2(CCXVI); P Heinlein 'African Union suspends Ivory Coast, reinstates Guinea' *Voice of America* 9 December 2010.

85 Heinlein (n 84 above); 'African Union reinstates Ivory Coast' *CNN World* 22 April 2011 articles.cnn.com/2011-04-22/world/ivory.coast.african.union_1_peace-and-security-council-african-union-president-laurent-gbagbo?_s=PM:WORLD; AU Peace and Security Council, 30th Meeting, 27 May 2005, Addis Ababa, PSC/PR/Comm. (XXX),

which were held in an atmosphere of intimidation and disregard for freedom of expression, press, assembly and association.⁸⁶ The embargo was lifted against the background of post-election violence in which hundreds died and 56 000 individuals were displaced from their homes.⁸⁷ Similarly, the *coup* leader of Mauritania had no problems coming back as an elected civilian president with the blessing of the AU.⁸⁸ In Guinea, Madagascar and Niger, however, negotiations succeeded in excluding *coup* leaders from running for power.⁸⁹

While the AU's firm stance on *coups d'état* as a means of change in government is not perfect, it is highly praiseworthy, especially when compared with the practice of the OAU. However, outside of its reaction to *coups d'état*, its practice with regard to human rights and democracy is wanting. As will be shown in the cases of Darfur and the Arab Spring, the AU's political establishment is unwilling to challenge regimes that commit unspeakable human rights violations. Relevant examples are the AU's practice with regard to the Darfur situation, the worst crisis that the organisation has dealt with to date, and the most recent revolutions in Tunisia, Egypt and Libya.

The AU's lack of will to probe into or challenge its member states' undemocratic elections or the violation of rights is not limited to states that have undergone a *coup d'état*. For instance, the AU's tolerance, if not outright support, of Robert Mugabe's election and election-related suppression in Zimbabwe⁹⁰ could be partly explained by

86 A Banjo 'Constitutional and succession crisis in West Africa: The case of Togo' (2008) 2 *African Journal of Legal Studies* 147 153-156, describing post-election crackdown on media and civil society and other related human rights abuses that were a backdrop to Faure Gnassingbe's victory; E Blunt 'African Union lifts Togo embargo' *BBC News* 27 May 2005, stating that African leaders accepted Mr Gnassingbe (the son of the former dictator) into their club despite the fact that the elections were controversial and the European Union did not lift its embargos for the same reason, <http://news.bbc.co.uk/2/hi/7874066.stm> (accessed 31 January 2012); PS Handy 'The dynastic succession in Togo: Continental and regional implications' (2005) 14 *African Security Review* 47 51.

87 EY Omorogbe 'A club of incumbents? The African Union and *coups d'état*' (2011) 44 *Vanderbilt Journal of Transnational Law* 123 141.

88 Omorogbe (n 87 above) 145; also see 'Mauritania and the African Union: All is rather easily forgiven' *The Economist* 23 July 2009; 'Opposition claims "massive fraud" in Mauritania poll' *AFP* 20 July 2009.

89 Omorogbe (n 87 above) 149 151 153.

90 Most independent observers are in agreement that the elections were won by Mugabe by the use of systematic violence against opposition supporters. Although the opposition leader, Morgan Tsvangirai, won a majority of votes, he withdrew from the second round citing violence against his electorate. See Amnesty International 'Zimbabwe: Amnesty International Report 2009', <http://thereport.amnesty.org/en/regions/africa/zimbabwe> (accessed 31 January 2012); Human Rights Watch 'Zimbabwe events of 2008', <http://www.hrw.org/en/node/79221> (accessed 31 January 2012).

the fact that more than a few African heads of government might have used electoral-rigging magic tricks and some hand twisting to stay in power.⁹¹ The tolerance and moral support for Mugabe's regime by Africa's political elite is of course against the backdrop of the powerless and voiceless African Commission's conclusion that the Zimbabwean regime is committing serious violations of human rights.⁹² In the elections that took place in the last two years, the AU has consistently given its seal of approval despite the controversy surrounding these elections. For instance, although the elections in Chad, Cameroon, Uganda, Djibouti, Equatorial Guinea, Gambia, Ethiopia and Rwanda were highly controversial, if not outright fraudulent, the AU observer missions found all of them to meet international standards and appealed to the populations to accept the official results.⁹³ Quite recently, amid reports and allegations of fraud in the presidential elections in Democratic Republic of Congo, the AU found that, except for 'logistical difficulties', the election was successful and ought to be accepted by Congolese voters.⁹⁴

91 R Bush & M Szeftel 'Sovereignty, democracy and Zimbabwe's tragedy' (2002) 29 *Review of African Political Economy* 5 11, arguing that self-interest must have been the interest that the African leaders were defending the Mugabe regime and supporting the argument with pertinent examples; PD Williams 'From non-intervention to non-indifference: The origins and development of the African Union's security culture' (2007) 106 *African Affairs* 423 274-275.

92 Stone (n 54 above) 225 235, describing the African Commission's findings of violations in Zimbabwe, Eritrea, Sudan, DRC and Uganda; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006); Final Communiqué of the 41st session of the African Commission on Human and Peoples' Rights, 30 May 2007; also Resolution on freedom of expression and the upcoming elections in Zimbabwe, ACHPR/Res 128 (XXXII) 07 (28 November 2007); 'Kenya urges AU to suspend Mugabe' *BBC* 30 June 2008, <http://news.bbc.co.uk/2/hi/africa/7481857.stm> (accessed 31 January 2012).

93 Generally, see Preliminary Statement of the African Union Observer Mission to the Sudan Elections 11-15 April 2010, issued at the AU Observer Mission Office Grand Holiday Villa Hotel, Khartoum, Sudan, 18 April 2010; Preliminary Statement of the African Union Observer Mission to the Presidential Elections in The Republic of The Gambia, 24 November, 2011, issued at the AU Observer Mission Office Senegambia Beach Hotel, Banjul, The Gambia, 25 November 2011; Joint Statement of International observer Mission of the Djibouti Presidential Elections held on 8 April 2011, Djibouti, 9 April 2011; Preliminary Statement of The African Union Observer Mission to the Presidential and Parliamentary Elections in Uganda, 18 February 2011, COP17/CMP7, 23 February 2011; 'Chad vote conformed to international standards: AU observers' *Radio Netherlands Worldwide* 27 April 2011; Declaration of the Election Observation Mission of the African Union, Republic of Cameroon, 9 October 2011; Preliminary Statement of the African Union Observer Mission on the Ethiopia Legislative Elections of 23 May 2010, issued at the AU Observer Mission Secretariat, Hilton Hotel, Addis Ababa, Ethiopia, 26 May 2010; Beyani (n 51 above) 591-592.

94 See 'DRC election hailed a success by African observers' *BBC News* 30 November 2011; A Nossiter 'Congo President Kabila denies reports of election fraud' *New York Times* 12 December 2011.

Trends in decision of the AU's political organs concerning the Darfur situation suggest the development of a dual approach. This approach includes a willingness to treat internal conflicts as legitimate concerns of the organisation, while pushing the human rights aspect of the same conflict to the side line.⁹⁵ Notwithstanding its failure to prevent the hell that broke loose on Darfur, the AU played a good fire brigade role as it was at the forefront of the effort to mitigate the horrific effects of the conflict. Beginning from successfully mediating the N'Djamena Humanitarian Cease-Fire Agreement, the AU has been active in mediating peace talks and supporting the implementation of agreements by providing peacekeeping troops.⁹⁶ Additionally, the AU has not shied away from pointing fingers or even directing condemnations when any of the parties breached a ceasefire agreement.⁹⁷ Despite great financial constraints,⁹⁸ the AU's provision of troops has increasingly contributed to the safety of internally-

95 In the past, the OAU had ignored violations of human rights and humanitarian law in the Sudan in keeping with its 'domestic affairs' doctrine. This is reflected in how the OAU sincerely dealt with the deteriorating relations of the Sudanese government with its neighbours (Ethiopia, Eritrea and Uganda) while ignoring the unfolding gross violations resulting from the war in the south; D Boubean 'A case study of Sudan and the Organisation of African Unity' (1998) 41 *Howard Law Journal* 413 436-37.

96 African Union Peace and Security Council Communiqué of the 17th Meeting of the Peace and Security Council, PSC/AHG/Comm (X) 25 May 2004, Addis Ababa, Ethiopia, authorising the first observer mission (which eventually became the African Union Mission in Sudan) to observe the implementation of the ceasefire, http://www.africa-union.org/News_Events/Communiqu%C3%A9s/25%20mayCommuniqu%C3%A9%2010th_.pdf (accessed 31 January 2012); also see JE Tangho & J Hermina 'The international community responds to Darfur: ICC prosecution renews hope for international justice' (2008-2009) 6 *Loyola University Chicago Law Review* 367 381-382, describing the role of the AU in negotiations and peace keeping; also see WWG O'Neill & V Cassis 'Protecting two million internally displaced: The successes and shortcomings of the African Union in Darfur' The Brookings Institution – University of Bern Project on Internal Displacement 5-8 (November 2005) (for a general description of the AU's role in the Darfur situation). A detailed description of the AU's mission in Darfur can also be found in Human Rights Watch 'Imperatives for immediate change: The African Union Mission in Sudan' (Human Rights Watch 18 1 (A)); also see SM Makinda & FW Okumu *The African Union: Challenges of globalisation, security, and governance* (2008) 84-87.

97 African Union, Press Release 112/2004, the Chairperson of the Assembly expressing serious concern over parties breaking the N'Djamena ceasefire, laying blame on both parties by describing specifically when and at what time each party was responsible for such, http://www.africa-union.org/News_Events/Press_Releases/112%2004%20Darfur%20Ceasefire%20Agreement%20violation.pdf (accessed 31 January 2012); African Union, Press Release 116/2004, the Chairperson of the Assembly condemning specifically the government of Sudan, http://www.africa-union.org/News_Events/Press_Releases/116%2004%20Darfur%2018%20dec%202004.pdf (accessed 31 January 2012).

98 The AU has been emphasising this point. See Assembly of the African Union – Declaration on the Activities of the African Union and Security Council of the African Union and the State of Peace and Security in Africa (Assembly/AU/Decl 3 (VI)) <http://www.africa-union.org/root/au/Documents/Decisions/decisions.htm> (accessed 31 January 2012).

displaced persons and it has won the confidence of both the rebels and the government as a neutral intermediary.⁹⁹

Even though the AU has been actively engaged with the situation in Darfur, the actions of the AU Assembly suggest that they have a different attitude towards the issue of human rights. This attitude was, for example, reflected when the AU responded to the United States' allegation that genocide was taking place in Darfur. Without launching any investigation of its own,¹⁰⁰ the AU Assembly countered the allegations of the US and concluded that the situation did not constitute genocide and that it was only a 'humanitarian situation'.¹⁰¹ The AU's indifference to the human rights aspect of the Darfur conflict is also reflected by the fact that the Sudanese government's implication in atrocities in Darfur has not affected Sudan's chairpersonship in the Peace and Security Council.¹⁰² A similar interpretation can be given to the fact that the AU did not mind conducting its Assembly's annual ordinary session (2006) in Khartoum, despite the fact that their host stood accused of committing the most serious international crimes a few kilometres away from their meeting hall. The Executive Council has also conducted both its ordinary and extraordinary sessions of 2006 in Sudan and has decided to hold an AU conference of ministers in charge of social development in 2010 in Sudan.¹⁰³

99 Rechner (n 78 above) 572-73, arguing that the OAU would not have been involved had the Darfur conflict taken place a decade earlier under the OAU's guard; 'The African Union in Darfur *NewsHour* 5 October 2005 (interview with employees of Refugees International describing the situation of internally-displaced persons) http://www.pbs.org/newshour/bb/africa/july-dec05/darfur_10-5.html# (accessed 31 January 2012).

100 NJ Udombana 'An escape from reason: Genocide and the International Commission of Inquiry on Darfur' (2006) 40 *International Lawyer* 41 64.

101 Para 2 of African Union, Assembly of the African Union 3rd ordinary session 6-8 July 2004, Addis Ababa, Ethiopia (Assembly/AU/Dec 54 (III)) <http://www.africa-union.org/AU%20summit%202004/ Assm/Assembly%20Decisions%20-Final.pdf> (accessed 31 January 2012); see also Udombana (n 100 above) 64, arguing that this shows that the member states of the AU chose to stand on Al Bashir's side on his confrontation with the US.

102 Udombana (n 100 above) 65; see also JE Wokoro 'Towards a model for African humanitarian intervention' (2008) 6 *Regent Journal of International Law* 1 21, arguing that the chances that the Peace and Security Council of the AU or the AU in general will be a champion of human rights are slim.

103 African Union, Decisions and Declarations: Assembly 1963-2008, <http://www.africa-union.org/root/au/Documents/Decisions/decisions.htm> (accessed 31 January 2012); African Union, Decisions and Declarations: Executive Council 1963-2006, <http://www.africa-union.org/root/au/Documents/Decisions/decisions.htm> (accessed 31 January 2012); Executive Council, 14th ordinary session 26-30 January 2009, Addis Ababa, Ethiopia, Decision on the 1st session of the African Union Conference of Ministers in Charge of Social Development, Doc EX.CL/477(XIV) para 7, <http://www.africa-union.org/root/au/Documents/Decisions/ExeCoundecisions.htm> (accessed 31 January 2012).

The AU is also one of the institutions that rallied behind the government's argument that the issuance of an arrest warrant against Hassan Al-Bashir would hurt the peace process in Darfur.¹⁰⁴ Later, in July 2009, the AU issued a declaration in which the Heads of State and Government, including those that are party to the Rome Statute, agreed not to co-operate with the ICC prosecutor's arrest warrant for Al-Bashir.¹⁰⁵ This position was reaffirmed at every AU summit, including at its 17th Summit held in July 2011.¹⁰⁶

The possibility (and allegation) that the Mbeki report, which suggests the establishment of a UN-Sudan hybrid court to provide justice,¹⁰⁷ aims at removing the ICC's arrest warrant from Al-Bashir's list of nuisances, is also one of the doings of the AU that has raised controversy.¹⁰⁸ What is interesting, though, is that behind all this political support for Al-Bashir's regime, the almost invisible human rights organs of the AU have been making findings that are opposite

104 Reporting that Jean Ping, Chairperson of the AU Commission, told a journalist: 'We say that peace and justice should not collide, that the need for justice should not override the need for peace.' 'Arrest warrant draws Sudan scorn' *BBC News* <http://news.bbc.co.uk/2/hi/africa/7924982.stm> (accessed 31 January 2012); also see M Simons 'Court issues arrest warrant for Sudan's leader' *New York Times* <http://www.nytimes.com/2009/03/05/world/africa/05court.html> (accessed 31 January 2012).

105 'African Union in rift with court' *BBC News* <http://news.bbc.co.uk/2/hi/8133925.stm> (accessed 31 January 2012); also see Human Rights Watch 'African civil society urges African states parties to the Rome Statute to reaffirm their commitment to the ICC' 30 July 2009, presenting the views and statements of 164 non-governmental organisations.

106 Decision on the Implementation of the Assembly Decisions on the International Criminal Court Doc EX.CL/670(XIX); also see 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 Doc Assembly/Au/10(XV).

107 Report of the African Union High Level Panel on Darfur (AUPD), Peace and Security Council, 207th Meeting at the Level of the Heads of State and Government 29 October 2009 Abuja, Nigeria, PSC/AHG/2(CCVII) 64-67, http://www.africa-union.org/root/ar/index/AUPD%20Report%20on%20Darfur%20%20_Eng%20_Final.pdf (accessed 31 January 2012); also see 'Mbeki to brief the UNSC on the AU roadmap for Darfur' *Sudan Tribune* 21 December 2009, <http://www.sudantribune.com/spip.php?article33535> (accessed 31 January 2012).

108 "'Our goal was to find a way out for Sudan president" says Mbeki panel member' *Sudan Tribune* 2 November 2009, <http://www.sudantribune.com/spip.php?article32981> (accessed 31 January 2012); Human Rights Watch 'UN: back AU call for Darfur prosecutions' 18 December 2009, arguing that the hybrid tribunal should be pursued but without affecting the ICC's arrest warrants on Al-Bashir and his co-accused collogues, <http://www.hrw.org/en/news/2009/12/18/un-back-au-call-darfur-prosecutions> (accessed 31 January 2012).

of the actions of the political organs.¹⁰⁹ The political elite filling the AU have not faltered in rescuing Al-Bashir even from the censure of the harmless Commission on Human and Peoples' Rights by preventing the publication of the Commission's report on the situation in Darfur.¹¹⁰ The political organs' activities are in negation of the Commission's finding that the government of Sudan is responsible for 'war crimes and crimes against humanity'.¹¹¹

An indifference of the AU's political organs to the human rights practices of member states has also been reflected in the organisation's reaction to the Arab Spring revolutions. The AU's reaction to the revolutions in Tunisia and Egypt was very similar. During the critical days of the revolution where security forces were coming down hard on protesters, the AU kept completely silent. In the days following the success of both revolutions, the Peace and Security Council of the AU quickly met to make a declaration to condemn the violence that had already stopped, and expressed its solidarity with revolutionaries who would have benefited from that solidarity a day or so ago.¹¹² In the two situations, therefore, the AU's efforts were no more than a placebo, possibly also a face-saving move to smoothen diplomatic relations with future post-revolution governments.

In the Libyan situation, the AU initially took a different course by moving quickly to condemn the attacks on civilians. Within a week of the Libyan uprising, the AU Peace and Security Council condemned

109 Press Release on the decision to suspend 13 international humanitarian organisations and the closure of three non-governmental organisations in Sudan (Commissioner, Special Rapporteur on the Rights of Human Rights Defenders in Africa) http://www.achpr.org/english/Press%20Release/press%20release_HRD_Sudan.htm (accessed 31 January 2012); Press Release of the Special Rapporteur on Refugees, Asylum Seekers, Internally-Displaced Persons and Migrants in Africa, http://www.achpr.org/english/_info/news_en.html (accessed 31 January 2012).

110 Executive Council 8th ordinary session 16-21 January 2006, Khartoum, Sudan; Decision on the 19th Activity Report of the African Commission on Human and Peoples' Rights, Doc EX.CL/236 (VIII) (authorising the publication of the 19th Activity Report of the African Commission on Human and Peoples' Rights and its annexes, except for those containing the Resolutions on Eritrea, Ethiopia, Sudan, Uganda and Zimbabwe) <http://www.africa-union.org/root/au/Documents/Decisions/ExeCoundecisions.htm> (accessed 31 January 2012).

111 22nd Activity Report of the African Commission on Human and Peoples' Rights EX.CL/364(XI) (2007); see paras 108-109, 123 & 137.

112 While the President of Tunisia stepped down on 14 January and the AUPSC made the declaration the following day, the President of Egypt stepped down on 11 February and the AUPSC made the statement on 16 February; Peace and Security Council 257th Meeting, Addis Ababa, Ethiopia, 15 January 2011 PSC/PR/COMM.2 (CCLVII); Peace and Security Council 260th Meeting, PSC/PR/COMM.(CCLX) 16 February 2011. It was reported in the media that one of the commissioners of the AU Peace and Security Council was quoted to have stated in a summit: 'We believe that there are changes that are necessary in order to respond to the wishes of the people, economic reforms, social measures, and probably also issues related to the government that need to be addressed.' Technically, however, this cannot be considered as an action of any AU organ.'

‘the indiscriminate and excessive use of force and lethal weapons against peaceful protestors’ which it characterised as a ‘violation of human rights and international humanitarian law’.¹¹³ The Peace and Security Council also recognised the democratic right of the protesters and called on the government to show restraint in its actions and in its inflammatory statements.¹¹⁴ The African Court passed provisional measures ordering Libya to ‘immediately refrain from any action that would result in the loss of life or the violation of physical integrity’.¹¹⁵ Thus, in the short time between the Tunisian and Egyptian revolutions, the AU’s learning curve seems to have improved. However, the AU’s actions could be criticised for not going as far as suspending Libya from the organisation or imposing sanctions on it.¹¹⁶

In the later stages of the conflict, however, the AU became protective of Gaddafi, especially when it was becoming clear that the intervention of the North Atlantic Treaty Organization (NATO) was becoming inevitable and would later determine the outcome of the conflict. Despite the fact that three AU member states voted in the UN Security Council for the authorisation of chapter VII measures, the AU was the only organisation to oppose the authorisation of the use of force in order to protect the civilian population.¹¹⁷ All other relevant organisations, including the Arab League and the Gulf Co-operation Council, supported the resolution.¹¹⁸ Until the last moment, the AU supported Gaddafi by pushing for its peace plan, shifting part of the blame for the crisis on NATO, and trying to salvage Gaddafi until the takeover of Tripoli.¹¹⁹ Furthermore, the AU also called on its member states not to co-operate with the ICC arrest warrants against Gaddafi,

113 Peace and Security Council 261st Meeting, PSC/PR/COMM (CCLXI) 23 February 2011; see para 2.

114 Peace and Security Council 261st Meeting (n 113 above) para 5.

115 In the matter of *African Commission on Human and Peoples’ Rights v Great Socialist People’s Libyan Arab Jamahiriya*, Application 004/2011.

116 O Tungwarara ‘The Arab Spring and the AU Response, Open Society Institute – Africa Governance Monitoring and Advocacy Project’ 19 September 2011.

117 See ‘AU’s opposition to military intervention in Libya ignored by UNSC’ *Sudan Tribune* 18 March 2011; ‘Africa: The African Union and Libya – On the horns of a dilemma’ 2 November 2011, allafrica.com/stories/201111030819.html (accessed 31 January 2010); Department of Public Information ‘Security Council approves “no-fly zone” over Libya, authorising “all necessary measures” to protect civilians, by vote of 10 in favour with 5 abstentions’ Security Council 6498th Meeting (Night) (SC/10200).

118 As above.

119 Peace and Security Council 265th Meeting, PSC/PR/COMM (CCLXI) 23 February 2011; Decision on the Report of the Peace And Security Council on its Activities and the State of Peace and Security in Africa Doc.Assembly/AU/4(XVII); Assembly of the Union 17th ordinary session, Decision on the Situation in Libya Assembly/AU/Dec.385(XVII); W Davison ‘African Union withholds support from Libyan rebels, calls for peace talks’ *Bloomberg* 26 August 2011; ‘Libya: Benghazi rebels reject African Union truce plan’ *BBC News Africa* 11 April 2011.

Saif Al-Islam and Al-Sanusi.¹²⁰ Although it is understandable that the AU should be unhappy with Western hypocrisy with regard to Gaddafi and the encroachment of NATO on its turf, it is unfortunate that the AU was willing to trade grave violations of human rights and humanitarian law for this interest.

Although the main impetus of this study is on the AU and its direct participants, it is important to point out that there are other actors that play a significant role in influencing its actions or the actions of its member states. Behind every major situation with which the AU and its members are faced, there are at least a number of hegemonic powers pulling one way or another. For example, the US war on terrorism and China's trade policy have been a common theme in the assessment of most of these situations.¹²¹ The trade and foreign policy of the European Union is another factor that has great influence.¹²² Another example of the role of hegemonic power can be seen in the NATO involvement in Libya¹²³ or the French involvement in the situations in Chad and Côte d'Ivoire.¹²⁴ However, because of the article's focus on the AU and actors within it, the article does not delve into the issue of hegemony in any depth.

120 Assembly of the African Union, Decision on the Implementation of the Assembly Decisions on the International Criminal Court Doc.EX.CL/670(XIX); also AU Peace and Security Council, Decision on the Peaceful Resolution of the Libyan Crisis, Extraordinary Session of the Assembly of the Union on the State of Peace and Security in Africa, EXT/ASSEMBLY/AU/DEC/(01.2011) 25 May 2011.

121 Generally see JE Wokoro 'Towards a model for African humanitarian intervention' (2008) 6 *Regent Journal of International Law* 1 15-18, arguing that the West's interests in Africa have been need based provides the scramble for Africa and the Cold War as examples of how only the need of the West can make Africa the centre of interest; JE Frazer 'Reflections on US policy in Africa, 2001-2009' (2010) 34 *Fletcher Forum of World Affairs* 95 105-107, briefly describing the US's counterterrorism initiatives and other interests in Africa; RP McAleavey 'Pressuring Sudan: The prospect of an oil-for-food programme for Darfur' (2008) 31 *Fordham International Law Journal* 1058 1066-1067, stating that the inability of the Security Council to impose sanctions against Sudan has been primarily due to Chinese veto power and the expression of their willingness to use this power if such a binding resolution was voted on; D Haroz 'China in Africa: Symbiosis or exploitation?' (2011) 35 *Fletcher Forum of World Affairs* 65 77, stating that China's investment policy does not take human rights practices into consideration.

122 See generally NJ Udombana 'Back to basics: The ACP-EU Cotonou trade agreement and challenges for the African Union' (2004) 40 *Texas International Law Journal* 59.

123 'NATO and the African Union pursue dialogue on Libya, North Atlantic Treaty Organisation' 31 May 2011 http://www.nato.int/cps/en/natolive/news_74968.htm (accessed 31 January 2012).

124 A Hansen 'The French military in Africa, Council on Foreign Relations' 8 February 2008, <http://www.cfr.org/france/french-military-africa/p12578#p2>; S Stearns 'UN and French forces attack Gbagbo's heavy weapons in Abidjan' 10 April 2011.

4 Projection of future trends

4.1 Involvement in conflict situations

A look at the past trends in decisions indicates that the AU will be more actively engaged in mediating and keeping peace. The AU is unlikely to be able to prevent armed conflicts that are responsible for the suffering of millions on the continent. The controlling factors for conflicts have always been domestic factors and there has been no significant change in this respect that shows that the AU will be able to prevent conflicts. Where the belligerents are willing to stop fighting, the AU will play a role in mediating negotiations and in providing peacekeeping troops. The AU's involvement in Burundi, Somalia, Comoros and Darfur is indicative of the fact that the AU is willing to go to places in Africa that the rest of the international community is either unwilling or unable to march into.

This positive projection does not, however, imply that the AU will tackle the determining factors behind these conflicts. For instance, in situations such as the one in Darfur, where inter-tribal conflicts, mainly between agrarian and sedentary communities, have spiralled out of control and turned into one of the worst catastrophes, the determining factor for the conflict is the combination of a lack of resources exasperated by desertification and global warming, proliferation of small arms, lack of democratisation and political stability in the state. It is unlikely that the AU will be able to deal with these determining factors. However, the determining factor for the AU's willingness to mediate or to be involved in peacekeeping operations seems to be the growing convergence of national policy that has come to be described by the expression 'African solutions to African problems'.¹²⁵ This idea has been promoted since the mid-1990s by Africa, motivated by the prevention of another Rwanda, and by the West, motivated by a willingness to help from a distance.¹²⁶

4.2 Prosecution of international crimes/Co-operation with the International Criminal Court

Despite increasing involvement in internal conflicts, the AU is likely to go through a long term phase of non-co-operation with the ICC. The AU has, regarding the situations in Sudan, Kenya and Libya,

¹²⁵ Generally see TM Mays 'African solutions for African problems: The changing face of African-mandated peace operations' (2003) 23 *Journal of Conflict Studies*; D Peterson 'Finding African solutions to African problems' (1998) 21 *Washington Quarterly*; Müller (n 61 above).

¹²⁶ M Goldman 'Sierra Leone: African solutions to African problems?' (2005) 9 *Max Planck Yearbook of United Nations Law* 457, especially 459 fn 5; L Lawson 'US Africa policy since the Cold War' (2007) 5-1 *Strategic Insights*; A Purvis 'The Somalia syndrome' *Time* 22 May 2000.

decided to publicly condemn and protest the ICC's involvement and it is unlikely that they will reverse their position any time soon.¹²⁷ However, despite their consensus for non-co-operation within the AU, individual African states have shown some difference as to the application of the AU's decision. For instance, some African states that are members to the Rome Statute have declared that they would not abide by the AU Assembly's decision,¹²⁸ while others declared that they would not comply with the arrest warrants of the ICC.¹²⁹ Since the number of states that have taken exception to the AU's decision are small in number, this only indicates the proverbial light at the end of the tunnel.

The dominant determining factor for the AU's resistance is African political elites fearing that the ICC might at some point investigate their own practices. Such a fear is not merely a subjective perception, as all of the cases that the ICC is currently prosecuting are African cases. An additional determining factor for non-compliance is the view

127 See Human Rights Watch 'Observations and Recommendations on the International Criminal Court and the African Union in advance of the 17th African Union Summit' 26 June 2011.

128 'South Africa legally rebuts AU resolution on arresting Bashir' 3 August 2009, <http://www.sudantribune.com/spip.php?article31996> (accessed 31 January 2012); 'Botswana says Sudan's Bashir will be arrested if he visits' *Sudan Tribune* 10 June 2009, <http://www.sudantribune.com/spip.php?article31449> (accessed 31 January 2012); 'Botswana says Bashir still vulnerable for arrest on its territory despite AU resolution' *Sudan Tribune* 16 August 2010, <http://www.sudantribune.com/spip.php?article35980> (accessed 31 January 2012); also see 'Botswana stands by International Criminal Court, Ministry of Foreign Affairs and international co-operation' 28 July 2010, http://www.iccnw.org/documents/BotswanaStandsByICC_28Jul2010_en.pdf (accessed 31 January 2012).

129 Djibouti, Chad, Uganda, Malawi and Kenya have invited Al-Bashir and pledged not to arrest him despite the fact that all three are members of the Rome Statute; see 'Sudan's President Bashir defies arrest warrant in Chad' *BBC News Africa* <http://www.bbc.co.uk/news/world-africa-10718399> (accessed 31 January 2012); 'Court worry at Omar al-Bashir's Kenya trip' *BBC News Africa* <http://www.bbc.co.uk/news/world-africa-11117662> (accessed 31 January 2012); 'Djibouti has specifically declared that Al-Bashir would not be arrested if in its territory though Al-Bashir would not travel to Djibouti because of the French and US military presence in the country' *Sudan Tribune*; 'Djibouti will not honour its Rome Statute obligations, invites Sudan's Bashir' 6 April 2009, <http://www.sudantribune.com/spip.php?article30777> (accessed 31 January 2012); 'Uganda pledged to arrest Al-Bashir until the July 2010 AU Summit when it invited him to attend'; Aljezeera 'Uganda invites al-Bashir to summit: Kampala reverses decision to bar Sudan's President, wanted by ICC, from AU gathering' <http://english.aljazeera.net/news/africa/2010/06/201068123447183209.html> (accessed 31 January 2012). In addition to these member states to the Rome Statute, Al-Bashir has visited Ethiopia, Eritrea, Zimbabwe and Egypt; although Kenya is one of the states that are opposed to the arrest of Al-Bashir, a Kenyan High Court issued an arrest warrant against him causing great concern on the side of the foreign ministry; D Miriri & A Dziadosz 'Kenya, Sudan move to fix fallout from Bashir ruling' *Reuters Africa* 30 November 2011; 'Sudan's Omar al-Bashir in Malawi: ICC wants answers' *BBC News* 20 October 2011, <http://www.bbc.co.uk/news/world-africa-15384163> (accessed 31 January 2012).

that the ICC is somehow enforcing the neo-colonial agenda of the West.¹³⁰ Although this perspective is not clearly articulated in official AU declarations and documents, it is a powerful perspective that gives a rallying point and ideological support to political elites who wish to challenge the moral authority of the ICC.¹³¹

A third determining factor is the role of the Rome Statute as a positive obligation upon states and as an authoritative symbol of state intent. Out of the 53 AU members, 41 states have signed the Rome Statute (not counting Sudan which withdrew its signature),¹³² while 33 of the signatories have ratified the statute.¹³³ This means that the majority of the members of the AU are members of the Rome Statute and have a legal obligation to comply with ICC arrest warrants. Herein lays one determining factor for future compliance with ICC decisions. As the substantive and procedural rules emanating from the Rome Statute permeate into domestic legislation and practice, the likelihood of compliance might also increase. Ratification of the Rome Statute as a determining factor of AU compliance will be strengthened if more African states ratify the Rome Statute.

4.3 Support for democracy and human rights

There is a strong indication that the AU might have shifted its practice of burying its proverbial head in the domestic affairs doctrine when it comes to dealing with *coups d'état*. By reacting swiftly to the *coups* of Togo, Mauritania, Guinea, Madagascar and Niger, it deprived the takeover regimes of diplomatic and ideological support. That the AU had low standards for some of the gaps in the subsequent election processes and that it was neglectful of the human rights conditions indicate that democratisation may not be a major priority. The focus

¹³⁰ See eg M du Plessis *The International Criminal Court that Africa wants* (2010) 20-21; K Ainley 'The International Criminal Court on trial' BISA Annual Conference 18, 15 December 2009; 'The International Criminal Court: Why Africa still needs it' *The Economist* 3 June 2010; 'Gadhafi indictment hinders peace: African Union' *CBS News* 2 July 2011, <http://www.cbc.ca/m/touch/news/story/2011/07/02/world-african-union-gadhafi.htm> (accessed 31 January 2012); A Arieff *et al* 'International Criminal Court cases in Africa: Status and policy issues' *Congressional Research Service* .15 2 April 2010, <http://fpc.state.gov/documents/organization/141591.pdf> (accessed 31 January 2012); S Akaki 'Zimbabwe coalition: African solutions to African problems?' *The African Executive* 1 October 2008, <http://www.africanexecutive.com/modules/magazine/articles.php?article=3575> (accessed 31 January 2012).

¹³¹ Generally see AM Ibrahim 'The International Criminal Court in light of controlling factors of the effectiveness of international human rights mechanisms' (2010-2011) *7 Eyes on the ICC* 157 177-186, discussing how the ICC and specifically the Office of the Prosecutor can minimise the perception of bias on the side of the ICC.

¹³² See 'Sudan may lose access to EU funds under Cotonou agreement' *Sudan Tribune* 25 April 2009, <http://www.sudantribune.com/spip.php?article30980> (accessed 31 January 2012).

¹³³ A list of signatories and members of the Rome Statute can be found on the website of the Coalition for the International Criminal Court, <http://www.icc-cpi.int/Menu/ASP/States+Parties/African%20States> (accessed 1 December 2011).

rather is specifically on ensuring that the continent is cleared of *coups d'état* that have marred African history. As a sign of authoritative communication, the AU Constitutive Act confirms the view that there is an intent to focus exclusively on *coups d'état* rather than a real consolidation of democracy on the continent. A cumulative reading of articles 4(p) and 30 of the AU Constitutive Act gives the impression that the AU is more interested in preventing the overthrow of existing governments through unconstitutional means rather than in prohibiting the retention of power by the ruling elites through unconstitutional means.¹³⁴

A construct of future trends in which the AU would react harshly against *coups d'état* that disturb the *status quo*, but would tolerate *status quos* that are maintained through unconstitutional means, is confirmed by a look at the conditioning factors of the AU's decisions in this regard. Since the most important policy decisions that shape the direction in which the AU is moving are taken by the Assembly, it is important to look at what motivates the members of the Assembly. Economist Intelligence Unit's 'Democracy Index for 2011' categorises one AU member state as a 'full democracy', nine as 'flawed democracies', 13 as 'hybrid regimes' and 27 (50 per cent) as outright 'authoritarian regimes'.¹³⁵ The Polity IV Dataset and the Polyarchy Dataset (Vanhanen Index) also support analogous conclusions about member states of the AU.¹³⁶ Hence, it is only natural that the political elites of member states, three quarters of which are either authoritarian or hybrid regimes, do not want the AU to conduct critical inquiries into the election, re-election and re-re-election of their rulers.

Past trends in the decisions of the AU also indicate that the human rights mechanisms of the AU are not going to make any noticeable difference in the human rights condition of Africans. Again, these conditioning factors point to the interests of member states and those of their political elites. According to Freedom House's 'Map of Freedom', out of the 53 member states of the AU, nine (17 per cent) can be characterised as 'free', 23 (43 per cent) as 'partly free' and 21 (40

¹³⁴ Art 4(g) states: 'The Union shall function in accordance with the following principles: ... (g) condemnation and rejection of unconstitutional *changes* of governments'(my emphasis); and art 30 states: 'Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.'

¹³⁵ Economist Intelligence Unit, Democracy Index 2011: Democracy Under Stress 4 (2011); also see Economist Intelligence Unit, Democracy Index 2010: Democracy Under Stress 3 (2010) (giving South Africa the same score for 2010) that translates roughly as 2% full democracies, 16,6% flawed democracies, 24% hybrid regimes and 50% authoritarian regimes.

¹³⁶ Generally see MG Marshall & K Jagers (Principal Investigators), Polity IV Country Reports 2010, Authority Trends, 1946-2010: South Africa, <http://www.systemicpeace.org/polity/polity06.htm>; Polyarchy dataset, Measures of democratisation 1999-2000 (April 2002) http://www.prio.no/sptrans/1141086495/file42500_democracy_1999-2000.pdf (accessed 31 January 2012).

per cent) as 'not free'.¹³⁷ The same study conducted in previous years shows that there is no improvement in human rights conditions in Africa.¹³⁸ Such statistics warrant the conclusion that the states covered in this report are more likely to want to avoid criticism from the AU and shield each other from such criticism. Even the minority that has a better human rights record is unlikely to actively champion the cause of human rights because it would be diplomatically imprudent to criticise and shame the majority of fellow member states.

Since the state parties and the Assembly are not going to easily erode their own domestic jurisdiction, whatever modest improvements in the system that could be achieved will depend on the activism of the African Commission. The Commission is deprived of resources to the extent that it does not have the financial capacity to hire or pay its professional and non-professional staff.¹³⁹ The Commission has, however, managed with remittent incomes from governmental (primarily European) and non-governmental sources and has been successful in recording the bare facts of violations on the continent. Therefore, whether the Commission will make modest contributions will largely depend on whether the Commission will be able to direct

137 Freedom House 'Freedom in the world 2011: Subscores (2011)' <http://www.freedomhouse.org/template.cfm?page=635>; Freedom House 'Map of freedom: Sub-Saharan Africa' (2010) http://www.freedomhouse.org/uploads/fiw10/FIW_2010_Map_Africa.pdf; Freedom House, Map of Freedom: Middle East and North Africa (2010) http://www.freedomhouse.org/uploads/fiw10/FIW_2010_Map_MENA.pdf. Freedom House produced its index based on a seven-point scale (with 1 representing the most free and 7 the least free) in which questions relating to the electoral process (three questions), political pluralism and participation (4), and functioning of government (3), freedom of expression and belief (4), associational and organisational rights (3), rule of law (4), and personal autonomy and individual rights (4) are used to scale states as 'free' (1.0 to 2.5), 'partly free' (3.0 to 5.0) and 'not free' (5.5 to 7.0). See Freedom House *Methodology* (2008) http://www.freedomhouse.org/template.cfm?page=351&ana_page=341&year=2008; see also J Sarkin 'Dealing with Africa's human rights problems: The role of the United Nations, the African Union and Africa's sub-regional organisations in dealing with Africa's human rights problems: Connecting humanitarian intervention and the responsibility to protect' Hofstra University Legal Studies Research Paper 09-01, (2009) *Journal of African Law* 1-2, describing the findings of numerous other statistics sowing to a similar conclusion.

138 Freedom House *Map of freedom: Sub-Saharan Africa* (2009) http://www.freedomhouse.org/uploads/fiw09/MOF09_SSAfrica_FINAL.pdf (accessed 31 January 2012).

139 Viljoen (n 73 above) 63; also see Odinkalu (n 51 above) 398-400; Beyani (n 51 above) 587-588; D Olowu 'Regional integration, development and the African Union agenda: Challenges, gaps, and opportunities' (2003) 13 *Transnational Law and Contemporary Problems* 211 243-245, outlining the dire financial situation of the AU); also see n 74 and accompanying text above.

public shame on states that it finds to have violated human rights.¹⁴⁰ Part of the Commission's contribution will depend on whether it allows the African Court to be relevant by referring cases to it. However, even in the best case scenario the contributions of the Commission and the Court are going to be gradual and indirect.

Behind the functioning of the African Commission, some credit should be attributed to the role of NGOs in the African human rights system. For instance, NGOs contribute financial support to the African human rights system, are the primary applicants to the African Commission, and have lobbied for the improvement of different aspects of the AU human rights system.¹⁴¹ The role of human rights NGOs, such as Amnesty International and Human Rights Watch, can be felt in their human rights advocacy and their fact-finding endeavours.¹⁴² In addition, one of the direct effects of international NGO activism has been seen to the human rights violations of Western multinationals¹⁴³ and takes a lead role in human rights education.¹⁴⁴

5 Conclusions and recommendations

The AU's first decade of work on human rights and democracy has shown significant improvement compared to the OAU. There seems to be a good amount of rhetorical impetus and positive legal

140 The probability of the African Commission becoming successful in this respect is small. First, the Commission's proceedings are not open to the public. Second, publication of the Commission's reports is an annual affair and is contingent upon the Assembly's authorisation (the Assembly has not always been co-operative in this regard). Third, the Commission has always had problems with financial resources that are necessary for any public relations activity. See generally Heyns (n 77 above) 700-702; Welch (n 49 above) 555.

141 See generally F Viljoen *International human rights law in Africa* (2007) 324-325; also Viljoen (n 73 above) 1 8-9, stating that NGOs have been lobbying for the formation of the African human rights court since the formation of the African Commission.

142 Nyanduga (n 42 above) 261, concluding that the role of NGOs is crucial in the African Commission's conclusions and decisions, especially on the finding of facts.

143 Eg note the withdrawal of Western multi-nationals from Darfur for fear that their public image may be tarnished by NGO human rights activism. See RO Matthews 'Sudan's humanitarian disaster: Will Canada live up to its responsibility to protect?' (2005) 60 *International Journal* 1049 1050-1053 1055, describing how Canadian civil society institutions were instrumental in influencing the withdrawal of Talisman from Sudan.

144 Generally see JP Martin *et al* 'Promoting human rights education in a marginalised Africa' in GJ Andreopoulos & RP Claude (eds) *Human rights education for the twenty-first century* (1997); also RP Claude 'The right to education and human rights education' (2005) 2 *SUR International Journal on Human Rights*, describing the activities of NGOs in human rights education, including in Africa and elsewhere; Andreopoulos & Claude (above) 436, describing in detail the activities of NGOs independent of the African regional political system.

development on the protection of human rights and democracy. Significant steps have also been taken to protect constitutionalism. However, the improvements are modest and for the main part lacking in consistency. As much as the AU has had achievements, it has either failed to act in certain situations and adversely contributed in others. A number of recurring conditioning factors of the AU's actions pertaining to human rights and democracy are identified, each having different levels of influence in different situations. While the domestic political arrangements of member states have proven to be a primary conditioning factor for the effectiveness of the AU in promoting the cause of human rights and democracy, the pressure created by the international community, based on the member states' legal obligations, pressure from pan-African sentiment within the AU and pressure from the AU's human rights organs, have played a secondary role.

A lack of willingness and incentive of Africa's political elite to protect human rights and democracy in their own territory, not least in other states, is the strongest conditioning factor. With some generalisation, it can be concluded that African domestic elites have an incentive and certainly a willingness to violate human rights. This has led to a tendency of African states to ignore or tolerate the violation of rights and the abrogation of democracy by other African states and to expect reciprocal treatment. It is, therefore, unreasonable to expect much change in the AU's practice unless there is a change in the members of the organisation.

A long-term solution to the problem of the domestic unwillingness to uphold human rights can only be achieved through the liberalisation and democratisation of members of the AU. Democratic transition and subsequent consolidation of democracy may significantly change the collective behaviour in the AU. In the meantime, however, political elites are unlikely to allow the AU to stand behind the pro-democracy movements that have sprung up throughout the continent. If anything, Tahrir-like movements are a threat to the current domestic political structures in most African countries.¹⁴⁵ In the short run, it is unlikely that the Arab Spring states (assuming they will consolidate democracy) will back democratisation or human rights on the rest

¹⁴⁵ Not counting states in which the level of repression precluded demonstrations. Arab Spring-inspired demonstrations have taken place in Uganda, Zimbabwe, Angola, Malawi, Burkina Faso, Sudan, Djibouti, Mauritania and South Africa. See C Ero 'The political changes in North Africa and the Middle East and the implications for sub-Saharan Africa' Open Society Institute – Africa Governance Monitoring and Advocacy Project, August 2011.

of the continent.¹⁴⁶ Considering the fact that the interests of the domestic undemocratic elites are the strongest and most consistent conditioning factor for the AU's human rights and democracy failures, the AU's record will remain unimpressive. It will, however, be dotted by an inconsistent patchwork of success brought about by intervening but generally weaker conditioning factors.

Closely related to AU member states' political motivations is the resurgence of a pan-Africanist sentiment that has created a common ideological platform. This has energised the push for the formation of the AU and has influenced its subsequent actions. Particularly, the African peace and security architecture and its activities in keeping the peace, including its opposition to *coups d'état*, can be explained partly as an expression of this pan-Africanist sentiment. In some situations, however, this sentiment has been used to support the disregard of a public order of human dignity. Examples of the latter are the Zimbabwean, Libyan and Darfur situations where this notion was a rallying point to support dictators who were committing grave violations of human rights. In sum, it can be concluded that pan-Africanist resurgence has generally been the conditioning factor for movements in support of human rights and democracy. However, in specific situations where there is a perception of Western interference, this sentiment may be summoned even at the expense of human rights and democracy.

The rise of African and international legislation supportive of human rights and democracy, including a wider acceptance of the Rome Statute, can be seen as a positive conditioning factor. Positive legislation will create a potential for future action by the political and (quasi-)judicial organs of the AU. However, considering the lack of enthusiasm of AU member states to fully enforce these laws gives one reason to be highly sceptical of their motivation. Additionally, the fact that leaders like Gaddafi were the patrons of some of these laws suggests that there is a lack of genuineness in making these human rights and democratic commitments.

About five centuries ago Machiavelli wrote that 'it is unnecessary for a prince to have all the good [ethical] qualities ... but it is very necessary to appear to have them'.¹⁴⁷ It looks as if the political elites in the majority of these states may be agreeing to an expanding

¹⁴⁶ Young democracies have been shown to be reluctant regarding the promotion of democracy in their foreign policy. See PB Mehta 'Do new democracies support democracy?' (2011) 22 *Journal of Democracy* 101; T Carothers & R Youngs 'Looking for help: Will rising democracies become international democracy supporters?' (2011) *The Carnegie Papers*; T Piccone 'Do new democracies support democracy? The multilateral dimension' (2011) 22 *Journal of Democracy* 139.

¹⁴⁷ N Machiavelli (trans WK Marriott) *The prince* (2005) 92.

number of regional human rights standards for sanctimoniousness.¹⁴⁸ Nevertheless, because these ethical standards are being legislated into positive law and morality, it will increasingly be possible to pressure current and future leaders to live up to these undertakings.¹⁴⁹ Once the ink with which these commitments were signed has dried, it is up to Africa's citizenry and supporters of human rights and democracy to call upon Africa's elites to respect their promises by demanding and pleading *pacta sunt servanda*.

A final set of conditioning factors relate to the effectiveness of judicial organs of the AU. The professionalism and assertiveness of the members of the African Commission and the activism of NGOs working with the Commission have been noted for the development of the AU's human rights mechanisms.¹⁵⁰ While the African Commission is commended for making the best of the limited legal framework in which it is born, at present it is presented with a novel opportunity to make its assertive input. As it is the gatekeeper of the African Court, the Commission should begin referring cases that have jurisprudential significance.¹⁵¹ If the Commission fails to refer cases to the Court, then both bodies' potential contributions to human rights will be foiled. Another point that underscores the importance of referring cases to the Court is that the Court's proceedings are open to the public, whereas the Commission's proceedings are confidential until their publication in the annual report is authorised by the Assembly. Both the Commission and the Court need to direct more funds to public relations endeavours, as their main, if not only, real power lies in their capacity to shame states that transgress against positive standards of the regional treaty system.

An analysis of the conditioning factors portrays a clear picture of where energies should be placed so as to get the most out of the AU system with regard to promoting human rights and democracy. Exertions on the secondary conditioning factors will have a limited impact and ought to be perused with the full knowledge that they wield only minor results over long periods of time. The fact remains that the most potent conditioning factor for the AU's success or failure

148 See M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41-54, concluding that, while most African states have not made any effort to live up to their human rights promises and norms, they show overwhelming acceptance of the rights in their rhetoric.

149 Full membership of AU states to the Rome Statute would certainly be helpful in this respect.

150 The lack of funding has been the most persistent problem facing the African Commission. However, this is primarily a failure of the political organs rather than the Commission itself.

151 While the African Commission's referral of the Libyan situation is interesting, there was no point in referring this case to the Court since the Commission could itself had issued an interim measure according to Rule 111 of its Rules of Procedure. The Commission should refer cases that have a jurisprudential significance.

to support or protect human rights and democracy is and will remain to be the domestic political situation of member states. This suggests that the AU's prospects of becoming a principal and constructive participant are contingent upon a dramatic change in the domestic political arrangements of member states. Unfortunately, the impetus for this change will not come from the AU itself. The thrust of human rights and democratisation movements should, therefore, be placed towards bringing about transformation within member states with or without the active involvement of the AU.

Minority rights, democracy and development: The African experience

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Summary

The article argues that, in spite of recent attempts to marry human rights to development, such a marriage remains one of convenience or, rather, to the inconvenience of minority or indigenous peoples who are the focus of discussion. The article asserts that, contrary to the claim that the relationship between rights and development is non-existent to begin with, such a relationship does exist. The crucial issue, however, is the category of people who are allowed to enjoy rights to development and to enjoy the fruits thereof. This analysis is grounded in three types of relationship between rights and development. These are identified as positive, negative and passive relationships. The article contends that the positive relationship is captured and colonised by the political and economic elite who control and direct how and when those under their control should benefit from a negative or passive relationship approach between rights and development. It is contended that the negative and positive relationship perspectives have continued to dominate the dynamics of economic development from the Enlightenment era, through colonialism, post-colonialism and the globalisation era. In the context of promoting effective minority rights which lies at the heart of peace and stability in Africa, the article suggests a re-visioning of the relationship between rights, democracy and development in Africa which challenges the current notion of 'market democracy', and 'liberal international orthodoxy', among other mantras. The analysis tackles ways in which the effective promotion of minority rights can be realised.

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1 Introduction

The idea that the enjoyment of rights is a means to facilitate and promote development (or 'progress') was first recognised during the post-Renaissance era in European history.¹ It was postulated that mankind, by use of reason and science, could progress. According to Nabudere, 'rapid developments' and 'great advances' in technological progress were achieved as a result of the rise of the natural sciences.² The natural sciences, in turn, flourished due to the free-thinking environment which reigned at the time and allowed the intellectual movement to burgeon. This environment emerged through the contribution of the then-emerging middle class to the destruction of the power of the church and imperialists whose interests were in landed feudalism.³ Thus, rights became a useful tool to promote progress and development. This era of progress led to the rise of technological development,⁴ which saw a mechanistic image of scientific positivism (based on rationality and systematic observation) playing a pivotal role in shaping the paradigm of Western thought and technological development.⁵

Three approaches to the relationship between rights and development may be identified: the positive, negative and passive approaches.

The enjoyment of rights and its role in promoting progress and development establish a *positive* relationship approach between rights and development. This relationship is anchored in the proposition that rights serve as a gateway to attaining sustainable development by providing a congenial atmosphere where people will have the opportunity to realise their potential and capacities.

However, rights discourse and praxis were appropriated by the powers-that-be and exercised against slaves, the poor, workers and women in general. This practice relied on a *negative* relationship approach between human rights and development. The relationship, from a neo-liberal perspective, is that human rights are not crucial

1 Precisely during the time of the Enlightenment when the idea of progress is said to have emerged. See L Baeck 'Shifts in concepts and goals in development' in UNESCO *Goals of development* (1987) 37-42. Also, GG Iggers 'The idea of progress: A critical reassessment' (1965) 71 *American Historical Review* 1-17.

2 D Nabudere *The political economy of imperialism: Its theoretical and polemical treatment from mercantilist to multilateral imperialism* (1977) ii.

3 J Berting 'Technological impacts on human rights: Models of development, science and technology, and human rights' in CG Weeramantry (ed) *The impact of technology on human rights: Global case-studies* (1993) 13-19.

4 According to Berting, the subduing of nature in the Jewish and Christian religions helped lay the foundation for the rise of Western technology; Berting (n 3 above) 21.

5 As above.

to those who produce wealth for capitalism, because wealth would trickle down to everybody upon the attainment of development.

Yet, the gateway to the enjoyment of rights should not be completely closed. Where it is observed that morale among the workers is low, production is on the decline as a result of abuses inflicted on the people, agitation is growing and bottled-up resentment is likely to explode, some piece-meal human rights reforms shall be implemented to bring order and stability. Upon a return to the normal situation, however, the original position should be reverted to. This is the *passive* relationship between rights and development approach which sees human rights as a necessary component of development only when development is threatened or disrupted.⁶

Applying these models to the situation which existed in Europe during the period of Enlightenment, it is noted that the negative and passive types were enjoyed by the underclass – workers, the poor, women, slaves and children (working as child labourers), but not the positive type. That is, the enjoyment of rights was restricted to those whose labour caused capitalism to thrive.⁷

In the same way, this class of people was not allowed to take part in the then-emerging democratic process. As a matter of fact, the classical liberal theory was dedicated to ‘the individual right to unlimited acquisition of property, to the capitalist market economy, and hence to inequality, and it was feared that these might be endangered by giving votes to the poor’. Macpherson adds that liberal theory, like the liberal state, was not at all democratic.⁸ It is small wonder that Bentham, though supportive of the idea of individual rights, described the idea of natural rights as ‘nonsense upon stilts’.⁹ Indeed, Bentham postulated that equality and productivity do not go together: Security of unequal property was an incentive for capital accumulation which was necessary to engender productivity. Also, a large labour force, whose incentive was fear of starvation, was a necessary prerequisite for the market to maximise productivity.¹⁰

6 K Appiagyei-Atua ‘Developing indigenous perspectives on human rights as Akan contribution to international human rights law in the context of development’ DCL dissertation, McGill University, 2000.

7 CB Macpherson ‘Politics: Post-liberal democracy?’ in R Blackburn (ed) *Ideology in social science* (1976) 17.

8 Macpherson (n 7 above) 19.

9 J Bentham *et al* (eds) *Rights, representation, and reform: Nonsense upon stilts and other writings on the French Revolution* (2002) 291.

10 Macpherson (n 7 above).

2 Application of the negative and passive relationships in Africa

When capitalist adventurism extended from Europe to the shores of Africa and the Americas, the local inhabitants who were encountered were considered not human but 'savage populations'.¹¹ Moreover, their lands were considered *terra nullius* and open for discovery and/or conquest and annexation.¹² In addition, their cultures were labelled as heathen, backward and barbaric, needing to give way to European civilisation. As noted by Gozzi:¹³

It was held, in particular, that the property rights of non-civilised peoples, grounded in the concept of 'occupation', could not be asserted against the 'sovereignty' of the European nation states. So it was the idea of national sovereignty that figured prominently in European international law, defining relations among Western states and legitimising their dominion over the lands taken by colonial expansion.

However, in the case of the Ottoman empire, China and Japan were admitted into the then exclusive European club of international law by way of an agreement (flowing from the 1856 Treaty of Paris) whereby they would grant the international minimum standard of treatment for aliens coming from Europe into their territories.¹⁴ These aliens were mainly the economic and political elite of Europe who could not bear to live while enjoying a lower standard of rights enjoyment while pursuing their economic interests outside the confines of their territories.

On the other hand, a different set of rules was applied in the African context. Rather, the colonialists sought to deny and suppress any notion of rights belonging to indigenous African peoples. Labelling Africans as savages gave Europeans the licence to engage in their Christianising and civilising mission, supposedly with the goal of eradicating all notions of supposed barbarism in the African, replacing it with European notions of rights, democracy and the rule of law and

11 P Fiore 'La science du droit international: Horizons nouveaux' (1909) 16 *Révue Générale de Droit International* 478.

12 See, eg, the International Court of Justice Advisory Opinion on Western Sahara para 80, in which it noted: 'Whatever differences of opinion there have been among jurists, the state practice of the relevant period [1884] indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terra nullius*. It shows that in the case of such territories, the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of *terra nullius* by original title but through agreements concluded with local rulers. Such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terra nullius*.'

13 G Gozzi 'History of international law and Western civilisation' 20 April 2007 SSRN: <http://ssrn.com/abstract=996239> or <http://dx.doi.org/10.2139/ssrn.996239> (accessed 31 March 2012).

14 As above.

Christianity. In reality, however, the motive was to promote hegemony and empire building.

In the case of the Gold Coast (now Ghana), for example, under George Maclean's administration, a number of coastal communities had submitted voluntarily to British protection, whereupon that which became known as the Bond of 1844 was signed between the British and local chiefs. This document, which obliged local leaders to submit serious crimes, such as murder and robbery, to British jurisdiction, laid the foundation in law for subsequent British colonisation of the coastal area. The Bond of 1844 stated as follows:¹⁵

Whereas the power and jurisdiction have been exercised for and on behalf of Her Majesty the Queen of Great Britain and Ireland, within diverse countries and places adjacent to her Majesty's forts and settlements on the Gold Coast, we, the chiefs of countries and places so referred to adjacent to the said forts and settlements, do hereby acknowledge that power and jurisdiction, and declare that the first objects of law are the *protection of individuals and property*.

That is, the main issue of rights protection for the locals was protection against abuse by their fellow indigenous peoples, but not protection against violations by the colonialists. In the circumstances, the best the colonialists could do was to allow the 'non-civilised' people to be given 'just treatment', as reflected in the League of Nations requirement on colonial authorities in mandatories.¹⁶ Humane treatment, however, was not being treated with humanity, dignity and respect as required under human rights law.

All these reflect a negative application of the relationship between rights and development. As a result, violations of human rights in the colonies were rife. According to Howard, in the Gold Coast,¹⁷ civil and political rights, as the contemporary world now defines them, were certainly not practised under colonial rule. She writes:¹⁸

Indeed, the British initially opposed UN passage of the Universal Declaration of Human Rights because they were afraid that the declaration would oblige them to implement those rights in their colonies.

3 Birth of minorities in Africa through colonialism

Minority issues in Africa are strongly associated with colonialism. While not discounting the fact that minority groups existed in the pre-colonial period, it is also on record that some dominant ethnic groups

¹⁵ My emphasis.

¹⁶ See art 23(b) of the Covenant of the League of Nations.

¹⁷ After independence in 1957, Gold Coast was changed to Ghana.

¹⁸ RE Howard *Human rights in Commonwealth Africa* (1987) 9.

gave protection to minority groups in its territory.¹⁹ For example, among the Asante, a chief or king, in his oath of ascension to the throne, includes in his oath the promise not to disclose the origins of his subjects to avoid discrimination against them.²⁰

However, the advent of colonialism created several new minority groups and exposed pre-colonial minority groups to new and intractable challenges through efforts to foster and facilitate the development of the colonial economic enterprise. First, minority groups were created through the policy of divide and rule whereby some members of the colonised population were 'raised' to a higher status than others, having been recognised as 'more human' or more prone to adopting European behaviours, lifestyles and mannerisms than others. These were given preferential treatment over their 'less human' brethren. The 'less human' brethren became minority peoples. A good example is the way in which Belgian colonial authorities treated the numerically-inferior Tutsis as genetically and physically superior over the numerically-superior Hutus who, as a result, became minorities under international law.²¹

Second, another group of minorities evolved from those communities who wanted to maintain a subsistence lifestyle as hunters, gatherers and nomads²² which did not conform to Locke's theory of property acquisition – that is, 'mixing one's labour with the soil' to produce wealth.²³ As a result, they were side-lined because they were not considered economically productive and therefore attractive to colonialism. It was such communities whose economic activities were considered stumbling blocks in the realisation of modernisation.²⁴

Third, where mineral resources were found, the locals were forcibly driven off or subjected to all manners of abuse for them to relinquish control over their lands.²⁵ Fourth, because of the nature of their political and social set-up, when it came to using local authorities to

19 S Adenito 'Ijebu a B'Eyan ("Ijebu or human being?"): Nineteenth century origins of discrimination against Ijebu settlers in colonial Ibadan, Nigeria' in MU Mbanaso & CJ Korieh *Minorities and the state in Africa* (2010) 143.

20 K Arhin *Traditional rule in Ghana: Past and present* (1985); also, GN Ayittey *Africa betrayed* (1992).

21 P Uvin 'Ethnicity and power in Burundi and Rwanda: Different paths to mass violence' (1999) 31 *Comparative Politics* 253.

22 Eg, the pygmies of the Great Lakes Region, the San of Southern Africa, the Hadzabe of Tanzania and the Ogiek, Sengwer and Yakuu of Kenya.

23 J Locke *Two treatises of civil government* (1988).

24 Refer to, eg, a speech by President Festus Mogae of Botswana in 2006 during the 40th anniversary of the country's independence in which he was quoted by the UN as saying: 'We should avoid setting up exclusive organisations whose membership is drawn from one tribe ... Our goal of nation building needs to prevail over narrow tribal sentiments.'

25 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

implement colonial policies such as 'indirect rule',²⁶ the authorities found it more expedient to deal with the 'more civilised brethren' with organised political structures. As a result, the 'more civilised' saw the others as inferior and treated them as such, during and after colonialism. Fifth, in communities whose lands could not produce cash crops such as cocoa, coffee, tea, and such that were in demand in Europe, nor minerals, a deliberate policy to create labour reserves was implemented to trigger labour flow to centres of commercial, farming, mining and industrial activities. In the case of Ghana, the northern sectors were neglected, occasioning men and women to stream down south to work as labourers and ending up in what we call *zongos*.²⁷

Six, some were driven off their lands to live as 'reserves residents' or as 'squatters' in order to give their lands away to support settler colonialism.²⁸ Seven, in a few territories, such as modern-day South Africa, Zimbabwe, Namibia and Botswana, the colonialists practised settler colonialism which meant that the local peoples all became minorities.²⁹ Eight, as a result of the haphazard manner in which the colonial borders were carved during the Berlin Conference of 1884-1885,³⁰ some major ethnic groups found themselves split into two or more and joined to different neighbouring countries. Some of those who turned out to be inferior in numbers ended up as minorities in the new countries they were joined to. Examples are the Touaregs in Mali, Niger, Burkina Faso, Libya, and the Ewes in Togo and Ghana. In sum, quotes Abraham:³¹

26 Indirect rule has been defined by Dr Lucy Mair as 'the progressive adaptation of native institutions to modern conditions'. See KA Busia *The position of the chief in the modern political system of the Ashantis* (1968) 105.

27 D Pellow *Landlords and lodgers: Socio-spatial organisation in an Accra community* (2008).

28 In both cases, communities enjoyed a severely limited 'right of occupancy' over their lands. A colonial agent is quoted by Okoth-Ogendo: 'I am afraid that we have got to hurt their (the natives') feelings, we have got to wound their susceptibilities and in some cases I am afraid we may even have to violate some of their most cherished and possibly even sacred traditions if we have to move natives from land on which, according to their own customary law, they have an inalienable right to live, and settle them on land from which the owner has, under that same customary law, an indisputable right to eject them.' HWO, Okoth-Ogendo *Tenants of the crown: Evolution of agrarian law and institutions in Kenya* (1991) 58. See A Barume 'Indigenous battling for land rights: The case of the Ogiek of Kenya' in J Castellino & N Walsh (eds) *International law and indigenous peoples* (2004) 363-365.

29 See Cobo's definition of minorities below.

30 Umzurike comments: 'The most irrelevant factor in deciding the fate of the continent was the Africans themselves who were neither consulted nor appraised of the conference.' UO Umzurike 'International law and colonialism in Africa' (1979) 3 *East African Law Review* 47, cited in A Anghie *Imperialism, sovereignty and the making of international law* (2005) 91.

31 G Abraham 'Lines upon maps: Africa and the sanctity of African boundaries' (2007) 15 *African Journal of International and Comparative Law* 61.

The 80 000 kilometres of boundaries bequeathed to Africa by its sometime colonial masters have contributed significantly to Africa's many problems: They unite those who should be divided and divide those who should be united; they limit access to resources that were once part of a shared heritage.

4 Development, modernisation theory and their impact on minorities

Modernisation theory evolved as a popular economic and political concept by neo-liberal economists when it became evident that colonialism could not be sustained and that political independence was inevitable.³² It was adopted as a model of development packaged for implementation as a means by which colonialism could escape blame for the negative development impact generated by the unrelenting exploitation and plunder of the resources of the colonised. Thus, it became the new development model for implementation in colonised states in order not to sever the centre-periphery relations³³ that capitalism established through colonialism. It was also a means for the colonialists to act as the 'new redeemers', though practically responsible for the problems created in the first place.

This notion of development was imposed on the decolonised states by the US.³⁴ According to Esteva, the US opened the era of development for the world when, on assumption of office in 1949, President Truman set the policy of embarking 'on a bold new program for making the benefits of American scientific advances and industrial progress available for the improvement and growth of underdeveloped areas'.³⁵ The old imperialism – exploitation for foreign profit – was to be replaced by 'a program of development based on the concepts of democratic fair dealing'.³⁶ This supposedly new development paradigm was to move the relationship from the negative to the positive, but in reality it was simply old wine in a new bottle.

32 W Zapf 'Modernisation theory and the non-Western world' paper presented to the conference 'Comparing processes of modernisation', University of Potsdam, 15-21 December 2003 <http://bibliothek.wzb.eu/pdf/2004/p04-003.pdf> (accessed 20 April 2012). Also see CK Wilber & K Jameson 'Paradigms of economic development and beyond' in CK Wilber & K Jameson *Directions in economic development* (1975) 7.

33 See, eg, AG Frank 'The development of underdevelopment' in JD Cockcroft *et al* (eds) *Dependence and underdevelopment* (1972).

34 L Baeck 'Shifts in concepts and goals in development' in UNESCO *Goals of development* (1988) 42-43. Other Western states that followed similar policies include Britain, France, Belgium, West Germany, Portugal, Spain, etc.

35 HS Truman Inaugural Address, 20 January 1949, in *Documents on American foreign relations* (1967). See G Esteva 'Development' in W Sachs (ed) *The development dictionary: A guide to power as knowledge* (1992) 6.

36 As above.

The effect of this 'development statement' was that from that period onwards, the Western model of progress was foisted on the 'backward' and 'underdeveloped' countries as their only escape route to freedom, civilisation and improvement of their lot.

Rostow, for example, outlined four stages of evolution that all countries would have to go through towards the attainment of economic growth. First, the 'traditional' stage; the 'preconditions of modernisation' is established in the second stage; third, the 'take-off' stage; and fourth, the 'drive to maturity'.³⁷ One salient feature of this model of development is the notion that economic growth, based on industrialisation and catapulted by science and technology, would spawn a gradual uni-dimensional evolution towards a more open global society imbued with some peculiar characteristics.³⁸ Development is thus to be measured by the level of technological advance as attained in a 'high mass consumption' society. This model gives the state a prominent role to play as the agent 'for advancing the human and economic dimensions of development through its exclusive prerogatives in collective problem-solving and conflict resolution'.³⁹

The process of modernisation had a devastating effect upon Africans, and on minority groups in particular. One example is through the policy of homogenisation and integration of colonised economies into the global economy and amalgamation of different ethnic entities to form the independent nation states of Africa.

At the time of independence, African leadership adopted this policy by seeking to consolidate communities of people into the nation state by abandoning its original agitation during the anti-colonial struggle for a Commonwealth of Free African States which called for the abolition or adjustment of 'artificial barriers and frontiers drawn by imperialists to divide African peoples'.⁴⁰ This approach would have helped to give better protection for minorities.

However, under the Charter of the then Organisation of African Unity (OAU), minority rights issues were not put on the agenda. All references to 'peoples' were interpreted to mean a whole people, a country as a whole, with no apparent reference to minorities. Moreover, the principle of *uti possidetis* was affirmed in the 1964 OAU

37 WW Rostow *The stages of economic growth: A non-communist manifesto* (1960).

38 These include (a) increasing individual occupational and social mobility together with a growing equality of educational opportunities; (b) a fading away of differences based on traditional differences and life-styles; (c) a concomitant growth of the middle classes as a consequence of the increasing demand for highly-skilled and professional workers; and (d) consequently, a decrease in collective types of antagonism, especially of class struggle.

39 S Shivakumar 'The constitutional foundations of development workshop in political theory and policy analysis' Indiana University, Bloomington, 2.

40 Abraham (n 31 above) 68.

Cairo Declaration on Border Disputes Among African States,⁴¹ which sought to legitimise national borders inherited from colonial rule. Thus, Julius Nyerere, the first President of Tanzania, is quoted as saying that '[Africans] must be more concerned about peace and justice ... than we are about the sanctity of the boundaries we inherit'.⁴² In addition, sovereignty and territorial integrity were held sacrosanct, underpinned by the principle of non-interference in internal affairs.⁴³

It was further argued that to preserve national unity, the community had to be incorporated into the state or the community equated to the state. Thus, for example, article 4 of the OAU Cultural Charter for Africa states:⁴⁴

The African states recognise that African cultural diversity is the expression of the same identity; a factor of unity and an effective weapon for genuine liberty, effective responsibility and full sovereignty of the people.

The pursuit of this policy meant for most minority groups 'internal colonialism'. They were and some are still treated as second-class citizens. They continue to struggle for recognition of their land rights; some remain on reserves carved out for them by the colonial authorities, and so on. Some are still considered 'backward and inconvenient entities' that pose as stumbling blocks to development and need to be assimilated or denied citizenship status. They have been killed, dispossessed or forced to assimilate in the process of nation building and national economic growth.⁴⁵

Also, the African Commission on Human and Peoples' Rights (African Commission) describes the indigenous peoples of Africa, *inter alia*, as follows:⁴⁶

They often live in inaccessible regions, often geographically isolated, and suffer from various forms of marginalisation, both politically and socially. They are subjected to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority. This discrimination, domination and marginalisation violate their human rights as peoples/communities, threaten the continuation of their cultures and ways of life and prevent them from being able to genuinely participate in decisions regarding their own future and forms of development.

41 *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, judgment of 22 December 1986, ICJ <http://www.icj-cij.org/icjwww/> (February 2000).

42 Abrahams (n 31 above).

43 See arts III (2) & (3) of the defunct OAU Charter.

44 Adopted at the 13th ordinary session of the OAU in Port Louis, Mauritius, 2-5 July 1976.

45 R Barsh 'Socially-responsible investing and the world's indigenous peoples' <http://www.firstpeoples.org/corporate/background.htm> (accessed 17 April 2012).

46 African Commission on Human and Peoples' Rights *Indigenous peoples in Africa: The forgotten peoples? The African Commission's work on indigenous peoples in Africa* (2006).

In the context of the rights-development relationship approach, it can be argued that African states unremittingly pursued the negative relationship approach in its dealings with its citizenry, particularly minorities. They became the inheritor state by maintaining the repressive colonialist policies and its means to maintain order and cohesion. Among others, it was contended that a strong hand was needed to propel economic growth and give room for the exercise of civil and political rights. Politically, it was argued that the granting of human rights would lead to the unleashing of centrifugal forces that may occasion the collapse of the new fragile nation state.⁴⁷

5 Minority rights protection at the international level

Attempts have been made in the past by some scholars to define minority groups. However, elements of these definitions were found problematic in its application to minorities in the African context. Referring to one definition of indigenous people proposed by Francesco Capotorti,⁴⁸ one notices that there are some major shortfalls in its application to Africa. For example, the definition contains the idea of two main groups, one dominant and other non-dominant. However, looking at the ethnic composition of most African states, there are several different minority groups located in the same country, with one (or sometimes a few more) as the dominant and the rest in non-dominant status.

Another important *lacuna* that is significant for consideration in terms of minority rights in Africa is the notion that the idea of the preservation of culture, traditions, and such is not pursued in a vacuum or in isolation from the issues of survival and development. It is therefore vitally important to attach culture and tradition to the mode of economic survival and development of the group. Such *lacunae* are taken for granted in the leading literature on minority rights which gives only scant attention to minority rights issues in Africa. Ethnicity is portrayed as the principal cause of civil wars in Africa. However, the ethnic factor is only one of the factors, if not simply the immediate cause. Remote factors are mainly economic and political: access to scarce resources and political power.

47 Y Ghai 'Human rights and governance: The Asian debate' (1994) 15 *Australian Year Book of International Law* 1.

48 UN Special Rapporteur on Minority Rights: 'A group, numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language' Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities UN Document E/CN 4/Sub 2/384/Add 1-7 (1977).

Looking at José Martínez Cobo's definition,⁴⁹ it is noted that in the African context, 'indigenusness' is not always tied to aboriginal status or original title to land. There are other traditional means of tracing common descent or ancestry, such as through myths and fables. Further, the definition limits itself to territories that have suffered from settler colonialism whereby colonialists are considered the dominant group and the locals as the minority. But this situation only applies to a few countries in Africa.

The international community has taken key steps to promote minority rights through the promulgation of various international instruments, including the Convention on the Prevention and Punishment of the Crime of Genocide;⁵⁰ the International Convention on the Elimination of All Forms of Racial Discrimination;⁵¹ Convention (No 169) Concerning Indigenous and Tribal Peoples;⁵² the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities;⁵³ and the UNESCO Universal Declaration on Cultural Diversity.⁵⁴

The latest addition to the list is the United Nations Declaration on the Rights of Indigenous Peoples.⁵⁵ This instrument is a comprehensive document which seeks to give effective protection and promotion of the rights of minorities. Among others, the Declaration recognises external self-determination (under articles 3 and 4 of the Declaration) if exercised in line with the demands of the UN Charter (under article 46). Article 4, for example, stipulates:

49 Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. His definition is: Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of that society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. Their historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors': Occupation of ancestral lands, or at least parts of them; common ancestry with original occupants of these lands; culture; language; residence in certain parts of the country, or in certain regions of the world; and, other relevant factors. Study on the Problem of Discrimination against Indigenous Populations, UN Doc E/CN.4/Sub.2/1986/Add.4.

50 Approved and proposed for signature and ratification or accession by General Assembly Resolution 260 A (III) of 9 December 1948.

51 Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965.

52 Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its 76th session.

53 Adopted by General Assembly Resolution 47/135 of 18 December 1992.

54 Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation at its 31st session on 2 November 2001.

55 Adopted by General Assembly Resolution A/61/L.67 of 13 September 2007.

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

However, as noted above, Africans are opposed to external self-determination for African minorities. This position has been reaffirmed by the African Commission in its advisory opinion on the United Nations Declaration on the Rights of Indigenous Peoples,⁵⁶ in which it noted:⁵⁷

The ACHPR has interpreted the protection of the rights of indigenous populations *within the context of a strict respect for the inviolability of borders and of the obligation to preserve the territorial integrity of state parties*, in conformity with the principles and values enshrined in the Constitutive Act of the AU, the African Charter on Human and Peoples' Rights (the African Charter) and the UN Charter.

However, Africa's position is in direct conflict with the African Commission's own decision in the *Katangese* case, in which it decided:⁵⁸

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

That is to say, if two conditions had been met, namely, violations of human rights which seek to compromise the territorial integrity of a country and where the minority group is denied the opportunity to participate in governance, then the minority group could exercise its right of self-determination. Because these situations had not been fulfilled in the case of the Katangese within Zaire, it meant it could only exercise a variant of internal self-determination.

This view reflects the proper position under international law, which is affirmed in *The Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Kosovo case), in which the UN General Assembly sought an advisory opinion regarding the legality of Kosovo's unilateral declaration of independence. The ICJ noted that⁵⁹

[t]he illegality attached to the declarations of independence ... stemmed not from the unilateral character of these declarations as such, but from

56 Adopted by the African Commission on Human and Peoples' Rights at its 41st ordinary session held in May 2007 in Accra, Ghana.

57 African Commission on Human and Peoples' Rights advisory opinion (n 46 above) para 6 (Commission's emphasis).

58 *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) para 6.

59 Advisory Opinion of 22 July 2010, para 81.

the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).

Africa should therefore amend its rigid stance to reflect that of international law which supports a positive relationship between rights and development for minorities. Also, to facilitate the monitoring of minority rights, Africa has to adopt the 'violations approach' proposed by Chapman.⁶⁰ Among the approaches proposed by her which are of direct relevance to our discussion, contains violations relating to patterns of discrimination.⁶¹ Articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) stipulate that violations related to discrimination represent a fundamental breach of the Covenant,⁶² which cannot be excused on grounds of being subject to progressive realisation. Also, under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁶³ apart from the usual obligation on states to promote non-discriminatory policies, states are also obliged to take proactive steps to eliminate discrimination against minorities through affirmative action.⁶⁴

6 Democracy and minority rights

Though liberal democracy and its ideology have helped to sustain the West, these concepts have not proven effective and workable in most African societies. One fundamental factor is the imposition of its majoritarian vision of the liberal international orthodoxy,⁶⁵ instead of a

60 AR Chapman 'A "violations approach" to monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 23.

61 The other two relate to state violations resulting from government actions, policies and legislation and the state's failure to satisfy minimum core obligations of enumerated rights.

62 Art 2(2) calls on state parties to guarantee that the rights enumerated in the Covenant 'will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Art 3 further amplifies that state parties must 'undertake to ensure the equal rights of men and women to the enjoyment of all economic, social, and cultural rights set forth in the present Covenant'.

63 Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965 and entered into force 4 January 1969, in accordance with art 19.

64 Art 1(4).

65 According to Rothchild, a majoritarian vision of liberal internationalist orthodoxy 'calls for individual (but not group) rights, separation of powers, party competition, and tolerance of diversity can at times also be extremely rigid and conformist'. D Rothchild 'Liberalism, democracy and conflict management: The African experience' paper presented at Conference on Facing Ethnic Conflicts: Perspectives from Research and Policy Making, Bonn, Germany 14-16 December 2000 http://www.zef.de/download/ethnic_conflict/rothchild.pdf (accessed 31 March 2012).

pluralistic, multi-ethnic-based notion of democracy, which recognises and takes into account the interests and wellbeing of minorities. Thus, attempts by Western states to impose its brand of democracy on non-Western states have not been in the best interests of minority groups and for the sake of political stability and social cohesion, particularly in the African context.

What makes the democratic idea even more precarious is the fact that it has been watered down to the notion of 'market democracy' which aims more at ensuring the efficacy of the democratic structure to promote market efficiency and does not support the positive rights-development relationship.

Judging by Africa's past record of a lack of recognition of minority rights and the fact that the new Constitutive Act of the African Union (AU) does not deal with minority rights issues, unless a situation degenerates into a crisis,⁶⁶ this type of democratic arrangement does not bode well for the future stability and development of the African continent.

Rothchild cites the Burundi example where, at the urging of the US and various non-governmental organisations (NGOs), democratic elections were called for and held in Burundi from 1993 to 1994 in an effort to bring peace between the Hutus and Tutsis. However, the plan failed. Instead, it paved the way for the resumption of intergroup violence in Burundi. The first reason for the failure of the Burundi plan was that ethnic differences were exploited by the local elite who have always felt threatened by regular political change through the ballot box. The second reason is that political participation was emphasised over and above the formation of strong civic institutions. Rothchild notes:⁶⁷

Clearly, to the extent this preference for liberal democracy becomes an orthodoxy and fails to adjust to local realities and alternative visions, it can sometimes complicate the process of managing conflict in ethnically-divided societies.

Indeed, democracy is supposed to be empowering when people are able to transcend their personal interests and meet as a group to articulate needs, assess capacities, impose duties and make rights claims or assert the same in order to deal with their needs. It in turn involves finding, through this interaction, the means to interpret their experiences, the injustices and stumbling blocks to their development and realise self-hood and contribute to community development. The process involves the exercise of the right to freedom of association, movement, assembly, and the like, which helps people to acquire agency, recover selfhood and earn self-confidence. This is the positive rights-development relationship in action.

66 Under art 4(h), the Union reserves the right to intervene in a member state 'pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity'.

67 Rothchild (n 65 above) 5.

However, where sovereignty is vested in an authority 'that proclaims its competence and willingness to settle all issues of collective action facing the society',⁶⁸ democratic governance becomes unitary and centralised in focus. It then loses its relevance for application in communities that are multi-ethnic in composition and that have serious minority rights issues to grapple with.

This brings us to the relationship between respect for minority rights, peace and development. The contention is that the suppression of minority rights compromises peace and that the absence of peace in turn impacts negatively on development. In other words, the rights-development relationship in this respect will be a negative one. However, this policy is what many African states have pursued against minorities.⁶⁹ Therefore, attempts by African states to suppress indigenous minority rights with the hope of attaining stability and development have failed because the negative rights-development relationship is unsustainable. In its report on conflicts in Africa, the Committee on Elimination of Racial Discrimination expressed⁷⁰

its alarm at the growing mass and flagrant violations of human rights of the peoples and ethnic communities in Central Africa, in particular, massacres and even genocide perpetrated against ethnic communities, and resulting in massive displacement of people, millions of refugees, and ever deepening ethnic conflicts.

As well, as noted by Christopher J Bakwesegha, a representative of the OAU:⁷¹

68 S Shavikumar <http://www.indiana.edu/~workshop/wow2/publications/jun1699.pdf> (accessed 31 March 2012).

69 African Commission on Human and Peoples' Rights (n 46 above).

70 The Committee on the Elimination of Racial Discrimination, Statement on Africa: 20/08/99 A/54/18 para 24 (Other Treaty-Related Document) 55th session 2-27 August 1999 reiterating its recent decisions, declarations and concluding observations, such as decision 3 (49) of 22 August 1996 on Liberia; Resolution 1 (49) of 7 August 1996 on Burundi; decisions 3 (51) of 20 August 1997, 1 (52) of 19 March 1998, and 4 (53) of 18 August 1998 on the Democratic Republic of the Congo; the declaration of 13 March 1996 on Rwanda; the concluding observations on Rwanda of 20 March 1997; the concluding observations on Burundi of 21 August 1997; decisions 4 (52) of 20 March 1998, 5 (53) of 19 August 1998 and 3 (54) of 19 March 1999 on Rwanda; decision 5 (54) of 19 March 1999 on the Sudan, which were the results of the Committee's consideration of the ethnic conflicts in these state parties under its early warning and urgent action procedures within the context of the Convention. It also referred to the Secretary-General's report on 'Causes of conflict and the promotion of durable peace and sustainable development in Africa' (A/52/871-S/1998/318 dated 13 April 1998), which noted, among others, that 'the main aim, increasingly, is the destruction not just of armies but of civilians and entire ethnic groups'.

71 It is on record that in the last 30 years, more than 30 wars have been fought in Africa. In 1996 alone, 14 of the 53 member states of the OAU were affected by armed conflicts, accounting for more than half of war-related deaths worldwide and resulting in more than eight million refugees and displaced persons. Most of these states bear an ethnic dimension. CJ Bakwesegha Keynote Address on 'The Rise of the Ethnic Question' Bonn, Germany, 13-16 December 2000.

There is hardly any country in Africa that has been spared the wrath of ethnic conflicts in terms of loss of lives, destruction of property as well as human displacement.

The situation in the Niger Delta is instructive. The strong-arm tactics employed by the Nigerian government as well as Shell to deal with the disruption of the work of Shell by minority groups in the Niger Delta have resulted in the exacerbation of Nigeria's chronic fuel shortages as well the death of thousands of people through explosions while trying to take out fuel from the leaking pipes, extra-judicial executions and the wanton invasion and destruction by military task force personnel.⁷² Shell has also reported increasing theft, or 'bunkering' of crude oil from its facilities, resulting in the loss of up to 32 000 barrels per day of production.⁷³ The Nigerian government has undertaken a number of measures to appease the aggrieved Niger Delta citizenry and calm the situation. However, typical of the application of the passive relationship between rights and development, this has not worked.

Minority Rights Group International emphasises the positive link between minority rights and development in the following terms:⁷⁴

What the development agencies overlook is the added value of giving special consideration to minorities – and their rights – in wider development policies Incorporating minorities' rights into the development process, and making the fulfilment of these rights a goal of development, will strengthen the success of development. Minority rights, if fully respected, are a useful tool for overcoming many of the key barriers to development already identified by development practitioners ... Mainstreaming minority rights in development co-operation will not only provide for improved human development for persons belonging to minorities; enforcement of minority rights can mean better development for all as a result of more democratic governance, greater stability and new policies to target development funds more effectively.

In such contexts, polycentric systems of governance are the preferred choice to realise this goal. Polycentric designs for governance⁷⁵

stress processes of self-co-ordination [and co-operation] among multiple, independent, and overlapping problem-solving units, with each capable of making adjustments to other such units, *as co-ordinated through a general system of rules.*

72 In the most serious such fire, in October 1998, more than one thousand people died in Jesse, Delta State, but similar explosions have continued to take place. Several hundred people died in July 2000 in a fire in Adeje, near Warri, Delta State, and dozens died from smaller explosions throughout the year. HRW 'Update on violations of human rights in the Niger Delta' <http://www.hrw.org/background/africa/nigeriabkg1214.htm> (accessed 17 April 2012).

73 As above.

74 'Minority Rights Group International, *Minority Rights and Development: Overcoming exclusion, discrimination and poverty*' (2002) executive summary of paper submitted to the UN Working Group on Minorities.

75 As above.

This affords problem-solving units within a polycentric system greater discretion to solve local problems locally.⁷⁶ It also gives room for the realisation of the potential of the local people, and thereby to acquire agency, self-confidence and the recognition of their worth and dignity. For that matter, it is not merely a question of recognising the underdevelopment and poverty of minorities and seeking to help them; it is a question of giving them space to contribute to helping themselves and the community as a whole.

In the case of *Pushpanathan v Canada*, the Supreme Court of Canada noted that 'a polycentric issue is one which involves a large number of interlocking and interacting interests and considerations'.⁷⁷ The Court explained:⁷⁸

While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint.

7 Conclusion

The article has sought to analyse the critical relationship that exists or should exist between human rights, democracy and development, particularly as it affects minorities, and to contend that the so-called relationship between them has remained in the negative/passive and not crossed the line to the positive. Although the recognition of the need for a positive relationship approach is present, its enjoyment is only made available to those who tread the corridors of powers – be it multinational corporations, heads of government or local political elites. Thus, the notion that the positive relationship has been established with the fall of communism is being touted largely for political reasons and as a public relations gimmick. Human rights rhetoric is used as a façade to deflect criticism and as a means to actually facilitate increased exploitation of an already exploited people, particularly minorities.

It notes further that it is troubling that African states have been manipulated to go along with various forms of development agendas by Western states, even in the New Partnership for Africa's Development (NEPAD) project. This is reflected in, for instance, NEPAD's subscription to the 'global standards of democracy' which do not take into account a multi-ethnic approach to democracy. The same goes for the African

76 n 74 above, 12.

77 *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 para 36.

78 As above.

Charter on Democracy, Elections and Governance⁷⁹ which calls for, among others, 'universal values and principles of democracy and respect for human rights'.⁸⁰

Moreover, African leadership has only given indirect attention to minority rights in the AU's Constitutive Act. With the realisation by the AU of the relationship between a lack of democratic space and civil wars and the subsequent impact of that on development,⁸¹ one would have expected the AU to wake up to the realities of the times and to give due recognition and respect to a pluralistic approach to democracy.

A positive approach to ethnicity in African politics is needed. It is the only way to constructively deal with the ethnic dimension exploited by African leaders and which has accounted for almost all of the 30 or more wars that have been waged in Africa since the formation of the OAU, including both inter-state and intra-state conflicts.

The type of democracy that is prescribed for Africa is not only tied, but it does not establish the positive relationship between human rights and development. It is simply presented as a functionalist tool to pave the way for the establishment of market forces that will facilitate further exploitation of an already over-exploited, marginalised, disenfranchised and disempowered community. That is the essence of *market* democracy. According to this democratic arrangement, human rights are not considered key. The emphasis is simply on some form of political participation through periodic elections. However, democracy is more than that.

To help establish the positive relationship between human rights and development, African citizens should be given the opportunity to design effective, workable and practical grassroots democracy. Democracy should play a role in establishing the proper relationship with human rights and development. It has to be in tune with the needs and circumstances of the people. Additionally, it has to be owned by them, be identified with their aspirations and daily experiences and its practice should likely lead to the attainment of sustainable, holistic development. Furthermore, democracy should be located in a broad-based, inclusive national government represented by all ethnic groups in the country, no matter how large and diverse. This may include the automatic reservation of certain parliamentary seats for disenfranchised and marginalised minority groups.

79 Adopted at the 8th Summit of the Assembly of Heads of State and Government of the AU held in Addis Ababa, Ethiopia, 29-30 January 2007 and entered into force on 15 March 2012.

80 See art 2(1) of the African Charter on Democracy, Elections and Governance.

81 Eg, the Preamble to the AU Constitutive Act states, *inter alia*: 'Conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda.'

An African notion of rights would see human rights as the key to unlocking the fetters to development. The ultimate goal of development should be the realisation of human potential and dignity through the ability of the community to meet its needs through its members' efforts and contributions. In short, development must be seen as an end in itself, to be attained through the exercise and enjoyment of rights. Clearly, then, it is the contention of this article that development is meant to enhance people's core values, and that development or growth is desirable only if it is consistent with the people's deepest values, including those of minorities.

The rule of law: Approaches of the African Commission on Human and Peoples' Rights and selected African states

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Summary

The African Commission on Human and Peoples' Rights is empowered to promote and protect human rights in Africa. Although the African Charter on Human and Peoples' Rights does not expressly use the phrase 'rule of law', the African Commission has interpreted its mandate under the African Charter as allowing it to promote and protect the rule of law in Africa. The article looks at four mechanisms through which the African Commission has attempted to promote the rule of law – in its resolutions, individual communications, promotional missions and through the periodic reports of state parties to the African Charter. The article shows that the African Commission has given different meanings to the concept of the rule of law. The article shows that, in their periodic reports to the African Commission, different African states have different understandings of the rule of law and have taken different measures to promote the rule of law in their jurisdictions. What is apparent is that the promotion and protection of human rights are crucial elements in rule of law discourse.

1 Introduction

The African Commission on Human and Peoples' Rights (African Commission) was established under article 30 of the African Charter

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on Human and Peoples' Rights (African Charter),¹ with the mandate to 'promote human and peoples' rights and ensure their protection in Africa'. The drafting history of the African Charter has been a subject of numerous academic publications and will not be repeated here.² Article 45 of the African Charter provides for four broad functions of the African Commission:

- 1 to promote human and peoples' rights and, in particular:
 - (a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to governments;
 - (b) to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislations;
 - (c) [to] co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
- 2 [to] ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
- 3 [to] interpret all the provisions of the present Charter at the request of a state party, an institution of the OAU [now African Union] or an African organisation recognised by the OAU [African Union].
- 4 [to] perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

The African Commission further is empowered to receive and adjudicate upon individual communications alleging the violation by a state party of the rights and freedoms under the African Charter.³ Article 62 of the African Charter obliges state parties to submit to the African Commission periodic reports on the measures taken to protect and promote the rights and freedoms under the African Charter. The African Charter, unlike, for example, the Protocol Relating to the Establishment of the Peace and Security Council of the Africa Union,⁴

1 Art 30 African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986; OAU Doc CAB/LEG/67/3 Rev 5 (1982) 21 *International Legal Materials* 58; reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29.

2 See F Ouguerouz *The African Charter on Human and Peoples' Rights - A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003); F Viljoen *International human rights law in Africa* (2007).

3 Arts 55 & 56.

4 Protocol Relating to the Establishment of the Peace and Security Council of the African Union. Para 13 of the Preamble provides that African leaders are aware 'of the fact that the development of strong democratic institutions and culture, observance of human rights and the rule of law ... are essential for the promotion of collective security, durable peace and stability, as well as for the prevention of conflicts'. Art 3(f) provides that one of the objectives of the Peace and Security Council of the African Union is to 'promote and encourage ... the rule of law ... as part of efforts for preventing conflicts'. Art 4(c) provides that one of the principles

does not expressly use the phrase 'rule of law' anywhere. Relying on the practice of the African Commission, the author discusses measures adopted by the African Commission to promote and protect the rule of law in Africa in line with its mandate under the African Charter. The discussion focuses on the African Commission's understanding of the concept of the rule of law as expressed in the resolutions it has passed, in the individual communications it has adjudicated upon, and in the promotional missions it has undertaken. The article also highlights the understanding of the state parties to the African Charter of the meaning of the rule of law as evidenced in the reports submitted to the African Commission. Against that backdrop, the author highlights major aspects of the concept of the rule of law as understood by the African Commission and African states. The African countries studied in the article have been chosen because their periodic reports to the African Commission contain the phrase 'rule of law'. Therefore, the author has not considered factors such as regional representation or attempted to strike a balance between countries emerging from conflicts and those that have never experienced conflict.

2 Rule of law

The phrase 'rule of law' was coined by Dicey in his book *Introduction to the study of the law of the constitution*, published in 1885.⁵ The definition or description or use of the phrase 'rule of law' is, to borrow words used in a different context, 'sort of a chameleon ... [which] by necessity changes the colour of its skin ... depending on where it finds itself'.⁶ This explains why the precise meaning of what constitutes the 'rule of law' is still being contested⁷ and is likely to be contested for as long as the phrase remains relevant. Thus, different people have approached it from different angles. For example, some people have

by which the Peace and Security Council will be guided is the 'respect for the rule of law'. Under art 5(2)(g), one of the criteria for a member state to be elected to the Peace and Security Council is that that state has respect for the rule of law.

- 5 See M Neumann *The rule of law: Politicising ethics* (2002) 1; S Beaulac 'The rule of law in international law today' in G Palombella & N Walker (eds) *Relocating the rule of law* (2009) 197-198.
- 6 It adopted that phrase from an article which has very little to do with the discussion of the concept of rule of law, at least directly. See P Gaeta 'When is the involvement of state officials a requirement for the crime of torture?' (2008) 6 *Journal of International Criminal Justice* 183.
- 7 For a detailed discussion of the various elements of the rule of law, see A Bedner 'An elementary approach to the rule of law' (2010) 2 *Hague Journal of the Rule of Law* 48-74. See also M Krygier 'The rule of law: Legality, Teleology, sociology' in Palombella & Walker (n 5 above) 49; Neumann (n 5 above) 23-50.

approached it from a legal or human rights perspective,⁸ others from a political or philosophical perspective,⁹ and there are those who have approached it from a sociological perspective.¹⁰ It is not the present author's intention to invent a definition of the concept. For purposes of giving meaning to the phrase, I rely on the meanings given to the phrase by Dicey, who wrote that the rule of law 'has three meanings, or may be regarded from three different points of view'.¹¹ According to Dicey, the first point from which the rule of law may be regarded is 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power'.¹² By this he meant¹³

[t]hat no man is punished or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.

The second meaning of the rule of law, according to Dicey, suggests the principle of equality before the law in the sense that 'every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'.¹⁴ Lastly, Dicey was of the view that the rule of law means that 'the laws of the constitution ... are not the source but the consequence of the rights of individuals, as defined and enforced by courts' and that:¹⁵

We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.

The above attempts to give meaning to the phrase 'rule of law' show that Dicey was not attempting to devise a definition of universal application.

8 Eg, T Bingham *The rule of law* (2010), who gives the history of the rule of law from the Magna Carta of 1215 to the Universal Declaration of Human Rights (10-32). The author also discusses the rule of law by looking at issues such as accessibility of the law, human rights, dispute resolution and the role of parliament. See DM Beatty *The ultimate rule of law* (2004), where the author analyses judgments from courts in different countries to discuss how the rule of law has been protected by such courts on issues such as liberty, equality, fraternity and proportionality.

9 Eg, it has been argued that 'politically-charged concepts like the rule of law are not defined for lexicographic or semantic purposes; they are defined according to an agenda.' See Neumann (n 5 above) 23.

10 Krygier (n 7 above) 45-69.

11 As quoted in Beaulac (n 5 above) 199.

12 As above.

13 As above.

14 As above.

15 As above.

The definition he came up with was based on his understanding of the rule of law in England.¹⁶ Whether his definition is accepted or rejected, one fact remains difficult, if not impossible, to dispute: One of the elements that he included in his definition has come to be accepted, by almost all those who have attempted to give meaning to the rule of law, as an important indicator for the existence of the rule of law – the issue of human rights. The fact that human rights are a strong pillar in Dicey’s definition of the rule of law should be understood in the context in which the phrase was developed. Dicey was analysing the ‘constitutional law’ of England and human rights have been part and parcel of that law at least since the Magna Carta in 1215.¹⁷ Therefore, human rights are inseparable from the rule of law. This is the case whether the rule of law is seen from a social, political, legal or economic perspective. Our attention now shifts to a discussion of the measures taken by the African Commission to protect the rule of law in Africa.

3 Resolutions

The African Commission has promoted human rights in Africa by passing resolutions on issues such as HIV/AIDS, access to essential medicine, and the right to a fair trial. Below, the article examines the way in which the African Commission has used the phrase ‘rule of law’ in these resolutions.

In its Resolution on the Establishment Committee on the Protection of People Living with HIV and Those at Risk, the African Commission noted that¹⁸

in circumstances where the rule of law and human rights are not respected as an integrated part of society, the most vulnerable groups within that society are often denied the level of protection they require and hence, are exposed to increased vulnerability.

That observation shows that the African Commission holds the view that the rule of law is critical in the fight against HIV/AIDS in Africa and in the protection of the rights of people living with HIV/AIDS. The above statement also shows that the African Commission holds the view that the rule of law is one thing and the protection of human rights is another, but that the two are inseparable in the protection of the most vulnerable. In the case of HIV/AIDS, it cannot be overemphasised that the protection of human rights is indeed an important factor if HIV/AIDS is to be fought in Africa. People living with HIV/AIDS should not

¹⁶ Krygier (n 7 above) 52-55.

¹⁷ T Bingham *The rule of law* (2010) 10-32.

¹⁸ 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 AIDS, ACHPR/Res 163(XLVII) 2010.

be discriminated against and should have access to medicines needed to treat the symptoms caused by the disease.

The African Commission also seems to draw a distinction between the rule of law, democracy and human rights. In its resolution on human rights defenders in Africa, it recognised their ‘crucial contribution ... in promoting human rights, democracy and the rule of law in Africa’.¹⁹ Likewise, in its resolution on Nigeria, it called upon the military government ‘to ensure respect for human rights and the rule of law’.²⁰ In its resolutions on the political situation in The Gambia and Comoros, the African Commission indicated that undemocratic changes of government threaten the rule of law.²¹ The African Commission draws a distinction between the rule of law, on the one hand, and the observance of international standards applicable to a fair trial, on the other. In its resolution on The Gambia, it called upon the military government to observe ‘the rule of law, as well as the recognised international standards of fair trial and the treatment of persons in custody’.²² The above resolutions show that the African Commission views the rule of law as distinct but inseparable from human rights and democracy. They also show that the African Commission holds the view that for a government to protect human rights and to observe the rule of law, that government does not have to be one that came to power democratically. Even military governments that come to power as a result of disregarding the supreme law of the land – as almost all constitutions prohibit undemocratic changes of government – have to respect the rule of law. This requires such governments to, amongst other things, protect and promote people’s rights that are guaranteed under domestic as well as international law. Of course, the fact that the government was elected into power does not of in itself mean that it will uphold human rights. Africa is not short of examples of governments that came to power through elections but which have violated peoples’ rights. However, military governments, as opposed to democratically-elected governments, are not accountable to the electorate because their acquisition and retention of power do not depend on the electorate.

As in the case of human rights and democracy, the African Commission also appears to reason that the rule of law is distinct from the independence of the judiciary. In its resolution on elections in Africa, it calls upon African countries to ‘[r]espect the rule of law and the independence of the *judiciary* which *is* essential for the realisation

19 Resolution on the Protection of Human Rights Defenders in Africa, ACHPR/Res 69(XXXV)04, Preamble, para 1.

20 Resolution on Nigeria, ACHPR/Res 16(XVII)95, para iv.

21 Resolution on The Gambia, ACHPR/Res 17(XVII)95, Preamble para 2; Resolution on the Situation in Comoros, ACHPR/Res 34(XXV)99, Preamble para 5.

22 Resolution on The Gambia, ACHPR/Res 13(XVI)94, para 3(iii).

of free and fair elections in Africa'.²³ Whether it is the independence of the judiciary that contributes to the rule of law or whether it is the observance of the rule of law that contributes to an independent judiciary is not a very easy question to answer. Nevertheless, what is difficult to dispute is that an independent judiciary is critical to the protection of some human rights, such as freedom of liberty and, as indicated earlier, the protection of human rights is an important element of the rule of law as defined by Dicey. Therefore, the independence of the judiciary remains an example of the rule of law. People should be confident that the judiciary will resolve their disputes independently and impartially. Otherwise people will take the law into their own hands.²⁴

The above examples show that the African Commission is of the view that the rule of law is distinct from democracy, human rights, justice and the independence of the judiciary. Whether that is the case is debateable, but this serves as an example of the complex nature not only of the meaning of the concept of the rule of law, but also of its application.

4 Communications

As mentioned earlier, the African Commission is empowered by the African Charter to hear individual and inter-state communications alleging the violation of the rights in the African Charter. Since its establishment, the African Commission has heard several cases in which it has applied or interpreted the different provisions of the African Charter. In some of these cases, the African Commission has expressly used the term 'rule of law.' These decisions are highlighted to have an understanding of the different ways through which the concept of the rule of law has been used in this context. In *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v Zimbabwe*,²⁵ the applicants argued, *amongst others*, that by deporting Mr Meldum although the High Court had ordered that he should not be deported, the state violated article 26 of the African Charter and that disobeying court orders was one of the signs of the lack of the rule of law in Zimbabwe.²⁶

23 Resolution on Elections in Africa, ACHPR/Res 133(XXXXVIII)08, para 1 (emphasis in original).

24 Of course, the law in question should not be perceived as oppressive, at least by the majority, and should also not be discriminatory against the minority. However, this debate is outside the ambit of this article.

25 (2009) AHRLR 268 (ACHPR 2009) para 118.

26 *Zimbabwe Lawyers for Human Rights* (n 25 above) para 78.

In finding that Zimbabwe had violated article 26 of the African Charter, the African Commission held, amongst others, that²⁷

[i]t is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that courts and tribunals resolve disputes both of a criminal and civil character free of any form of pressure or interference. The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law or the factual merits of the dispute. Without the rule of law and the assurance that comes from an independent judiciary, it is obvious that equality before the law will not exist.

There are several points of relevance in the above quotation. One, human rights depend on the rule of law; two, the rule of law can only be guaranteed when courts are independent and impartial;²⁸ three, the rule of law prevents the arbitrary exercise of power; and four, equality before the law is an integral element of the rule of law. This shows that the African Commission holds the view that the protection of human rights, the independence of the judiciary and the rule of law are inseparable. The African Commission is of the view that for a state to be democratic, it has to be governed by the rule of law and that a state that respects the rule of law has to allow people to exercise their human rights. It held expressly that 'the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law'.²⁹ In *Article 19 v Eritrea*, where the government detained several journalists *incommunicado*, the African Commission, in finding that the Eritrean government had violated the African Charter, held that³⁰

[n]o political situation justifies the wholesale violation of human rights; indeed general restrictions on rights such as the right to free expression and to freedom from arbitrary arrest and detention serve only to undermine public confidence in the rule of law and will often increase, rather than prevent, agitation within a state.

27 *Zimbabwe Lawyers for Human Rights* (n 25 above) para 118. In *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006), the African Commission held that 'by virtue of the rule of law', it is incumbent upon government ministers to honour court judgments; see para 71. The Minister of Finance had refused to pay the applicant's money although the Court had ordered that the applicant should be compensated by the government as a result of his property being damaged and stolen by government soldiers.

28 In fact, the African Commission expressly held that '[t]he independence of the judiciary is a crucial element of the rule of law'. See *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) para 66. It also held that 'where the judiciary cannot function properly the rule of law must die'. See *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 235 (ACHPR 2009) para 89.

29 *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 79. The African Commission held that the illegal detention and torture of opposition leaders by the Sudanese government violated several provisions of the African Charter.

30 *Article 19 v Eritrea* (n 28 above) para 108.

In the above quotation, the African Commission takes that view that, in order to prevent agitation in a given state, the government must respect human rights, otherwise people's confidence in the rule of law will be undermined. This observation is important because in cases where people feel that a government in question does not respect the rule of law and in particular their rights, some of them could resort to unconstitutional means to change such a government. This has been the case in many African countries, for example in Uganda, where President Museveni started a guerrilla war on, amongst other grounds, the fact that the previous governments had no respect for the rule of law; Sudan, leading to secession in 2011; the Democratic Republic of Congo, when Mobutu was overthrown; and Rwanda, where the Tutsi rebelled against the Hutu government on the basis that they were being discriminated against. This is because people suspect that elections would never be free and fair if organised by a government that has no respect for human rights.

In *Constitutional Rights Project and Another v Nigeria*, where the government arbitrarily detained those who had protested against the rigging of elections, the African Commission found that Nigeria had violated the African Charter and held that '[n]o situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter-productive.'³¹ In the two decisions above, the African Commission reasons that a respect for human rights strengthens public confidence in the rule of law and that a respect for the rule of law prevents agitation within a state and that a government's failure to uphold the rule of law is a recipe for political instability. The African Commission seems to be of the view that justice differs from the rule of law. In *Kenneth Good v Republic of Botswana*, where the applicant, who was a university professor, published an article critical of the government and was deported without being given a chance to be heard, the African Commission held that³²

[i]t makes a mockery of justice and the rule of law for a person legally admitted to a country to all of a sudden be told to leave against his will and he/she is not given reasons for the expulsion.

Whether the rule of law can be distinguished from justice is debateable. Justice means, amongst other things, that people should have a fair trial which complies with the principles laid down in international law, and that a government should respect court orders. It has been shown above that Dicey's rule of law is founded on three principles, including the supremacy of the law and a respect for human rights. Therefore,

31 *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) para 58.

32 Communication 313/05, *Kenneth Good v Republic of Botswana*, 28th Activity Report para 193.

the administration of justice in accordance with the law is an example that the rule of law has taken root or is in the process of taking root.

For the rule of law to be upheld, the African Commission held that people must know which conduct is prohibited by law and which is not. Laws should not have a retroactive effect. The African Commission stated that '[i]f laws change with retroactive effect, the rule of law is undermined since individuals cannot know at any moment if their actions are legal'.³³ The African Commission's view is that it is the responsibility of the state to restore and maintain the rule of law.³⁴ The African Commission also holds the view that for a trial or hearing to have been held in accordance with the rule of law, such a trial or hearing must be in line with the African Charter.³⁵ In other words, if a trial is not conducted in accordance with the African Charter, that trial cannot be considered to have been in line with the rule of law. In assessing whether a state in question upholds the rule of law, the African Commission will conduct its assessment on the basis of the provisions of the African Charter and international human rights standards.

5 State party reports

As mentioned earlier, under article 62 of the African Charter, state parties are obliged to submit periodic reports to the African Commission on the measures taken to protect and promote the rights and freedoms under the African Charter. Although, as mentioned earlier, the African Charter does not expressly oblige state parties to observe the 'rule of law', some state parties have indicated in their reports to the African Commission the measures they have taken to promote or observe the rule of law in their jurisdictions. The author highlights a few of the state parties' periodic reports to show the context in which the phrase 'rule of law' has been used and also to indicate the measures that those state parties have taken to promote what they call the rule of law. After an outline of the measures taken by the respective state parties to promote the rule of law, the author analyses those reports.

In its Third and Fourth Periodic Reports, Algeria notified the African Commission that it had done some of the following to 'consolidate the rule of law': Fresh elections were held; human rights protection mechanisms were strengthened; the judiciary was reformed to ensure

33 *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 59.

34 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 67. See *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe* (n 28 above) para 176.

35 *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 42.

its independence;³⁶ a new constitution was enacted which ‘enshrined freedoms and strengthened political pluralism, the separation of powers and the independence of the judiciary’; and several pieces of legislation were enacted to guarantee fundamental rights and freedoms such as freedom of association, political participation and access to information.³⁷

In its Second Periodic Report to the African Commission, Burkina Faso writes that ‘the report seeks to be exhaustive in presenting developments in the rule of law in Burkina Faso and the new measures adopted in the area of protecting and promoting the rights provided for under the African Charter’.³⁸ The report indeed explains in detail the measures taken to strengthen the rule of law in Burkina Faso, which include the presidential elections that were held; the official investigation of the circumstances surrounding the death of a prominent journalist; political parties’ activities; the measures taken to deal with the political crises in the country; the nomination of the Council of Elders to bring about peace and reconciliation in the country; government’s alliances with political parties; the amendments to the Constitution; amendment of the electoral laws; parliamentary reform; and the decentralisation of power.³⁹ The African Commission was also informed that the government had established the Ministry for the Promotion and Protection of Human Rights as a ‘new agent of democracy and the rule of law, which is required to play a vital role in ensuring the entrenchment of democratic governance, particularly with a view to instituting a culture of peace and human rights in the country’.⁴⁰ The government reported that the establishment of a compensation fund for victims of political violence ‘contributed to an appeasement of the political and social life of the country and thus contributed to the strengthening of the rule of law’.⁴¹ It further reported that⁴²

[t]he rule of law and political life witnessed positive developments ... between 1998 and 2002 ... which have served to strengthen the democratic process and the foundations of a constitutional state. This has led to a consolidation of the situation of rights, duties and freedoms.

The rule of law is thus not only about the independence of the judiciary and the protection of human rights. It is also about, in Burkina Faso’s

36 Peoples’ Democratic Republic of Algeria’s Third and Fourth Periodic Reports to the African Commission on Human and Peoples’ Rights (August 2006) 4.

37 Algeria’s Third and Fourth Periodic Reports (n 36 above) 5-6.

38 Periodic Report of Burkina Faso to the African Commission on Human and Peoples’ Rights on the Implementation of the African Charter on Human and Peoples’ Rights October 1998-December 2002 (July 2003) 5.

39 Periodic Report of Burkina Faso (n 38 above) 7-13.

40 Periodic Report of Burkina Faso (n 38 above) 19.

41 As above.

42 As above.

view, strengthening and establishing state institutions, strengthening human rights, holding elections and amending legislation.

In its Second Periodic Report to the African Commission, Cameroon addressed the issue of the right to freedom from discrimination and, in particular, the rights of people in same-sex relationships, and wrote that it was not 'out of place to take a second look at the rule of law in Cameroon with regard to this sensitive issue'.⁴³ The report added that the 'condemnation of homosexuality' is in line with Cameroon's national and international human rights obligations and in particular article 12 of the Universal Declaration of Human Rights, article 26 of the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights.⁴⁴ The report added that⁴⁵

legal action is taken against them [homosexuals] for engaging in practices that are in contravention of both the existing legislation as well as the things that the democratic Cameroonian society of today still considers as good morals.

The Cameroonian example shows, *inter alia*, that the rule of law can actually be invoked to violate widely-accepted rights such as the right to be free from discrimination on the ground of one's sexual orientation.

In its Initial and Cumulative Report, the Central African Republic informed the African Commission that 'in showing its firm determination to consolidate the rule of law and the development of the individual, [it] condemns the exploitation of man in all its forms by ratifying several international human rights instruments'.⁴⁶ The report adds that the Preamble to the 1986 Constitution reaffirms the 'principle of liberty' by providing that 'the Republic is determined to develop the rule of law which would guarantee its inhabitants the security of their persons and their property, which would protect the weakest and allow each individual to freely exercise his/her rights'.⁴⁷ The report adds that when the Constitution was amended in January 1995, the Preamble was also amended to proclaim that the state 'resolved, to develop the rule of law based on genuine pluralist democracy ... and with the full exercise of fundamental rights and liberties'.⁴⁸ While reporting on the

43 Second Periodic Report on Cameroon within the Framework of the African Charter on Human and Peoples' Rights (report not dated) para 93.

44 Second Periodic Report on Cameroon (n 43 above) para 94.

45 As above.

46 See Initial and Cumulative Report of the Central African Republic on the African Charter on Human and Peoples' Rights (January 2006) 27.

47 Initial and Cumulative Report of the Central African Republic on the African Charter on Human and Peoples' Rights (January 2006) 27.

48 As above. The report also indicates that the Central African Republic 'by subscribing to the relevant provisions [*sic*] of the Charter solemnly re-affirmed in the preamble to the Constitution on 27th December 2004 that, *determined to build a state with the rule of law based on pluralist [*sic*] democracy guaranteeing the security of individuals and their property, the protection of the weakest, notably vulnerable persons ...*' 41 (emphasis in original).

measures taken to give effect to article 7 of the African Charter which guarantees the right to a fair trial, the Central African Republic wrote that⁴⁹

[j]ustice is what best characterises the rule of law for which the Central African Republic aspires so deeply. Thus the necessary guarantees for a fair judgment which are enshrined in the Charter are recognised by the Central African Republic.

The report thereafter outlines the legislative, administrative and judicial measures taken to ensure that the right to a fair trial is guaranteed to all individuals.⁵⁰

In its Periodic Report to the African Commission, Benin reported that '[s]trengthened good governance and the improvement of the legal and institutional framework are all steps which will go a long way to usher in true democracy and rule of law in Benin'.⁵¹ The Democratic Republic of Congo in its Initial Report informs the African Commission that the Mobutu dictatorial government was overthrown by the Alliance of Democratic Forces for the Liberation of Congo for, *inter alia*, the latter to institute 'a democratic system and the rule of law'.⁵² The Democratic Republic of Congo also informed the African Commission that a National Human Rights Conference of the Democratic Republic of Congo was held in June 2001 in Kinshasa and one of the tasks assigned to this forum was to '[r]eaffirm the Democratic Republic of Congo's will to respect, promote and protect human rights with a view of facilitating the consolidation of the rule of law'.⁵³ The delegates at the National Human Rights Conference adopted the Congolese Charter on Human and Peoples' Rights which, *inter alia*,⁵⁴

lays particular emphasis on the notions of equality and non-discrimination, particularly in relations between men and women – and establish the priority of the rule of law in relations to the restrictions or other exceptions to be added to it.

The Ethiopian government informs the African Commission in its Combined Initial and Fourth Periodic Reports that '[f]or the last decade and half, the government and the people have travelled a long way towards respect for the rule of law, human rights protection and

49 Initial and Cumulative Report of the Central African Republic (n 47 above) 28.

50 Initial and Cumulative Report of the Central African Republic (n 47 above) 28-29.

51 See Periodic Report of the Republic of Benin on the Implementation of the Rights and Freedoms Enshrined in the African Charter on Human and Peoples' Rights (2008) 29.

52 Initial Report of the Democratic Republic of Congo to the African Commission on Human and Peoples' Rights (April 2002) 12.

53 Initial Report of the Democratic Republic of Congo (n 52 above) 24.

54 Initial Report of the Democratic Republic of Congo (n 52 above) 32.

democratisation'.⁵⁵ The government adds that in 1995 a new Constitution was enacted 'that guarantees the protection of human rights, democracy and rule of law'.⁵⁶ The report adds that the judiciary is independent and 'serves as a balancing power to the executive, by providing the "checks and balances" which are decisive for the observance of the rule of law, good governance and democratisation'.⁵⁷ The report also reveals the fact that in 2004 the government launched the Public Sector Capacity Building Programme which includes as one of its sub-programmes the Justice Sector Reform Programme whose 'objective is to promote the rule of law as well as efficient and effective functioning of the justice system as part of Ethiopia's broader democratisation and public sector development process'.⁵⁸ The government also reported that it had established the Institute of the Ombudsman 'to oversee the protection of human rights and freedoms of citizens by the executive, to ensure good governance and rule of law and to duly rectify or prevent unjust decisions and orders of executive organs and officials'.⁵⁹

The government of Madagascar reported to the African Commission that it had formulated the Madagascar Plan of Action 2007–2012 on responsible government⁶⁰ with one of its 'challenges' being to 'strengthen the rule of law'. The priority projects and activities for this challenge are as follows: to make punishment within the legal system harsher for corruption; to pursue the review of laws; to put in place simplified legal procedures to ensure rapid and transparent justice delivery; to continue clearing the backlog of cases; to review case laws and regulations by an independent committee including the Economic Development Board of Madagascar; to boost the observation, monitoring and protection of human rights by the National Commission and Office of the Ombudsman; to amend laws to ensure that detainees are not imprisoned without trial for more than a year (30 days for minor offences); to increase financing to improve medical and health conditions within prisons and to develop efficient prison camps to ensure proper nutrition; and to create an educational reintegration system for juvenile delinquents.⁶¹

The Mauritian government reported to the African Commission that the Constitution of Mauritius 'rests on two fundamental tenets:

55 Federal Democratic Republic of Ethiopia's Combined Report (Initial and Four Periodic Reports) to the African Commission on Human and Peoples' Rights (report not dated) para 1.

56 Federal Democratic Republic of Ethiopia's Combined Report (n 55 above) para 12.

57 Federal Democratic Republic of Ethiopia's Combined Report (n 55 above) para 40.

58 Federal Democratic Republic of Ethiopia's Combined Report (n 55 above) para 443.

59 Federal Democratic Republic of Ethiopia's Combined Report (n 55 above) para 473.

60 Madagascar Periodic Report in Accordance with the African Charter on Human and Peoples' Rights (2008) para 297.

61 Madagascar Periodic Report (n 60 above) para 299.

the rule of law and the doctrine of separation of powers';⁶² that the Mauritian Supreme Court held that 'the right to personal liberty ... is at the heart of all political systems that purport to abide by the rule of law and protects the individual against arbitrary detention'.⁶³ The government also reported that during the time when Mauritius held the chair of the Southern African Development Community, 'it often impressed upon leaders and the governments of the region the necessity to adhere to the principles of democracy, good governance and the rule of law'.⁶⁴ The government also reported that, under Mauritian law, the right to freedom of expression has to be exercised in a manner that is respectful of the integrity and independence of the judiciary 'given the particular role, which the judiciary has always been called upon to play in systems which are based on the rule of law'.⁶⁵ Niger reports that since 1999 it has enjoyed 'the rule of law as instated at the end of the National Conference in 1991' that adopted the new Constitution.⁶⁶ On the issue of the administration of justice, Niger reported that '[j]ustice is rendered on the national territory on behalf of the people and in strict compliance with the rule of law as well as the rights and freedoms of citizens'.⁶⁷ Niger also reported that the Ministry of Justice established a⁶⁸

legislative reform commission on criminal, civil and commercial law. The mission of this commission is to amend existing texts in such a way as ... to introduce concepts in line with the democratic context of the state, and the rule of law.

After outlining several court decisions in which the judges held that the African Charter was part and parcel of Nigerian law, the Nigerian government reported that 'it goes without saying that the observance of human rights is a tribute to the rule of law'.⁶⁹ The report added that rebels in some parts of the country 'fighting against the rule of law' were responsible for displacing thousands of people.⁷⁰ South Africa's First Periodic Report cites a Constitutional Court decision in which the Court held that 'under the rule of law' citizens and non-citizens 'are entitled to rely on the state for the protection and enforcement of their

62 The Republic of Mauritius's Second, Third, Fourth and Fifth Combined Reports under the African Charter on Human and Peoples' Rights (2008) 3.

63 Mauritius's Second, Third, Fourth and Fifth Combined Reports (n 62 above) 12.

64 Mauritius's Second, Third, Fourth and Fifth Combined Reports (n 62 above) 66.

65 Mauritius's Second, Third, Fourth and Fifth Combined Reports (n 62 above) 80.

66 Initial and Periodic Report of the Republic of Niger to the African Commission on Human and Peoples' Rights on the Implementation of the African Charter on Human and Peoples' Rights 1988-2002 (report not dated) 5.

67 Initial and Periodic Report of the Republic of Niger (n 66 above) 6. See also 22.

68 Initial and Periodic Report of the Republic of Niger (n 66 above) 84.

69 Nigeria's Third Periodic Country Report: 2005-2008 on the Implementation of the African Charter on Human and Peoples' Rights (September 2008) 29.

70 Nigeria's Third Periodic Country Report (n 69 above) 75.

rights'⁷¹ and the High Court decision in which the judge issued an interdict against unlawful land occupiers, basing his decision on the fact that the Court 'had to apply the law of the land in the interests of democracy, the rule of law, equality and precedent'.⁷²

In its Seventh Periodic Report, Rwanda informed the African Commission that the government was in the process of amending several pieces of legislation largely to strengthen 'principles such as the separation of powers, the independence of the judiciary and the rule of law'.⁷³ Rwanda added that, since coming into power in 1994, the government has 'embarked on a process of reconciliation, of the reconstruction of the rule of law and of democratisation'⁷⁴ and that the establishment of the traditional *Gacaca* courts to expeditiously deal with cases of genocide was meant to '[e]radicate for good the culture of impunity whilst instilling the rule of law in the national society'.⁷⁵ The government supports organisations of genocide survivors because they, *inter alia*, support 'the government in its efforts to instil the rule of law and to translate as faithfully as possible the aspirations of the population throughout the participative democratisation process'.⁷⁶ The government also reports in the context of the right to liberty that '[r]espect for the fundamental principle of the rule of law requires the government to intensify the fight against injustice'.⁷⁷ In its Eighth Periodic Report, Rwanda informed the African Commission that a new Constitution had been enacted in 2003 '[e]stablishing the rule of law based on the respect of fundamental liberties and human rights'.⁷⁸ Rwanda also informs the African Commission that new pieces of legislation had been enacted 'strengthening principles such as independence of the judiciary and promoting the rule of law'.⁷⁹ The government reports that it has ratified several international, regional and sub-regional human rights instruments because 'Rwanda ... [is] one of the countries which want to establish the rule of law'.⁸⁰ In its Combined Ninth and Tenth Reports to the African Commission, Rwanda

71 Republic of South Africa's First Periodic Report on the African Charter on Human and Peoples' Rights (2001) 57.

72 South Africa's First Periodic Report (n 71 above) 62.

73 Seventh Periodic Report of Rwanda to the African Commission on Human and Peoples' Rights 1999-2002 (February 2003) 7.

74 Seventh Periodic Report of Rwanda (n 73 above) 8. See also 26, where the government reports that it was engaged in a 'permanent ... to overcome certain difficulties and pursue the re-establishment of the rule of law in general, and to promote respect for human rights in particular'.

75 Seventh Periodic Report of Rwanda (n 74 above) 10.

76 Seventh Periodic Report of Rwanda (n 74 above) 19.

77 Seventh Periodic Report of Rwanda (n 74 above) 27.

78 Eighth Periodical Report of Rwanda to the African Commission on Human and Peoples' Rights 2002-2004 (March 2005) 9.

79 Eighth Periodical Report of Rwanda (n 78 above) 11.

80 Eighth Periodical Report of Rwanda (n 78 above) 27.

states that it has implemented some of the following initiatives in its effort to strengthen the rule of law: the representation of the youth, women and the disabled at various political levels; the decentralisation of policy to facilitate the active participation of citizens to fight poverty in planning and managing their own development process; the establishment of community courts (*Gacaca*) to expeditiously bring to trial genocide suspects; the establishment of self-help community projects; and community policing.⁸¹ The government assures the African Commission that '[t]he country is committed to being a capable state, characterised by the rule of law that supports and protects all its citizens without discrimination'.⁸² The government informs the African Commission that its Constitution obliges it to build 'a state governed by the rule of law, a pluralistic democratic government'.⁸³

In its Second Periodic Report, Sudan reported that '[t]he 1991 criminal code includes a series of guarantees relating to the custody and treatment of prisoners which constitute together what should be called the rule of law'.⁸⁴ In the same report, Sudan explains what it understands by the phrase 'the rule of law' by writing:⁸⁵

The rule of law includes the presumption of innocence, non-retroactivity of criminal laws, fair trial standards, the right to be released on presentation of sureties, the right to defence, the right to appeal, to call witnesses and to examine the prosecution witnesses, and the right to be assisted by an interpreter.

In its Third Periodic Report, Sudan reported to the African Commission that its Constitution 'has established a deeply-rooted foundation for the system of justice whose pillar is the rule of law[,] independent [*sic*] of the judiciary as well as the judges themselves ...'.⁸⁶ The report adds that the law prohibits conduct aimed at compromising the independence of the judiciary because 'they are bound to observe the provisions of the Constitution by the dispensation of justice and application of the principle of the rule of law'.⁸⁷ The report adds that the 'Constitution provides for the principle of the rule of law and imposes on the judges to protect the principle' and to dispense

81 Ninth and Tenth Periodic Report of the Republic of Rwanda under the African Charter on Human and Peoples' Rights 2005-July 2009 (July 2009) para 106.

82 Ninth and Tenth Periodic Report of the Republic of Rwanda (n 81 above) para 181.

83 Ninth and Tenth Periodic Report of the Republic of Rwanda (n 81 above) para 219.

84 Third Periodic Report of Sudan Pursuant to Article 62 of the African Charter on Human and Peoples' Rights: It Comprises the Required Reports up to April 2003 (April 2003) para 31.

85 Periodic Report of Sudan (n 84 above) para 32.

86 Third Periodic Report of the Republic of the Sudan under Article 62 of the African Charter on Human and Peoples' [*sic*] Rights (May 2006) para 29.

87 Third Periodic Report of the Republic of the Sudan (n 86 above) para 59.

justice impartially and without fear or favour.⁸⁸ It reports that the Constitution subjects all the organs to state to the rule of law;⁸⁹ that the Ministry of Justice Act was enacted in 1983 and it requires the Ministry to 'endeavour to promote the principle of the rule of law [and the] provision of a conclusive justice'.⁹⁰

The Ugandan government reported to the African Commission that in 1986 it had established a commission of inquiry to investigate the human rights violations and 'breaches of the rule of law ... committed against persons in Uganda' by past dictatorial regimes.⁹¹ The report added that 'ordinary Ugandans welcomed the inquiry with enthusiasm, regarding it as an indication of the government's commitment to upholding human rights and the rule of law'.⁹² The government adds that there has not been a state of emergency in Uganda for many years because '[t]he rule of law is ... today prevalent in Uganda' and the Constitution clearly stipulates the circumstances under which the state of emergency may be declared and the rights and freedoms that must be protected during the subsistence of the state of emergency.⁹³

Zambia reports to the African Commission that in 2003 it established a Constitutional Review Commission with the mandate to, *inter alia*, 'recommend appropriate ways and means of entrenching and protecting human rights, the rule of law and good governance in the Constitution',⁹⁴ and that '[a]rticle 113(d) of the Constitution ... makes it a duty of every citizen to promote democracy and the rule of law'.⁹⁵

Zimbabwe reported to the African Commission that human rights organisations 'which support efforts to increase public awareness of human rights principles and the rule of law operate without hindrance';⁹⁶ that the government's commitment and adherence 'to the respect of human and peoples' rights and the rule of law remain pivotal to its domestic and foreign policy';⁹⁷ and that 'Zimbabwe will continue to actively participate in all international fora whose aim is to advance the respect of human rights and the rule of law'.⁹⁸ The

88 Third Periodic Report of the Republic of the Sudan (n 86 above) para 160.

89 Third Periodic Report of the Republic of the Sudan (n 86 above) para 88.

90 Third Periodic Report of the Republic of the Sudan (n 86 above) para 156.

91 See The Republic of Uganda Report to the [African] Commission on Human and Peoples' Rights Presented at the 39th Ordinary Session of the [African] Commission on Human and Peoples' Rights Banjul, The Gambia (May 2006) para 10.6.

92 Uganda Report (n 91 above) para 10.7.

93 Uganda Report (n 91 above) para 27.21.

94 Zambia's Initial Report to the African Commission on Human and Peoples' Rights (not dated) para 119(b).

95 Zambia's Initial Report (n 94 above) para 311. See also para 537.

96 Advance Copy of the Summary of Zimbabwe's First Report to the African Commission on Human and Peoples [sic] Rights (1992) para 6.1.

97 Advance Copy of the Summary of Zimbabwe's First Report (n 96 above) 20.

98 As above.

government of Zimbabwe reported to the African Commission that one of the challenges it faced was that⁹⁹

Britain and its allies have associated land reform with lawlessness, emphasising the belief that the rule of law can only exist in Zimbabwe through the restitution of individual property rights to white commercial farmers.

The government reported (or complained?) to the African Commission that ‘the British anti-Zimbabwe campaign has peddled falsehoods about the “rule of law”, human rights and a wide range of “governance” issues that it claims to be violated by the Zimbabwean government’.¹⁰⁰

What the above examples highlight is that African countries are committed to taking measures that promote the rule of law. Activities undertaken by these states range from holding elections, amending legislation, ensuring the independence of the judiciary, and fighting corruption to establishing state institutions to promote democracy, and ratifying international and regional human rights instruments. The fact that all the countries report on the measures taken to protect and promote human rights as a sign that they are observing the rule of law should be understood against the background that human rights are inseparable from the rule of law and that the African Commission is responsible for monitoring the promotion and protection of human rights and therefore reports before it are expected to emphasise human rights issues.

It is one thing for a country to amend legislation, ensure the independence of the judiciary, organise elections, ratify international instruments, establish human rights institutions and fight corruption, and quite another to have the impact of such initiatives realised in practice. It is critical that such reports go beyond outlining the measures being taken to promote the rule of law and actually inform the African Commission on how such measures have been implemented in practice and how they have impacted on the lives of ordinary people. Many countries ratify international instruments, but those instruments remain of no use at the local level unless they have been domesticated for courts to rely on them in interpreting the relevant human rights provisions. Legislation could be enacted and no measures taken to implement it in practice. Measures could be taken to fight corruption, but that does not mean that such measures have been or are likely to be effective. Elections could be held but in an environment in which they cannot be free and fair. The law could provide for an independent judiciary, but resources may not be made available to such a judiciary to carry out its mandate. The point being made here is that it is not

99 The Republic of Zimbabwe 7th, 8th, 9th and 10th Combined Report under the African Charter on Human and Peoples’ Rights (October 2006) 46.

100 Zimbabwe 7th, 8th, 9th and 10th Combined Report (n 99 above) 11.

enough for countries to report in abstract terms on the measures being taken to promote the rule of law. They should report on how those measures have been implemented in practice.

A worrying trend emerging from the reports studied for this article is that there appears to be an understanding that the rule of law goes hand in hand with the promotion and protection of civil and political rights. This is why issues such as the right to a fair trial, the holding of elections, freedom of expression and the establishment of the institutions to support democracy feature prominently in these reports. However, in these reports many countries also report on the measures taken to protect socio-economic and cultural rights, but not in the context of the rule of law. It is therefore critical that African states are reminded that the promotion and protection of socio-economic and cultural rights are as important to the rule of law as are the promotion and protection of civil and political rights.

The question whether the ratification of international human rights instruments is an example of whether a given state respects the rule of law is an important one. Some of the reports discussed above show that states have cited the fact that they ratified or acceded to international treaties as an example that they are either on their way to having the rule of law entrenched in their jurisdictions or that in fact there is a rule of law in those countries. However, it is one thing for a state to ratify an international human rights treaty and quite another for the obligations imposed by such a treaty to be implemented. There are two issues that need to be examined closely in cases where a state cites its ratification of an international treaty to demonstrate its adherence to the rule of law: whether such a treaty is part and parcel of the law of the state in question, that is, whether litigants can rely on such treaties in courts of law and that judges or magistrates are in fact allowed to apply such treaties, and whether states take the obligations imposed by such treaties seriously, for example by submitting their periodic reports on time and implementing the recommendations made by treaty enforcement bodies on those reports or in communications brought against such states. The Cameroonian experience above is an example of the tension that might exist between a state's international obligations and its domestic law. Therefore, before states are commended for ratifying international treaties, the question should be asked how the obligations imposed by those treaties are being or have been implemented.

6 Promotional mission reports

The African Commission, in order to fulfil its promotional role, has conducted several missions to different African countries. The reports written on those missions highlight the achievements that have been registered by the relevant country and the challenges faced in the protection and promotion of human rights. In those reports, the African

Commission makes recommendations on what it thinks the measures are that should be taken to promote and protect human rights. Our attention now shifts to an examination of the mission reports to distil the African Commission's observations or recommendations with regard to the rule of law. There are two broad ways through which the African Commission has dealt with the question of the rule of law in its mission reports. One, it has criticised some governments for failing to uphold the rule of law. This has been the case with regard to the government of Zimbabwe which the African Commission criticised for its failure to 'uphold the rule of law' and its failure 'to chart a path that signalled a commitment to the rule of law' when it encouraged war veterans to intimidate and assault opposition politicians.¹⁰¹ The second way has been for the African Commission to applaud certain countries for putting in place mechanisms to promote the rule of law.

In its report on its promotion mission to Ghana, the African Commission¹⁰²

observed with appreciation [that] the establishment of the *Commission on Human Rights and Administrative Justice*, together with the independence of the judiciary and other institutions supporting democracy, the rule of law and human rights, have created a conducive atmosphere of trust in which a culture of human rights can flourish.

The Ghanaian government informed the African Commission that '[t]he police are established to, among other things, provide protection for persons and property, prevent the commission of crime, and uphold the rule of law'.¹⁰³

In its report on the promotion mission to Botswana, the African Commission delegation noted that¹⁰⁴

[s]ince independence, Botswana has exhibited strong elements of democracy – accountability of government to the electorate through regular free elections held every five years, relatively uncorrupt government bureaucracy, government and judicial respect for human rights and the rule of law ...

The African Commission delegation noted that one of the government officials 'indicated that corruption by its nature undermines democracy, the rule of law, diverts resources from their legitimate goals, undermines the economy and inevitably undermines the enjoyment of human rights'.¹⁰⁵

The Guinea Bissau Minister of Justice informed the African Commission that prisons are important in combating 'impunity and

101 Executive Summary of the Report of the Fact-finding Mission to Zimbabwe 24-28 June 2002, para 5.

102 Report of the Promotion Mission to the Republic of Ghana 1-5 September 2008, para 169 (emphasis in original).

103 Report of the Promotion Mission to the Republic of Ghana (n 102 above) para 182.

104 Mission Report to the Republic of Botswana 14-18 February 2005 8.

105 Mission Report to the Republic of Botswana (n 104 above) 34.

further respect for the rule of law and human rights', but noted that many offenders were being released early to decongest prisons.¹⁰⁶ The Minister also informed the delegation that 'the international community has commended his government's seriousness in respect of the rule of law'.¹⁰⁷

Some governments, such as that of Zimbabwe, have questioned the African Commission's conclusions as to the question of the status of the rule of law in those countries. The Zimbabwean government, for example, responded to the African Commission's findings that there was a breakdown of the rule of law in the country by saying that it 'denies that there was ever a breakdown of the rule of law. There never was a time that the system failed to address the situation in the country.'¹⁰⁸ Such disagreements highlight the difficulties inherent in drawing the conclusion that there is or there is not a breakdown of the rule of law in the country. Countries expect the African Commission to give compelling evidence before it draws the conclusion that there is a breakdown of the rule of law in the country. It also means that the African Commission will have to do more research and establish what constitutes the breakdown of the rule of law in a country which is, for example, not experiencing a civil war. Otherwise, its reliance on a few examples of some people, even with government approval, engaging in criminal activities will easily be rejected by governments.

7 Conclusion

The above paragraphs have examined the way in which the African Commission has used its mandate to promote the rule of law. The author has looked at the resolutions passed by the African Commission, the communications decided by the Commission, and promotional mission reports to demonstrate the Commission's different understandings of the concept of the rule of law. All three mechanisms show that the African Commission has had a different understanding of the meaning of the rule of law at different times. This is a clear example of how difficult it is to come up with a single universal meaning of what the rule of law is. However, what is clear is that human rights protection is an integral part of the rule of law. The author has also looked at state parties' periodic reports to show how states have reported to the African Commission on the measures they have taken to promote and respect the rule of law in

106 Report of the Promotional Mission to the Republic of Guinea Bissau 16-22 March 2005 15.

107 Report of the Promotional Mission to the Republic of Guinea Bissau (n 106 above) 19.

108 Executive Summary of the Report of the Fact-finding Mission to Zimbabwe 24-28 June 2002 30.

their jurisdictions. What emerges is that, although different states have different understandings of what the rule of law is, every state is making an effort to ensure that it puts measures in place to promote what it considers to be the rule of law.

Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms

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Summary

The enactment in 2001 of the Children's Act was a significant development in the implementation of international children's rights norms in Kenya. The Act still stands as the first statute which substantially attempts to domesticate Kenya's obligations under any human rights treaty (in this case, the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child). Almost a decade since the Act entered into force, there is a poignant lesson to be learned. This is that in contexts such as Kenya's, where full compliance with international child rights norms requires a process of comprehensive audit of existing laws and policies, not even the enactment of a consolidated law such as the Children's Act suffices. Rather, the process requires a continuous review of all laws, on the one hand, and the putting in place of administrative and other practical measures, on the other. A significant development is the passage of a new Constitution, 2010. However, realising this potential under the new dispensation will require decisive political commitment to ensure the allocation of resources and the institution of practical measures for the implementation of child rights-related laws. The Free Primary Education programme still stands out as an example of a positive measure geared towards addressing the situation of some of Kenya's poor children. The challenge remains of replicating its example to other

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key areas, including health and child support to poor families. The need for further legal provisions, for example in the area of juvenile justice, the required repeal of laws such as in relation to corporal punishment and the gaps in enforcing existing laws mean that the process of harmonising Kenyan law with CRC and the African Children's Charter is far from complete.

1 Introduction

The status of the United Nations (UN) Convention on the Rights of the Child (CRC) as the most universally-ratified human rights treaty remains intact.¹ The year 2011 also saw a significant development in the adoption by the UN of an Optional Protocol to CRC which puts in place a complaints procedure at the international level regarding violations of children rights.² States continue to submit reports on the progress of implementation of CRC, albeit with noted delays.³

In Africa, the sister covenant to CRC, the African Charter on the Rights and Welfare of the Child (African Children's Charter) is ratified widely.⁴ The body in charge of monitoring states' compliance with the legal obligations under the African Children's Charter – the African Committee of Experts on the Rights and Welfare of the Child – issued its first adjudicative decision, finding a violation of children's rights to a nationality by the Kenyan government in relation to children of Nubian descent – a minority group in Kenya.⁵

1 Convention on the Rights of the Child, adopted by the UN General Assembly on 20 November 1989, has been ratified by 192 states – all UN member states apart from the United States, Somalia and South Sudan. More countries have ratified CRC than any other human rights treaty in history.

2 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure adopted and opened for signature and ratification by UN General Assembly Resolution 66/138 of 19 December 2011. As at 23 April 2012, no states had ratified the Protocol although it had been signed by 21. According to art 19 of the Protocol, it will enter into force three months after the deposit of the 10th instrument of ratification or accession.

3 The UN Committee on the Rights of the Child has consistently noted delays in the submission of state reports. However, in a recent examination of reports, the Committee has noted that it receives a large number of reports every year. It has, as an exceptional measure, recommended to some states, such as Kenya, to present consolidated periodic reports.

4 As of April 2012, 46 out of 54 member states of the African Union had ratified the African Children's Charter.

5 Communication 002/009 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya* (Nubian children's case). The decision issued on 22 March 2011 and further discussed in sub-sec 4.2 below is available at <http://www.ihrda.org/wp-content/uploads/2011/09/002-09-Nubian-children-v-Kenya-Eng.pdf> (accessed 2 April 2012).

Rightly so, the current focus of governments, treaty-monitoring bodies, civil society activists and academics has shifted from the near-universal ratification of CRC and the wide acceptance of the African Children's Charter to the actual situation of children. Hence the questions: Against the backdrop of the African Committee of Experts' decision on Kenya, what is the present state of children's rights in Kenya? How is Kenya faring in the process of implementing children's rights, both in terms of legislation and in practice? Almost a decade since the enactment of the primary legislation – the Children's Act, 2001 – what are the successes, constraints and challenges? The article attempts to answer these issues in relation to Kenya.

2 Children's rights under the Children's Act

The Children's Act of 2001 remains the primary Kenyan law setting forth the legal obligations of all duty bearers – government, parents and civil society – to respect, protect and fulfil the rights of children. It is the first example of a comprehensive enactment in Kenya which gives effect to any international human rights treaty to which the country is a party.

The Act provides for a catalogue of rights for children. It also makes provision for new institutional arrangements and enacts the concept of 'parental responsibility' – elaborating on parental rights, powers, duties and authority.

Part II of the Act (sections 3-22), which deals with the 'rights and welfare of the child', is by far the most significant part of the Act. This part of the Act makes provision for the four rights which have been identified by the UN Committee on the Rights of the Child (CRC Committee) as reflecting the 'soul' of CRC.⁶ These core principles include, firstly, the best interests principle provided for in section 4(2) of the Act.⁷ Secondly, the Act guarantees the child's right to life, survival and development (section 4(1)). Thirdly, the Act provides for children's right to non-discrimination (section 5). Lastly, the Act provides for the rights of the child to participation and to be accorded the opportunity

6 UN Committee on the Rights of the Child, General Comment 5: 'General Measures of Implementation of the Convention on the Rights of the Child' CRC/GC/2003/5 27 November 2003. General Comments are authored by human rights treaty monitoring bodies (including the UN Committee on the Rights of the Child). By their nature (having been made by the treaty-monitoring body after years of experience of examining state party reports and state practice) these comments constitute authoritative elaborations on legal obligations entailed in the provisions of the various treaties.

7 The Act provides that '[t]he best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'.

to express his or her opinion, taking into account the child's age and degree of maturity (section 4(4)).

Section 6 of the Children's Act secures the right of the child to live and to be cared for by his or her parents. Section 7 guarantees the right of every child to 'free basic education which shall be compulsory in accordance with article 28 of the CRC' and be the responsibility of the state and parents. The child's right to religious education of choice is provided for in section 8. Sections 9 and 10 provide for children's rights to health and medical care and the rights to protection from armed conflict and economic exploitation and work.

The child's right to a name and nationality is provided for in section 11. However, as discussed in this article, certain categories of children, such as children of Nubian or Somali descent, still face formidable obstacles in accessing birth registration procedures.⁸

Section 12 of the Act provides for the right of children with disabilities to access education, special care and appropriate treatment. Section 13 provides for the child's right to protection from physical and psychological abuse, neglect and exploitation. Section 14 guarantees the right of the child to be protected from female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.⁹ In addition, sections 15, 16 and 17 provide for the right of the child to be protected from sexual exploitation, drugs, torture, deprivation of liberty, capital punishment and life imprisonment. The child's rights to leisure and privacy are the subject of section 18.

The Act's catalogue of 'duties and responsibilities of the child' in section 21 was a first amongst the new children's legislation that has been enacted in different African countries since 1990. The influence of the African Children's Charter on the provisions of the Kenyan Children's Act is evident in the inclusion of these 'duties and responsibilities'.¹⁰ By providing for the responsibilities of the child, the Act takes on board the opinion that children's rights cannot be viewed in isolation and that emphasis should not be placed solely on

8 See para 4.2 below.

9 This provision has since been bolstered in relation to female genital mutilation (FGM) by the provisions of the Prohibition of Female Genital Mutilation Act 32 of 2011, which provides for stiffer penalties in relation to FGM. Under sec 29 of this Act, persons convicted of FGM and related offences, such as aiding and abetting the commission of FGM, are liable to a punishment of a minimum of three years' imprisonment or a minimum fine of Kshs 200 000 (US \$2 500) or both imprisonment and fine. Under sec 20 of the Children's Act, the offence attracted a maximum imprisonment term of 12 months or a fine not exceeding Kshs 50 000 (US \$625) or both. The new law against FGM has been in legal effect since 4 October 2011.

10 The African Children's Charter makes provision for 'duties' of children in art 31.

children's rights to the exclusion of the rights of their parents and the community at large.¹¹

The Act sets out penalties for persons who infringe on the above highlighted rights of the child in section 20.¹² Section 22 confers jurisdiction on the High Court to enforce any of the rights of the child and confers legal standing (*locus standi*) on any member of the public to institute action or to approach the Court for such enforcement.¹³

3 The constitutionalisation of children's rights in Kenya

Kenya's new Constitution, in force since 27 August 2010, introduces a progressive Bill of Rights (chapter 4) which is by and large guided by international human rights standards. It guarantees economic, social and cultural rights – including the rights to food, housing, sanitation, water, health (including reproductive health care), education and social security as enforceable rights,¹⁴ alongside civil and political rights – including the rights to life, liberty and security of the person, privacy, freedom of conscience, religion, belief and opinion, freedom of expression and freedom of association. In addition, the Bill of Rights provides for other rights, including equality and freedom from discrimination. It includes specific provisions on the rights of minorities, persons with disabilities, older members of society, youth and children.

Article 53 of the Constitution provides as follows:

- 1 Every child has the right –
 - (a) to a name and nationality from birth;
 - (b) to free and compulsory basic education;
 - (c) to basic nutrition, shelter and health care;

11 See GO Odongo 'The domestication of international standards on the rights of the child: A critical and comparative evaluation of the Kenyan example' (2004) 12 *The International Journal of Children's Rights* 419-424, but cautioning, however, that the concept of children's duties is amenable to abuse.

12 Sec 20 provides that '[n]otwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in sections 5-19, such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine'.

13 This too is a landmark legal development, since Kenyan courts have over the time restrictively interpreted *locus standi* in the sense that only those with a 'sufficient interest' in a matter may have the right to sue in court. This restricted interpretation has been a significant constraint to 'public interest litigation' even in constitutional and civil litigation cases which touch on the enforcement of fundamental rights and freedoms.

14 The Constitution envisages that the economic, social and cultural rights that it guarantees will come into effect immediately from the date when it (the Constitution) came into legal effect (27 August 2010).

- (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
 - (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
 - (f) not to be detained, except as a measure of last resort, and when detained, to be held –
 - (i) for the shortest appropriate period of time; and
 - (ii) separate from adults and in conditions that take account of the child's sex and age.
- 2 A child's best interests are of paramount importance in every matter concerning the child.

The Constitution recognises the right of every one, including children, to pursue action in the courts in the event of a denial of any of any of the guaranteed rights – whether civil, political or economic, social and cultural. The inclusion of enforceable social and economic rights in the Bill of Rights will, for the first time in Kenya, ensure access to legal remedies and allow people to hold the government accountable for violations of these rights. The Constitution places an obligation on the state to 'observe, respect, promote and fulfil' the rights and freedoms in the Bill of Rights and to enact and implement legislation to fulfil its international obligations in respect of human rights and freedoms.¹⁵

The Constitution also provides for access to other institutions, such as the independent human rights institution.¹⁶

4 Implementation of the four key principles of CRC and the African Children's Charter¹⁷

4.1 The right of the child to have his or her best interests taken into account

The principle of the 'best interests of the child' has been part of Kenyan family law in relation to guardianship and custody issues. There are examples of significant court decisions in this regard as far

¹⁵ Art 21 Constitution of Kenya.

¹⁶ One of these institutions under art 59 is the Kenya National Human Rights Commission.

¹⁷ These four 'key principles' or rights have been identified as forming the core of implementation of CRC; see UN Committee on the Rights of the Child, General Comment 5 (n 6 above); The African Committee of Experts on the Rights and Welfare of the Child, which is responsible for monitoring states' implementation of the African Children's Charter, has also adopted these principles as the key principles for the realisation of children's rights. See Guidelines for Initial Reports of States Parties (Prepared by the African Committee of Experts on the Rights and Welfare of the Child Pursuant to the Provision of article 43 of the African Charter on the Rights and Welfare of the Child) Cmttee/ACRWC/2 II Rev2, 2003, http://www.africa-union.org/child/Guidelines%20for%20Initial%20reports%20_%20English.pdf (accessed 3 April 2012).

back as four decades ago. In an early 1970 case, *Wambwa v Okumu*,¹⁸ the High Court in a custody dispute invoked the principle of the best interests of the child¹⁹ in deciding against customary law in making the order that the best interests of a 14 year-old girl determined that the mother be granted custody rather than the father. This was in conflict with the relevant customary law that dictated that the father be granted custody.

Consequent to 2001, the Children's Act has revolutionised the importance of this principle by extending its application to the entire panoply of matters affecting children; whether private (involving parents and families) or public (by government, courts and other public authorities).²⁰ However, the need for further government action to give full effect to the best interests of the child principle has been expressed, for example by the UN Committee, who has called on the Kenyan government to²¹

ensure that the principle of the best interests of the child is systematically taken into account in all programmes, policies and decisions that concern children, and especially aiming at addressing vulnerable and disadvantaged children, *inter alia* by sensitising and training all involved officials and other professionals.

4.2 The right to non-discrimination

The overarching children's right to non-discrimination is a key provision under the Children's Act and the Constitution. In practice, however, concerns remain regarding unlawful discrimination against certain categories of children, including female children (in many respects including access to education), children of certain minorities, children with disabilities, refugee children and children of asylum seekers.

The recent decision by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) in a case regarding the situation of children of Nubian descent in Kenya²² is significant in reiterating Kenya's and other states' legal obligations. The decision was made in the context of the reality that persons of Nubian descent in Kenya have historically suffered exclusion from obtaining citizenship. In practice, the majority of Nubian children are

18 [1970] EA 578 (Kenya) 41, discussed in Odongo (n 11 above) 422.

19 At the time included as part of the Guardianship of Infants Act, Cap 144 Laws of Kenya, since repealed by the Children's Act.

20 Odongo (n 11 above) 422.

21 UN Committee on the Rights of the Child, Concluding Observations on Kenya's second periodic report, 19 June 2007, CRC/C/KEN/CO/2, para 27.

22 Nubian children's case (n 5 above).

not registered as Kenyans or any other citizens at birth.²³ This situation hinders the affected children's access to education, health care and other essential public services which comprise of their economic, social and cultural rights guaranteed under Kenya's domestic laws, the Constitution and the African Children's Charter to which Kenya is party. As a result, these children grow up facing obstacles to their and their families' ability to ensure their life, survival and development and with uncertainty as to whether they will ever become Kenyan citizens. The Children's Committee declared the case admissible before it after a review of the inordinate delay in the adjudication of the complainants' case before Kenyan courts.

On the merits, the Children's Committee affirmed that Kenyan Nubian children had the right to a nationality under article 6 of the African Children's Charter. According to the Committee, state parties have an obligation under the Charter to make sure that all children are registered immediately after birth. The obligation is not only limited to passing laws (and policies), but also extends to addressing all *de facto* limitations and obstacles to birth registration.²⁴ The Committee held that Kenya's citizenship confirmation procedures, which make it difficult for persons of Nubian descent to register the birth of their children and fail to take into account the historical official failure to provide valid identity documents to Kenyans of Nubian descent, unlawfully discriminate against the affected children in violation of article 3 of the African Children's Charter.²⁵ According to the Committee, 'being stateless as a child is generally antithesis to the best interests of the child'.²⁶ Among other recommendations, the Committee urged Kenya to take all necessary legislative, administrative and other measures in order to ensure that children of Nubian descent, that are otherwise stateless, can acquire a Kenyan nationality and proof of such a nationality at birth. It also recommended that the government of Kenya adopt a short, medium and long-term plan, including legislative, administrative and other measures to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education, of affected children of Nubian descent, preferably in consultation with the affected beneficiary communities.

23 In its decision, the Committee cites the report, Kenya National Commission on Human Rights (2007) *An identity crisis? A study on the issuance of national identity cards*, Nairobi, <http://www.knchr.org/dmdocuments/Final%20IDsReport.pdf> (accessed 23 August 2011). This report identified and recorded practices indicating discrimination against certain populations in Kenya, including persons of Nubian descent, in the grant of birth registrations and other official identity documents.

24 Nubian children's case (n 5 above) para 40.

25 Nubian children's case (n 5 above) para 57.

26 Nubian children's case (n 5 above) para 46.

4.3 The right to life, survival and development

It is understood that this right goes beyond the protection of children's lives and also relates to life expectancy, child mortality, immunisation, malnutrition, preventable diseases and other related issues.²⁷ As the Africa Child Policy Forum explains:²⁸

The term 'survival' covers a child's right to life and the right to meet the needs that are the most basic in a child's existence. These needs include adequate standard of living, shelter, nutrition, and access to medical services. Amongst other things, states are urged to take all possible measures to improve neo-natal care for mothers and babies, reduce infant mortality, and improve conditions that promote the wellbeing of children. The survival and the development of a child therefore depend on the health conditions and the socio-economic and cultural environment in which the child grows. Harmful traditional practices such as infanticide greatly increase child mortality rates. Two other rights are inextricably tied with the implementation of the right to survival and development, namely, the right to health and the right to education.

Section 4(1) of the Children's Act explicitly provides for the child's right to life, survival and development. The inclusion of a children's rights clause, which explicitly provides for children's socio-economic rights (article 53) and a general clause providing for enforceable socio-economic rights (article 43) in the Constitution, also ensures that this right is now part of Kenya's Constitution. As discussed further in section 10 of this article, poverty remains a major cause and consequence of children's rights violations in Kenya.

4.4 The right to participation, including respect for the views of the child

The Children's Act (section 4(4)) expressly provides for the right of children to have their views taken into account in matters affecting them. It is significant that the Act further specifies that this right is to be taken into account in light of the degree of the child's maturity. This consideration corresponds with the concept of children's evolving capacities under article 12 of CRC. Although not expressly provided for under the children's rights clause in the Constitution, this right is implied as part of the constitutionally-guaranteed rights of children. Such a reading is based on article 52(2) of the Constitution, which provides that the specific provisions which elaborate certain rights in relation to certain groups of persons (including the children's rights clause), 'shall not be construed as limiting or qualifying' any of the

27 The African Child Policy Forum *In the best interests of the child: Harmonising laws in Eastern and Southern Africa* (2007) 36.

28 See The African Child Policy Forum *In the best interests of the child: Harmonising laws on children in West and Central Africa* (2011) 36, http://www.africanchildinfo.net/site/index.php?option=com_sobi2&sobi2Task=sobi2Details&sobi2Id=1068&Itemid=59&lang=en (accessed 3 April 2012).

general rights that are part of the Bill of Rights. These rights include the right to freedom of expression under article 33 of the Constitution.

In practice, there are examples of official initiatives to encourage greater children's participation. For example, the government has on many occasions recognised civil society-led initiatives, such as the establishment of children's clubs and an informal children-led children's parliament which, from time to time, deliberates on issues and makes recommendations for required government interventions on issues affecting children.²⁹ Another example of a child participation initiative led by civil society was the participation of groups of children in giving opinions to influence the child law reform process that led to the enactment of the Children's Act of 2001 and children's participation in the collection and discussion of data, leading to the compilation of Kenya's first and second periodic state reports to the UN Committee on the Rights of the Child.³⁰ Beyond these examples, however, children's rights to participation require much more profound changes. Prevailing socio-cultural and traditional attitudes still inhibit the full consideration of children's views in the private or family and public settings. The UN Committee has called on the government to³¹

promote, facilitate and implement, within the family, schools, the community, in institutions as well as in judicial and administrative procedures, the principle of respect for the views of children and their participation in all matters affecting them ...

5 Significance of the inclusion of children's rights in the Constitution

5.1 Transformative potential of the provisions, particularly in relation to socio-economic rights

The inclusion of human rights norms in the Constitution, particularly article 43 which provides for a number of socio-economic rights, offers a blueprint for the betterment of the plight and welfare of Kenyan society. This includes children who are further entitled under articles 53(1)(a) and (c) to the right to basic and compulsory education, basic nutrition, shelter and health care. Article 21(3) provides for the obligation of 'all state organs and public officers' to address the needs of 'vulnerable groups within society ... including children'.

29 Government of Kenya (2005) *Kenya second periodic state report to the UN Committee on the Rights of the Child*, CRC/C/KEN/2 paras 162-164.

30 Save the Children (Sweden) 'Children's rights in Kenya – An analysis based on the CRC Reports' (2006) <http://ecaf.savethechildren.se/Documents/ECAF%20docs/Children's%20Rights%20in%20Kenya.pdf> (accessed 3 April 2012).

31 Concluding observations on Kenya (n 21 above) para 29.

The Constitution provides for a number of general principles in relation to the interpretation of rights, including children's rights. Article 24 provides for the limitations clause requiring any limitation to any right under the Bill of Rights to be 'reasonable and justifiable'. Article 20 provides that the interpretation of the meaning and scope of human rights shall be with respect to the promotion of values such as those that underpin an open and democratic society and based on human dignity, equality, equity and freedom. Article 21(2) provides that the state shall take legislative, policy and other measures to ensure the progressive realisation of socio-economic rights provided for under article 43 of the Constitution. Article 20(5) provides that the state bears the burden of proving that it lacks resources to implement socio-economic rights, but calls on the state to ensure that the process of allocation of resources is done in light of 'prevailing circumstances ... including the vulnerability of particular groups and individuals', which under article 21(3) explicitly includes children.

It is instructive to note that the qualifications regarding the progressive nature of state obligations and availability of resources in relation to socio-economic rights under article 43 of the Constitution are not made with regard to children's rights under article 53, including the right to free and compulsory basic education and children's rights to nutrition, shelter and health care. The implication is therefore that the legal obligations regarding children's socio-economic rights are of an immediate nature. Hence, in instances where the state is primarily obliged to provide for these rights, the state cannot claim that such an obligation is progressive/incremental over time and/or is subject to the availability of resources. Examples include children without parental care or other primary care and who may be placed in alternative care places or children without such care at all.

Writing with reference to the comparative South African example, one children's rights expert is of the opinion that³²

providing for justiciable socio-economic rights at a constitutional level ... and singling out children as beneficiaries can be highlighted for the potential it has to ensure that resource allocation for the fulfilment of

32 J Sloth-Nielsen 'Domestication of children's rights in national legal systems in the African context: Progress and prospects' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 57-61. Sloth-Nielsen further discusses the South African High Court's 2006 decision in the case *Centre for Child Law & Others v MEC for Education & Others* Case 19559/06 (30 June 2006), which dealt with the nature of the state obligation towards children placed by a court in alternative care hostels. The hostels in which the children were hosted were, however, in a poor state, exposing children to inhabitable conditions and environmental and health hazards as a result of exposure to freezing conditions. The Court interpreted the lack of internal limitations in sec 28 of the South African Constitution 1996 to decide that, while children's socio-economic rights were subject to reasonable and proportional limitations to which all human rights under the Constitution were subject, these rights were 'unqualified and immediate'. Hence, the absence of internal limitations made children's socio-economic rights not subject to the

children's rights is prioritised, as well as for the fashioning of creative (legal) remedies ...

5.2 Entrenchment of the children's rights regime

The children's rights regime under the Children's Act, 2001, ran the risk of redundancy in the event of repeal or amendments to the Act. Hence, in the period before the 2010 Constitution, the children's rights guarantees under the Children's Act stood on tenuous legal ground. They could be de-legalised through a simple majority vote in parliament – the process of amending or repealing ordinary legislation under Kenyan law. However, the provisions of the Constitution now entrench the Bill of Rights providing for a two-thirds majority vote in both sets of parliament (upper and/or lower houses) in addition to a majority vote in a public referendum before any amendment(s).³³

Despite the global popularity of the concept of children's rights, genuine official commitment to the implementation of children's rights in practice cannot be taken as a given.³⁴ This is especially with regard to obligations related to government financial allocation for the realisation of children's rights or issues such as juvenile justice that may require governments to uphold children's rights in the context of socio-political climates where children's rights principles may easily be sacrificed in the face of perceived public pressure about other priorities or positions such as crime control.³⁵

Therefore, the specific inclusion of children's rights in the Kenyan Constitution offers a much-needed legal buffer against the potential danger of the repeal of or amendments to the Children's Act.

5.3 Addressing legal challenges to statutory provisions on child rights

The inclusion of children's rights norms in the Constitution ensures that guarantees of children's rights in ordinary legislation (including

availability of resources and legislative measures for their progressive realisation. The Court ordered the authorities to provide each of the children in this case with a sleeping bag, and to put in place proper access control and psychological support. This case is further discussed at <http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/case-reviews/south-african-cases/high-court-cases/document.2009-05-29.2634707373/> (accessed 30 July 2011).

33 Constitution of Kenya, 2010, ch 16, secs 255-257.

34 See, generally, J Sloth-Nielsen 'The contribution of children's rights to the reconstruction of society: Some implications of the constitutionalisation of children's rights in South Africa' (1996) 4 *The International Journal of Children's Rights* 323 327-328.

35 For a general discussion on possible tension between children's rights norms and public pressure relating to child/juvenile justice, see, generally, GO Odongo 'The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context' unpublished LLD thesis, University of the Western Cape, 2006.

the Children's Act) are in line with the Constitution. This is important in the Kenyan context where the process of implementing the Children's Act in the last decade has consistently had to wrestle with the question whether the provisions of the Act can stand scrutiny in light of the absence of equivalent explicit provision for child rights norms under the old Constitution. A 2006 court decision of the Court of Appeal concerning the issue of pre- and on-trial detention of children and the High Court's judgment regarding parental responsibility reinforce this point. This is discussed in the section below.

6 Interpreting the provisions of the Children's Act in relation to parental care

The provisions of the Children's Act in Part III – sections 23-28 – provide for the concept of 'parental responsibility' in a way that affirms the primary duty of parents and guardians to ensure children's rights – including the provision for the basic needs of children. The role of the state is important but secondary in supporting primary care givers. The state assumes a primary role for children only where parental or alternative care is lacking.³⁶

In article 54(1)(e), the new Constitution provides for the child's right to parental care and protection, 'which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not'. This provision affirms the primary role of parents and is in tandem with the Children's Act in this regard. It, however, goes further than the relevant provisions of the Children's Act. This is by virtue of the express statement that the child's right to parental care is an equal responsibility of both parents irrespective of marital status. In contrast, the Children's Act – in particular sections 24 and 25 – places a particular emphasis on the marital status of parents providing, for children born outside marriage, for the mother's parental responsibility in the 'first instance'³⁷ and for a process by which the father applies to a court to 'acquire' parental responsibility under section 25(1).³⁸

The author has previously agreed with the criticism by Kenyan children's rights advocates that the provisions of the Act are patently

36 This interpretation is implicit in sec 23(2) of the Act which clarifies what constitutes 'parental duties'.

37 Sec 24(3)(a).

38 The Children's Act provides in sec 25(1): 'Where a child's father and mother were not married at the time of his birth, the court may, on application of the father, order that he shall have parental responsibility for the child; or the father and mother may by agreement ('a parental responsibility agreement') provide for the father to have parental responsibility for the child.'

and inherently discriminatory.³⁹ In the case of *Rose Moraa (Suing through Next Friend) Josephine Kavinda and Another v Attorney-General*,⁴⁰ the High Court, sitting as a constitutional court of three judges, considered the possible discriminatory nature of sections 23 and 25(1) of the Children's Act. In a ruling delivered in December 2006, the Court adopted a very restrictive interpretation of the place of international law on Kenyan law. It proceeded to hold that the relevant provisions of the Children's Act did not lead to unfair discrimination. In the Court's view, the purpose of the differential treatment was justified as it was meant to place parental responsibility for children born outside marriage, in the first instance, on the mother of the child.⁴¹ In this regard, the Court was guided by the provision that paternal responsibility could further be 'acquired' by virtue of section 25(1) of the Children's Act, holding that 'the principle of equality and of non-discrimination does not mean that all distinctions between persons are illegal'.⁴²

In a series of cases since 2003, the Kenyan High Court has affirmed the relevance of scientific proof of paternity through DNA testing.⁴³ However, the net effect of the provisions of the Children's Act in relation to children born outside marriage and mothers of this category of children is one of unjustifiable discrimination. The court decision in the *Rose Moraa* case has the effect that the fathers of children born out of wedlock cannot be legally presumed to have parental responsibility in the first instance, even where such a presumption may be necessary in light of the rights of affected children, including the children's best interests. Fathers of this category of children have the discretion to disown their children or to acquire paternal responsibility.⁴⁴ On the other hand, women alleging paternity must prove the paternity beyond reasonable doubt where such paternity is contested by the child's alleged father.⁴⁵ This will often necessitate DNA testing. As discussed by the women's rights organisation FIDA-Kenya, however,

39 GO Odongo 'Domesticating international children's rights norms: The Kenya case study' in S Lagoutte & N Svaneberg (eds) *Women and children's rights: African views* (2011) 61-83.

40 High Court Civil Case 1351 of 2002, reported in [2006] eKLR (*Rose Moraa* case).

41 FIDA-Kenya (undated) 'Research on the implementation of gender-related laws' 20, <http://fidakenya.org/wp-content/uploads/2011/02/Analysis-of-gender-discriminatory-laws-in-kenya.pdf> (accessed 6 August 2011).

42 As above.

43 See EZ Ongoya 'The emerging jurisprudence on the provisions of Act No 8 of 2001, Laws of Kenya – The Children's Act' (2007) 1 *Kenya Law Review* 214-224, http://78.136.28.31/klr/fileadmin/pdfdownloads/Elisha_Paper.pdf (accessed 5 August 2011).

44 This is the import of sec 25 of the Act as upheld by the court decision. See 'Judges shield love fathers from cost of care: Little girl loses case over right to upkeep' *Saturday Nation* 2 December 2006.

45 FIDA-Kenya (n 41 above) 19.

the required DNA tests are likely to be 'expensive and out of the reach of many women'.⁴⁶

The explicit provision in the Constitution – article 54(1)(e) cited above – which provides for the child's right to parental care stated as the 'equal responsibility' of both parents, now provides a basis for looking into a possible legal review of sections 23 and 25 of the Children's Act. The author is of the view that the Court's ruling maintaining the legality of sections 23 to 25 in so far as the discrimination against children born outside marriage is concerned, cannot stand legal scrutiny in light of the provisions of the Constitution. The Constitution also provides for an expanded role of international treaties to which Kenya is party.⁴⁷ This would require a consideration of the discriminative nature of the provisions of the Children's Act in the context of children's rights under CRC, the African Children's Charter and women's rights under the UN Convention on the Elimination of Discrimination against Women. 'Discrimination' under these treaties is defined more broadly than was hitherto defined under section 82 of Kenya's applicable Constitution at the time (on the basis of which the High Court's decision was based).⁴⁸

In cases regarding children born within a marriage or cohabitation, where the father is presumed to have accepted *de facto* parental responsibility as envisaged by section 25(2) of the Children's Act,⁴⁹ courts have, in contrast, consistently upheld children's rights to parental care taking into account the child's best interests. A recent

46 As above.

47 Eg, art 2(5) of the Constitution provides that 'the general rules of international law shall form part of the laws of Kenya'.

48 In the *Rose Moraa* case (n 40 above), the court adopted the long-held strict interpretation by courts of Kenya's dualist legal approach to treaties holding that the direct provisions of a treaty, including CRC and CEDAW (and the relevant treaty interpretation as regards the right to non-discrimination), requires a corresponding domesticating legislation/statutory provisions in order to apply as Kenyan law. Sec 82(4) of the old Constitution permitted discrimination against women in marriage, inheritance, adoption and other matters of personal law under customary law and was widely criticised for its legalisation of gender-based discrimination contrary to the right to equality. It inherently stood in conflict with a number of other laws, including the Children's Act 2001, which provides for, among others, the best interests of the child principle. Because of the doctrine of the supremacy of the Constitution (in art 3 of the previous Constitution, Constitution of Kenya 1969, as subsequently amended), the Court in the *Rose Moraa* case opined that, in the event of a conflict, the provisions of the Constitution were superior to those of the Children's Act.

49 Sec 25(2) provides: 'Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.'

example is a December 2010 decision in the case *SB v AAL*.⁵⁰ This case involved issues of parental responsibility, custody, maintenance and child support in the context of family separation. In its decision, the High Court was unequivocal that the father had acquired parental responsibility due to his cohabitation with the children's mother and his provision of material and other support for the children's care.⁵¹ In such a context, the Court was of the view that 'neither the father nor the mother shall have a superior right or claim against the other in exercise of parental responsibility'.⁵²

7 Juvenile justice

The obligations of states under CRC (articles 37 and 40) and the African Children's Charter (article 17) read together with the overarching rights of the child, such as the best interests of the child, have the effect that states must ensure reform of the regular criminal justice system in dealing with children in conflict with the law. This necessitates a child-specific justice system. The underpinning principle for a child-specific justice system is based on the rationale that child offenders differ from adult offenders due to reasons of childhood, evolving capacities and vulnerability. In addition, they are more amenable to change than their adult counterparts. As a result, CRC introduces 'reintegration' as the aim of a juvenile justice system.

Part XIII of the Children's Act provides for the rights applicable to ensure due process for alleged child offenders and an array of alternative sentences which a court has at its disposal to deal with a child found by a court to have committed a crime.⁵³ It prohibits the use of the death penalty, imprisonment and corporal punishment of children⁵⁴ in line with the provisions of CRC and the African Children's Charter.⁵⁵ These provisions significantly advance Kenya's compliance

50 Civil Appeal 178 of 2000 (In the High Court at Mombasa), reported in [2010] *eKLR*.

51 As above.

52 As above.

53 Secs 186 & 191 respectively.

54 The Act goes further than CRC (art 37) and the African Children's Charter (art 17), both of which outlaw the use of life imprisonment and not all forms of imprisonment as the Act does.

55 There are a number of examples between 2002 and 2007 where courts have proceeded to impose (contrary to the explicit prohibition) the death penalty and prison sentences on child offenders for capital and other offences. Two examples illustrate this point. In the case *Peter N Lugulai v Republic*, Nakuru HC Criminal Appeal 363 of 2002 (unreported), discussed in Ongoya (n 43 above) 225, a magistrate's court sentenced a 16 year-old offender to death upon a finding of guilt in relation to the capital offence of robbery with violence. On appeal, the High Court overturned the conviction of the child on the basis of a lack of incriminating evidence. In relation to the death penalty, the Court stated that the Children's

with its obligations under CRC and the African Children's Charter as regards juvenile justice.

However, there are concerns that the Act fails to fully comply with Kenya's legal obligations in relation to juvenile justice. On two successive occasions – ten and four years ago – the UN Committee on the Rights of the Child recommended that Kenya should raise its minimum age of criminal responsibility – the age below which children are legally presumed not to be capable of committing crimes.⁵⁶ In 2007 the Committee urged Kenya to raise the age from the current age of eight years to 12 years and consider increasing it.⁵⁷ However, to date, the age of criminal responsibility remains eight – a clear violation of CRC and the African Children's Charter.⁵⁸

A significant limitation in the Children's Act, 2001 remains unaddressed to date. As already pointed out, a trial court has an array of alternative sentences/disposition measures to resort to upon finding a child guilty. However, the Act does not explicitly recognise the possibility of a formal referral of children away from criminal justice (diversion) processes before trial. The limited scope for diversion under the Act does not comply with the general spirit of CRC.⁵⁹

In a number of court cases since 2003, the Kenyan High Court has upheld the provisions of the Act and the Child Offender Rules – made under schedule 5 of the Children's Act. These provisions relate to the process of expediting cases involving child offenders, including by setting time limits for these trials and the pre-trial detention of

Act (sec 190(2)) was explicit in its inapplicability to children even in the event of a finding of guilty. The other example is the case *CKL v Republic*, Kericho High Court Criminal Appeal 104 of 2004 (unreported), discussed in Ongoya (n 43 above) 225. In this case, a child offender who was 17 years old at the time of committing two offences of arson and assault had been sentenced by a lower court to serve concurrent prison sentences of 18 months and three years, respectively, for the offences. On appeal, the High Court declared that the custodial sentences were illegal as sec 191 of the Children's Act prohibited the imposition of the sentence of imprisonment on child offenders.

56 Concluding observations on Kenya (n 21 above) para 68; UN Committee on the Rights of the Child 'Concluding Observations on Kenya's initial report', CRC/C/15/Add 160, 7 November 2001, para 22.

57 Concluding observations on Kenya (n 21 above) para 68(a).

58 Although CRC and the African Children's Charter do not specify such an age explicitly, the UN Committee on the Rights of the Child has recommended the age of 12 as the minimum age states should set in this regard. See UN Committee on the Rights of the Child, General Comment 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007 paras 32-33.

59 Art 40(3) and the UN Beijing Rules on the Administration of Juvenile Justice (Rule 11) which encourage diversion at all stages of the criminal justice procedure.

children.⁶⁰ In a second set of decisions, the High Court has ruled that the Act and Rules made under it do not have the effect of imposing time limits within which to 'complete trials' *per se*, but provide a basis for ensuring an expeditious handling of criminal cases involving alleged child offenders.⁶¹ Still, the common effect of both sets of decisions has been to implement the principle of detention as a last resort and for the shortest period of time for children.⁶²

A 2006 court decision put a halt to this progressive trend of court decisions. The case is discussed in the next sub-section below.

7.1 The case of *Kazungu Mkunzo and Another v Republic*⁶³

Rule 12 of the Child Offender Rules, which are part of subsidiary legislation under schedule 5 of the Children's Act, provides for time limits within which a case involving a child must be completed. The rule also makes provision for the dismissal of any cases (involving children) that are not completed within three months after the child's taking of plea (except for capital or serious offences which are to be

60 Eg, in *R v SAO (a minor)* [2004] eKLR, in which the High Court enforced the provisions on time limits by ordering the release on bail, pending trial, of a 13 year-old girl charged with murder. The Court cited the inordinate delay at the start of the trial in applying the provisions of the Child Offender Rules. In *Victor Lumbasi v Republic*, Bungoma High Court Criminal Case 57 of 2006 (unreported), the High Court held that, irrespective of the nature or seriousness of the criminal charge, including the capital offence of murder, unless there are militating circumstances, bail should ordinarily be granted to an alleged child offender. The Court also held that where a child is not released on bail, the Court may make an order for his or her detention in a children's remand home until the case is heard and determined which in any event must be within 12 months from the date of plea. In *Republic v Wambua Musyoka* Machakos High Court Criminal Case 24 of 200 (unreported), the High Court ordered the immediate release on bail of a suspected offender after an eight-month duration of the trial on the basis that the Child Offender Rules under the Act set a 12-month time limit within which to complete criminal trials involving alleged child offenders.

61 Eg, in *Republic v Matano Katana Mombasa* High Court Criminal Case 33 of 2004 (unreported) and *Republic v ST (a child)*, Nakuru High Court Criminal Case 144 of 2003 (unreported). In both cases, the High Court decisions interpreted the purpose of the explicit wording of the Child Offender Rules (Rule 12) which set a time limit of three months for the trial of children for non-capital offences and one year for capital offences to be a safeguard to prevent delays in the completion of criminal cases involving alleged child offenders. According to the Court's decisions, the Rules provided trial courts jurisdiction to grant bail pending the hearing and disposal of cases against children, especially where there was a delay. The Court was of the view that, despite the prescriptive nature of the Rules, which set a time frame within which to complete the trial process, the Rules did not have the effect that cases regarding children accused of committing offences would have to be halted based on these time limits.

62 As provided for under CRC (art 40) and the African Children's Charter (art 17) and in the subsidiary legislation – the Child Offender Rules promulgated by the Minister in charge under the Kenyan Children's Act.

63 Court of Appeal, Criminal Appeal 239 of 2004, [2006] eKLR http://www.kenyalaw.org/family/all_cases.php?pageNum_Recordset1=1&totalRows_Recordset1=111 (accessed 23 April 2012).

dismissed after 12 months from the date of plea).⁶⁴ This particular rule was designed to further children's rights, particularly article 37(b) of CRC which requires that detention of children should be used as a last resort and *for the shortest period of time*.

In this decision dated July 2006, Kenya's then highest court, the Court of Appeal, held that Rule 12 was unconstitutional and violated the Children's Act itself. The Court reasoned that the rule purported to set time limits within which to complete the criminal trial of alleged child offenders in a context when Kenya's Constitution, applicable at the time, and the Children's Act did not make corresponding express provisions setting time limits on the completion of trials – involving children or adults. According to the Court, the setting of such time limits did not comply with section 186 of the Children's Act which provides that such trials must be determined 'without delay', and section 77 of the then applicable Kenyan Constitution which provided for the right to a fair trial for all persons, including the right to be tried 'within a reasonable time'. The Court reiterated that section 77 of the previous Constitution did not expressly specify time limits for completing criminal trials.

The import of the Kenyan Court of Appeal's judgment is that for this rule to have stood legal scrutiny, it should have been passed into law as part of the Act and not subsidiary legislation to the Act. Also, the legality of such a rule would have had to involve a constitutional amendment to the general right to a fair trial as was provided in section 77 of the applicable Constitution.

As with the High Court's decision regarding section 25 of the Children's Act on parental responsibility,⁶⁵ the Court adopted a view by which the interpretation of the provisions of an international treaty has no relevance at all to the subject issue that was in this case drawn from the provisions of a treaty to which Kenya was a party. The provisions of the new Constitution, which explicitly include the principle of detention as a last resort and for the shortest period of time⁶⁶ and an expanded role of international treaties to which Kenya is party, would necessitate a different court interpretation in favour of the rules prescribing time limits for the trial of children and restrictions to the detention of child offenders. Still, in relation to the Children's Act, the government needs to ensure the inclusion, in the substantive provisions of the Act, the Child Offender Rules, including provisions regarding time limits within which criminal cases involving children must be completed. This would ensure legal consistency between

64 Children's Act, Child Offender Rules, Rules 12(2) & (4).

65 Discussed in sec 6 above.

66 Art 53(1)(f) provides for a child the right 'not to be detained, except as a measure of last resort, and when detained, to be held (i) for the shortest appropriate period of time'.

the provisions of the Constitution, the Act and the Rules promulgated under it.

Further, the discrete aspects of child justice require considerable detail necessitating separate legislation. The 2010 proposal for a draft Child Justice Bill is therefore a step in the right direction. It is instructive that the Bill seeks to make statutory provision for time limits in relation to trials involving child offenders by incorporating the time limits in the Child Offender Rules under the Children's Act into the main body of the draft Child Justice Bill.⁶⁷

8 Advancing the protection of children from corporal punishment⁶⁸

The high prevalence of corporal punishment in Kenyan homes and schools, with the attendant physical, psychological and other forms of harm to children, has been documented previously.⁶⁹ In July 2007, the UN Committee on the Rights of the Child noted, in relation to Kenya, that⁷⁰

[it] continues to be concerned at corporal punishment in the home, in the penal system, in alternative care settings, as well as in employment settings. The Committee is also concerned at the continued use of corporal punishment in practice by certain schools and the lack of measures to enforce the prohibition of this practice ...

The Committee recommended that Kenya introduces legislation which explicitly abolishes corporal punishment in all settings – 'in the home and in all public and private alternative care and employment settings'.⁷¹

67 Draft Child Justice Bill 2010, art 59.

68 In General Comment 8: The right of the child to protection from corporal punishment and other cruel and degrading forms of punishment, CRC/C/GC/8, 2 March 2007, para 11, the UN Committee on the Rights of the Child defined 'corporal' or 'physical' punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ('smacking', 'slapping', 'spanking') children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, eg, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, caning, forcing children to stay in uncomfortable positions, burning, scalding, or forced ingestion.

69 See J Stavropoulos *Violence against girls in Africa: A retrospective survey in Ethiopia, Kenya and Uganda* (2006); The African Child Policy Forum; ANNPCAN Kenya *From physical punishment to positive discipline: Alternatives to physical/corporal punishment in Kenya* (2005). An earlier study is the 1999 study by Human Rights Watch 'Spare the child: Corporal punishment in Kenyan schools' 1 September 1999, <http://www.unhcr.org/refworld/docid/45d1adbc2.html> (accessed 30 April 2012).

70 Concluding Observations on Kenya (n 21 above) para 34.

71 Concluding Observations on Kenya (n 21 above) para 35.

Under CRC, 'children's physical integrity is absolute: Any corporal punishment as a means of discipline, whether used in schools or the homes and whether considered mild, moderate or severe, is prohibited'.⁷² This absolute prohibition extends to the use of corporal punishment in the justice system. While there is wide global acceptance of the prohibition of corporal punishment in the criminal justice system, the legal sanctioning of the use of corporal punishment – smacking, caning, whipping and other forms – in schools and homes, remains prevalent in many African countries.

In Kenya, the Children's Act, 2001 explicitly prohibits the imposition of corporal punishment on child offenders.⁷³ A subsequent 2003 amendment to Kenya's Penal Code abolished the use of corporal punishment in the criminal justice system, whether for children or adults.⁷⁴ This law did not outlaw the use of corporal punishment in the context of prisons under which the Prisons Act still permits the use of corporal punishment, and children held under institutional care in respect of which the Borstal Institutions Act retains the applicability of the penalty as a form of discipline.⁷⁵

Subsidiary legislation promulgated by the Education Minister in 2001 specifically provides that corporal punishment should not be used as a form of school discipline.⁷⁶ It appears, though, that the Children's Act leaves a window for the use of corporal punishment by parents and others (including school authorities). Section 127 of the Act retains the right of parents and others to 'administer reasonable punishment'.

Kenya's new Constitution now provides for the absolute legal protection of children from of all forms of corporal punishment in all settings – including in homes and schools. Article 29 of the Constitution provides:

72 L Kurki 'International standards for sentencing and punishment' in M Tonry & S Frase (eds) *Sentencing and sanctions in Western countries* (2001) 339-340, interpreting the views of the UN Committee on the Rights of the Child in relation to arts 19, 28(2) & 37 of CRC (prohibiting all forms of abuse of children by parents, any form of cruel, inhuman and degrading treatment and punishment and obliging states to ensure all forms of school discipline conforms to human dignity). This interpretation has recently been reiterated by the Committee; see UN Committee on the Rights of the Child, General Comment 13: The right of the child to freedom from all forms of violence, CRC/C/GC/13, 18 April 2011 para 17.

73 Sec 191(2). Sec 18(1) on the prohibition of torture, cruel and inhuman treatment is also relevant for the prohibition of corporal punishment.

74 Criminal Law (Amendment) Act 5 of 2003.

75 Sec 55 of the Prisons Act, ch 90 Laws of Kenya allows for the imposition of corporal punishment on any male inmates (except inmates held under sentence of death or pursuant to a civil penalty). Sec 36 of the Borstal Institutions Act, ch 92 Laws of Kenya allows for the imposition of corporal punishment on male inmates, including boys held within Borstal institutions.

76 Legal Notice 56 of 2001 – The Education (School Discipline) Regulations 2001.

Every person has the right to freedom and security of the person, which includes the right not to be –

....

- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.

Article 53(1)(d) further makes provision for every child's right 'to be protected from all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour'. It is instructive that the Bill of Rights, under which this provision falls, is stated to apply to all and binds all state organs.⁷⁷ By virtue of the supremacy of the Constitution,⁷⁸ it is submitted that the provisions of the Constitution supersede the statutory and other provisions – including section 127 of the Children's Act – which retain the applicability of forms of corporal punishment. The relevant provisions of the Children's Act and other laws, such as the Prisons Act and the Borstal Institutions Act and the relevant rules made under these laws, should be repealed to ensure compliance with the Constitution.

The constitutional prohibition of all forms of corporal punishment is progressive. However, achieving substantial and total compliance in the use of alternative forms of discipline for children requires the enforcement of the requisite criminal law⁷⁹ in addition to extra-legal measures. To this end, the recommendation made by the UN Committee on the Rights of the Child to Kenya in 2007 remains relevant. The Committee urged Kenya to ensure, *inter alia*, 'public education and awareness-raising campaigns on children's rights to protection from all forms of violence and promotion of alternative, participatory, non-violent forms of discipline'.⁸⁰ To date, this process is yet to be taken up as a key aspect of child protection by the relevant government agencies.

⁷⁷ Constitution of Kenya, 2010, art 20(1).

⁷⁸ Art 2(4) of the Constitution provides that '[a]ny law, including customary law, that is inconsistent with this Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid'.

⁷⁹ In the absence of corresponding provisions in Kenya's criminal law, the prohibition of all forms of corporal punishment in all settings requires the legal enactment of the necessary penal proscription in order for there to be a legal basis for criminal prosecution of individuals and other actors who may violate this prohibition.

⁸⁰ Concluding Observations on Kenya (n 21 above) para 35.

9 Official commitment to the realisation of children's socio-economic rights: The contrasting examples of education and health

9.1 Children's rights to free and compulsory education

Under article 53 of the Constitution and section 7 of the Children's Act, children's rights to primary/basic education is stated to be 'free and compulsory'. Section 7 of the Children's Act specifically provides that basic education shall be compulsory 'in accordance with article 28 of the CRC'. In practice, the compulsory nature of basic education, as envisaged under Kenyan law, depends not only on the duty of parents and children, on the one hand, to ensure school attendance, but also the duty of government to ensure that such education is indeed available and 'free', on the other. The realisation of this right is currently being done under the auspices of the government's free primary education programme discussed in this section.

9.2 Free primary education programme

In 2003 the Kenyan government made free primary education (FPE) one of its key official programmes. The programme initially involved the scrapping of school tuition fees in all 18 000 public primary schools in 2003. This policy has been retained in the 20 000 or so public schools.⁸¹ In addition, the programme introduced financial disbursements, based on student population, to cover the purchase of school text books. The policy of government allocation of tuition fees and the provision of text books remains. However, in practice the majority of public schools impose some forms of non-tuition and other levies on parents.

Writing in 2006, I agreed with the widely-held view at the time that the FPE programme was the most recognisable achievement of the government.⁸² Over eight years since the initiation of the programme there are examples of considerable progress through the programme. The major success of the FPE programme remains the increased access to primary schooling, especially to children who would previously not have been able to access such schooling at all. There were a total of 5,9 million children in primary schools at the end of 2002 – before the programme's inception in early 2003 – with the number rising

81 Recent government documents such as the government of Kenya *Kenya economic survey 2011 – Highlights* (2011) 38 (on file with author) indicate the total number of primary schools in the country as of 2010 to be 27 489. Of these, there were about 20 000 public (state) primary schools in the country as of July 2011 – an increase of about 11% since 2003. See T Muindi 'Teacher truancy short-changes pupils' *The Daily Nation* 20 July 2011 68.

82 See Odongo (n 39 above) 72.

to 6,8 million at the end of 2003 and 7,6 million in March 2006.⁸³ The government's Economic Survey of 2011 reports that as of the year 2009, there were 8,83 million children enrolled in primary schools and 9,38 million by the end of 2010.⁸⁴

The huge increase in the number of children enrolled in schools has been mainly attributed to the introduction of the FPE programme. Most of the beneficiary children are Kenya's vulnerable and poorest. A 2009 study attributes the increase in numbers to the halving of household educational expenditure when sending children to state schools following the introduction of the programme.⁸⁵

However, a few lingering concerns remain. The impressive increase in enrolment rates has not been matched by a concomitant increase in the quality of education in Kenya's public primary schools where the FPE policy is being implemented. In the period since the introduction of the FPE programme, the number of children in private schools has nearly tripled. During this period, school results and overall enrolment rates in many of Kenya's state (public) primary schools have fallen compared to earlier years.⁸⁶ In the rural areas, practices such as early marriages and widespread child labour remain formidable obstacles to schooling.⁸⁷ The factors leading to school drop-outs, particularly in relation to harmful cultural practices, affect girls disproportionately more than boys.

9.3 Constraints to the realisation of children's rights to health

According to the United Nations Population Fund (UNFPA), as of June 2011 up to 86 out of 1 000 new-born children in Kenya are likely to die before reaching the age of five.⁸⁸ The factors affecting households' health status in Kenya include low income *per capita*, low literacy levels, poor government spending in the health sector resulting in restricted immunisation coverage and inadequate household access to doctors by households and the high HIV/AIDS prevalence rates. These and other poor indicators, in effect, infer that the right to 'the highest

83 *Kenya second periodic state report* (n 29 above) para 401.

84 Government of Kenya (n 81 above) 38.

85 T Bold *et al* 'Free primary education in Kenya: Enrolment, achievement and local accountability' (2009) 10, <http://www.economics.ox.ac.uk/Members/tessa.bold/work/Kenya%20CSAE%20Conf%20Mar09.pdf> (accessed 10 August 2011).

86 See, generally, 'Improving institutions for pro-poor growth' University of Oxford 'Lessons from Kenya's introduction of free primary education' (2009) <http://www.iig.ox.ac.uk/output/briefingpapers/pdfs/iiG-briefingpaper-03-kenya-primary-education.pdf> (accessed 1 August 2011).

87 A July 2011 study by a Kenyan NGO cited by Muindi (n 81 above) found that student performance in public schools was poorest in arid and semi-arid rural Kenya and rural parts of Western Kenya.

88 See UNFPA 'State of the world's midwifery, 2011 – Kenya country situation' (2011), http://www.unfpa.org/sowmy/resources/docs/country_info/profile/en_Kenya_SoWMy_Profile.pdf (accessed 23 August 2011).

attainable standard of health which includes the right to health care services' under section 43 of the new Constitution and the right to health under section 9 of the Children's Act remain a pipe dream for many Kenyans and Kenyan children.

Government spending and complementary private sector support to the health sector are crucial for improved access to health care services by majority poor households. This would entail improved official budgetary allocation to public health. The government also needs to expand the household/child support programme discussed in the next section of the article in addition to examining how the user fees in the public health sector inhibit access to health care, especially by the majority poor family households.⁸⁹

10 Poverty, the lack of a social security system and orphan and vulnerable children

The majority of Kenyan children bear the brunt of living in conditions of poverty. Poverty is both a major cause and consequence of children's rights violations. Published in 2009, a joint government-UNICEF study summarises the Kenyan situation as follows:⁹⁰

Forty-six years after independence, Kenya still faces the challenges of inequality and disparity. The poverty gap and socio-economic disparities continue to manifest in the lives of children, who in large numbers, are engaged in hazardous and exploitative forms of child labour to cope with the grinding economic and social hardships, mainly in the informal sector due to the socio-economic circumstances of their families and guardians. As is the case in many developing countries, these children, mainly from the socially-deprived segments of the country, are readily recruited by traffickers into the modern slavery of the sex trade, domestic labour and are often victims of the worst forms of abuse, denied their rights to care, education, and health ...

In an article regarding the South African Children's Act, Sloth-Nielsen correctly argues in relation to a much-needed transformative role of the law in this regard:⁹¹

⁸⁹ Kenya is yet to abolish the imposition of user fees in public health institutions. The applicable government policy still requires the standard payment of Ksh 10 (US \$0,08) to access the lowest health unit (dispensary) and Ksh 20 (US \$0,16) for access to health centres. For many low-income families, these standard payments are beyond their reach and often entail a balancing of expenditure between health care and other basic needs such as food.

⁹⁰ Government of Kenya and UNICEF 2009 *Situational analysis of children, young people and women in Kenya: Securing Kenya's future in the hands of children and young people*, Nairobi: GoK/UNICEF (2009) 128.

⁹¹ J Sloth-Nielsen 'A developing dialogue – Children's rights, children's law and economics: Surveying experiences from Southern and Eastern African law reform processes' (2008) 12 *Electronic Journal of Comparative Law* 4.

The drafters of [the South African Act] intended that the statute would be of far greater reach than merely a regulatory framework elucidating rights, responsibilities and respective roles of parents, family members, communities and the state: In conception this new law was intended to be transformative of both social and economic relationships ...

At the end of the year 2004, the Kenyan government, with the assistance of donor and international agencies,⁹² introduced an experimental social security programme aimed partly at addressing the vulnerability of families and children to poverty. The programme involves the granting of limited forms of social cash transfers to targeted households. To qualify for the programme, the household has to be poor, has to contain orphans or vulnerable children – explicitly defined as persons under the age of 18 – and must not be receiving benefits in another programme, either in cash or kind.⁹³ With this focus, the programme has benefitted mainly caregivers with a primary responsibility for children orphaned and affected by the HIV/AIDS pandemic and living in poverty.

Between 2006 and 2010, each beneficiary household within selected districts across the country received a flat rate amount of Kshs 1 500 (US \$18) per month. From a small beneficiary base of 22 500 households in the 2007/2008 financial year, the programme is reported to have benefitted 60 000 households in 2008/2009; 80 000 in 2009/2010 and a projected 100 000 households in 2010/2011. Overall, the programme is intended to reach up to 300 000 households caring for orphaned and vulnerable children by 2015.⁹⁴ Although noble, this initiative remains geographically and numerically limited in scope – still covering only a small portion of households caring for orphaned and vulnerable children. With a specific substantive focus, it does not address the need for child support for other categories of children such as those without access to adequate shelter, food and health care. Further, the scheme is not backed by explicit legal provisions and its implementation exclusively relies on political and donor goodwill.

The absence of a comprehensive state-funded child support programme in Kenya ensures that the children's rights guaranteed under the Children's Act and the new Constitution⁹⁵

92 These are mainly the World Bank, UNICEF, the Swedish International Development Co-operation Agency (SIDA) and the UK Department for International Development (DFID).

93 JH Bryant 'Kenya's cash transfer programme: Protecting the health and human rights of orphans and vulnerable children' (2009) 11 *Health and Human Rights* <http://www.hhrjournal.org/index.php/hhr/article/viewArticle/174/259> (accessed 15 August 2011).

94 As above.

95 MN Wabwile 'Rights brought home? Human rights in Kenya's Children Act 2001' in A Bainham & B Rwezaura (eds) *The international survey of family law* (2005) 393 413.

remain paper rights and pipe dreams for the hundreds of thousands of doomed poor children in Kenya who are decimated daily by hunger, malnutrition, curable diseases, and material deprivation due to the grinding poverty situation in the country.

Over half of Kenya's near 40 million people are children. More than half of Kenyans live below the poverty line.⁹⁶ This implies that a significant population of Kenya's children – upwards of ten million – are in urgent need of child support.⁹⁷ As of 2009, up to 12 per cent of Kenya's children – some 1,8 million – were orphans.⁹⁸ The UNAIDS global statistics of 2010 indicate that as of 2009, an estimated 1,2 million Kenyan children had been orphaned by AIDS alone.⁹⁹

11 Enduring examples of child abuse

Despite the passing of new laws, including the Sexual Offences Act, 2006,¹⁰⁰ the Counter Trafficking in Persons Act, 2010¹⁰¹ and the Prohibition of Female Genital Mutilation Act, 2011,¹⁰² the various forms of child abuse sought to be criminalised with stiffer penalties still remain. Poor enforcement of existing laws and the entrenched nature of gender-based discrimination continue to ensure impunity for child sexual abuse. This is despite the marginal improvement in relation to accountability for sexual offences compared to the period before the enactment of the law on sexual offences.¹⁰³ Previous studies on trafficking in Kenya have noted the existence of cross-border and internal trafficking of children.¹⁰⁴ In 2006, up to 175 000 Kenyan children were reported to be victims of domestic, regional and international child trafficking for various forms of exploitation, including sexual exploitation, labour, domestic servitude, illegal

96 Kenya's Second Periodic Report (n 29 above) para 328 stated that at least 56% of Kenyans lived below the poverty line.

97 Bryant (n 93 above).

98 As above.

99 See UNAIDS *UNAIDS Report on the Global AIDS Pandemic*, <http://www.unaids.org/globalreport/> (accessed 10 August 2011). The report defines 'orphans' as children aged under 18 who have lost one or both parents to AIDS.

100 Act 3 of 2006, providing stiffer penalties for sexual offences and criminalising various forms of sexual offences against children and adults. The Act has been in legal effect since 21 July 2006.

101 Act 8 of 2010 providing for harsher penalties in relation to the trafficking in persons. The law has been in legal effect since 13 December 2010.

102 Act 32 of 2011 (n 9 above) which provides for harsher penalties for the offence of female genital mutilation/cutting.

103 See, generally, Federation of Women Lawyers in Kenya (FIDA-K) (2009) *Implementation of the Sexual Offences Act – A Research Report*.

104 See, generally, African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) *Report of the Conference on Child Trafficking, Nairobi*, 17 August 2006.

adoption, organ removal, street vending and agricultural labour.¹⁰⁵ While the prevalence rates of female genital mutilation have dropped among certain ethnic communities, in others they have virtually stagnated or even risen.¹⁰⁶ Amongst some ethnic groups, including the Borana, Kisii, Maasai, Kuria and Somali communities, the prevalence rate of genital cutting among girls remains over 90 per cent in some areas.¹⁰⁷ In addition, the ever-burgeoning numbers of children who live or fend for a living in the streets point to the failure of children's rights duty bearers, including families and the government, to ensure children's parental or alternative care.¹⁰⁸

Specific categories of children, such as children with disabilities, refugees and internally-displaced children and children from minority groups,¹⁰⁹ continue to suffer discrimination over and above the children's rights violations that they face. There also remain considerable gaps in enforcing the existing domestic legal provisions under the Children's Act and the Employment Act, 2007 regarding the protection of children from child labour. A nation-wide study on the issue found that about 600 000 children work and attend school and 1,3 million are out of school altogether, with 34 per cent of the children working in commercial agriculture and fisheries, 24 per cent in subsistence agriculture and fisheries, 18 per cent in domestic and related services, and 24 per cent in other sectors.¹¹⁰ Overall, the problem of child labour is a manifestation of the high incidence of poverty at household levels.¹¹¹ Ultimately, dealing with the problem will require measures to address the impact of poverty on the realisation of children's rights.

105 Government of Kenya and UNICEF (n 90 above) 137.

106 As above.

107 As above, citing Government of Kenya *Kenya Demographic and Health Survey 2008/9* (2009).

108 A joint 2009 government-UNICEF study estimated that there were 700 000 street children in Kenya. This study uses an expansive definition of street children to include children working in the streets; see Government of Kenya and UNICEF (n 90 above) 130.

109 In respect of discrimination faced by children from minority groups in relation to birth registration and the right to a nationality, see generally KNCHR (n 23 above).

110 PO Alila & JM Njoka 'Child labour, new and enduring forms from an African development policy perspective', cited in Government of Kenya and UNICEF (n 90 above) 140-141.

111 As above.

12 Concept of childhood under Kenyan law and practice

It is clear from the children's rights clause in the Constitution and the provisions of the Children's Act that the concept of children as bearers of rights is now firmly anchored in Kenyan law. Article 260 of the Constitution and section 2 of the Children's Act state that a 'child' is any person under the age of 18 years. This definition is a considerable advance in Kenyan law due to the fact that prior to the enactment of the Act, different definitions of a 'child' abound in law.¹¹² However, even with this legal definition there remain issues at a practical and legal level.

In practice it is clear that widespread cultural definitions of a child are prevalent, much to the detriment of children's rights. The widespread socio-cultural concept of childhood conflicts with the legal view of children as bearers of certain legal entitlements ('rights'). Hence, as discussed in relation to the right to free and compulsory education in an earlier section of this article, many children's access to education is still limited by virtue of negative cultural practices under which, among others, children are viewed as a vital source of labour.

In addition, inconsistencies remain between the legal reference of 18 as the age below which persons are considered children and the applicable and often discriminatory low legal minimum age limits. One key area relates to the age of marriage. In 2007, the UN Committee of the Rights of the Child noted the concern that different laws set the minimum age of marriage differently, in conflict and differently for boys and girls.¹¹³ There are current legislative proposals for the harmonisation of the different marriage law regimes (African, Christian, Muslim and Hindu marriage regimes) with reference to one co-ordinated marriage law – the Marriage Bill, 2007. Part of the proposed changes includes the legal provision for the age of 18 as the minimum age for marriage. However, the proposed law is yet to be considered by parliament. This leaves a window of opportunity for early marriage, especially by young girls.

Addressing the various inconsistent and discriminatory sets of legal minimum ages is vital to harmonising Kenyan law with existing treaty

112 See P Kameri-Mbote 'Custody and the rights of children' in K Kibwana & L Mute (eds) *Law and the quest for gender equality in Kenya* (2000) 161-181. Different terms were used to refer to children within the legal system, including terms such as 'infant', 'young person', 'juvenile', 'minor', etc.

113 Concluding Observations on Kenya's Second Periodic Report (n 21 above) para 22. The Hindu Marriage and Divorce Act, ch 157 Laws of Kenya and the Marriage Act, ch 150 Laws of Kenya provide that the minimum age for marriage for a girl is 16 and the minimum age of marriage for a boy 18 (in relation to Hindu and Christian marriages). Customary law and Islamic law (applicable for personal matters under Kenyan law) allow for persons under the age of 18 (without necessarily setting minimum ages) to be married.

obligations. Further, the government must invest in a public education and sensitisation process aimed at reconciling the different prevailing cultural conceptions of children with the legal recognition of children as bearers of human rights if the concept of children's rights is to be part of practice within the family, societal and official settings.

13 Conclusion

The constitutionalisation of children's rights norms following the passing of a new Constitution serves to highlight the hitherto tenuous nature of legislating children's rights norms in an ordinary piece of legislation that is subject to political vagaries and whims. By entrenching children's rights, the new Constitution decisively deals with the previous incongruence between the Children's Act and Kenya's Constitution – a point emphasised by court decisions which have served to stymie the cause of children's rights. In some instances, such as the absolute protection of children from corporal punishment, the new Constitution further advances Kenya's compliance with international legal obligations.

The new Constitution provides for a transformative legal framework within which to realise children's rights, particularly with reference to the child's right to life, survival and development. Poverty stands out as a major cause and consequence of children's rights violations in Kenya. The guarantee of children's and families' socio-economic rights provides a key reference point within which to address the welfare of Kenyan children, specifically those living in poverty. However, it goes without saying that addressing the problem of poverty will invariably involve the formulation and implementation of requisite policies to provide flesh to the bare bones of the provisions of the Constitution. The pilot limited cash transfer grant programme, highlighted in this article, is a positive example in alleviating the plight of a select target group of children living within poor households. More generally, the FPE programme, although itself long overdue for reform, offers a powerful example for addressing the need for children's improved access to other essential services such as health.

The enactment in 2001 of the Children's Act was a significant development in the implementation of international child rights norms in Kenya. Indeed, the Act stands out as the first to domesticate Kenya's legal obligations under any human rights treaty. Almost a decade since the Act entered into legal force, the major lesson is that full compliance with international children's rights norms requires a continuous review of all laws, on the one hand, and administrative and other practical measures to ensure the realisation of children's rights, on the other.

Reconceptualising the ‘paramountcy principle’: Beyond the individualistic construction of the best interests of the child

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Summary

This article laments the individualistic construction of the best interests of the child principle. Decision making in a family context goes beyond a mere trumpeting of the interests of the individual child and involves balancing various competing interests. Decisions often claimed to be made in the interests of children are not just about children – they are an attempt to balance the competing interests of family members. A child’s best interests are often limited by the broad interests of the community (especially in communitarian societies) and the rights of others, particularly the rights and interests of parents, siblings, caregivers and other persons exercising parental responsibilities. Consequently, decisions made in a family context usually seek to balance different family members’ rights and interests. Drawing inspiration from literature on the subject, the article advocates the adoption of a holistic approach to the welfare principle. It is shown, towards the end of the article, that the South African courts and legislature have rightly endorsed the notion that the fact that the best interests of the child are ‘paramount’ does not mean that it is not limitable. Much depends on the competing interests at stake, the factors that must be weighed in the process of making a value judgment and the weight to be accorded to each factor in light of the facts of each case.

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1 Introduction

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall *be a primary consideration*.¹

In all actions concerning the child undertaken by any person or authority the best interests of the child shall be *the primary consideration*.²

A child's best interests are of *paramount importance* in every matter concerning the child.³

In all actions concerning the care, protection and well-being of a child the standard that the best interest of the child is of *paramount importance*, must be applied.⁴

Generally, the provisions referred to above reflect the seriousness with which the law treats children's interests. The term 'paramountcy principle' is used loosely to refer to what is commonly known as the best interests of the child. Therefore, the terms 'paramountcy principle' and the best interests of the child are used interchangeably in the article. The article argues, firstly, that the 'paramountcy principle' casts such an individualistic and 'bossy' image of the child as to suggest that when decisions affecting children are made, nothing except the best interests of the child matters.⁵ Narrowly constructed, the 'paramountcy principle' requires decision makers to religiously follow what the child needs or wants without reference to other competing interests. Secondly, it is shown that the paramountcy principle may be of limited relevance to communitarian societies. These societies are built on the importance of group solidarity and collective interests. Thirdly, parental rights and interests are very important in family relationships and it is argued by the author that parents and other holders of parental responsibilities have a wide discretion when making decisions affecting children.

1 Art 3(1) United Nations Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990.

2 Art 4(1) African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990) entered into force 29 November 1999.

3 Sec 28(2) Constitution of the Republic of South Africa, 1996.

4 Sec 9 South African Children's Act 38 of 2005.

5 In the juvenile justice context, Cameron J in *Centre for Child Law v Minister of Constitutional Development (Centre for Child Law)* Case CCT 98/08 [2009] ZACC 18, para 29, interprets the provision that the 'child's best interests are of paramount importance' to mean that the child's interests are 'more important than anything else'. However, Cameron J acknowledges that a wide spectrum of factors is relevant in determining the interests of the child.

Decisions claimed to be made in the interests of children often reflect what parents want of their children and may not necessarily be in the interests of children. It is argued in the article that we need to go beyond individualistic conceptions of child welfare rights towards an appreciation of relational rights and responsibilities between children and others, especially in a family context. According to Minow and Shanley,⁶

[a] conception of relational rights and responsibilities ... would not regard 'rights' as belonging to individuals and arising from the imperative of self-preservation, but rather would view rights as claims grounded in and arising from human relationships of varying degrees of intimacy.

An adequate theory of family law must simultaneously view an individual as a distinct individual as well as a person fundamentally involved in relationships of dependence, care and responsibility with other family members. Relational rights and responsibilities draw our attention to the claims that arise out of relationships of human interdependence. This may turn out to be very important for children who, as part of the human family, live in a world framed and influenced by practices and decisions of the larger society, including the state. Accepting the reality that rights are by 'nature' relational may turn out to be important when exercising the onerous responsibility of balancing competing rights and interests, especially those of children, parents and the family. Lastly, it is argued that the codification of informal, non-confrontational and inquisitorial dispute-resolution mechanisms in South Africa's Children's Act reflects an emerging acceptance by the South African legislature that the interests of the child are limitable. The trend towards a holistic and non-individualistic approach to the paramountcy principle is also evident from statutory provisions which require decision makers to listen to children, parents, caregivers and other holders of parental rights and responsibilities before making major decisions in respect of the child.

2 The 'paramountcy' principle is unduly individualistic

It may be argued that the paramountcy principle casts such an individualistic and 'bossy' image of the child as to suppose that nothing matters except that child's best interests. First, the paramountcy principle (if not its interpretation) is unduly narrowly individualistic and fails to reconcile the rights of children and those of parents. Those who argue for children's liberation tend to construe human rights protection as a zero-sum game in which children's gains are adults' losses, rather than as a uniform enterprise in which children's rights

6 See M Minow & ML Shanley 'Relational rights and responsibilities: Revisioning the family in liberal political theory and law' (1996) 11 *Hypatia* 4 23.

add value to the existing body of parental rights.⁷ Lord Nicholl remarks that ‘the principle must not be permitted to become a loose cannon destroying all else around it’.⁸ Interpreted strictly, the paramountcy principle requires decision makers to do what is best for the child, no matter how marginal the benefit or the interests of others. It requires that only the interests of the child be considered, nothing more, nothing less. The African Charter on the Rights and Welfare of the Child (African Children’s Charter) heightens this individualism by boldly claiming that the best interests of the child are ‘the’ primary consideration in all actions concerning the child undertaken by any person or authority.⁹

Once made ‘the’ primary or ‘the’ paramount consideration, the principle risks becoming a loose cannon destroying all else around it. In theory, this may be the case, but in practice, the paramountcy principle is not the sole consideration in deciding matters affecting the child and may even play a subordinate role in other contexts. For instance, it can be hypothesised that it is in the best interests of the child to be brought up by both parents living together as husband and wife. In fact, this proposition has been turned into a presumption under international law. One could argue that making the best interest standard legally ‘paramount’ could literally coerce parties to a marriage to live together in a broken marriage ‘for the sake of the children’. In reality, this does not often obtain even in countries in which legislation requires parents and other professional agents to ensure that custody arrangements are finalised prior to the issue of a decree of divorce.¹⁰ In determining whether to grant a divorce to warring parents in a broken marriage in which one or both parties clearly want out, the best interests of the child are not pivotal as children are not parties to the marriage contract. The child’s best interests may be relevant to the determination of post-divorce custody arrangements, but no one should be denied divorce just because it is in the best interests of the child for the parties to remain together. If the parties are going through lengthy and acrimonious litigation, it is often the case that one of the parties would have left the matrimonial home well before the issuance of the decree of divorce and the law can hardly do anything about that.

When exercising their common responsibility for the upbringing and development of the child, parents or legal guardians should

7 See BB Woodhouse ‘The constitutionalisation of children’s rights: Incorporating emerging human rights into constitutional doctrine’ (1999-2000) 2 *University of Pennsylvania Journal of Constitutional Law* 1.

8 See *Re L (Minors (Police Investigation: Privilege))* [1997] AC 16 33B.

9 Art 4 African Children’s Charter.

10 See eg the Divorce Act 70 of 1979 and the Mediation in Certain Divorce Matters Act 24 of 1987.

ensure that the 'best interests of the child will be their basic concern'.¹¹ Admittedly, 'will' is aspirational and 'the' is obligatory. In terms of article 9(1) of the United Nations (UN) Convention on the Rights of the Child (CRC), 'a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine that such separation is *necessary for the best interests of the child*'. Article 9(3) states that children 'separated from one or both parents [shall] maintain personal relations and direct contact with both parents on a regular basis, *except if it is contrary to the child's best interests*'. Article 20(1) of CRC refers to 'a child in whose own best interests cannot be allowed to remain in' the family environment. Article 37(c) refers to the right of every child deprived of their liberty to be separated from adults *unless it is considered in the child's best interest not to do so*'. Article 40(2)(b)(iii) entrenches the child's right to have a matter determined in the presence of parents unless it is considered not to be in the best interests of the child. The word 'paramount' in respect of the child is mentioned only in article 21 which understandably deals with matters relating to adoption. Article 21 requires states that allow adoption 'to ensure that the *best interests of the child shall be the paramount consideration*'. Save for this provision, other CRC provisions which mention the best interests of the child do not characterise them as 'the paramount consideration', but use very neutral language to point decision makers to the relative importance of children's interests. Even if the paramountcy of the best interests of the child is considered as a cardinal principle running throughout CRC and colouring all other provisions including the ones mentioned above, it can be argued that CRC leaves room for more or less weight to be attached to other competing interests in certain deserving circumstances. In my view, the intention of the framers of CRC was to ensure that the paramountcy principle does not become an exacting standard for private and state action.

Unsurprisingly, CRC states that the best interests of the child shall be 'a' primary consideration in order to avoid the elevation of the paramountcy principle beyond the reach of other important interests.¹² The wording 'shall be a primary consideration' in article 3 of CRC 'indicates that the best interests of the child will not always be the single overriding factor [to be considered] as there may be [other] competing or conflicting human rights interests ... between different groups of children and between children and adults'.¹³ Given the importance of the community in African societies and the fact that children are required to make sacrifices for the benefit of the family

11 See art 18(1) CRC.

12 See art 3(1) CRC.

13 R Hodgkin & P Newell 'Best interests of the child' in R Hodgkin *et al* (eds) *Implementation handbook for the Convention on the Rights of the Child* (2007) 35-38.

and the group to which they belong, it is regrettable that the African Children's Charter envisions that the best interests of the child shall be 'the' as opposed to 'a' primary consideration.¹⁴ Herring argues that we need to shift our focus from an individualistic version of welfare to an inclusive one that accommodates the interests of children, parents and others.¹⁵ The reasons he gives are that as social actors involved in relationships with others, children should be altruistic to the extent of not requiring from parents excessive sacrifices in return for minor benefits. Further, he argues that this approach enables decision makers to consider the problem not as a clash between the interests of parents and those of children, but as an invitation to decide what a proper parent-child relationship would be in the circumstances of each case.¹⁶

A 'relationship-based' approach to the 'paramountcy principle' would accommodate the rights of parents and other family members. In a recent judgment,¹⁷ the South African Constitutional Court held that determining whether the removal of a child (in need of care and protection) from the family environment is in the best interests of the child requires an evaluation of the views of parents and the child affected. Such a determination requires, 'as a minimum, [that] the family, and particularly the child concerned ... be given an opportunity to make representations on whether removal is in the child's best interests'.¹⁸ A relationship-based approach to family relations envisages an evaluation of competing interests and seeks to ensure that both parties are heard before determining where the interests of the child lie. Herring explains this approach thus:¹⁹

A relationship based on unacceptable demands on a parent is not furthering a child's welfare ... The child's welfare is promoted when he or she lives in a fair and just relationship with each parent, preserving the rights of each, but with the child's welfare at the forefront of the family's concern.

There is a great deal of 'give and take' in family relationships and we should not be ashamed to say that parents too have rights and interests which deserve legal protection. In fact, international law does

14 See art 4(1) African Children's Charter.

15 J Herring 'Welfare principle and the rights of parents' in A Bainham *et al* *What is a parent? A socio-legal analysis* (1999) 89 101.

16 Herring (n 15 above) 101-102. For a critique of the individualistic nature of human rights, see K Marx 'On the Jewish question' in J Waldron (ed) *Nonsense upon stilts: Bentham, Burke and Marx on the rights of man* (1987) 146-147; K Marx 'On the Jewish question' in D McLellan (ed) *Karl Marx: Selected writings* (1971) 54; CR Sunstein 'Rights and their critics' (1995) 70 *Notre Dame Law Review* 727 732.

17 *C & Others v Department of Health and Social Development, Gauteng & Others* 2012 2 SA 208 (CC).

18 C (n 17 above) para 27; see also para 36,

19 J Herring 'The Human Rights Act and the welfare principle in family law – Conflicting or complementary?' (1999) 11 *Child and Family Law Quarterly* 223 225.

recognise the responsibilities, rights and duties of parents (or members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child) to provide, in a manner consistent with the evolving capacities of the child, *appropriate direction and guidance* in the exercise by the child of the rights recognised in the Convention.²⁰ Whereas parental direction and guidance must be appropriate and given to enable the child to exercise all rights in the Convention, parents have a considerable discretion in making decisions they consider to be best for their children. Thus, parents decide what kind of education (religious or secular) their child should receive, what values the child should be socialised to accept and how the child should generally view the world. This is discussed in great detail below.

It may even happen that the best interests of other children supersede or compete with the best interests of a particular child. This may be unavoidable even where the adult or competent authority making the decision listens to all the children affected by the decision. In the process of making decisions concerning the allocation of parental rights and responsibilities or the granting of custody and access rights or those concerning residence and education, a competent authority may decide that the interests or preference of a particular child should not be decisive in order to ensure that other compelling interests and rights are protected and promoted. These decisions are usually based on, among other factors, the fitness and propriety of a particular person to ensure that the child receives adequate support, attains an education and develops a well-rounded personality. Contrary to the picture painted by the law and other disciplines, these decisions are not always based on the best interests of the child, which interests cannot be indisputably and scientifically determined in the first place.²¹

In *MS v M*,²² the Constitutional Court of South Africa held that the ‘expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular’.²³ It proceeded to hold that ‘the word “paramount” is emphatic’ and that, if interpreted literally, the phrase ‘in all actions concerning the child’ would virtually embrace all laws and forms of public action, since very few measures would not have a direct

20 See art 5 CRC.

21 On the indeterminacy of the welfare principle, see RH Mnookin ‘Child custody adjudication: Judicial functions in the face of indeterminacy’ 1975 (39) *Law and contemporary problems* 226; R Mnookin *In the best interests of children* (1985) 257; J Goldstein *et al Beyond the best interests of the child* (1980); S Parker ‘The best interests of the child – Principles and problems’ in P Alston (ed) *The best interests of the child: Reconciling culture and human rights* (1994) 26-41.

22 *MS v M* 2008 3 SA 232 CC.

23 *MS v M* (n 22 above) para 23.

or indirect impact on children and thereby concern them.²⁴ Such a sweeping construction of the paramountcy principle could not have been intended by the framers of the Constitution since all rights therein are limitable. The Court observed that the paramountcy principle should not be applied in a manner that could unduly obliterate other valuable and constitutionally-protected interests.²⁵ It held that the welfare principle is not an ‘overbearing and unrealistic trump of other rights’ and that it is ‘capable of limitation’.²⁶ Consequently,²⁷

[t]he fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights ... their operation has to take into account their relationship to other rights, which might require that their ambit be limited.

The paramountcy principle does not mean that where family or state action has the potential to affect children negatively, then the principle would necessarily override other considerations.²⁸ In other words, the best interests of the child, like other rights in the Bill of Rights, are subject to limitations that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.²⁹

In the absence of other interests competing for protection and imposing limitations that meet the required constitutional standard of reasonableness and justifiability, the best interests of the child prevail. In Madala J’s words,³⁰

[r]endering the child’s best interests paramount does not necessitate that other competing constitutional rights may be simply ignored or that a limitation of the child’s best interest is impermissible.

Albeit in a different context, the South African Constitutional Court, in *MS v S*,³¹ held that the paramountcy of the best interest standard does not require courts to protect children from the negative consequences of being separated from their caregivers. The furthest the courts are constitutionally required to go is to pay ‘appropriate attention to the interests of the child and to take reasonable steps to minimise damage’³² in all matters that have an impact on the child. It is the constitutional obligation of the Court to ensure that a

24 See para 25 of the judgment.

25 As above.

26 See para 26 of the judgment.

27 As above.

28 As above.

29 See sec 36 of the South African Constitution; see also A Skelton ‘Constitutional protection of children’s rights’ in T Boezaart (ed) *Child law in South Africa* (2009) 280-282.

30 *MS v M* (n 22 above) para 112.

31 Case CCT 63/10 [2011] ZACC 7; *MS v S* (*Centre for Child Law as Amicus Curiae*) 2011 2 SACR 88 (CC) para 35.

32 As above.

balancing exercise that considers all the competing interests is taken and to consider the circumstances of the child when weighing up the importance of the child's interests against the interests of society and the rights of others.³³ Sachs J views the constitutional position of the best interests of the child as follows:³⁴

The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.

If the child is to be constitutionally imagined as a person who lives in a context where his or her interests compete with and may even be limited by social interests and the interests of other individuals, it cannot be defensibly argued that the child's interests are 'more important than anything else' or that anything else is less important than the child's best interests. Communitarianism and parental rights pose an enduring challenge to the individualistic conception of the paramountcy principle often taught and revered by mainstream thinkers.

3 Communitarianism's challenge to the paramountcy principle

Communitarian cultures and societies pose a serious challenge to the individualistic nature of the 'paramountcy' principle. For instance, the 'paramountcy' principle conflicts with African ideology because the latter emphasises collectivism, reciprocal duties of support and restraint on individual liberty. The Asante proverb 'I am because we are and therefore we are because I am' captures the core of African political thought and traditional conceptions of social order. While the last part of the proverb can go either way and be interpreted to suggest that individualism is an inherent part of communitarian cultures, it is arguable that the phrase 'we are because I am' suggests that individuals play a pivotal role in constructing social values. As will be seen below, the phrase shows that the interests of the individual are not entirely, if at all, ignored, but are considered in light of communal interests. Nhlapo argues that group solidarity was never construed to mean a blanket disregard for individual liberty.³⁵ He observes that '[t]raditional society's concern with the primacy of the collective does

³³ n 31 above, para 37.

³⁴ *MS v M* (n 22 above) para 42.

³⁵ See T Nhlapo 'Cultural diversity, human rights and the family in contemporary Africa: Lessons from the South Africa constitutional debate' (1995) *International Journal of Law, Policy and Family* 208.

not compel the conclusion that there was a total absence of human worth divorced from social role'.³⁶ Nonetheless, indigenous African communities are built on the four principles of respect, restraint, responsibility and reciprocity.³⁷ Under this conception, the interests of the child and those of the community are symbiotic. Hence, the preservation of group identity is thought to be in the interests of the child and the interests of the family. In patrilineal Africa, relationships are constructed along the extended family model. Parenthood is largely social and all decisions concerning children should be taken after consulting all members of the kinship group, not just the child's biological parents. The child stands not as an individual but as a family member; she serves the family and the family serves her.³⁸ The individual interests of the child and those of the family are inseparably interwoven.

Since the family is a resource for the child, it is thought in her interests for her to support it and to maintain family bonds.³⁹ This stands in sharp contrast to international law which emphasises the primacy of the child's individual interests. 'Living' customary law (namely the customs, traditions, beliefs and values by which people govern themselves and not customary law as applied by the state apparatus) perceives children's interests as consistent with and articulates them with reference to the interests of the group. This overcomes the theoretical challenges that come with viewing the child as an atomistic individual living outside the realm of relationships with others. True, the emphasis on the group may cause the interests of the child as an individual to assume subordinate status, but the ultimate purpose behind African collectivism is to ensure the protection of the interests of the group as a whole, including children.

36 Nhlapo (n 35 above) 221.

37 For a detailed discussion of reciprocal support obligations, respect and restraint, see BA Rwezaura 'Changing community obligations to the elderly in contemporary Africa' (1989) 4 *Journal of Social Development in Africa* 5; ATwum-Danso 'Reciprocity, respect and responsibility: The 3Rs underlying parent child-child relationships in Ghana and the implications for children's rights' (2009) 17 *International Journal of Children's Rights* 415; NA Apt 'Ageing and the changing role of the family and the community: An African perspective' (2002) 55 *International Social Security Review* 39-44; NA Apt & M Grieco 'Urbanisation, caring for elderly people and the changing African family: The challenge of social policy' (1994) *International Social Security Review* 111-22; TN Nhongo 'Impact of HIV/AIDS on generational roles and intergenerational relationships' paper presented at the workshop on HIV/AIDS and Family Wellbeing, Namibia, 28-30 January 2004; E Goody *Context of kinship: An essay in the family sociology of the Gonja of Northern Ghana* (1973).

38 A Armstrong *A child belongs to everyone: Law, family and the construction of the best interests in Zimbabwe* Innocenti Occasional Papers, Child Rights Series 11 1995 5; T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 114.

39 Armstrong (n 38 above) 7.

Armstrong observes:⁴⁰

Usually, the child's individual interests will not be ignored, even when the child is expected to help meet family needs. This is because it is in the best interests of the family that the child be developed to her full potential, since the child is a resource for the future ... Thus the interests of the family are thought to lie in supporting, protecting and developing the child's potential as a family member who will support other family members in the future.

Similarly, Minow once wrote that 'when [a] system assigns rights to individuals, it actually sets in place patterns of relationships'.⁴¹ Human rights claims go beyond a mere trumpeting of individual interests and embody a sacred promise that a viable structure of relational responsibilities can be established to house the interests of others.⁴² Clearly, the proposed primacy of the principle and its bias towards the child's individual rights should not become a 'loose cannon' destroying all collective rights around it. If other compelling interests are more urgent than the interests of the child, the latter's interests may be sacrificed. Given that the 'paramountcy' principle is 'inextricably linked to cultural context', it is important for reformers to understand indigenous African persons in their own terms rather than impose on them standardised versions of child welfare.⁴³ This enables the legal process to accept that the paramountcy principle is sufficiently flexible to embrace communitarian values; to recognise that the choice of what is best for a child is inherently value-laden and culture-bound; and to note that individualism itself is a reflection of Western cultural values.⁴⁴ This is not to argue for the abandonment of the paramountcy principle, but to defend its inevitable moderation should it conflict with other competing interests such as social justice, minority rights, indigenous rights and the rights of other individuals.

While fully aware that culture is not static, that culture evolves in response to internal and external factors, is negotiated and constructed

40 Armstrong (n 38 above) 8. This argument ties in well with Cohen's contention that 'corporate kinship in which individuals are responsible for the behaviour of their group members is a widespread tradition. *But in addition, the individual person and his or her dignity and autonomy are carefully protected in African traditions, as are individual rights to land, individual competition for public office, and personal success*'. R Cohen 'Endless teardrops: Prolegomena to the study of human rights in Africa' in R Cohen *et al* (eds) *Human rights and governance in Africa* (1993) 1 14.

41 M Minow *Making all the difference: Inclusion, exclusion and American law* (1990) 277.

42 J Waldron 'The role of rights in practical reasoning: "Rights" versus "needs"' (2000) 4 *The Journal of Ethics* 115 124 132.

43 See art 5 of CRC, stating that parental rights and responsibilities must be exercised in a manner consistent with local custom.

44 See P Alston 'The best interests principle: Towards a reconciliation of culture and human rights' in Alston (n 21 above) 1-25; A An-Na'im 'Cultural transformation and normative consensus on the best interests of the child' in Alston (n 21 above) 62-81.

and may be political, my point is that our quest for normative consensus should not come at the expense of cultural diversity and that a closer look at communitarianism reveals its realistic link with the child's best interests. To perceive group interests not as in conflict with children's interests, to characterise the child not as an atomistic individual divorced from the kinship group and to allow marginalised persons and cultures to – as far as possible – order their families along their own philosophical lines, is to permit them to exercise dignity rights and cultural freedoms denied them by colonialism, apartheid and racial segregation.⁴⁵ It has been stated that, in assessing the paramountcy principle, decision makers must consider the collective cultural rights of the child. It is beyond doubt that the implementation of children's individual rights in indigenous communities – including the 'paramountcy' principle – requires the consideration of how these rights relate to collective cultural rights. Experts have it that indigenous children 'have not always received the distinct consideration they deserve [and children's] individual interests cannot be neglected or violated in preference of the best interests of the group'.⁴⁶

In assessing best interests, state parties should factor in indigenous children's cultural rights and the need to exercise those rights with other members of the group.⁴⁷ While acknowledging that there may be a difference between the best interests of the individual child and those of children as a group,⁴⁸ the Committee on the Rights of the Child (CRC Committee) holds that a consideration of the collective cultural rights of the child forms part of establishing the best interests of the child.⁴⁹ States should adopt legislative, administrative and judicial measures (including professional training and awareness-raising programmes) to ensure the systematic, culturally-sensitive application of children's rights and interests.⁵⁰ However, General Comment 11 does not explain how collective interests can be reconciled with the child's individual welfare and why collective interests should be factored in when deciding an individual child's 'distinct' best interests. It is sufficient here to state that the ambivalence and ambiguity echoed

45 Davis writes: 'People are not meant to be socialised to uniform, externally imposed values. People are to be able to form families and other intimate communities within which children might be differently socialised and from which adults would bring different values to the democratic process.' PC Davis 'Contested images of family values: The role of the state' (1994) 107 *Harvard Law Review* 1348 1371.

46 United Nations Committee on the Rights of the Child General Comment 11 (2009) 'Indigenous children and their rights under the Convention' 12 February 2009, CRC/C/GC/11 para 30.

47 General Comment 11 (n 46 above) para 31.

48 The CRC Committee maintains that where the child's interests as an individual are affected, courts and administrative bodies should consider only the affected child's interests as primary.

49 General Comment 11 para 32.

50 General Comment 11 para 33.

in the Committee's analysis fully demonstrate the complexity of the task of reconciling not only individual interests and group interests but philosophical dimensions of universality and cultural relativism to the human rights debate.

The author is mindful that the tension between, on the one hand, the interests of the group and, on the other, the individual interests of the child, is, to some extent, a universal problem. It does not obtain only in communitarian societies but is well recognised even in individualistic Western societies. In the final analysis, it is a matter of degree. Conversely, predominantly communitarian societies – whether in Africa, Asia or Eastern Europe – do recognise the importance of individual interests in all facets of life, including decision making within the family. However, an undiluted emphasis on group interests may perpetuate the subordinate status of children and their exclusion from the domain of decision making – a problem which this article seeks to challenge. Scholars in African customary law have pointed out that the prominence of group interests over individual interests tend to mean that the former will trump children's interests in the event of a disharmony between the two.⁵¹

Group-orientation bureaucratises (and slows down) decision making, enables adults to articulate what they consider to be best for children (children are not members of traditional decision-making bodies such as the family council) and suppresses children's contribution to decision making.⁵² 'Facing it together', argues Kaime, 'negates the idea of children's interests being the primary consideration.'⁵³ In fact, there is an array of evidence showing that the focus on group interests gives adults the opportunity to claim the labour time of young members of the family and to socialise children to submit to the authority of elders.⁵⁴ Historically, this gave birth to the concept of 'wealth in people' to explain claims which individuals were permitted to make on other people's time and resources. Thus, the family head or the paternal family had rights in the person, labour time and the property of their children.⁵⁵ The family head had the

51 Kaime (n 38 above) 118; C Himonga 'The right of the child to participate in decision making: A perspective from Zambia' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 95.

52 Kaime (n 38 above) 117-118.

53 Kaime (n 38 above) 115.

54 See generally RS Rattray *Ashanti law and constitution* (1956) 13; H Kuper *Kinship among the Swazi* (1962) 96.

55 B Rwezaura *et al* 'Parting the long grass: Revealing and reconceptualising the African family' (1995) 35 *Journal of Legal Pluralism* 25 32-33, explaining that 'a wife's agricultural work was institutionalised into a wife's service to her husband and his family'; 'a man's agricultural or other productive work was institutionalised into the labour obligations of kinship'; and 'women and children were considered to be resources which men wanted to amass ... as illustrated by the fact that ... a man's wealth did not draw a distinction between people and material possessions'.

right to create relationships of obligation and dependency with subordinates as a way of ensuring personal security during old age and group survival after death.⁵⁶ Interpreted narrowly and especially by persons with vested interests, group interests will no doubt crowd out both the best interests of the child and the individual rights of persons within the group.⁵⁷ While communitarianism overemphasises the importance of tradition and social context in shaping individuals and their relationships, it risks further marginalising perspectives of disempowered groups – women and children – that have not historically had strong political representation. This problem *must be conceded*, but the best interests of the child must mean something more than always meeting the child's individual needs at all costs. It is beyond doubt that there is an important individual core element of the best interest of the child which cannot be overridden by collective claims, but the latter will inevitably – and indeed should – temper the way in which the individual right is exercised and interpreted. Denial of this interplay flies in the face of empirical evidence in case studies such as those contained in some book volumes.⁵⁸

In the context of custody and access, Bosman-Swanepoel *et al* have been tempted to contend that⁵⁹

[i]n customary law the interests of the child ... play no part in terms of custody or access. They are believed to be irrelevant issues. If bride wealth (seduction damages) is paid, the child belongs to the father's family and may be demanded by them. If it has not been paid, the child belongs to the mother's family and may be demanded by them.

Although *lobola*, illegitimacy and maintenance played or perhaps still play an important role in deciding who gets custody of children, the weight Bosman-Swanepoel *et al* attach to these factors is somehow off the mark. No doubt, the purpose of *lobola* and other traditional institutions was to involve the entire group, through negotiation and sharing of the proceeds, in the process by which the family was to lose its child to the other family. At stake were the interests of the group and, to a limited extent, the individual liberty of the woman or girl to be married. While custody on divorce depended on whether *lobola* was paid and, in that sense, limited the interests of the child, the

56 See C Bledsoe *Women and marriage in Kpelle society* (1980) 55.

57 See generally P Jones 'Group rights and group oppression' (1999) 7 *Journal of Political Philosophy* 353-377; C Bentley 'Whose right it is anyway? Equality, culture and conflicts of rights in South Africa' Democracy and Governance Research Programme; Occasional Paper 4.

58 P Alston 'The best interests principle: Towards a reconciliation of human rights and culture' in Alston (n 21 above) 1 21.

59 H Bosman-Swanepoel *et al Custody and visitation disputes: A practical guide* (1998) 48-49.

interests of the child were not absolutely negated.⁶⁰ Himonga argues that⁶¹

[i]t is indisputable that *lobola* plays a vital role in the affiliation of children under customary law. But it is questionable that it has such a dominant position as to leave no room whatsoever for considerations of the welfare of the child or for the joint responsibility of the families of the two parents for the support of the child.

Himonga argues that in patrilineal societies, even if *lobola* has not been paid, the child's paternal family remains a 'reserve' family and may be called upon to provide for the child in times of need. Similarly, she insists that⁶²

there appears to be no customary rule that denies the importance of the welfare of the child nor justifies the family of the natural father to deny the child support or to abandon him or her merely because he or she is illegitimate.

Apart from communitarianism, it is shown below that the twin concepts of family autonomy and parental rights, even in the context of largely individualistic societies such as Western Europe and the United States, impose extensive limits on the theoretical paramountcy of the best interests of the child.

4 Parental rights, family autonomy and the 'paramountcy' principle

One finds in CRC and the European Convention on Human Rights (European Convention)⁶³ an enduring protection of family and parental rights which helps us to accurately draw the boundaries of the best interests of the child. Much of the protection of the rights and interests of others is entrenched in the provisions codifying family and parental autonomy in decisions concerning children. It is provided that⁶⁴

the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children,

60 See DS Koyana *et al Customary marriage systems in Malawi and South Africa* (2007) 39, arguing that '[a] dispute over child custody would be resolved not by reference to a particular system of customary law, but by applying the principle of the best interest of the child'; see also TW Bennett *A sourcebook of African customary law for South Africa* (1991) 291 and *Hlope v Mahlalela & Another* 1998 1 SA 449.

61 C Himonga 'Implementing the rights of the child in African legal systems: The *Mthembu* journey in search of justice' (2001) 9 *The International Journal of Children's Rights* 89 109.

62 Himonga (n 61 above) 110.

63 See eg art 8 European Convention.

64 Preamble CRC. See also arts 3(2), 5, 7, 9, 10 & 16.

should be afforded protection and assistance so that it can fully assume its responsibilities within the community

and that ‘the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding’.

Parents, members of the extended family and the community *as provided for by local custom* and other persons responsible for the child, have the responsibilities, rights and duties to provide (*in a manner consistent with the child’s evolving capacities*) appropriate direction and guidance in the exercise by the child of the rights in CRC.⁶⁵ State parties to CRC have an obligation to ‘respect the rights and duties of the parents and legal guardians, to provide direction to the child ... *in a manner consistent with the evolving capacities of the child*’.⁶⁶ Under article 18(1) of CRC, the state has an obligation to ensure the recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.⁶⁷ Further, the state should render appropriate assistance to parents and guardians to ensure that they adequately perform their child-rearing responsibilities and should also develop institutions, facilities and services for the care of children.⁶⁸

These provisions confer on parents considerable autonomy to educate, direct and guide their children as they see fit and in the absence of child abuse, the state should refrain from interfering with family autonomy and privacy.⁶⁹ In the last two decades of the twentieth century there was a flurry of academic writing advancing the view that parents should not be at liberty to raise their children the way they see fit; that parents have rights only inasmuch as those rights enable them to further the rights and interests of their children;⁷⁰ and that parents should be licensed before they may

65 Art 5 CRC.

66 Art 14(2) CRC.

67 This is a presumption (couched as a principle) that it is in the best interests of the child for parents who never married or who later divorce, to have access to the child and to contribute towards her upbringing.

68 Art 18(2) CRC.

69 See also art 17(1) of CCPR prohibiting unlawful and arbitrary interferences with family privacy and art 17(2) promising everyone the right to protection against such interference; see also art 16(3) of the Universal Declaration of Human Rights and art 23(1) affirming that ‘the family is the natural and fundamental group of society and is entitled to protection by the state’. See also art 10(1) of ICESCR.

70 J Eekelaar ‘The emergence of children’s rights’ (1986) 6 *Oxford Journal of Legal Studies* 161; ‘The eclipse of parental rights’ (1986) 102 *Law Quarterly Review* 4; BB Woodhouse ‘A public role in the private family: The Parental Rights and Responsibilities Act and the politics of child protection and education’ (1996) 57 *Ohio State Law Journal* 393; P Montague ‘The myth of parental rights’ (2000) 26 *Social Theory and Practice* 47; D Archard ‘Child abuse: Parental rights and the interests of the child’ (1990) 26 *Journal of Applied Philosophy* 183-194.

assume the responsibilities associated with parenthood.⁷¹ While the idea that parents have no rights outside their duties to further the interests of the child existed in the eighteenth century (this can be traced way back to Locke), it was the holding in *Gillick* which opened the floodgates to the myth that parents have no rights divorced from parental obligation.⁷² However, the pendulum has swung and the emerging trend shows that the twin concepts of the best interests of the child and parental responsibility have not – as was initially thought – spirited away parents' independence to exercise discretion in directing and guiding their children.⁷³ Interpreting the best interests of the child in the context of parental care, former justice of the South African Constitutional Court, Sachs J, held:⁷⁴

Indeed, one of the purposes of section 28(1)(b) is to ensure that parents serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cell phones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable.

It is the parent's right and duty to direct and guide children to develop an understanding that their interests and rights are part of a broad scheme of relational rights and responsibilities for the protection of important family or social interests. Whatever content is ascribed to it, the best interests of the child never implies that the child and its needs be considered in isolation but, on the contrary, envisions the child in the context of a system of relationships – the totality of the familial arrangements in which the child finds herself or himself. When legal practitioners and judicial officers speak of the interests of the child, they are always speaking about the relationship between family members – the child and the parents, the father and the mother, the child and the family. More often, what matters most is not the status, competences and role of the child, but rather that of adults (especially the immediate caregiver) in ensuring that the child's needs are met.

71 H LaFollette 'Licensing parents' (1980) 9 *Philosophy and Public Affairs* 182-97; HB Eisenberg 'A "modest" proposal: State licensing of parents' (1994) *Connecticut Law Review* 1415-1452.

72 *Gillick v West Norfolk and Wisbech AHA and Department of Health and Social Security* [1986] 1 AC 112 170D-E.

73 See A Bainham 'Is anything now left of parental rights' in R Probert *et al* (eds) *Responsible parents and parental responsibility* (2008) 23-42; S Gilmore *et al* 'Introduction: Parental responsibility – Law, issues and theses' in Probert *et al* (above) 1-22; S Gilmore 'The limits of parental responsibility' in Probert *et al* (above) 63-83; H Reece 'The degradation of parental responsibility' in Probert *et al* (above) 85-102.

74 *MS v M* (n 22 above) para 134.

Hence, the assumption in international and South African law⁷⁵ is that it is in the interest of children to live in their families, whether or not the family is deprived of one of its parents.

The term 'child', unlike the term 'individual', does not stand independently but necessarily connotes a relationship.⁷⁶ Kennedy states that in certain contexts 'it might turn out that pursuing [protection, provision and] *emancipation as entitlement* could reduce the capacity and propensity for collective action'.⁷⁷ This is usually so in the family context, where attempts to pursue a purely adversarial approach to dispute resolution invariably led to the complete withdrawal of family support and queries the family's role in shielding its members against possible harm from external forces. The term 'child' connotes a relationship with a family member of the preceding generation and emphasises that the child is seen as an integral component of the family. As such, the child is subject to the authority of the family (historically the *paterfamilias*) and this relationship supposes obligations of different types on the side of the child and the family.⁷⁸ While the best interest criterion claims to exclude the needs, interests and rights of parents or families, in reality it does not and it would be naive to suppose that repeated reference to the criterion shows greater attention to the plight, rights and interests of children.

It may be useful to recall that the best interest standard is not applicable to the day-to-day relationship between the parent and the child outside the context of litigation, for instance.⁷⁹ Lowe and Douglas observe that 'parents are not bound to consider their children's welfare in deciding whether to make a career move, to move house or whether to separate or divorce'.⁸⁰ In considering whether a parent is a fit and proper person capable of exercising the responsibilities associated with post-divorce parenting, the character and even wishes of the parents usually play a role. Lucker-Babel remarks that 'in the case of divorce or visiting rights, the child's views [and interests] would have a less severe effect as the judge is generally entitled to consider the interests and needs of all the members of the family' concerned.⁸¹

Further, the primacy of the paramountcy principle under CRC is limited to decisions taken by courts of law, administrative authorities

75 See sec 7 Children's Act.

76 T Ezer 'A positive right to protection for children' (2004) 7 *Yale Human Rights and Development Law Journal* 1.

77 D Kennedy 'The dark side of virtue' in H Steiner *et al* (eds) *International human rights in context: Law, politics and morals* (2008) 494.

78 For the codification of children's responsibilities, see art 31 of the African Children's Charter and sec 16 of the South African Children's Act.

79 See J Herring *Family law* (2007) 395-396.

80 N Lowe & G Douglas *Bromley's family law* (1998) 326.

81 MF Lucker-Babel 'The right of the child to express views and to be heard: An attempt to interpret article 12 of the UN Convention on the Rights of the Child' (1995) 3 *The International Journal of Children's Rights* 391-400.

and legislative bodies, public or private social welfare institutions.⁸² This is also evident from the stipulation in international law that parents have the primary responsibility for the upbringing and development of the child,⁸³ and that the best interests of the child ‘will’ – ‘not shall’ – be their ‘basic concern’, not ‘primary consideration’.⁸⁴ However, parental separation and divorce should be done in a manner that guarantees future reconciliation between child and family, since the ‘mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life’.⁸⁵ Personal relations and contact with family are deemed in the interests of children⁸⁶ and may override the child’s view unless this places the child at risk.⁸⁷

From their child’s birth, parents have the right, above all others, to raise their biological children in their own home or to authorise another person to raise them instead.⁸⁸ Where it is intentional, the act of procreation is adult-centred and designed to serve adult interests in having children. In many cases, it is the consenting adults (and sometimes children) who choose to have a child because they want a child for their own reasons. Macleod remarks:⁸⁹

Those who accept the responsibility of raising children frequently do so because the project of creating and raising a family is an important ... element of their own life plans. *Viewed from this perspective, parents cannot be seen as mere guardians of their children’s interests. They are also people for whom creating a family is a project from which they derive substantial value. They have an interest in the family as a vehicle through which some of their own distinctive commitments and convictions can be realised and perpetuated.*

It cannot be sensibly claimed that parents plan to bear children for the latter’s benefit or that parents have no independent interests and rights outside the ambit of the ‘paramountcy principle’. Provided

82 See art 3(1) CRC.

83 See arts 18(1), 27(2), (3) & (4).

84 See art 18(1) of CRC and compare with art 3(1) of CRC.

85 See European Court of Human Rights in *B v United Kingdom* judgment of 8 July 1987, para 60.

86 Art 9(3) CRC.

87 Hence, art 9(1) states that ‘a child shall not be separated from her parents against *their* will ... [unless] separation is necessary for the best interests of the child’. It is not clear whose ‘will’, but read with art 9(2), it seems the ‘will’ is that of both parents and the child.

88 M Guggenheim *What is wrong with children’s rights* (2005) 20.

89 See CM Macleod ‘Conceptions of parental autonomy’ (1997) 25 *Politics and Society* 117 119; see also D Archard *Children, family and the state* (2003) 97, arguing that ‘[b]eing a parent is extremely important to a person. Even if a child is not to be thought of as property or even as an extension of the parent, the shared life of a parent and child involves an adult’s purposes and aims at the deepest level ... parents have an interest in parenting – that is, in sharing a life with, and directing the development of their child. *It is not enough to discount the interests of a parent in a moral theory of parenthood. What must also merit full and proper consideration is the interest of someone in being a parent.*’

there is no threat of harm to the child, the right to have one's family life respected and protected insulates families from unwarranted voyeuristic intrusion by the state. In the United States, the Supreme Court has repeatedly and firmly held that parents have independent rights; recently affirmed alongside children's rights.⁹⁰ Guggenheim, rightly so in my view, writes that parental rights 'have come to be regarded in American constitutional law as among the most protected and cherished of all constitutional rights'.⁹¹ Under the European Convention, 'everyone has the right to respect for his private and family life, his home and his correspondence' and 'there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... and for the protection of the rights and freedoms of others'.⁹² The protection of family autonomy and parental rights in this provision shows that it is unlawful for the state to limit parental discretion unless the parent causes or threatens to cause harm to the child. Where the rights and freedoms of others (children included) dictate that the state interfere with the parent's discretion to decide the lifestyle and even fate of the child, the concept of parental autonomy potentially and practically authorises limits to the individual interests of children.

It often happens that parents and other persons with identifiable interests in the life of the child seek to further their own interests in the guise of the best interests of the child. It is no surprise, then, that many disputes which are theoretically constructed as being just about children are not just about children. In reality, the majority of legal actions concerning children are instituted by adults, even as many countries are extending *locus standi* to children themselves. Consider, for instance, the position of a non-resident father with regard to contact with his child. He may insist and the court may hold, much to the disappointment of a resident mother, that physical contact between him and the child is in the best interests of the child. Yet, it is patent that the father is more concerned with his self-serving interests and self-esteem. The fact that both the father and the child may derive independent or mutual benefit from contact should not deceive the observer to believe that the father's behaviour was motivated by the child's welfare and well-being in the first place.⁹³ Bainham recently

90 See *Meyer v Nebraska* 262 US 390 (1923); *Pierce v Society of Sisters* 268 US 510 (1925); *Wisconsin v Yoder* 406 US 205 (1972).

91 Guggenheim (n 88 above) 23.

92 Arts 8(1) & (2) European Convention.

93 See A McCall Smith 'Is anything left of parental rights?' in E Sutherland & A McCall Smith (eds) *Family rights: Family law and medical advance* (1990) 10, arguing that '[t]he right to the society of the child is a parental right and it is appropriately considered as a parent-centred right, and it has nothing to do with any consideration of the welfare of the child. This right is accorded to thoroughly disagreeable parents in exactly the same way as it is accorded to those who are more congenial company from the child's point of view.'

argued that 'parents do have independent interests which are not referable exclusively to promoting their children's welfare and that the legal system should explicitly and unapologetically endorse them'.⁹⁴ Beyond their legal obligation to provide their children with the bare essentials of life (clothing, food, health care and an education), parents wield extensive control on how they are to provide these goods and services.

While parents are under the coercive power of the state to ensure that their children have access to an education and to essential medical care when sick, parents choose the kind of education (private or public, religious or secular) and hospital they send their children to. In the same vein, the parent's right to provide religious direction to the child enables the parent, usually to the exclusion of all others, to instil the adoption of religious values of their choice. Decisions concerning education, clothing, food and religion usually depend on the 'sort of child' the parents wish to raise and are rarely solely shaped by the best interests of the child. Bainham, for two reasons, proposes that the law should openly recognise that children's interests may be limited by the interests of parents. First, doing so would reflect honesty and transparency in the private and social ordering of families. It would dissipate the fallacy that every action that parents, caregivers and persons with parental responsibilities take constitutes a furtherance of the best interests of the child and it would reflect that the welfare principle is of decidedly limited application in the context of private law relationships.⁹⁵ It is in this context that Bainham contends that it will be a blatant distortion of the truth of family life if society and the law were to insist that in taking decisions relating to such matters as where and when to go shopping; 'where the child is to live, go on holiday, spend weekends or which friends and relatives the child should visit and when', parents have to be guided solely by the best interests of children.⁹⁶ These are family decisions and they reflect the way in which parents or persons with parental responsibilities wish to spend their time.⁹⁷ The law supports parents in such cases and children are required to co-operate regardless of the directions to which their interests may point.

Second, causal parents have rights and interests independent of their children's because they have responsibilities to care for their children. In other words, the 'burdens and sacrifices associated with pregnancy, the birth itself and the beginnings of life for the child ... fall disproportionately' on the biological parents (particularly the mother)

94 Bainham (n 73 above) 23-42.

95 Under art 3 of CRC, the welfare principle – while broad – is not applicable to family relationships. The closest CRC comes is to recognise the application of the principle to private social welfare institutions.

96 Bainham (n 73 above) 31.

97 As above.

to warrant an unequivocal consideration of their interests.⁹⁸ As such, the state should refrain from removing a child from the care of a parent unless it can establish that the child is either suffering, or at risk of suffering significant harm attributable to a standard of care which is not that of the reasonable parent.⁹⁹ If children's best interests and parental autonomy are perceived as being on a continuum and not necessarily mutually exclusive, the duty of the state will be to ensure that the degree of support, coercion and compulsion materialise at the right point in that continuum. Lindley has argued that the best interests of the child, parental autonomy and state intervention can best be reconciled if there is thorough consultation between the state and families with children identified as in need of care. She observes that to address the tension in this triangular relationship, the British Children's Act is¹⁰⁰

firmly based on the principle that a child's welfare is likely to be best promoted by services being provided for him/her (whether on a voluntary or compulsory basis) which involve consultation with his/her family in the decision-making and planning process. Such involvement is particularly important given the evidence ... that contact between children in care and their families is the key to children returning home from the care system; and the evidence that by far the majority of children who are looked after in the care system (both on a voluntary or compulsory basis), return to their families or home communities when they leave the care system (86 per cent within the first five years and an estimated 92 per cent eventually) ... The principle of the state working in partnership with families to [identify children in need of care and] provide services to children is central to the philosophy underpinning the public law provisions of the Act. *This principle seeks to respect parental autonomy, without compromising the child's welfare and need for protection (if any).*

The CRC provisions referred to above, underlining the importance of parental autonomy and family stability in a child's upbringing, embody a legal presumption that parents are best placed to evaluate the interests of the child. Although there exist really bad parents, this appears to be a sound presumption given the limited number of children who end up in institutional or alternative care.¹⁰¹ The development of the concept of family stability is consistent with the image of the 'normal home' and the idea that the child needs a major point of orientation for him or her to develop optimally into a fully-fledged citizen. Further, family stability connotes the stability of a child's way of life (particularly the emotional, social, educational and psychological aspects of life) as well as the building of important relationships that are necessary to

98 Bainham (n 73 above) 33.

99 Bainham (n 73 above) 37.

100 B Lindley 'State intervention and parental autonomy in children's cases: Have we got the balance right?' in A Bainham *et al* (eds) *What is a parent? A socio-legal analysis* (1999) 197-199-200.

101 Of course, many other cases go unreported.

meet the child's 'need' to enjoy 'a childhood' or to settle in school between the child and those performing parenting roles.

Where parents agree on custody arrangements after divorce, the best interests of the child are 'scarcely indistinguishable from the parental interest' and are often assimilated to whatever parents agree.¹⁰² Since the decision is made against the background of a solution which best suits the parties, it does not matter an iota what the separate needs, views and interests of the child are. Although the parental interest is often cast as a formal reference point which does not indicate a point of view independent of that relating to the child, 'it in fact conflates the child's needs with the options, choices and wishes of the parents'.¹⁰³ These cases rarely come before the courts and when they do, the judge is likely to give effect to the agreement between parents. It can be argued that the court has an obligation to ensure that the parental agreement is not contrary to the objectives of parental responsibility (namely to protect the child's education, welfare, development and morality), but the truth of the matter is that this process of verification is a mere formality.¹⁰⁴ They observes that '[t]he judge only has at his disposal the version of facts presented by the parties and in any case has no power to oversee the enforcement of a judgement imposed on the parents contrary to their joint wishes'.¹⁰⁵

However, family autonomy and privacy should not be interpreted to perpetuate the private/public divide in ways that mask existing socio-economic inequalities and unjust power relations that have confronted women and children for centuries. Nor does family autonomy mean that children are the property of their parents to be abused at their parents' whim. Like the paramountcy principle, parental autonomy is subject to permissible legal limits, especially where the child has suffered or is likely to suffer harm. Further, the paradigm shift from parental authority to parental responsibilities and rights cannot be ignored. The importance of this shift finds expression in the terms 'guide' and 'direct' (in article 5 of CRC) which connote a shift from the parent as 'sanctioner' to parent as 'enabler'.¹⁰⁶ This has important implications for the way in which we understand the welfare principle and parental rights. Finally, there is a need to re-emphasise that, in terms of article 5 of CRC, parental autonomy, responsibilities and rights must be exercised in a manner consistent with the child's age and

102 I Thery 'The interest of the child and the regulation of the post-divorce family' in C Smart & S Sevenhuijsen (eds) *Child custody and the politics of gender* (1989) 78-92.

103 As above.

104 As above.

105 As above.

106 G van Bueren *The international rights of the child* (1995) 73-77-86.

evolving capacities, and that decision makers should have regard to the views of the child in constructing the best interests of the child.

In other words, the degree to which parents are entitled to exercise paternalistic oversight of children should reflect the degree to which children, based on their level of maturity, need such oversight. As the child grows up and his or her capacities develop, the interests of the child can be equated with his or her wishes, views and preferences. In *Thoughts*, Locke proposes that the child's treatment as a rational being should be relative to the child's capacities and age, given that the ability to reason develops with one's maturation.¹⁰⁷ Parental guidance originates from the child's lack of reason as well as an inability to provide for her or his own self. However, the concepts of welfare and protection intrinsic in the best interests of the child necessitate some level of parental intrusion into the domain of child autonomy, especially if there are factors (including age and lack of maturity) suggesting that implementing the child's view will be detrimental to the child's best interests.

7 Best interests decision making under the Children's Act

South African courts have long recognised that a determination of the best interests of the child depends on a host of factors which do not constitute an exhaustive list. In *McCall v McCall*,¹⁰⁸ King J observes that, in determining what is in the best interests of the child, regard must be had to the following factors:¹⁰⁹

- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
- (d) the capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;

107 J Locke *Some thoughts concerning education* (1693) para 81 and J Locke *Two treatises of government* (P Laslett ed Cambridge 1988) (1690) (*First or second Treatise*), *Second Treatise*, paras 55-57, 304-05 and paras 58, 61 & 63, 306-309. For a similar approach, see LM Purdy *In their best interest? The case against equal rights for children* (1992).

108 1994 3 SA 201 (C).

109 *McCall* (n 108 above) 205A-F.

- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in particular circumstances the child's preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same-sex matching, particularly here, whether the minor children should be placed in the custody of their father; and
- (m) any other factor which is relevant to the particular case with which the court is concerned.

The decision on what is best for the child involves balancing multifarious factors and competing interests. In making this decision, a court should 'draw up a balance sheet ... to strike a balance between the sum of the certain and possible gains against the sum of the certain and possible losses'.¹¹⁰ Save for the need to consider the views and preferences of the child, many of the factors mentioned in *McCall* have been largely codified in the South African Children's Act.¹¹¹ Considering the factors enumerated in section 7 of the Children's Act,¹¹² South Africa arguably has one of the world's most realistic

110 *Re A (Male Sterilisation)* [2000] 1 FLR 549.

111 Act 38 of 2005.

112 Sec 7 reads: '(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely (a) the nature of the personal relationship between (i) the child and the parents, or any specific parent; and (ii) the child and any other care-giver or person relevant in those circumstances; (b) the attitude of the parents, or any specific parent, towards (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child; (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs; (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from (i) both or either of the parents; or (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living; (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis; (f) the need for the child (i) to remain in the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition; (g) the child's age, maturity and stage of development; gender; background; and any other relevant characteristics of the child; (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development; (i) any disability that a child may have; (j) any chronic illness from which a child may suffer; (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment; (l) the need to protect the child from any physical or psychological harm that may

legislative schemes revealing the holistic nature of the concept of the best interests of the child. There are indications that the child is not viewed as an island unto herself, but as part of the larger community in which he or she lives. In determining whether a particular decision is in the best interests of the child, reference must be had to the nature of the personal relationship between (i) the child and the parents, or any specific parent; and (ii) the child and any other caregiver or person relevant in those circumstances.¹¹³ The relevance of the behaviour of other persons to determining what is in the interests of the child is fully acknowledged in this provision. Where there is a history of abuse and neglect of the child (or any other person close to the child) by a parent or any other caregiver, it will not be in the interests of the child to leave the child in the care or custody of the abusive person.¹¹⁴ In this respect, the capacity of parents, or any specific parent, or of any other caregiver or person, to provide for the needs (emotional, moral, physical and intellectual) of the child,¹¹⁵ weighs heavily. Granting full parental responsibilities to an abusive caregiver compromises the child's physical and emotional security and his or her intellectual, emotional, social and cultural development in contravention of the Children's Act¹¹⁶ and the South African Constitution.¹¹⁷ Parents and other decision makers in the public and private sectors have a duty to protect the child from any physical or psychological harm that may be caused by subjecting the child or by subjecting another person to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour.¹¹⁸

More importantly, however, statutory law perhaps for the first time unambiguously accepts that parents wield a great deal of power in shaping and deciding what constitutes the best interests of the child. Section 7 states that the attitude of parents, or any specific parent, towards the child, and towards the exercise (by themselves and by others) of parental responsibilities and rights in respect of the child,

be caused by (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person; (m) any family violence involving the child or a family member of the child; and (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.'

113 Sec 7(1)(a) Children's Act.

114 See sec 7(1)(m) Children's Act.

115 Sec 7(1)(d) Children's Act.

116 Sec 7(1)(k) Children's Act.

117 Sec 28(1) entrenches children's rights '(d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f) not to be required to perform work or provide services that (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health spiritual, moral or social development'.

118 Sec 7(1)(l) Children's Act.

should also play an important role in deciding what is best for their children.¹¹⁹ To bolster this claim, it must be mentioned that the Children's Act requires a person holding parental responsibilities and rights in respect of a child to give due consideration to the views and wishes expressed by a co-holder of parental responsibilities and rights before making any major decision involving the child.¹²⁰ A major decision involving the child is 'any decision which is likely to change significantly or to have a significant adverse effect on the co-holder's exercise of parental responsibilities and rights in respect of the child'.¹²¹ Where a holder of parental responsibilities and rights decides to relocate to another country, he or she should give due weight to the views and wishes of a co-holder of parental responsibilities and rights even when it becomes patent that the relocation is in the best interests of the child. It is clear, from this section, that the interests of parents (defined broadly to include social parents),¹²² siblings and any person with whom the child has developed an emotional attachment, are also important and should play a pivotal role in defining the best interests of the child.

That the interests of other persons, particularly those exercising parental responsibilities and rights, are relevant in adjudicating children's best interests is evident from the section of the Children's Act which requires the decision maker to consider the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis.¹²³ Depending on the circumstances of the case, decisions regarding relocation and inter-country adoption usually affect the child's right to maintain personal relations and disrupt the child's direct contact with the parents. Accordingly, the views and interests of the parent who remains in the country where the couple were habitually resident play a pivotal role in constructing the child's best interests. Further, section 24(1) requires any person having an interest in the care, well-being and development of a child to apply to the High Court for an order granting guardianship of the child to the applicant. It further states that when considering an application contemplated in subsection (1), the court must take into account (a) the best interests of the child; (b) the relationship between the applicant and the child, and any other

119 Sec 7(1)(b) Children's Act.

120 Sec 31(2)(a) Children's Act.

121 Sec 31(2)(b) Children's Act.

122 Sec 7(2) states that 'parent' includes any person who has parental responsibilities and rights in respect of a child.

123 Sec 7(1)(e) Children's Act.

relevant person and the child; and (c) any other factor that should, in the opinion of the court, be taken into account.¹²⁴

The wording of section 24 indicates that the best interest of the child is just one of the factors that must be taken into account in determining whether to grant guardianship of a child to the applicant. Traditionally, the other factors mentioned in this provision are construed as aids to the analysis of the best interests of the child, and not as independent considerations which, together with the best interest of the child, compete for value, recognition and application. However, much depends on whether the applicant or the person who already has guardianship of the child is a fit and proper person to be granted guardianship or to continue acting as the child's guardian.¹²⁵ While this does not mean that the best interests of the child pale into insignificance, it does show that such interests are limitable and require a delicate balancing exercise between the interests of the child and the interests of, say, guardians. Such a proposal rightly questions the forceful image of the welfare principle often portrayed in academic literature and some court judgments. In *MS v M*,¹²⁶ Sachs J held: 'Thus, in *Fitzpatrick*¹²⁷ this Court held that "it is necessary that the standard should be flexible as circumstances will determine which factors secure the best interests of the child".¹²⁸ He further states:

To apply a predetermined formula for the sake of certainty, irrespective of circumstances, would in fact be contrary to the best interests of the child concerned. This Court, far from holding that [the welfare principle] acts as an overbearing and unrealistic trump of other rights, has declared that the best interests injunction is capable of limitation. Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute.¹²⁹

Determining what is best for the child also includes an analysis of the likely effect on the child of any change in the child's circumstances, whether caused by relocation; removal from an abusive caregiver; separation from siblings and friends; and parental separation and divorce.¹³⁰ A change in the circumstances of the child may either require the child to make huge sacrifices or, in serious cases, cause developmental damage to the child, especially where the child has been living with a sibling, parent, caregiver or person towards whom the child has developed emotional attachment. Moreover, the Children's Act emphasises the need for the child to (i) remain in

124 Sec 24(2) Children's Act.

125 See sec 4(3) of the Children's Act.

126 *MS v M* (n 22 above).

127 *Minister of Welfare and Population Development v Fitzpatrick & Others* 2000 3 SA 422 (CC); 2000 7 BCLR 713 (CC).

128 Para 18 of the judgment.

129 *MS v M* (n 22 above) paras 24 & 26.

130 Sec 7(1)(b) Children's Act.

the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition.¹³¹ This provision mirrors the variety of family models, value systems and traditions that presently obtain in South African society. Any determination of what is best for the child must factor in the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment.¹³² These provisions underline the importance of stability in the upbringing of the child and the assumption that it is in the best interests of the child to remain in the care of one parent, family and extended family. What emerges as particularly striking from this proposal is the recognition that, while children's best interests remain important, the interests of parents, the nuclear family and the extended family should be considered and may be important in the analysis of what constitutes the child's best interests. To this end, children's right to have their best interests considered as 'paramount' may be sacrificed for the family good in special circumstances.

However, the main point is that the Children's Act emphasises that the extent to which children have the right to grow up in the context of their families and culture should shape the way we think about individual and state responsibility towards children. To King, the child's right to grow up in the context of a family and culture is based on the fundamental truth that this can be crucial to the 'basic dignity, survival and development' of each one of us.¹³³ The paramount place of family unity and the doctrine of non-intervention evident in CRC¹³⁴ and the Children's Act¹³⁵ may not be ignored in the context of the child's best interests. Even where the neglect or abuse of parental responsibilities have been or are likely to be established, public interventions meant to rescue the children affected must not be aimed at dividing children and their families, but must have the ultimate aim of re-uniting children and their families.

One telling omission from this scheme pertains to the role the views and preferences of the child should play in deciding what is best for the child. While section 7(1)(g) refers to the child's age, maturity and stage of development, gender, background and any other relevant characteristics of the child, it does not refer to the views and wishes of

131 Sec 7(1)(f) Children's Act.

132 Sec 7(1)(k) Children's Act.

133 S King 'Competing rights and responsibilities in inter-country adoption: Understanding a child's right to grow up in the context of her family and culture' in C Lind *et al* (eds) *Taking responsibility, law and the changing family* (2011) 257-259.

134 See the Preamble and arts 3(2), 5, 7, 9, 10 & 16 CRC.

135 See secs 6(3), (4) & (5); 7(1)(a)-(f), (k) & (n); 31(2)(a), 33(1), (2) & (3) & 70-73 Children's Act.

the child. However, child participation in decision making – including decisions determining the best interests of the child – is codified as a general principle¹³⁶ and in many other sections in which decisions that directly affect the child are contemplated. Given the growing concern about the exclusion of children from the decision-making process, it would have been beneficial to include explicitly the views and preferences of the child as part of the criteria to be considered in determining the province of the paramountcy principle.

9 Beyond individualism and towards a more perfect union

Besides portraying children as citizens, the Children's Act portrays parents and children not as foes but as partners who should assume joint responsibility for the harmonious development of the child's personality. Accordingly, the child and his or her family are no longer viewed as adversaries contesting for control of the child's life, but as partners in the enterprise of promoting and making the best decisions for the child. To this end,¹³⁷

a child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affect the child.

Under section 31(2)(a), children's views must also be given due consideration before taking any major decision concerning the child. A major decision in respect of the child includes a decision concerning consent to the child's marriage, consent to the child's adoption, consent to the child's departure or removal from the Republic, consent to a child's application for a passport and consent to the alienation or encumbrance of any immovable property of the child.¹³⁸ It also includes a decision affecting contact between the child and a co-holder of parental responsibilities and rights or a decision regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27, or any decision which is likely to significantly change or adversely affect the child's health, education, living conditions or personal relations with a parent or family member.¹³⁹ Arguably, decisions concerning a change of residence and educational arrangements for the child squarely constitute major decisions provided they substantially change or adversely affect the child's health, education, living conditions or personal relations with

136 See sec 10 Children's Act.

137 Sec 6(5) Children's Act (my emphasis).

138 Secs 31(1)(b)(i) & 18(3)(c) Children's Act read together.

139 Sec 31(1)(b) Children's Act.

a parent or family member. The fact that the Children's Act requires decision makers to elicit the views of the child, parents and other holders of parental responsibilities and rights shows that the interests of all the parties involved must be considered before making major decisions affecting the child.

Since the child is viewed in the context of his relationship with others, the Act also requires decision makers to consider the views of all holders of parental responsibilities and rights before making decisions that significantly or adversely affect the latter's rights. Section 31(2) (b) of the Children's Act states that before taking any decision which is likely to substantially change or adversely affect the exercise by co-holders of parental responsibilities and rights of such rights and responsibilities, a co-holder of parental responsibilities and rights must give due weight to the views and wishes of other co-holders of such responsibilities and rights.¹⁴⁰ Strictly speaking, views are not synonymous with interests, but it is submitted that the reason behind requiring co-holders of parental responsibilities to air their views before a decision is made is not just to ensure that the interests of the child are protected, but also to give co-holders of parental responsibilities an opportunity to promote their interests and those of the child. The obligation imposed on a holder of parental responsibilities and rights to listen and give consideration to the views of both the child and co-holders of parental responsibilities and rights shows both the need to ensure that the child is protected from irrational and self-serving decisions by holders of such rights, and the desire of the framers of the Act to ensure that children, parents and significant others view each other not as potential suspects, but as partners forever bound to promote the interests of the child in a manner that does not ignore other important competing interests.

Further, it is mandatory for the state to give the child's family an opportunity to express their views in any matter concerning the child if this serves the child's best interests.¹⁴¹ The legal drive towards non-confrontational means of promoting children's rights is also apparent in section 6(4) which provides that 'in any matter concerning a child, an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided'. Thus, while it remains very important to give due consideration to children's views, it is as important to give due consideration to the views of co-holders of parental responsibility and to give the child's family a voice before making any decision concerning child care and parenting. Clearly, the most important goal is to ensure that the views of those involved – especially where they represent competing versions

140 Sec 31(2)(b) Children's Act; see also sec 18(5).

141 Sec 6(3) Children's Act.

of what is best for the child – be reconciled in a non-confrontational manner.

Adjudicators are bound to consider the nature of the personal relationship between the child and the parent; the attitude of the parent(s) towards the child or towards the manner in which parental responsibilities are exercised by other persons; and the likely effect on the child of any change in the circumstances (including changes caused by separation from any or both of the parents or siblings or relatives or persons with whom the child has been living and the child's right to remain in the care of or maintain a connection with her parents, family, extended family, culture or tradition).¹⁴² Viewed through the lens of sections 6, 7 and 9 of the Act, the concept of the best interests of the child embodies a bundle of specific needs and rights associated with childhood as a stage. As a result, an informed analysis of the concept should factor in all aspects of the child's life, including the right to education; the right to adequate housing, clean water and medical treatment; the right to intellectual, social, emotional and psychological development and stability; the right to maintain contact with one's parents, siblings, family and friends; the family's views about what is in the child's interests; and the child's perspective of what would best increase his or her life chances. It may also be that emotional attachment between the child and each of the caregivers is an indicator of where the best interests of the child lie. Arguably, the breadth and indeterminacy of the best interest principle mean that there is a host of factors, including parental and social interests, relevant to the decision-making process.

A consideration of the interests of both parents in post-conflict situations would likely provide the best possibility of co-operation in broken families in which divorce is usually both a factor and a result. Where parents agree on parenting after divorce, it is important that the law accepts their proposals unless the private arrangement is clearly detrimental to the children affected. For instance, post-divorce mediation has been shown to enable parties to accept the final outcome of the case, to obviate the evaluation and comparison of the personal characteristics of the parents (thereby lessening competition), to reduce the stigma associated with 'losing' a case in adversarial litigation, to discourage the parties from looking at the extent to which their interests influenced the decision and to give parties an opportunity to concentrate on the development of a harmonious triangular relationship that gives the child an opportunity to benefit from the contribution of both parents. Being an informal and private process not bound by rules of procedure, child-centred mediation is capable of accommodating various cultural and religious value systems in a manner which enables parties to participate in

¹⁴² Secs 7(1)(a), (b), (d), (f), (g), (h) & (k) read with sec 9.

culturally-appropriate ways. All the parties have the opportunity to present their cases to the mediator and to¹⁴³

exercise greater control over the consequences of their disputes as it is up to them to reach their own joint decisions – they formulate their own agreement and make an emotional investment in its success. They are therefore more likely to support the agreement than they would be if the terms were negotiated by their legal representatives or ordered by the court.

When parents feel that their interests have not been considered or that the other parent has used the best interests of the child to get care or contact rights, it can be difficult for the ‘losing’ parent to keep a natural relationship with the child.¹⁴⁴ Whilst the attitudes of the parents may not be the responsibility of the law, the evaluation of such attitudes is of vital importance to the process of reconciling them and ensuring joint responsibility for the welfare of their children.¹⁴⁵ Constructed in this fashion, the best interests of the child ‘influence the possibility of obtaining an agreement between the parties ... and thus of preventing the case from being brought to court’.¹⁴⁶ The desire to influence parents and families to engage each other in parenting pre- or post-divorce is combined with yet another desire to induce the willingness of the child and the parents to co-operate with each other in making joint decisions affecting the child.

Proceedings in the Children’s Court must be held in a room that is, among other things, conducive to the informality of the proceedings and *participation of all persons involved*. The room should not be ordinarily used for the adjudication of criminal trials and should be accessible to people with disabilities and special needs.¹⁴⁷ However, the Act does not envisage the resolution of many disputes through litigation and is designed to promote out-of-court solutions to such disputes. It is one of the objects of the Act to ‘strengthen and develop community structures which can assist in providing care and protection for children’.¹⁴⁸ Thus, a children’s court may choose to order a lay forum hearing in an attempt to settle the matter out of court. Such informal dispute resolution may include (a) ‘mediation by a family advocate, social worker, social service professional or other suitably qualified person’; (b) a family group conference contemplated in section 70; and (c) mediation contemplated in section 71.¹⁴⁹ Section 70 grants the Children’s Court the discretion to ‘cause a family group conference

143 M de Jong ‘Child-focused mediation’ in Boezaart (n 29 above) 112 114.

144 See K Sandberg ‘Best interests and justice’ in Smart & Sevenhuijsen (n 102 above) 100 107.

145 As above.

146 As above.

147 Sec 42(8) Children’s Act.

148 Sec 2(e) Children’s Act.

149 Sec 49(1) Children’s Act.

to be set with the parties involved in a matter brought or referred to the children's court'. The conference must include members of the children's family and must be targeted at framing an out-of-court solution to the problem involving the child.¹⁵⁰

Decisions made at family group conferences and other lay forums,¹⁵¹ while not necessarily conclusive, are likely to be endorsed by the Children's Court when the matter in question comes before such court. It is instructive to note that the Children's Act unequivocally states that matters can be decided out of court and that where this has been done, the out-of-court decision may either be accepted and be made an order of court or be rejected or be referred back for consideration of specific issues.¹⁵² In making the decision whether to 'divert' the matter away from the civil justice system, the court should consider the 'vulnerability of the child, the ability of the child to participate and the power relationships within the family'.¹⁵³ Clearly, the Children's Act seeks to minimise confrontation between children and parents even where proceedings are decided in court. When it becomes necessary for proceedings to be launched in the Children's Court, such 'proceedings must be conducted in an informal manner and as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved'. The emerging trend towards co-operation and family reunion reveals that, while parents and families are neither faultless nor always supportive of the best interests of the child, they should not necessarily be viewed as potential oppressors who do not care about the interests of the child.

More importantly, regard should be had to the need to consider which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child in matters such as care, where the paramountcy principle is applicable. However, the child's interests should not be lost in the desirability of a non-confrontational approach. If anything, the child's interests must be considered together with the interests of members of the child's extended family, taking into account the child's cultural development and the communitarian ideals that define relationships in the extended family context. The child remains a member of the community, but is certainly an individual with interests and not a mere extension of her parents.¹⁵⁴ Nonetheless, there are common themes running through all the provisions of the Children's Act.

150 Sec 70(1) Children's Act.

151 See secs 70 & 71 Children's Act.

152 Sec 72 Children's Act.

153 Sec 49(2) Children's Act.

154 *MS v M* (n 22 above) paras 18-19; holding that a child should be 'constitutionally imagined as an individual with distinctive personality, and not merely as a miniature adult waiting to reach full size'.

First, the Act does not view children and parents as belligerents competing for the power to control the lives of children, but as partners tasked with making the best decision for the good of the child as well as the family. Second, the codification of informal, inquisitorial, non-confrontational and, where possible, out-of-court dispute resolution mechanisms is intended to counter and reduce the negative impact on children of formal, adversarial and confrontational judicial proceedings. Third, even where the child is heard, the child's voice does not make much of a difference since the Children's Act invariably requires that the decision maker gives parents, siblings, caregivers and the family an opportunity to be heard before a decision is made. Both participation and decision making are joint (family) projects. These measures are intended to reduce the dire effects (such as family breakdown and the removal of the child from the family home) of litigation and to send a signal that the best interests of the child would be better promoted if the decisions made also promote family unity and the interests of other family members. The emphasis is on relationships rather than individual rights and interests.¹⁵⁵

Against this background, one is forced to endorse Herring's proposal that the only way to curb the imaginary and individualistic construction of the 'paramountcy principle' is to adopt 'a relationship-based welfare approach' in which a child's interests are perceived in the context of the parent-child relationship, 'preserving the rights of each, but with the child's welfare at the forefront of the family's concern'.¹⁵⁶ Noting that Herring's proposal considers the interests of parents and the child who is directly affected, but not those of siblings, Inwald fashions an approach which recognises that the interests of a young child are difficult to separate entirely from the interests of other close family members. Inwald terms this a family-based approach to the welfare principle.¹⁵⁷ Such an approach, interpreted properly, is not an argument for the abandonment of the best interests of the child, nor is it a case for allowing parents to always have a final say in all decisions concerning their children.¹⁵⁸ It is a case for the inevitable qualification of the paramountcy principle and an attempt to dilute the

155 Bonthuys argues, eg, that in cases of relocation by a custodian parent, the child's right to parental care should be balanced with the parent's right to care for the child and to have a relationship with him or her. In deciding the child's interest, the court should weigh parental rights to care for the child, to free movement and to a profession against the rights of the child and of the non-custodian parent. See E Bonthuys 'The best interest of children in the South African Constitution' (2006) 20 *International Journal of Law, Policy and the Family* 23 39.

156 Herring (n 19 above) 223.

157 D Inwald 'The best interest test at the end of life on PICU: A plea for a family centred approach' (2008) 98 *Archives of Disease in Childhood* 248 250.

158 For an argument for the abandonment of the welfare principle, see H Reece 'The paramountcy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 267.

extreme individualism that would result from its literal conception and application. It is in the best interests of the child to know not only that they form part of a complex social web of interpersonal relationships, but also that social demands can limit and broaden their autonomy, rights and goals.

10 Conclusion

Individualistic welfare rights and interests negate the dimension of sociality. They, too, negate the role parents, significant others and persons with parental responsibilities and rights play in the development of the child's character and personality. Living practices in communitarian societies view the promotion of the child's individual interests as inherently linked to the interests of the family and society as an entirety. Whereas the interests of the community should somehow define the boundaries of the child's interests, one must be wary of using a standard that will completely wipe out the interests of the child as an individual member of the community. Beside the brakes applied by communitarianism to the individualism that characterises a narrow construction of the paramountcy principle, it must be emphasised that parental rights and the doctrine of family autonomy confer considerable discretion on persons seized with parental responsibilities. As such, decisions made from day to day are family decisions reflective of the way in which parents intend to spend their time. In making these decisions, families rarely give determinative regard to the individual interests of a particular child. The South African legislature and courts have accepted that, although the best interests of the child are paramount, it does not mean that they are absolute. What is best for the child depends on the factors competing for the core of the 'paramountcy principle' and the relative importance of each factor in light of the circumstances of each case. Whichever factors the decision maker considers relevant, regard must be had to both the individual interests of the child and the social realities and relations that form a complex web of interpersonal relationships. It is my view that no other model could better contextualise human relationships than a family-based approach to the welfare principle.

The human right to health in Africa and its challenges: A critical analysis of Millennium Development Goal 8

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Summary

This article seeks to locate the right to health within the broader frameworks of socio-economic development and political governance. It identifies two critical factors as fundamentally responsible for the dismal state of health and well-being of Africans, despite a robust regional human rights regime that explicitly proclaims health as a human right. First, there is a lack of access to health services – the result of spiralling and crippling poverty amongst the general population. Second, governments in the region are either unwilling or unable to come to the aid of people in their jurisdictions. These unmet challenges ground the need for international intervention, an instance of which is the establishing of the Millennium Development Goals (MDGs). MDG 8 explicitly requires international co-operation and recognises that without enormous assistance, poor countries would be unable to attain the various benchmarks of the MDGs.

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However, although MDG 8 could have a transformative impact on health in Africa, given its potential to supply the missing link in the struggle toward improving population health (resources), there are structural and operational difficulties that could undermine this possibility. The article critically analyses these difficulties and offers suggestions on how to surmount them.

1 Introduction

As of 15 March 1999 all 53 member states of the African Union (AU) had ratified the African Charter on Human and Peoples' Rights (African Charter).¹ By becoming parties to the Charter, African countries recognise that individuals within their respective jurisdictions 'have the right to enjoy the best attainable state of physical and mental health'² and, consequently, undertake to adopt measures necessary to protect their health by ensuring 'that they receive medical attention when they are sick'.³ However, more than a decade after entry into force, key provisions of the African Charter remain unimplemented, even as human wellbeing and vital health indicators continue to plunge across the region. One out of every eight children born in sub-Saharan Africa dies before the age of five.⁴ In 2008 there were 8,8 million under-five deaths worldwide, half of them in Africa.⁵ The maternal mortality rate (MMR) in the region is equally abysmal. The global MMR hovers around 536 000 annually,⁶ approximately half (265 000) occurring in sub-Saharan Africa.⁷ Relative to population, the region leads the rest of the world in deaths resulting from HIV/AIDS, malaria and other preventable diseases.⁸ Life expectancy has plummeted to 45 years, worse than anywhere else.⁹ Although this deplorable state of health

1 African [Banjul] Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3 Rev 5 (1981), entered into force 21 October 1986, reprinted in (1982) 21 *International Legal Materials* 58; C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29.

2 Art 16(1).

3 Art 16(2).

4 UN The Millennium Development Goals Report 2011 25 http://www.un.org/millenniumgoals/11_MDG%20Report_EN.pdf (accessed 12 November 2011).

5 UN The Millennium Development Goals Report 2010 27 <http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010%20En%20r15%20-low%20res%2020100615%20-.pdf> (accessed 12 November 2011).

6 UN The Millennium Development Goals Report 2009 http://www.un.org/millenniumgoals/pdf/MDG_Report_2009_ENG.pdf (accessed 12 November 2011).

7 As above.

8 WHO *World Health Statistics 2010* (2010) 70.

9 WHO (n 8 above) 56.

may be blamed on a gamut of factors, two are particularly critical.¹⁰ First, there is an acute shortage of health services throughout the region. Second, the vast majority of governments in the region are either unwilling or unable to come to the aid of the people within their respective jurisdictions. These unmet challenges ground the need for international intervention, an instance of which is the compact establishing the Millennium Development Goals (MDGs).

The MDGs, derived from the Millennium Declaration of 2000, consist of eight goals which all 191 member states of the United Nations (UN) have pledged to achieve by 2015.¹¹ Of the MDGs, four are directly related to health, namely, (i) to reduce child mortality; (ii) to improve maternal health; (iii) to combat HIV/AIDS, malaria and other diseases; and (iv) to eradicate poverty.¹² Each of the MDGs has time-bound and quantifiable targets measurable by specific indicators – all designed to assess country progress (or lack thereof) toward the Goals. Meeting these targets, in terms of identifying and vanquishing the various factors responsible for the poor state of health in Africa, is undoubtedly a sure way of advancing human development and overall wellbeing in the region. This awareness found bold expression in MDG 8, which explicitly requires the international community to ‘develop a global partnership for development’.¹³

MDG 8 has an omnibus character in that it charts multiple avenues of assistance for developing countries, including reforming the global trading and financial system, debt relief, improved access to essential drugs, technology transfer, and so forth.¹⁴ Encapsulated within this omnibus provision is a requirement for more generous official development assistance (ODA) to countries committed to poverty reduction.¹⁵ Whilst all the various paths to meeting MDG 8 are relevant to health, none has a more direct bearing than ODA increase. This explains why ODA is a focal point of this article. The fact that most morbidities and mortalities in Africa result from diseases that are easily preventable and inexpensive to treat points to crippling poverty amongst the population as the major culprit. Despite staking contrary positions in health policies and legislative frameworks, obtaining

10 To the list could be added a third factor, namely, socio-economic health determinants. Although we do not want to minimise their importance, space constraint militates against full elaboration.

11 See GA Res 55/2, UN GAOR, 55th sess, Agenda Item 60(b), UN Doc A/RES/55/2 (2000).

12 The remaining MDGs are to: achieve universal primary education, promote gender equality and empower women, ensure environmental sustainability and develop a global partnership for development. See UN Statistics Division, Official List of MDG Indicators, <http://unstats.un.org/unsd/mdg/Resources/Attach/Indicators/OfficialList2008.pdf> (accessed 12 November 2011).

13 As above.

14 As above.

15 As above.

health services is still a function of cash in the region, as those unable to pay are denied care. And because most governments in the region are incapable or unwilling to meet these expenses out of national funds, even for pregnant women and children, the sick are left to their fate. Resource deficit – at the individual or institutional level – is the greatest constraint to health services in the region, a gaping hole which MDG 8 (via increased ODA) is targeted to plug. But although MDG 8 could have a gigantic transformative impact on health, given its potential to supply the missing link (resources) in the struggle toward health for all in the region, there are structural and operational difficulties that could undermine this possibility. The article analyses these difficulties critically and offers suggestions on how to surmount them.

The article consists of five sections. Following the introduction, part 2 analyses how payment is made for health services. It recognises that the transition from user fees to a social health insurance (SHI) model, used in several African countries, bodes well for health in the region, but argues that the full benefits would remain unharnessed unless poverty amongst the population receives priority attention. Part 3 presents the bane of health sector development in the region – corruption – as well as its antidote – good governance. The section's central thesis is that improving population health in Africa hinges on the ability and preparedness of each country to disavow corruption and embrace good governance – a key requirement of MDG 8. Operationalising this requirement is the subject of part 4. The section carves out a special role for donor countries in ensuring that funds meant for health programmes in Africa actually achieve the intended objective. The conclusion is that, whether MDG 8 in fact becomes a panacea to Africa's health woes, depends critically on the extent to which donor nations are prepared to hold their counterparts in Africa accountable for the way ODA funds are spent.

2 Payment for services: An impediment to access to health care

There are two principal methods of paying for health services, namely, user fees and a prepaid system. User fees simply means making payment at the point of service (the individual is treated and he pays the cost of treatment). In prepaid systems, on the other hand, individuals contribute a predetermined amount to a fund from which payment is made when illness strikes. An advantage to prepaid systems is risk pooling: Risks of illness are shared by members of the pool (a sick fund, for instance), and not borne by any one individual or family. Conversely, in a user fee arrangement, individuals bear the full risk of illness, the consequences of which can be catastrophic. Depending on the nature of illnesses, paying for treatment could force the payer into poverty or deleteriously impact other aspects of wellbeing. The

payer gets what he paid for, which, in many cases, might be less than optimal care. Cost often acts as a deterrent to the uptake of care or may force a delay in seeking treatment.¹⁶ These downsides make user fees unattractive as a system of health care financing. In fact, a 2005 study found that abolishing user fees could prevent around 233 000 deaths of children less than five years old in 20 African countries.¹⁷ Despite being the ‘most inequitable method for financing health-care services’, user fees remain the dominant system of paying for health care in Africa, even as countries in other parts of the world are rapidly moving away from the system.¹⁸

The World Health Organisation (WHO) has been an active campaigner for abolishing user fees. Its 2008 Report was explicit in its admonition to countries to ‘resist the temptation to rely on user fees’.¹⁹ In addition, the Fifty-Eighth World Health Assembly (WHA) urged countries to²⁰

ensure that health-financing systems include a method for prepayment of financial contributions for health care, with a view to sharing risk among the population and avoiding catastrophic health-care expenditure and impoverishment of individuals as a result of seeking care.

The resolution reiterates WHO’s concept of ‘fair financing’ – the distribution of health care costs according to individual ability to pay, not the risk of illness.²¹ Even the World Bank, whose structural adjustment programme (SAP) foisted user fees on developing nations (as a condition for the receipt of loans) in the 1980s and 1990s, has completely reversed its position. The Bank’s *Reaching the poor policy brief* series is a periodic publication aimed at disseminating information on policies and practices that have made payment for care more progressive and access less inequitable in various developing nations.

Africa is responding, albeit tepidly, to the message. By the end of the 1990s, several countries in the region had successfully laid the foundation for a health system financing method that is not afflicted

16 Several studies document the impact of user fees as less utilisation of services. See, eg, CD James *et al* ‘To retain or remove user fees? Reflections on the current debate in low and middle income countries’ (2006) 5 *Applied Health Economics and Health Policy* 137-153; S Russell & L Gilson ‘User fee policies to promote health service access for the poor: A wolf in sheep’s clothing?’ (1997) 27 *International Journal of Health Services* 359–379; EK Ansah *et al* ‘Effect of removing direct payment for health care on utilisation and health outcomes in Ghanaian children: A randomised controlled trial’ (2009) 6 *PLoS Medicine* 0048-0058.

17 C James *et al* ‘Impact on child mortality of removing user fees: Simulation model’ (2005) 331 *British Medical Journal* 747-749.

18 WHO *The World Health Report 2008: Primary health care now more than ever* (2008) 24.

19 WHO (n 18 above) 26.

20 WHO Sustainable Health Financing, Universal Coverage and Social Health Insurance, 57th World Health Assembly, 25 May 2005, Agenda item 13.1, Resolution WHA 58.33.

21 WHO *The World Health Report 2000: Health systems: Improving performance* (2000) 35.

with the deficiencies of user fees and which, as urged by WHO, has the potential to provide universal coverage.²² Some of these countries – Nigeria, Ghana, Kenya, Rwanda, Senegal and Tanzania – opted for the SHI model and have reached varying degrees of implementation, whereas debate is ongoing in several other countries (Ethiopia, Liberia, Uganda, South Africa, Sierra Leone, Lesotho, Swaziland, Zambia and Zimbabwe) on the modalities for crafting the new system. Rwanda leads the pack in terms of coverage. As of 2006, 73 per cent of its citizens were covered by the nation's insurance system.²³ Ghana's pace has been extraordinary. Its SHI scheme became fully operational in 2005 (although the law establishing it was enacted in 2003) and by 2008 the coverage rate has jumped to 45 per cent of the population.²⁴ Other countries, such as Kenya and Nigeria, have not fared as well.

SHI as a preferred method of health care financing is consistent with the vision of the AU. In mobilising additional sources of revenue, countries are urged to seek a payment system that is consistent with solidarity and equity, and avoids payment at the point of service.²⁵ The African Health Strategy specifically calls for the adoption of SHI and the abolition of user fees.²⁶ The progressivity of SHI derives from its two core attributes: income and health-related cross-subsidies. Income-related cross-subsidies occur when contributions are tied to income, in which case the rich subsidise the poor since they pay more for the same benefit package. Health-related cross-subsidies, on the other hand, arise where high-risk individuals utilise more services than low-risk individuals even though insurance contributions are not desegregated according to risks. In other words, the 'less sick' subsidise the 'real sick'. If, as has been argued, people on a lower socio-economic ladder suffer a disproportionate burden of illness and substantially shorter life expectancies versus those higher up the ladder,²⁷ and the percentage of population living in poverty is highest in Africa,²⁸ then SHI may be the key that could unlock the health bondage in the region. This claim is based on the benefits that would likely accrue

22 WHO (n 18 above).

23 DE Logie *et al* 'Innovations in Rwanda's health system: Looking to the future' (2008) 372 *Lancet* 258.

24 S Witter & B Garshong 'Something old or something new? Social health insurance in Ghana' (2009) 9 *BMC International Health and Human Rights* <http://www.biomedcentral.com/1472-698X/9/20> (accessed 16 November 2011).

25 See The African Health Strategy: 2007 – 215, Third Session of the African Union Conference of Ministers of Health, Johannesburg, South Africa, 9-13 April 2007, CAMH/MIN/5(III), 11 http://www.africa-union.org/root/UA/Conferences/2007/avrill/SA/9-13%20avr/doc/en/Health_Strategy_Min_Draft.pdf (accessed 16 November 2011).

26 n 25 above 11-12.

27 R Wilkinson & M Marmot (eds) *Social determinants of health: The solid facts* (2003) 7.

28 UNDP *Human Development Report 2009: Overcoming barriers: Human mobility and development* (2009) 176-178.

from extending insurance coverage to those who would otherwise be unable to afford it in terms of access to preventive and curative services. But the fact that the coverage rate remains extremely low in some SHI countries (Nigeria and Kenya, for instance) in the region is a pointer to the difficulties that might frustrate the ambition.

The low uptake of coverage in Africa is primarily a product of poverty. Appreciating the value of insurance is one thing; having the wherewithal to pay for it is a totally different ball game. Consequently, even in countries with a high coverage rate, a great number of the insured makes no payment to the scheme. In Ghana, only a third of the covered population pays anything to the scheme, the rest receiving *gratis* coverage.²⁹ This raises sustainability concerns, especially since a large share of the fund for these schemes are sourced from foreign donors. An additional problem may lie in 'selling' SHI to potential beneficiaries. Mobilisation campaigns aimed at educating the people on the value of insurance and the affordability of contributions could generate mass enrolment. Yet, there is no evidence that this heavy lifting is being done by programme administrators. Take Rwanda, for instance. Contribution to its insurance scheme was pegged at \$2 per year plus 10 per cent fee per illness episode.³⁰ This sum, in all likelihood, is less than the average Rwandese spends annually for health services under the user fees system since, aside from the annual fee, only a fraction of the expenses that would have been incurred under user fees is now paid in the event of an illness.³¹ This sort of information needs to be disseminated as far and wide as possible, employing the services of credible sources such as religious and civic leaders. This is a strategy that must be built into SHI systems in Africa to improve uptake and accelerate progress toward the goal of securing access to universal coverage.³²

3 Corruption and good governance

Not quite long ago, a minister of finance in an African nation was asked to look the other way while funds donated for HIV and AIDS programmes in his country were being siphoned to a privately-held bank account. Outraged, he alerted authorities to investigate

29 Witter & Garshong (n 24 above).

30 Logie *et al* (n 23 above) 259.

31 Rwanda, a small country of 9,5 million people, is categorised as a high-burden malaria nation. In 2008, the country recorded 3,2 million malaria cases. Malaria treatment costs \$1,50 to \$2,40 for adults and \$0,40 to \$0,90 for children. See WHO *World Malaria Report 2008* (2008) 142.

32 For background information on SHI systems in Africa (using the experience of Nigeria), including challenges to uptake of coverage, see O Nnamuchi 'The Nigerian social health insurance system and the challenges of access to health care: An antidote or a white elephant?' (2009) 28 *Medicine and Law Journal* 125–166.

his colleague at the Ministry of Health who had made the request. Shortly afterwards, he was assassinated, his killers unknown. This narrative, although a depiction in a Nollywood epic, is not too distant from reality on the ground in the region.³³ Fast forward to 1 October 2010 – Uganda, East Africa. *The Independent* (a British newspaper) reported that malaria, an easily preventable and treatable disease, kills 300 people every day in that country. The reason: '[w]idespread government corruption and theft of anti-malarial drugs' supplied by the international community to be distributed free to the people.³⁴ Fiction or reality, these vignettes point to the fact that the flagrant conversion of public health resources to private use contributes staggeringly to skyrocketing morbidities and mortalities in Africa. Indeed, in its 2006 report Transparency International considers corruption to be 'a powerful force', the eradication of which 'restores diverted resources to their intended purpose, bringing better health, nutrition and education' as well as 'opportunity and hope' to the affected population.³⁵ Simply put, corruption is a human rights issue. And because corruption is 'the single greatest obstacle to social and economic development',³⁶ measures to alleviate it should occupy centre stage in strategic plans of any country seeking to advance its development agenda and human rights.³⁷

Successful corruption alleviation measures are built on good governance, restructuring the entire socio-economic system to make it more sensitive to people's needs and aspirations. Indeed, no nation can boast of good governance without having first gotten a firm grip on corruption in its basic institutions. The two go hand in hand: '[a] society committed to the fight against corruption is on the right path to good governance' – and, of course, the converse is also true.³⁸ Commitment to good governance (which, obviously, includes credible anti-corruption measures) has gained prominence in the international development arena since the demise of the Cold War. Out of the

33 *The corridors of power*, produced by Ossy Okeke and directed by MacCollins Chidebe (Ossy Affason Production, Nigeria) 2005.

34 O Steeds 'Theft and corruption take malaria drugs away from Africa's poorest' *The Independent* 1 October 2010 <http://www.independent.co.uk/news/world/africa/theft-and-corruption-take-malaria-drugs-away-from-africas-poorest-2094525.html> (accessed 16 November 2011).

35 Transparency International *Global Corruption Report 2006* (2006) xiii.

36 UN Office of Drugs and Crime (UNODC) *Handbook on planning and action for crime prevention in Southern Africa and the Caribbean regions*, UN Publication Sales E.09.IV.1 (2008) 111.

37 B Toebes 'The impact of acts of corruption on the enjoyment of the right to health' paper presented at the International Council on Human Rights, Review Meeting, Geneva, 28-29 July 2007.

38 African Development Bank 'Combating corruption in Africa' Proceedings of the Regional Learning Workshop on Combating Corruption in Africa, 27-30 January 2003 8, http://www.u4.no/helpdesk/helpdesk/queries/query_attach/q44Addisreport.pdf (accessed 17 November 2011).

ashes of blank checks, to despotic leaders whose countries had been of strategic importance to one or the other of the warring powers, grew a demand for good governance as a condition for receipt of aid. Over the years, good governance has emerged as the cornerstone of bilateral and multilateral development agreements and the lexicon for appropriate behaviour on the part of aid-receiving nations – a lexicon that has come to define the MDGs and a host of other global and regional development initiatives.³⁹

MDG 8 is a momentous compact between affluent countries and less developed ones. As *quid pro quo* for tariff concessions, debt relief, more generous ODA as well as greater access to essential medicines and enhanced technology transfer, developing countries covenant to commit to ‘good governance, development and poverty reduction’.⁴⁰ That this compact will be instrumental to attaining the MDGs was clearly apparent at Monterrey:⁴¹

Effective partnerships among donors and recipients are based on the recognition of national leadership and ownership of development plans and, within that framework, sound policies and good governance at all levels are necessary to ensure ODA effectiveness.

As President George W Bush subsequently explained:⁴²

We have a moral obligation to help others – and a moral duty to make sure our actions are effective. At Monterrey in 2002, we agreed to a new vision for the way we fight poverty, and curb corruption, and provide aid in this new millennium. Developing countries agreed to take responsibility for their own economic progress through good governance and sound policies and the rule of law. Developed countries agreed to support those efforts, including increased aid to nations that undertake necessary reforms. My own country has sought to implement the Monterrey Consensus by establishing the new Millennium Challenge Account. This account is increasing U.S. aid for countries that govern justly, invest in their people, and promote economic freedom.

39 Eg in 2001, African leaders pledged to ‘work, both individually and collectively, to promote’ the principles of democracy, good governance, human rights and so forth ‘in their countries and subregions and on the continent’. See The New Partnership for Africa’s Development (NEPAD), October 2001, para 71, http://www.nepad.org/system/files/framework_0.pdf (accessed 17 November 2011).

40 UN Statistics Division (n 12 above) MDG 8, Target 8.A.

41 UN Monterrey Consensus of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002, Final Text of Agreement and Commitments, para 40 <http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf> (accessed 17 November 2011).

42 See ‘President addresses United Nations high-level plenary meeting’ 14 September 2005 <http://merln.ndu.edu/archivepdf/nss/WH/20050914.pdf> (accessed 17 November 2011). The Millennium Challenge Account is a mechanism through which the United States funds projects in countries meeting the following eligibility criteria: commitment to just and democratic governance, economic freedom and investment in its people.

The implication then, assuming the rhetoric is operationalised by donor nations, is that no longer would aid be given to countries that cannot demonstrate good governance and the rule of law.

This paradigmatic shift is significant for two reasons. Apart from its moral imperativeness (just and fair rule is an intrinsic moral good), good governance is a catalyst that can spur economic development and stem the tide of poverty in Third World countries. Completely unshackling the suffocating stranglehold of corruption, overreaching bureaucratic regulations and institutional ineptness, thereby unleashing the full force of the ingenuity, resourcefulness and creativity of the private sector, is an automatic trigger of economic growth. The root of persistent slow growth in many African countries is traceable to the corruption-driven and power-grabbing centralisation of authority which benefits a select few but impedes the development of a vibrant private sector. As experience shows, the level of economic success or decline in a given society is directly related to its quality of governance. It is no coincidence that upon secession from China and the adoption of a free market economy (and, of course, democracy), the economy of Taiwan blossomed whereas people in mainland China languished in abject poverty. Nor is it fortuitous that when it changed course, by following in the footsteps of its breakaway neighbour, the not-long-ago moribund Chinese economy surged to historical proportions, accounting for one-third of global economic growth in 2004.⁴³

What does good governance entail? What are its components and why are they important to the health component of the MDGs? The essential elements of good governance consist of respect for the rule of law and human rights, the existence of effective state institutions, transparency and accountability at all levels of government and public participation in decision making.⁴⁴ These elements, to varying degrees, form the blueprint for the work of virtually all anti-corruption and governance organisations. One such organisation is Freedom House, an independent research and advocacy organisation whose mission is to promote democracy and human rights. Each year, since 2004, Freedom House had issued its *Countries at the Crossroads* Report – an influential and widely-referenced analysis of government performance in countries considered at ‘a critical crossroad in determining their political future’.⁴⁵ Countries are assessed on the basis of four indicators: (i) accountability and public voice; (ii) civil liberties; (iii) rule of law; and (iv) anti-corruption and transparency frameworks. Certainly,

43 World Bank ‘China quick facts’ <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/CHINAEXTN/0.contentMDK:20680895~pagePK:1497618~piPK:217854~theSitePK:318950,00.html> (accessed 17 November 2011).

44 K Annan *We the peoples: The role of the United Nations in the 21st century* (2000) 22.

45 Freedom House ‘Countries at crossroad’ <http://www.freedomhouse.org/template.cfm?page=139&edition=9> (accessed 17 November 2011).

each of these indicators is an important measure for gauging the commitment of countries to good governance. So, how are countries in Africa faring?

Freedom House ranks countries on a scale of 0 to 7, from the weakest to the strongest performance. On this ranking, the report card on Africa is troubling. Out of 12 countries reported in 2010, only Ghana and South Africa attained above average scores (over 3,5 points) on all four metrics. Particularly frightening is the data on the availability of an effective system to fight corruption and enforce government transparency. On this critical index, the score ranges from below average (1,04–3,44) – Zimbabwe, Democratic Republic of Congo, Côte d'Ivoire, Nigeria, Liberia, Kenya, Tanzania, Sierra Leone and Malawi – to slightly above average (3,58–3,90) in Uganda, Ghana and South Africa.⁴⁶ These figures translate to less than 50 per cent aggregate score, a gravely disturbing performance that is consistent with findings in another important survey, Corruption Perceptions Index (CPI). CPI is an annual publication by Transparency International of the perceived level of corruption in the public sector in over 150 nations.⁴⁷ Quite unsurprisingly, an overwhelming majority of African countries rank in the bottom half of the table.⁴⁸

The adoption in 2003 of the African Union Convention on Preventing and Combating Corruption has done little to improve the attitude of public officials toward national treasuries.⁴⁹ That this treaty would become a toothless bulldog could have been predicted easily by anyone familiar with the region's sociopolitical dynamics. The problem has never been an absence of a proper legislative framework. Decades-old anticorruption measures are enshrined in the codes of virtually every country in the region, some dating as far back as 1960s,⁵⁰ but all have had very negligible impact.⁵¹ Thus, the concern expressed by African leaders 'about the negative effects of corruption and impunity on the

46 As above.

47 Transparency International 'Corruption Perceptions Index 2009' http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table (accessed 18 November 2011).

48 As above. Better performing African countries include (in descending order) Botswana, Mauritius, Cape Verde, Seychelles and South Africa.

49 Adopted by the 2nd ordinary session of the Assembly of the Union, Maputo, 11 July 2003, entered into force 4 August 2006 <http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf> (accessed 1 March 2012).

50 See, eg, Nigeria Public Accounts Committee 1966, Tanzania Permanent Commission of Enquiry 1966, Côte d'Ivoire Anti-Corruption Law 1977, Ethiopia Special Anti-Corruption Squad 1977, cited in African Development Bank (n 38 above) 9.

51 Besides the regional framework and country-based legislation against corruption, sub-regional organisations have either adopted measures against corruption (Southern Africa Development Community (SADC) and the Economic Community of West African States (ECOWAS)) or working on one (East African Community (EAC)).

political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples' remains as dire today as nearly a decade ago when the provocative declaration was made.⁵²

Although the impact of this devastation is felt in all sectors, it is more visible in the health sector, perhaps because of the seemingly greater availability and easier accessibility of health data. Compared to other sectors, it is less difficult to see how resources illicitly siphoned from public treasuries deprive the Health Ministry of funds that could have been deployed toward the construction of health facilities or improving existing ones, purchasing essential medicines and so forth, and to link the resource deficit to, for instance, high child and maternal mortalities, morbidities and mortalities and other negative health indicators. Consider this very interesting case: Swaziland is a tiny impoverished land-locked country in Southern Africa ruled by a despotic monarch, King Mswati III. In 2002, the King made a down-payment of \$4,75 million for a \$49,03 million private jet,⁵³ the price tag twice as much as the nation's health budget.⁵⁴ In addition to fancy cars and luxurious mansions, the King maintains offshore bank accounts worth billions of dollars.⁵⁵ The treasury loses \$5,7 million a month or \$64 million annually, an amount equal to the national debt.⁵⁶ The aftermath of this depredation is all too evident amongst the King's subjects. In addition to soaring incidence of poverty, health indices are plunging precipitously. The United Nations Development Programme (UNDP) reports that 63 per cent of the population in Swaziland lives on less than \$1,25 per day, among the worst in Africa,⁵⁷ and although, at 26 per cent, Swaziland's HIV infection prevalence rate ranks worst globally,⁵⁸ less than half of its population with advanced HIV infection has access to anti-retroviral drugs.⁵⁹ Paradoxically, blame for this low coverage rate, as in several other African countries, is heaped on resource constraints despite abundant incontrovertible evidence of unabashed squandering of the nation's resources by the ruling family and its acolytes.

52 See the Preamble, African Union Convention on Preventing and Combating Corruption 2003 (n 50 above).

53 Currency converted at the exchange rate of £1=\$1,58, as of 1 October 2011.

54 J Clench 'African king buys jet' *The Sun* 8 July 2002, <http://www.thesun.co.uk/sol/homepage/news/art.151480.ece> (accessed 18 November 2011).

55 J Catsoulis 'An extravagant ruler of a modest kingdom' *New York Times* 25 April 2008, http://movies.nytimes.com/2008/04/25/movies/25king.html?ref=mswati_iii (accessed 18 November 2011).

56 'Swaziland: A leisurely pace in tackling corruption' *Irin News* 14 July 2006, <http://www.irinnews.org/report.aspx?reportid=59657> (accessed 19 November 2011).

57 UNDP *Human Development Report 2010: The real wealth of nations: Pathways to human development* (2010) 162.

58 WHO *World Health Statistics 2010* (2010) 32.

59 WHO (n 58 above) 95.

Egregious health indices in Africa cannot be decoupled from gaping holes in its resources – money siphoned off treasuries by leaders charged with its security. It is estimated that about \$140 billion was stolen by African leaders in the four decades since independence.⁶⁰ For a region as poor as Africa, this is an incalculable loss, the impact of which was captured in a recent testimony before the United States House of Representatives:⁶¹

The West must understand that corruption is part of the reason that African nations cannot fight diseases properly, cannot feed their populations, cannot educate their children and use their creativity and energy to open the doorway to the future they deserve. The crime is not just theft. It is negligence ... corruption is responsible for as many deaths as the combined results of conflicts and HIV/AIDS on the African continent.

This is an undeniable truth which begs the question: Why, in spite of robust legal frameworks, does corruption persist in Africa?

The persistence of corruption in the region is traceable to a number of factors, two of which are particularly noxious. First, despite unrelenting political posturing and grandstanding, African leaders only pay lip service to the fight against corruption. One need not go further than the disdainful treatment of a few honest public officials in the region in proof of this point. For unearthing an intricate web of corruption, cover-ups and cronyism in Kenya, John Githongo, at the time the nation's anti-corruption czar, now lives in exile.⁶² Nuhu Ribadu, the former head of Nigeria's Economic and Financial Crimes Commission, was also forced into exile in 2007 for his zealous pursuit and prosecution of erring politicians. Similarly, in Sierra Leone, Val Collier, chairperson of the Anti-Corruption Commission, was sacked in 2005 for daring to speak out against the embezzlement of public funds by legislators.⁶³ The second reason making corruption incessant in Africa is docility on the part of the citizenry. 'Docility', in this context, means acquiescence to misappropriation of public resources. It arises when people go about their business as if looting the treasury is somehow an unavoidable reward for holding a political position. True, there are always dissenting voices, but they are often drowned out by popular (even if tacit) approval and, in some instances, reward for offending parties. Chieftaincy and other honorary titles, once reserved for respectable and honest men in the region, are now lavished on corrupt politicians – no questions asked. By contesting and

60 WE Williams *Liberty versus the tyranny of socialism: Controversial essays* (2008) 189.

61 N Ribadu 'Capital loss and corruption: The example of Nigeria' testimony before the US House Financial Services Committee, 19 May 2009 4, http://www.house.gov/apps/list/hearing/financialsvcs_dem/ribadu_testimony.pdf (accessed 19 November 2011).

62 For a comprehensive account of corruption in Kenya, see M Wrong *It's our turn to eat: The story of a Kenyan whistle-blower* (2009).

63 Wrong (n 62 above) 326.

winning (often rigged) elections, a great number of corrupt dictators have been allowed to metamorphose into 'honourable' statesmen. Even the few that have been tried and convicted receive no enduring condemnation. In short, there is an astounding lack of what Easterly describes as a 'social norm' – that is, societal protestation of conduct inimical to general welfare.⁶⁴ This is a common feature of developing economies and, lamentably, a powerful factor that sustains treating public resources as *res nullius* in many of these countries.

4 Role of international co-operation in realising the Millennium Development Goals

In a report prepared for the Millennium Summit in 2000, the then UN General Secretary, Kofi Annan, urged the global community to 'do more, and ... do it better'.⁶⁵ Annan's challenge was a clarion call for advanced economies to come to the rescue of developing ones. The response to this call is crystallised in MDG 8, which explicitly proclaims an increase in official development assistance as vital for resource-poor countries to meet their MDG obligations. This increase, as Monterrey Consensus notes, is of significant importance as, in many of these countries, 'ODA is still the largest source of external financing and is critical to the achievement of the development goals and targets of the Millennium Declaration and other internationally agreed development targets'.⁶⁶ Indeed, because Africa has the highest proportion of people living in extreme poverty, a situation worsened by the higher prevalence of internal conflicts, HIV/AIDS and other problems, Annan urges 'special provision for the needs of Africa' and 'full support to Africans in their struggle to overcome the continent's problems'.⁶⁷ The UN remains steadfast in its commitment to this principle. Ban Ki-Moon, who succeeded Annan, reiterates that '[t]he world possesses the resources and knowledge to ensure that even the poorest countries, and others held back by disease, geographic isolation or civil strife, can be empowered to achieve the MDGs', and warns that '[m]eeting the goals is everyone's business'.⁶⁸

Certainly, the Millennium Declaration is by no means the first international poverty reduction initiative sought to be achieved by increasing ODA, but there is clearly a difference: 'They differ from all other global promises for poverty reduction in their comprehensive nature and the systematic efforts taken to specify, finance, implement,

64 W Easterly *The white man's burden: Why the West's efforts to aid the rest have done so much ill and so little good* (2006) 87-88 120.

65 Annan (n 44 above) 17.

66 UN (n 41 above) para 39.

67 Annan (n 44 above) 78.

68 UN (n 6 above) 3.

monitor and advocate them,' notes Professor of Development Studies, David Hulme, in a recent study.⁶⁹ Aside from this critical difference, it must be emphasised that the assistance called for (in the nature of increased ODA as a vehicle to attaining the MDGs) should not be construed as an act of charity on the part of donor nations. Far too often, international development assistance has been characterised in terms of a benevolent Global North pulling along the less privileged nations in the South. But although the very idea of lending a helping hand to another entity has its foundation in benevolence, this is no longer the case when it comes to ODA and other forms of international assistance. Under extant rules of international law, what was once a mere moral obligation has been transformed to a legal duty.⁷⁰

The Millennium Declaration has been strengthened by subsequent international agreements, most notably, the Brussels Programme of Action for the Least Developed Countries for the Decade 2001-2010,⁷¹ the Global Programme of Action for the Sustainable Development of Small Island Developing States,⁷² and the Monterrey Consensus, the last calling on industrialised countries to meet their commitment of allocating 0,7 per cent of Gross National Product (GNP) to ODA,⁷³ a pledge first made in 1970 but which has remained unfulfilled four decades later.⁷⁴ Lethargy on the part of wealthy nations to make good

69 D Hulme 'Governing global poverty? Global ambivalence and the Millennium Development Goals' 6 May 2009 2, http://www.devstud.org.uk/downloads/4b9e9dd2c9394_Hulme_PAPER.pdf (accessed 19 November 2011).

70 This legal duty is enshrined in the United Nations Charter (art 1(3), which requires 'international co-operation' in solving global problems; arts 55 & 56); the Universal Declaration of Human Rights (arts 22 & 28); and the International Covenant on Economic, Social and Cultural Rights (ICESCR), art 2(1) which imposes an obligation to implement the provision of the treaty 'individually and through international assistance and co-operation', and art 23. For a comprehensive analysis of international development assistance as a legal obligation as well as a legal right, including a discussion as to who constitutes the right holders (aid receiving nations) and duty bearers (donor countries) see, generally, O Ferraz & J Mesquita 'The right to health and the Millennium Development Goals in developing countries: A right to international assistance and co-operation?' July 2006 (on file with author); S Skogly *Beyond national borders: States' human rights obligations in international co-operation* (2006); S Skogly & M Gibney 'Transnational human rights obligations' (2002) 24 *Human Rights Quarterly* 781; S Skogly 'The obligation of international assistance and co-operation in the International Covenant on Economic, Social and Cultural Rights' in M Bergsmo (ed) *Human rights and criminal justice for the downtrodden: Essays in honour of Asbjørn Eide* (2003) 403-420.

71 Third UN Conference on the Least Developed Countries, A/CONF.191/11, <http://www.un-documents.net/ac191-11.htm> (accessed 19 November 2011).

72 UN Report of the Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barbados, 25 April-6 May 1994 (UN Publication, Sales No E.94.I.18 and corrigenda), ch I, Resolution 1, annex II.

73 UN (n 41 above) para 42. See also UN Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August - 4 September 2002, A/CONF.199/20 52.

74 UN Millennium Project 'The 0,7% target: An in-depth look' <http://www.unmillenniumproject.org/press/07.htm> (accessed 19 November 2011).

on this pledge derives from growing concerns about questionable accountability and transparency frameworks in many of the countries receiving aid.⁷⁵ In fact, some industrialised countries such as the United States are vehemently opposed to setting specific ODA targets. John Bolton, the then United States Ambassador to the UN, argued in 2005 that the United States never committed to setting aside 0,7 per cent of its GNP to ODA.⁷⁶ However, despite this apparent opposition, the United States did set aside \$5 billion over five years for ODA.⁷⁷

At the Gleneagles Summit in 2005, G8 members agreed to double aid for Africa by 2010 to the tune of at least \$25 billion, out of \$50 billion slated to be doled out annually to all developing countries.⁷⁸ However, as of April 2011, less than half of the funds promised to Africa has materialised,⁷⁹ leading to a concern about how the shortfall would impact upon Africa's progress toward the attainment of the MDGs. This is a legitimate concern; after all, the funds 'are not just numbers. They represent vital medicines, kids in school, help for women living in poverty and food for the hungry,' all of which are in peril unless resources are urgently sourced from somewhere else.⁸⁰

The flipside of worries about the ODA deficit is a larger concern, namely, whether appropriated funds will in fact be deployed to designated programs and projects in Africa. This unremitting worry is the foremost of the challenges facing development experts in the region. 'More aid for Africa' has become a cliché. Year in and year out, international funds are pumped into Africa, no questions asked about the fate of previous disbursements. The fact that Africa's socio-economic fundamentals remain tragically unchanged, decades after a massive transfer of international resources, is morally outrageous – to taxpayers in donor countries whose hard-earned dollars evaporate into an ocean of mismanagement or wind up in private pockets, depriving

75 In addition to fraud-related concerns, another factor that might operate to hamper the remittance of ODA funds to resource-deficit nations is the ongoing global recession. Many members of the Organisation for Economic Co-operation and Development (OECD), the very countries which are expected to increase their ODA, are themselves facing serious internal financial difficulties. With skyrocketing unemployment, a rising budget deficit and a bleak economic future, some of these countries – Greece, Portugal, Spain, Italy, Ireland and so forth – are simply not in a position to give aid as in previous years.

76 P Engardio 'Bush balks at pact to fight poverty' *Bloomberg Business Week* 2 September 2005, http://www.businessweek.com/bwdaily/dnflash/sep2005/nf2005092_5264_db039.htm (accessed 19 November 2011).

77 As above.

78 UN Millennium Project 'The G8 Gleneagles Summit: Doubling aid to Africa' <http://www.unmillenniumproject.org/press/g8overview.htm> (accessed 19 November 2011).

79 L Elliott 'Western countries fail to meet Gleneagles aid pledges' *Guardian* 6 April 2011, <http://www.guardian.co.uk/global-development/2011/apr/06/g8-fails-to-meet-gleneagles-aid-pledges> (accessed 20 November 2011).

80 As above.

residents of receiving countries of the benefits that could have been reaped had the funds been appropriately utilised. The question then becomes: Given the poor record of previous aid to Africa, is there any reason to think that more ODA is desirable?

The response, obviously, depends on who you ask. An observation in a publication by the Cato Institute in 2005 sums up one side of the argument:⁸¹

Helping Africa is a noble cause, but the campaign has become a theatre of the absurd – the blind leading the clueless. The record of Western aid to Africa is one of abysmal failure. More than \$500 billion in foreign aid – the equivalent of four Marshall Aid Plans – was pumped into Africa between 1960 and 1997. Instead of increasing development, aid has created dependence.

Observations such as this have led some scholars to conclude, rather reflectively, that aid hurts Africa and should, for that reason, be halted. The most vocal contemporary proponent of this idea is Zambian economist Dambisa Moyo.⁸² She argues that '[c]orruption is a way of life' in Africa and, as such, all aid does is fuel more corruption and prop up corrupt leaders.⁸³ Awash with cash, these leaders have no difficulty manipulating and interfering with state institutions, have no regard for basic human liberties, trample on the rule of law and invest little in productive ventures. In her view, this creates an unwelcoming environment for domestic and foreign investment, leading to economic decline and poverty, in response to which the donor community 'gives more aid, [continuing] the downward spiral of poverty'.⁸⁴ But not everyone is in agreement with Moyo.

For Jeffrey Sachs, Harvard economist and former Director of the UN Millennium Project, it is unfortunate that '[t]he outside world has pat answers concerning Africa's prolonged crisis. Everything comes back, again and again, to corruption and misrule.'⁸⁵ Sachs decries the tendency to blame every shortcoming in Africa on corruption and poor

81 T Ayodele *et al* 'African perspectives on aid: Foreign assistance will not pull Africa out of poverty' *Cato Institute Economic Institute Development Bulletin* No 2, 14 September 2005 1, <http://www.cato.org/pubs/edb/edb2.pdf> (accessed 20 November 2011).

82 D Moyo *Dead aid: Why aid is not working and how there is a better way for Africa* (2009) 48-68, marshalling evidence on the deleterious impact of aid on Africa; 71-97, suggesting an alternative framework to aid. See also Easterly (n 64 above) 42-44, arguing that poverty and slow growth in Africa are, undeniably, products of bad governance, not some exogenous factors.

83 Moyo (n 82 above) 48.

84 Moyo (n 82 above) 49. See also Easterly (n 64 above) 135-136; ML Tupy 'Poverty that defies aid' http://www.cato.org/pub_display.php?pub_id=3920 (accessed 20 November 2011), noting that despite massive aid receipt totaling more than \$450 billion between 1960 and 2005, the GDP in Africa declined from \$1,770 to \$1,479 between 1975 and 2000, whereas South Asia, which received 21 per cent less in aid, had a GDP growth within the same period from \$1,010 to \$2,056.

85 J Sachs *The end of poverty: Economic possibilities for our time* (2005) 188.

governance, arguing that the region's current predicament cannot be divorced from its history, geopolitics and domestic policies.⁸⁶ In short, '[t]he claim that Africa's corruption is the basic source of the problem,' he contends, 'does not withstand practical experience or serious scrutiny'.⁸⁷ To further substantiate his argument, Sachs uses the Transparency International report to demonstrate that there are several relatively well-governed countries in Africa, such as Ghana and Malawi, that are seriously lagging behind in economic growth compared to Asian countries (Bangladesh and India, for example) which have prospered even though perceived to be more corrupt.⁸⁸

Moyo attempts to reconcile this apparent paradox by projecting what she calls 'positive' corruption as an explanation. Her hypothesis is that kleptocrats in Asia invest their loot in domestic economies, in contrast to their African counterparts who deposit stolen aid in Western banks. Of course, stolen or not, investing in a domestic market is, in principle, a surefire way to generate growth, hence her choice of the term 'positive' to distinguish the scenario in Asia from that in Africa where no dividend results to local economies, and which she describes as 'negative' corruption.⁸⁹ But even without Moyo's elucidation, it is intellectually difficult to delink poverty and human suffering in Africa from corruption and misrule, regardless of support for aid or otherwise. The aforementioned Cato Institute publication was quite emphatic: 'The evidence that foreign aid underwrites misguided policies and feeds corrupt and bloated state bureaucracies is overwhelming.'⁹⁰

So, what to do? Could the 'international co-operation' called for in MDG 8 and, most recently, the outcome document of the MDGs Summit 2010,⁹¹ be interpreted to mean discontinuing parcelling out funds to governments lacking capacity for judicious use of the funds? The United States, as described previously, is attempting to do exactly that. Its Millennium Challenge Corporation (MCC), which replaced the Millennium Challenge Account,⁹² seeks to fund countries that can demonstrate commitment to (i) good governance; (ii) sound economic policies that promote open markets and private enterprise; and (iii) investment in its people, particularly in health

86 As above.

87 Sachs (n 85 above) 190–191. For a concise rebuttal of this claim, see Easterly (n 65 above) 42–44 130–132.

88 Sachs (n 85 above) 191.

89 Moyo (n 82 above) 56–57.

90 Ayodele *et al* (n 81 above) 2.

91 UN General Assembly 'Keeping the promise: United to achieve the Millennium Development Goals' (Draft Resolution), 17 September 2010, 65th session Agenda Items 13 & 115, A/65/L.1 8, <http://www.un.org/en/mdg/summit2010/pdf/mdg%20outcome%20document.pdf> (accessed 20 November 2011).

92 Millennium Challenge Act of 2003, Pub L No 108-199 (codified at 22 USC 7701 *et seq*).

and education⁹³ – all measured by 17 different policy indicators.⁹⁴ For a country to qualify for assistance, it must obtain a score above the median on at least half of the indicators on each of the three categories or baskets mentioned above.⁹⁵ To emphasise its unique importance, corruption is the only indicator in respect to which a country must obtain above median score in order to attain eligibility; failing this, funding is denied regardless of performance on the other indicators.⁹⁶ Although some countries – Benin, Mozambique and Senegal, for instance – with less than median score on corruption have received funding under the programme, this was based on evidence that they were taking concrete actions to remedy the deficiency.⁹⁷ Sheila Herrling, Vice-President for policy and evaluation at the MCC, warns that the agency stands ready to suspend or revoke funding if it finds evidence of ‘a pattern of action that has the government implicated in undermining the institutions of accountability such as the courts, the media or anti-corruption agencies’.⁹⁸ This policy change in the way poverty reduction and development in poor countries are financed by the United States has forced countries to ‘show a new leaf’ in order to access funds. Countries are enacting stronger anti-corruption legislation, strengthening oversight institutions, infusing greater transparency to policy making and increasing investigation and prosecution of corruption-related cases.⁹⁹

A remarkable innovation of the MCC is that funds are disbursed directly to vendors for defined projects, bypassing governments, and thereby reducing the risk of misappropriation.¹⁰⁰ Despite its positives, however, the MCC model is far from perfect. A key weakness is the

93 22 USC 7706(b).

94 C Tarnoff ‘Millennium Challenge Corporation’ 16 November 2010 *Congressional Research Service* 7-5700, RL32427 2, <http://www.mcc.gov/documents/guidance/mcc-policy-fraudandcorruption.pdf> (accessed 20 November 2011).

95 As above.

96 DB Gootnick & JM Franzel ‘Millennium Challenge Corporation: Progress made on key challenges in first year of operations’ testimony before the Committee on International Relations, House of Representatives, United States Government Accountability Office, 27 April 2005, GAO-05-625T 5, <http://www.gao.gov/new.items/d05625t.pdf> (accessed 20 November 2011).

97 C Neubauer & M Cella ‘US aid meant to reward reforms goes to countries listed as corrupt’ *Washington Times* 22 August 2010, <http://www.washingtontimes.com/news/2010/aug/22/countries-on-us-lists-for-corruption-aid/?page=1> (accessed 20 November 2011).

98 As above. This is consistent with the discretionary component of the process the MCC uses for determining eligibility of countries which allows it to approve funding based on (i) whether countries deficient on any of the indicators are taking measures to improve the deficiency; (ii) supplemental information that sufficiently addresses gaps or weaknesses in previous data; and (iii) any other material information. See Gootnick & Franzel (n 96 above) 7.

99 Millennium Challenge Corporation ‘Fighting Corruption’ <http://www.mcc.gov/pages/activities/activity/fighting-corruption> (accessed 20 November 2011).

100 Neubauer & Cella (n 97 above).

failure to pull the plug on projects in countries with a questionable corruption scorecard. But realising that the model has been operational for just a little over seven years (created in January 2004) gives hope that its performance would improve with time. For better or worse, one of the undeniable legacies of the IMF Structural Adjustment Programme in Africa (1980s through 1990s) was that recipient countries were forced to undertake harsh macro-economic and fiscal reforms that they would have otherwise not countenanced but for the funds they desperately needed. The same push might be what is needed to jolt the region out of its present stupor. Africa's desperate need for development cash may ultimately be the catalyst that forces its political leadership to adopt much-needed good governance and anti-corruption reforms. This is not fantasy. In a 2003 article, 'Does foreign aid corrupt?', University of Lisbon economist José Tavares found that foreign aid does in fact decrease corruption due to the fact that 'rules and conditions' attached to the grant 'limit the discretion of the recipient country's officials'.¹⁰¹ Tavares's paper is significant for highlighting the powerful positive effect of linking aid receipt to conditions designed to ensure that funds are spent only on approved projects and programmes – just as embedded in the MCC processes. Given these benefits, the MCC model (or some modified version) should be internalised by all multi-lateral and bilateral development agencies and institutionalised in their dealings with Africa and other emerging democracies similarly challenged.¹⁰²

101 J Tavares 'Does foreign aid corrupt?' (2003) 79 *Economic Letters* 104. For opposing views, see Easterly (n 64 above) 135-136; S Knack 'Aid dependence and the quality of governance: Cross-country empirical tests' (2001) 68 *Southern Economic Journal* 310-329; S Djankov *et al* 'The curse of aid' *The World Bank*, April 2005, <http://www.econ.upf.edu/docs/papers/downloads/870.pdf> (accessed 20 November 2011), noting that aid does not advance democracy.

102 The accountability mechanism imbedded in MDG 8 is noticeably one-sided. This is not inadvertent. Instead, it is a reflection of the widespread assumption that responsibility for the economic woes in the Global South rests squarely on the shoulders of its leaders. It has become increasingly routine to heap blames on mismanagement and inefficient use of resources – in other words, if only aid receiving nations could be better managers of resources flowing into their national treasuries, their situations will be different. But this assumption is wrong. Aside from its imperialistic undertone, the idea presupposes that industrialised countries would always deliver on their promises. This is clearly not borne out by the reality on the ground, as evidenced by the preceding analysis on shortfalls in ODA remittances by these countries. This raises the need for a viable framework to compel desired action on the part of affluent nations. The following accountability mechanisms have been suggested: human rights monitoring bodies such as the Committee on Economic, Social and Cultural Rights via examination of the state's periodic report; shadow reports by civil society organisations; Special Rapporteurs (on the right to health, eg) during formal country visits; peer review process, eg, of the Development Co-operation Directive (DAC) and the OECD; and so forth. See Ferraz & Mesquita (n 70 above) 19-23.

5 Conclusion

That the state of health in Africa remains precarious, more than a decade after its governments uniformly proclaimed health as a human right, is a strident testament to the vacuousness of socio-economic rights in resource deficit settings. Nevertheless, as this discourse shows, this is a handicap which MDG 8 is greatly suited to address – by injecting resources to support existing and new health initiatives. But for MDG 8 to transform the right to health in Africa into a *de facto* entitlement, for it to morph into a real panacea to the region's health quandary, certain fundamental changes would have to be made in the way affluent nations interact with countries in the region. This is the thrust of accountability measures built into MDG 8 and has a significant implication for human rights in Africa.

Human rights, including the right to health, are best protected in an environment where democracy, the rule of law and individual liberty are allowed to flourish. By subjecting ODA to country performances on these benchmarks, the international community signals strongly that the era of blank checks to ill-governed countries is over, that support for country programmes would have to be earned and justified by objectively verifiable criteria. For this venture to succeed, however, affluent countries must show a strong resolve to see it through. Donor nations must be prepared to hold their counterparts in Africa accountable for the way ODA funds are spent, regardless of whether funds are earmarked for specific projects or doled out as budgetary support. The United States MCC system, despite its imperfections, commends itself as a model to be adopted by the rest of the industrialised world. Denying assistance to countries which cannot demonstrate a credible commitment to good governance violates no human rights principle, for a country lacking in good governance is also one where human rights, even those related to health, are not respected. And this, ultimately, is the reason a teeming number of development economists are opposed to more aid (without accountability) for Africa, an opposition that is grounded purely on humanitarianism – the understanding that the poor state of health and wellbeing in Africa is a human rights challenge that can no longer be tolerated.

Human rights developments in the African Union during 2010 and 2011

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Summary

This article considers human rights developments in the African Union (AU) during 2010 and 2011; two years that saw the work of the leading human rights institution on the African continent, the African Commission on Human and Peoples' Rights (African Commission), stagnate, in particular in its work on individual communications. Despite increased resources, the Commission and its Secretariat have been unable to increase the visibility and impact of its work. This situation was exacerbated by the interference with the work of the Commission by the political organs of the AU, most prominently by refusing to publish the Activity Report of the Commission. This delayed the publication of the 29th Activity Report by a year. The African Court on Human and Peoples' Rights is off to a slow start, spending much time and resources on trying to convince states to ratify the Protocol and make the declaration allowing individuals and NGOs to submit cases to the Court. The article also covers developments in the African Committee on the Rights and Welfare of the Child, which for the first time adopted a decision on a communication, the African Peer Review Mechanism and the AU policy organs.

1 Introduction

The year 2011 celebrated 30 years since the African Charter on Human and Peoples' Rights (African Charter) was adopted, 25 years

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since its entry into force and ten years since the entry into force of the Constitutive Act of the African Union (AU), which set out the promotion and protection of human rights as one of the objectives of the continental organisation that replaced the Organisation of African Unity (OAU). In 2011 the AU adopted a declaration on shared values which included a commitment to human rights.

Despite the regional institutional framework which had been established, Africa faces many challenges in ensuring the protection of the human rights of everyone living on the continent. Much remains to move from rhetoric to reality. The article considers human rights developments in the AU during 2010 and 2011. The focus is on the work of the African Commission on Human and Peoples' Rights (African Commission). The article considers the work of the African Court on Human and Peoples' Rights, the African Committee on the Rights and Welfare of the Child, the African Peer Review Mechanism and the role of the AU policy organs in promoting and protecting human rights.

2 African Commission on Human and Peoples' Rights

2.1 Composition

In July 2010 the AU Assembly appointed Lucy Asuagbor from Cameroon as member of the African Commission for a period of three years.¹ She replaced Commissioner Angela Melo. At the AU Summit in July 2011, Maya Sahli Fadel (from Algeria) and Med Kaggwa (from Uganda) were elected to six-year terms on the Commission, while Pacifique Manirakiza (from Burundi) was elected to a four-year term² to complete the mandate of Commissioner Mohamed Fayek (from Egypt), who was elected for a six-year term in 2009,³ but who chose not to complete his term. Commissioners Reine Alapini-Gansou (from Benin) and Pansy Tlakula (from South Africa) were re-elected for six-year terms.

At its session in October 2011, the African Commission elected Commissioner Dupe Atoki as Chairperson and Commissioner Zainabo Sylvie Kayitesi as Vice-Chairperson for a period of two years.

At the end of 2011 the Commission was composed of seven women and four men. The Commission had three members from West Africa (Benin, Mali and Nigeria); three from East Africa (Burundi, Rwanda and Uganda); one from Central Africa (Cameroon); two from Southern Africa (Mauritius and South Africa); and two from North Africa (Algeria and Tunisia). The commissioners are composed of a mix of legal practitioners (Alapini-Gansou, Atoki and Maiga); judges (Asuagbor, Kayitesi and Yeung); an NGO leader (Khalfallah); academics (Manirakiza

1 Assembly/AU/Dec.313(XV).

2 Assembly/AU/Dec.378(XVII).

3 Assembly/AU/Dec.244(XIII).

and Sahli Fadel); a head of a national human rights institution (Kaggwa); and a head of an electoral commission (Tlakula).

2.2 Sessions

The African Commission held three sessions totalling 40 days in 2010 (8th extraordinary session (22 February to 3 March); 47th ordinary session (12 to 26 May); and 48th ordinary session (10 to 24 November)); and four sessions totalling 42 days in 2011 (9th extraordinary session (23 February to 3 March); 49th ordinary session (28 April to 12 May 2011); 50th ordinary session (24 October to 5 November 2011); and 10th extraordinary session (12-16 December)).

All the sessions were held in Banjul, The Gambia, where the Secretariat of the Commission is located. To hold sessions outside of Banjul would be good for the Commission's visibility. The Commission should also reflect on moving its headquarters from Banjul, considering the serious human rights violations in The Gambia, including threats against the Commission itself.⁴

2.3 Resources

The African Commission was allocated US \$2 968 874 from the AU budget for 2010 which, together with donor contributions of US \$1 960 978, meant a total budget of close to US \$5 million for 2010.⁵ The Commission was allocated US \$3 624 600 from the AU budget for 2011 which, together with donor contributions of US \$4 318 289, meant a total budget of close to US \$8 million for 2011.⁶ This funding level is relatively similar to the Inter-American Commission on Human Rights which in 2011 received US \$4,3 million from the Organization of American States and US \$5,1 million from donors.⁷ However, the Inter-American Commission is arguably much more productive. For example, the African Commission receives less than one per cent of the more than 1 500 petitions that the Inter-American Commission receives in a year.

The African Commission is still suffering from understaffing, in particular with regard to legal officers. Some of the blame for this situation falls on the administrative processes of the human resources department of the AU Commission which is responsible for recruitment. However, it is clear that the African Commission cannot, as in the past, blame a lack of performance on a lack of resources.

4 F Viljoen *International human rights law in Africa* (2012) 293.

5 EX.CL/Dec.600(XVIII).

6 EX.CL/Dec.600(XVIII).

7 http://www.oas.org/en/iachr/mandate/financial_resources.asp (accessed 3 April 2012).

2.4 Rules of Procedure

The African Commission adopted new Rules of Procedure (RoP) in 2010. The new RoP replaced the 2008 interim RoP. A welcome addition is the incorporation of the provision on the incompatibility of membership of the Commission with certain government offices.⁸ The Commission now has the possibility to declare vacant a seat of a commissioner who takes up such an office.⁹

The RoP include promising provisions on visibility, although there is a contradiction between the promise of transparency and an overemphasis on confidentiality, stemming from article 59 of the African Charter. The RoP provide that the report of each session should be published on the Commission's website after the report has been approved by the Commission.¹⁰ This would be one way to navigate around the requirement that the Activity Report of the Commission must be considered by the AU Assembly before it is published.¹¹ However, Rule 61 provides that '[r]eports, decisions, session documents and all other official documents' should only be published as part of the report submitted to the AU Assembly, while state reports only should be published on the website directly when they are received. This goes far beyond what is required under article 59 of the African Charter.¹²

The RoP provides that the African Commission, or its bureau when the Commission is not in session, shall forward information about serious or massive human rights violations requiring urgent action to avoid irreparable harm, to the Chairperson of the AU Assembly, the Peace and Security Council, the Executive Council and the Chairperson of the AU Commission.¹³ The Commission or its special mechanisms may also act in such circumstances, including by issuing urgent appeals.¹⁴ When the Commission's attention is drawn to serious or massive human rights violations through a communication, the Commission may also refer the case to the African Court on Human and Peoples' Rights (African Court) if the state where the violations took place has ratified the Protocol establishing the Court.¹⁵

8 RoP Rule 7. This corresponds to the *note verbale* sent by the AU Commission calling for states to nominate members to the Commission. See Viljoen (n 4 above) 290-291.

9 RoP Rule 7(3).

10 RoP Rules 37(3)& 38.

11 Art 59 African Charter; RoP Rule 59.

12 M Killander 'Confidentiality v publicity – Interpreting article 59 of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 572-581.

13 RoP Rules 79, 80& 84.

14 RoP Rule 80(2).

15 RoP Rule 84(2).

The Commission has rarely made use of this provision. In 2010 the Commission referred the situation of religious clashes in Jos, Nigeria, to the Peace and Security Council.¹⁶ As discussed below, the Commission has used the provision on referring a case of massive violations to the African Court on one occasion, in a case dealing with Libya.

Other provisions of the RoP are discussed below under the various monitoring methods used by the African Commission.

2.5 State reporting

Every state party to the African Charter is expected to submit reports to the African Commission every two years on measures taken to implement the Charter. During the 48th session, the Commission considered the combined 8th, 9th and 10th periodic reports of the Democratic Republic of the Congo (DRC).¹⁷ The Commission adopted its concluding observations on the reports at the same session. The periodic reports of Burkina Faso, Libya, Namibia and Uganda were considered during the 49th session.¹⁸ The African Commission adopted concluding observations on Namibia at the same session, while the adoption of the concluding observations on Burkina Faso and Libya was deferred because of time constraints. The adoption of the concluding observations on Uganda was deferred since the Ugandan delegation had failed to respond to the questions posed by the Commission during the examination of the report.¹⁹ The concluding observations on Burkina Faso and Uganda were adopted at the 50th session.

At the 50th session, the African Commission considered the periodic reports of Nigeria, Togo and Burundi.²⁰ It adopted concluding observations on Nigeria and deferred consideration of the concluding observations on Togo and Burundi to the next session, pending additional information from the two states.

According to the Commission's Rules of Procedure, concluding observations should be included in the Activity Report.²¹ So far no concluding observations have been included in the Activity Reports and the information provided on the website is not complete.

Many states are long overdue with their reports and some have never submitted a report despite having been party to the African Charter for many years. As of May 2011, 12 countries had never submitted reports to the Commission.²²

16 30th Activity Report para 258.

17 29th Activity Report, para 174.

18 30th Activity Report, para 217.

19 30th Activity Report, para 219.

20 31st Activity Report, para 12.

21 RoP Rule 77(3).

22 Comoros, Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Gabon, Guinea Bissau, Liberia, Malawi, São Tomé and Príncipe, Sierra Leone, Somalia. 31st Activity Report, Annexure.

2.6 Status of human and peoples' rights on the continent

In January 2011, the AU Executive Council called upon the African Commission to include in its future reports a report on the status of human and peoples' rights in Africa.²³ These reports should address positive developments, causes of concern and the measures taken by the African Commission in relation to human rights issues on the continent.

The Commission adopted the first such status report at its 9th extraordinary session.²⁴ As a positive development, the Commission referred to the many elections that were conducted around the continent in 2010. It mentioned the referendum in South Sudan which created the new state of South Sudan as a significant exercise of the right to self-determination. Further positive developments included the adoption of the first African law on indigenous peoples by the Republic of the Congo, a law on the rights of persons with disabilities in Uganda and a law on the rights of older persons in Mauritius. The adaptation of the educational system in Namibia to the mobile lifestyle of indigenous communities, and the adoption of community service as an alternative to imprisonment in Zimbabwe and Lagos State of Nigeria were commended by the Commission. The Commission also took note of the ratification by African states of international and regional human rights instruments. It commended Burkina Faso, Ghana, Malawi, Mali and Tanzania for having made declarations allowing direct access for individuals and non-governmental organisations (NGOs) with observer status before the Commission to the African Court.

The African Commission expressed concern at reports of arbitrary arrest, arbitrary detention, torture, ill-treatment, harassment, the assassination of journalists, human rights defenders and others, as well as overcrowding and malnutrition in prisons. The Commission also expressed concern at reports relating to discrimination, marginalisation, prejudices, stereotyping and exclusion from political participation of vulnerable groups such as women, indigenous populations, people living with HIV/AIDS, and sexual minorities, as well as growing religious intolerance in some states. The Commission similarly noted that not all state parties had established national human rights institutions (NHRIs) and that not all existing NHRIs comply with the Paris Principles. In addition, many of the existing NHRIs are under-resourced.

23 Executive Council Decision EX.CL/Dec.639 (XVIII), adopted during the 18th ordinary session of the Council, in Addis Ababa, Ethiopia, from 27 to 28 January 2011, para 2.

24 30th Activity Report of the African Commission, paras 245 *et seq.* The information included here is based on this report.

The African Commission adopted the second report on the situation of human and peoples' rights on the continent at its 50th session.²⁵ In this report, the Commission noted the adoption of laws, such as the Freedom of Information Act in Nigeria, the Children's Protection and Welfare Act in Lesotho and institutions such as the National Observer of Places of Deprivation of Liberty in Senegal, the Child Protection Unit within the South African Police Service, and the Burundi National Human Rights Commission. The Commission also referred to the elections conducted during the period covered. It commended the improvement in the representation of women in parliaments, ministries and other decision-making positions in Algeria and a constitutional amendment which guarantees the right to equality of men and women. The African Commission commended the inclusion of provisions prohibiting torture in the training manual of the Ugandan military and the commutation of death sentences in accordance with judgments of Ugandan courts. The Commission also commended the adoption of the law relating to the protection of persons with disabilities in Burkina Faso.

On the negative side, the Commission referred to the widespread arrest and arbitrary detention of civilians, journalists and human rights defenders. It also referred to the conflict and famine in Somalia which had resulted in massive refugee influx to Kenya. The Commission noted with concern reports of extra-judicial killings and persecution of African migrant workers in Libya, as well as the killing of innocent civilians during the Libyan conflict. The Commission also criticised the low number of ratifications of the Protocol establishing the African Court and the fact that only five states had made declarations allowing individuals and NGOs with observer status direct access to the Court.

The status of human and peoples' rights reports may be useful in providing an overview of current developments based on the activities undertaken by the Commission. Although concise and informative, they should not be produced to the detriment of other important functions of the Commission, such as the communications procedure.

2.7 Resolutions and other documents adopted by the African Commission

One way through which the Commission discharges its promotional and protective mandates is the adoption of resolutions. The resolutions can be thematic or country-specific. Accordingly, the Commission adopted several resolutions on a variety of issues in

25 31st Activity Report of the African Commission, para 24 *et seq.*

2010 and 2011: 11 at the 48th session;²⁶ six at the 49th session;²⁷ seven at the 9th extraordinary session;²⁸ and six at the 50th session.²⁹ The details of some of the most important thematic resolutions are discussed below.

In the Resolution on Elections in Africa (2010), the African Commission deplored the recurrence of election-related violence and human rights violations. It called upon states to create conditions conducive to the conduct of free, fair and credible elections and urged states to provide equitable access to state-controlled media and resources to opposition parties. The Commission also called

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- 26 29th Activity Report, para 197. These resolutions include (i) Resolution on Elections in Africa; (ii) Resolution on Repealing Criminal Defamation Laws in Africa; (iii) Resolution on the Co-operation between the African Commission on Human and Peoples' Rights and the African Peer Review Mechanism; (iv) Resolution on the Deteriorating Situation of Indigenous People/Communities in Some Parts of Africa; (v) Resolution to Increase Members of the Working Group on Older Persons and People with Disabilities in Africa; (vi) Resolution on the Appointment of a Special Rapporteur on Human Rights Defenders in Africa; (vii) Resolution on the Appointment of Members of the Committee on the Protection of the Rights of People Living with HIV(PLHIV) and those at Risk, Vulnerable to and Affected by HIV; (viii) Resolution on the Ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; (ix) Resolution on Crimes committed against Women in the Democratic Republic of Congo (DRC); (x) Resolution on Securing the Effective Realisation of Access to Information in Africa; and (xi) Resolution to Increase the Membership of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa.
- 27 30th Activity Report, para 233. These resolutions include (i) Resolution on the Appointment of the Special Rapporteur on Refugees, Asylum Seekers, Internally-Displaced Persons and Migrants in Africa; (ii) Resolution on the Rights of Indigenous Women in Africa; (iii) Resolution on the Appointment of Members of the Research Team on the Study of Freedom of Association in Africa; (iv) Resolution on the Safety of Journalists and Media Practitioners in Africa; (v) Resolution on the Renewal and Extension of the Mandate of the Advisory Committee on Budgetary and Staff Matters; and (vi) Resolution on the Nomination of Expert Members to the Working Group on the Rights of Older Persons and People with Disabilities in Africa.
- 28 31st Activity Report, para 22. These resolutions include (i) Resolution on the Human Rights Situation in the Great Socialist People's Libyan Arab Jamahiriya; (ii) Resolution on the Human Rights Situation in the Republic of Tunisia; (iii) Resolution on the Human Rights Situation in the Arab Republic of Egypt; (iv) Resolution on the Human Rights Situation in the People's Democratic Republic of Algeria; (v) Resolution on the Human Rights Situation in the Republic of Côte d'Ivoire; (vi) Resolution on the Electoral Process and Participative Governance in the Republic of Benin; and (vii) Resolution on the Electoral Process and Participative Governance in the Federal Republic of Nigeria.
- 29 The Commission adopted resolutions relating to the renewal and reconstitution of its Special Mechanisms; membership of its Advisory Committee on Budgetary and Staff Matters and extending its mandate; Resolution Establishing a Working Group on Communications and Appointment of Members; Resolution on the General Human Rights Situation in Africa; Resolution on the Situation of Human Rights Defenders in Africa; and a Resolution on Indigenous Peoples' Rights in the Context of the World Heritage Convention and Designation of Lake Bogoria as a World Heritage Site.

on states to ensure the protection of journalists, human rights defenders, election observers and monitors, before, during and after elections. It further reiterated its call on states to ratify the African Charter on Elections, Democracy and Governance. This Resolution is a clear improvement over the Resolution on Elections in Africa (2008), which did not expressly address the issue of equitable access to state-owned media and the protection of election observers and monitors.

In the Resolution on Repealing Criminal Defamation Laws in Africa (2010), the African Commission called on states to repeal or revise criminal defamation or insult laws in line with the freedom of expression guarantee in the African Charter. It urged journalists and media practitioners to respect the principles of ethical journalism and standards in gathering, reporting, and interpreting accurate information.

In the Resolution on Securing the Effective Realisation of Access to Information in Africa, the Commission took cognisance of the absence of access to information laws in Africa. Currently, only seven African countries have comprehensive access to information legislation, namely, Angola, Ethiopia, Liberia, Nigeria, South Africa, Uganda and Zimbabwe. The Commission tasked the Special Rapporteur on Freedom of Expression and Access to Information to develop a model law on access to information in Africa. In accordance with the Resolution, a draft model law has been prepared.³⁰ In collaboration with civil society organisations (CSOs), the Special Rapporteur has organised several workshops in South, West and East Africa with a view to discussing the draft.

To reinforce the 2004 Resolution on Human Rights Defenders in Africa and in cognisance of the frequent attacks on human rights defenders, the African Commission adopted the Resolution on the Situation of Human Rights Defenders in Africa (2011). In this Resolution, the Commission called upon states to recognise the role of human rights defenders in the promotion and protection of rights and freedoms. It similarly encouraged states to adopt specific legislation on the protection of human rights defenders to protect them against violence and reprisal. It is unfortunate that the Resolution does not address the issue of access to funds, including from foreign sources, of human rights defenders in Africa as some countries, including Egypt and Ethiopia, have legislation that makes it illegal for human rights advocates to receive funds from foreign sources.

At the 50th ordinary session, the African Commission launched the Principles on the Implementation of Economic, Social and Cultural Rights in the African Charter and the Guidelines on Reporting by

³⁰ In collaboration with the Special Rapporteur, the Centre for Human Rights co-ordinates the drafting of the law. The Draft Model Law is available at <http://www.chr.up.ac.za/index.php/comments.html> (accessed 27 April 2012).

State Parties on Economic, Social and Cultural Rights under the African Charter. The Principles clarify the nature of obligations that socio-economic rights entail. The Reporting Guidelines are intended to ensure that states provide sufficient detail in their periodic reports about the status of socio-economic rights in their jurisdictions.

2.8 Promotional missions

Members of the African Commission undertook promotional missions to Algeria (December 2010), Cameroon (February 2011), DRC (April 2011), Central African Republic (June 2011), Niger (July 2011) and Kenya (October 2011). Promotional visits are important as they provide opportunities for dialogue to members of the Commission with governments, CSOs and other stakeholders on the human rights situation in the concerned state.

In a positive development, the visit to Cameroon served as a follow-up and evaluation of the implementation of recommendations made by the African Commission during the visit of the Special Rapporteur on Human Rights Defenders in 2006, and implementation of concluding observations made during the consideration of Cameroon's periodic report presented at the 47th ordinary session of the Commission. The visit to the DRC also served to follow up on the concluding observations adopted by the Commission. The use of promotional visits as mechanisms of follow up on recommendations is an important beginning, given that one of the main challenges the Commission faces is the failure of states to comply with its recommendations, resolutions and concluding observations.

Promotional missions are conducted at the request of the Commission or at the invitation of a state.³¹ The missions include the relevant special mechanisms such as Special Rapporteurs, working groups or committees. With regard to a proposed mission to Sierra Leone, which was intended to include all the special mechanisms of the Commission, the government chose only to invite the Special Rapporteur on Prisons. As the Commission felt this was too limited, it decided not to conduct a mission.³² However, the special mechanisms sometimes undertake missions without other commissioners. For example, the Special Rapporteur on Prisons and Other Places of Detention visited Nigeria and Tunisia.

Mission reports should be prepared within 30 days with an additional 30 days for the participants to provide input to the draft report prepared by the Secretariat, whereafter it should be adopted by the Commission. The adopted report should be sent to the state for its comments. After 60 days, the report should be published with the

31 29th Activity Report, annex II, para 9 (Cameroon), 15 (DRC).

32 29th Activity Report para 92.

comments of the state attached.³³ Whether the mission reports should be published separately or be included in the activity report is unclear. In practice, mission reports have neither been included in the Activity Reports nor published on the Commission's website.³⁴

No protection missions were undertaken in 2010 and 2011.

2.9 Communications

At its 8th extraordinary session, the African Commission adopted its decision on Communication 373/09, *Interights and Another v Mauritania*.³⁵ In the communication, Interights, the Institute for Human Rights and Development in Africa and *Association mauritanienne des droits de l'homme* requested a review of the Commission's decision in Communication 242/2001, in which the Commission held that the prohibition of a political party violated freedom of association.³⁶ The request for review was submitted in September 2004, following the decision of the African Commission adopted in June 2004.

The complainants argued that the Commission had failed to address all the allegations made in Communication 242/2001. The Commission acknowledged that it had failed to pronounce itself on the allegations with regard to articles 1, 2 and 14 of the African Charter.³⁷ The Commission held that the complainants had not shown how the victim had been discriminated against and that there was therefore no violation of article 2 of the Charter. The Commission held that Mauritania had violated the right to property in article 14 of the African Charter, since it had not shown that the confiscation was in accordance with law and for the public interest. The Commission also held that any finding of a violation of the Charter constituted a violation of the obligation to recognise the rights in the African Charter as set out in article 1.

The complainants further argued that the Commission had not been impartial, since one of the members of the Commission in 2004 was a national of Mauritania and participated in the deliberations. The Commission noted that, according to its records, the Mauritanian commissioner did not participate in the deliberations on Communication 242/2001. The complainants had therefore not shown that the Commission had not been impartial in its decision.

At its 47th ordinary session, the African Commission decided two cases, one on admissibility and one on the merits.

33 RoP Rule 60.

34 However, it should be noted that the African Commission launched an improved website in May 2012 which includes some mission reports.

35 The communication number is 373/09, even though the request for review was submitted in 2004.

36 *Interights & Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004).

37 Para 38.

The Commission held that Communication 333/2006, *Southern Africa Human Rights NGO Network and Others v Tanzania*, was inadmissible. The complainants argued that a judgment of the Court of Appeal of Tanzania delivered in 1995, which held that the death penalty was permissible, violated article 4 of the African Charter. The Commission declared the communication inadmissible since the complainants had not explained why it had taken them more than ten years after the judgment of the Court of Appeal to submit the case to the Commission. The communication therefore did not comply with article 56(6) of the African Charter, which provides that '[c]ommunications ... shall be considered if they are submitted within a reasonable period from the time local remedies are exhausted'. Why it took the Commission, for its part, three and a half years and 15 pages to reach the conclusion that the communication was inadmissible is not clear.

Communication 313/05, *Good v Botswana*, dealt with the deportation in 2005 of Professor Good, an Australian citizen, who had lived legally in Botswana for 15 years. His deportation followed an article critical of the presidential succession in Botswana. According to Botswana law, the President could decide on deportation without giving any reasons and such a decision was not reviewable by the courts. The African Commission held that the lack of possibility of review violated the right of access to court in article 7(1) of the African Charter and the right to deportation proceedings in accordance with the law as provided in article 12(4) of the Charter. The Commission further held that '[t]he expulsion of a non-national legally resident in a country, for simply expressing their views ... is a flagrant violation of article 9(2) of the Charter'. The Commission further held that to only give Professor Good 56 hours to leave the country, which forced him to leave his 17 year-old daughter behind, violated the right to family life as provided in article 18 of the African Charter. The decision is in line with the Commission's established case law with regard to deportation.

In order to avoid being held accountable, Botswana, to its discredit, challenged the existence and competence of the African Commission to deal with the case. Botswana argued that the reference to the OAU in the African Charter meant that the African Commission no longer existed after the dissolution of the OAU and the creation of the AU. Hardly surprisingly, the African Commission held that the termination of a treaty other than the African Charter could not affect the existence of the African Commission.

At its 48th ordinary session, the African Commission declared two communications inadmissible. Communication 305/05, *Article 19 and Others v Zimbabwe*, involved the compliance of the radio broadcasting regulatory regime of Zimbabwe with several provisions of the African Charter. The Commission held that communications should be submitted within a reasonable time unless there is 'a good and compelling reason' for the delay. In this particular case, a delay of two years after the exhaustion of local remedies was considered

unreasonable. The complainants submitted that the delay was intended to 'wait and see' whether the judgment of the Supreme Court, which partly ruled in their favour, would be implemented. The Commission rejected this submission on the ground that the communication was in relation to the provisions of the broadcasting law that were declared constitutional by the Supreme Court and not those which were declared unconstitutional. There was therefore no need to wait for the implementation of the judgment. The Communication was thus inadmissible.

Communication 338/07, *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria*, was declared inadmissible because of a lack of exhaustion of local remedies as the complainant, according to the Commission, had only made 'generalised statements about the unavailability of local remedies'.³⁸ The complainant has had another communication declared inadmissible on the same grounds before the Commission,³⁹ but has been a successful litigant before the ECOWAS Community Court of Justice which does not require the exhaustion of local remedies.

Two communications were declared inadmissible at the 9th extraordinary session.⁴⁰

Communication 306/05, *Muzerengwa and 110 Others v Zimbabwe*, dealt with forced eviction. It was declared inadmissible by the Commission for non-exhaustion of local remedies because the complainants had only raised procedural issues before the local courts.⁴¹

Communication 361/08, *Zitha v Mozambique*,⁴² concerned the disappearance of the complainant's father in 1975, long before the African Charter was adopted and ratified by Mozambique. The Commission held that the concept of 'continuous violations can be applied to acts of disappearances, which can be qualified as a violation that occurs and continues over time, until it ceases, that is, until the missing person is no longer disappeared'.⁴³ Due to the continued nature of enforced disappearances, the Commission had temporal jurisdiction. The communication was, however, rejected on the ground that local remedies had not been exhausted.⁴⁴ The Commission

38 Para 66.

39 *Socio-Economic Rights and Accountability Project v Nigeria* (2008) AHRLR 108 (ACHPR 2008).

40 Communication 306/05, *Muzerengwa & 110 Others v Zimbabwe*. The case concerned eviction from land without the provision of alternative land.

41 Para 73.

42 Communication 361/08, *Zitha v Mozambique*.

43 Paras 93 & 94.

44 RoP Rule 108(1).

also held that the communication had not been submitted within a reasonable time.⁴⁵

At the 9th extraordinary session, the Commission also decided one communication on the merits: Communication 334/06, *Egyptian Initiative for Personal Rights and Interights v Egypt*. However, the decision has not been attached to the Activity Report.⁴⁶ In the case, the Commission held that Egypt had violated the right to fair trial and the prohibition against torture in a case where three persons were sentenced to death for terrorism.⁴⁷

All in all, the Commission in two years decided two cases on the merits (of which one has not been published) and declared four cases inadmissible. This is a deplorable record, considering the resources that have been put at the disposal of the Commission.

The oldest pending communication was submitted to the African Commission in 2002, while five communications that have not yet been decided were submitted in 2003.⁴⁸ The main reason given for the deferral of communications is the lack of response from the respondent state. This should not be a relevant reason for deferral of communications for many years in light of the Commission's jurisprudence that, in the absence of a response from the government, there is a presumption that what the complainant had submitted is correct.⁴⁹ The Rules of Procedure provide that after seizure of a complaint, the complainant has two months to develop arguments on admissibility, whereafter the state has two months to respond.⁵⁰ The complainant then has one month to respond to the issues raised by the state,⁵¹ after which the Commission may hold a hearing and make a decision on admissibility. When a complaint has been declared admissible, the complainant has 60 days to submit arguments on the merits, whereafter the state has 60 days to respond.⁵² The complainant then has 30 days to respond to the issues raised by the state.⁵³ Thus, if no hearings are held, the

45 RoP Rule 108(2).

46 The Commission noted in the 30th Activity Report (para 239) that the decision would be included in the next Activity Report. However, it was not attached to the 31st Activity Report. This delay of publication of decisions is unfortunate, but unfortunately not unusual. Eg, the decision in *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009), which was adopted at the Commission's session in May 2009, was only published in the 28th Activity Report adopted by the Assembly in July 2010.

47 The decision has been published by Interights on its website, see <http://www.interights.org/files/195/Taba%20Judgment.pdf> (accessed 18 May 2012).

48 2004 (7), 2005 (4), 2006 (13), 2007 (17), 2008 (6), 2009 (15), 2010 (5).

49 See eg *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

50 RoP Rule 105.

51 RoP Rule 105(3).

52 RoP Rule 108(1).

53 RoP Rule 108(2).

Commission should have the material necessary for a decision within 10 months from seizure.

Considering the relatively low number of communications received, the African Commission should have been able to handle its workload more efficiently.

The Rules of Procedure provide that the African Commission ‘may solicit or accept’ interventions by others than the complainant and the respondent state, so-called *amicus curiae* briefs.⁵⁴ The utility of this provision might be limited in view of the fact that the Commission has interpreted article 59(1) of the African Charter to require that no information about communications may be published before the final decision is included in the Activity Reports, which is published only after being considered by the AU Assembly. The Commission should at least, as it has occasionally done, publish the names of all pending cases in the Activity Report. Potential *amici curiae* can then identify the cases the Commission has been seized of. They can then contact the complainant/s to get information on the subject matter of the case and decide whether they wish to submit *amicus curiae* briefs.

The 2010 Rules provide that decisions on the merits shall not be transmitted to the parties until publication is authorised by the Assembly through the adoption of the Activity Report.⁵⁵ This is a change from the provision in the 2008 interim Rules of Procedure, which provided that the decision should be transmitted to the parties with a note that they should keep the decision confidential until the adoption of the Activity Report.⁵⁶ This provision only breeds further unnecessary delay in implementing the decisions of the Commission.

If a violation is found, the state should provide information to the Commission on how it has implemented the decision within 180 days of having been informed of the decision.⁵⁷

3 African Court on Human and Peoples’ Rights

3.1 Composition

Four new members of the African Court were elected at the AU Summit in July 2010: Augustino SL Ramadhani from Tanzania; Duncan Tambala from Malawi; Elsie Nwanwuri Thompson from Nigeria; and Sylvain Ore from Côte d’Ivoire. Judge Fatsah Ouguergouz from Algeria was re-elected as a member of the Court. These judges were appointed

54 RoP Rules 85 & 99(16).

55 RoP Rule 110(3).

56 RoP (2008) Rule 113(4).

57 RoP Rule 112(2).

for six-year terms, with the exception of Mr Ore, who was appointed for a four-year term.⁵⁸

3.2 Resources

The African Court was allocated US \$6 169 591 from the AU budget for 2010 and secured US \$1 769 784 from partners for the same period.⁵⁹ Its budget for 2011 was thus close to US \$8 million. The Court was allocated US \$6 478 071 from the AU budget for 2011 and secured US \$2 911 544 from partners for the same period.⁶⁰ Its budget for 2011 was thus close to US \$9,4 million. This can be contrasted to the Inter-American Court of Human Rights which had a budget of almost US \$4 million in 2011, of which half was received from the OAS.⁶¹

The financial resources allocated to the African Court are clearly excessive in relation to its current workload and output. The African Court, whose workload principally consists of the communication procedure, received more money from the AU than the African Commission whose activities include not only the communications procedure, but also, for example, the consideration of state reports and promotional missions. Even in terms of communications, the African Commission received more communications than the Court. The Commission clearly has a higher workload than the Court. It should accordingly receive more money from the AU than the Court.

3.3 Cases

In a speech to the November 2010 session of the African Commission, the President of the African Court, Judge Gerard Niyungeko indicated⁶²

that the foremost challenge of the African Court is its inability to hear cases due to the small number of countries that have ratified the Protocol Establishing the Court, as well as the small number of states parties which have made the Declaration allowing individuals and NGOs to submit cases directly to the Court.

By the end of 2011, only five states had made declarations to the Court allowing for direct access to individuals and NGOs with observer status before the Commission: Burkina Faso, Malawi, Mali, Tanzania and Ghana. By the end of 2011, two cases had been submitted against

58 Assembly/AU/Dec.315(XV).

59 EX.CL/Dec.524(XVI)

60 EX.CL/Dec.600(XVIII).

61 Inter-American Court of Human Rights, Annual Report 2011 68.

62 Report of the 48th ordinary session of the African Commission on Human and Peoples' Rights para 22.

Tanzania,⁶³ one against Malawi⁶⁴ and one against Burkina Faso.⁶⁵ The Court has declared a number of cases inadmissible because they were either submitted against states not party to the Protocol or states which have not made the declaration allowing for direct access.⁶⁶

By the end of 2011, the African Commission had only referred one case to the African Court – against Libya.⁶⁷ This case was referred to the Court in terms of the provision in the Commission's Rules of Procedure in relation to referral of cases of massive human rights violations in states party to the Court Protocol. The Court issued its first order for provisional measures in which it called on Libya to 'refrain from any action that would result in loss of life or violation of physical integrity of persons'.⁶⁸ Interestingly, the African Commission did not request an order for a provisional measure. The Court decided to issue the provisional measure of its own volition.⁶⁹

At its November 2010 session, the African Commission tasked the Secretariat with identifying cases which could be referred to the Court and report to the Commission at the next session.⁷⁰ As of the end of 2011, the Commission had only referred the case against Libya to the Court.

The African Court seems set to work under its current legal framework for the foreseeable future. The Protocol on the African Court of Justice has entered into force, but the Court is unlikely to be established pending the entry into force of the Protocol on the Statute of the African Court of Justice and Human Rights which merges the African Court of Justice and the African Court on Human and Peoples' Rights. The AU Assembly in July 2010 asked the AU Commission to finalise a study on the implications of giving the African Court criminal jurisdiction over international crimes such as genocide, crimes against humanity and war crimes and report to the AU Summit in January

63 These cases have been merged by the Court. See Applications 9/2011 & 11/2011, *The Tanganyika Law Society and the Legal and Human Rights Centre and Reverend Christopher Mtikila v the United Republic of Tanzania*. The case involves the right of individuals to stand for elections as independent candidates.

64 Application 3/2011, *Mkandawire v Malawi*.

65 Application 13/2011, *Beneficiaries of the Late Norbert Zongo – Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo and Burkinabe Human and Peoples' Rights Movement v Burkina Faso*.

66 <http://www.african-court.org> (accessed 30 April 2012).

67 Application 4/2011, *African Commission on Human and Peoples' Rights v Libya*.

68 Order for provisional measures on Application 004/2011, <http://www.african-court.org/en/cases/judgments-and-orders/> (accessed 5 March 2012). See J Oder 'The African Court on Human and Peoples' Rights' order in respect of the situation in Libya: A watershed in the regional protection of human rights?' (2011) 11 *African Human Rights Law Journal* 495.

69 Oder (n 65 above) 499.

70 Report of the 48th ordinary session of the African Commission on Human and Peoples' Rights para 251.

2011.⁷¹ The AU had not taken any final decision with regard to this issue by the end of 2011.

4 African Committee on the Rights and Welfare of the Child

4.1 Composition and sessions

The African Committee on the Rights and Welfare of the Child (African Children's Committee) is the principal regional human rights organ for the promotion and protection of the human rights of children in Africa, based primarily on the Protocol to the African Charter on Human and Peoples' Rights on the Rights and Welfare of the Child. As of the end of 2011, 46 out of 54 African Union member states had ratified the Protocol.

The Children's Committee has 11 members. During 2010 and 2011, seven new members were appointed to the Committee – six in July 2010 and one in January 2011. The Committee is the only organ that is empowered to receive communications based on a treaty that exclusively deals with the rights of children. The UN Committee on the Rights of the Child (CRC Committee) does not yet have similar powers. The main functions of the Children's Committee include receiving and considering complaints of violations (communications), state reports, and conducting investigative missions.

The African Children's Committee held its 15th and 16th ordinary sessions in 2010 and its 17th and 18th ordinary sessions in 2011. The 18th session was the first to be held outside Ethiopia, where the Secretariat of the Committee is based in the Department of Social Affairs of the AU Commission. The 18th session was hosted by Algeria.

At its 16th session, the Children's Committee adopted its Plan of Action for 2010 to 2014. The Committee also established a joint Committee with CRC with a view to exchange information and integrate the works of the two committees.⁷²

The practice of organising a meeting to bring together civil society organisations prior to the sessions of the African Commission has been replicated in relation to the sessions of the Committee. The report of the NGO Forum and recommendations are normally presented before the Committee.

4.2 State reports

The African Children's Committee considered the periodic report of Uganda during its 15th session. A high-level delegation, headed by

71 Decision on the abuse of the principle of universal jurisdiction, Assembly/AU/Dec.292(XV).

72 Activity Report of the 16th session of the Committee, paras 45-48.

Minister of State for Youth and Children Affairs of Uganda, attended the session. The consideration of the periodic report of Rwanda was postponed since Rwanda had not sent a delegation. The report of Rwanda was finally considered at the 16th session, where the Rwandan delegation was headed by the Minister of Gender and the Family. Togo presented its report at the 17th session.⁷³ The delegation from Togo was led by the Minister for Social Action and National Solidarity. At the request of the representative of Cameroon, the consideration of Cameroon's report was deferred to the next session. The periodic report of Cameroon was presented to the Children's Committee during its 18th session by the Minister of Social Affairs of Cameroon. The Committee also considered the country report of Niger, which was presented by the Minister of Social Development and Protection of Women and Children. At the same session, the Ambassador of Senegal in Algeria presented the first report of Senegal to the Committee. The delegations, with the exception of that of Senegal, were at a high level.

4.3 Communications

As of December 2011, the African Children's Committee had received only two communications. The first communication, dealing with children affected by the LRA conflict in Northern Uganda, was submitted to the Committee in 2005.⁷⁴ The communication was declared admissible at the 17th session in 2010 and the parties made oral submissions on the merits at the 18th session.

The Committee adopted its first ever decision on the merits of a communication at the 17th session. The communication was submitted by the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative⁷⁵ and alleged the denial of the right to registration and nationality of children of Nubian descent in Kenya. The case was heard in the absence of a representative of the government of Kenya. The Children's Committee proceeded to consider the merits of the case as the government of Kenya had failed to respond to the Committee.⁷⁶ The decision is an encouraging move and should facilitate the speedy disposal of communications. It will also hopefully encourage states to respond to the requests of the Committee, or face the consequences of hearing the case in their absence.

The children of Nubian descent were denied citizenship because their parents were not recognised by the Kenyan government as citizens

⁷³ Activity Report of the 17th session of the Committee, para 39.

⁷⁴ *Centre for Human Rights v Uganda*.

⁷⁵ Communication 2/2009, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v The Government of Kenya* (22 March 2011).

⁷⁶ Activity Report of the 17th session of the Committee, para 35.

of Kenya as they did not have any place which they could call their homeland (the Nubians originated from Sudan and were brought to and settled in Kenya by the British during the colonial period). Because the parents often do not have identification documents, the children could not be registered at birth. Even when the children were registered, birth registration did not serve to prove citizenship. This had led to the statelessness of many children of Nubian origin. The Children's Committee held that the practice of failing to register Nubian children constituted a violation of article 6(2) of the African Children's Charter, which imposes a duty to register children immediately after birth. The Committee concluded that, although not all Nubian children are stateless, a significant number of them were indeed rendered stateless because of the practice of refusal to register them. This constituted a violation of article 6(4) of the African Children's Charter. The Committee also concluded that the different treatment of children of Nubian descent by the Kenyan government constituted discrimination contrary to article 3 of the African Children's Charter. The Committee recommended to Kenya to ensure that children of Nubian origin who did not have Kenyan nationality or are otherwise stateless are granted such nationality and proof of such nationality. It also recommended that Kenya should take the necessary measures to ensure that the birth registration system does not lead to discrimination against children of Nubian origin.

In accordance with its Rules of Procedure, the African Children's Committee has appointed one of its members to follow up on the implementation of the decision in the Nubian children case which was decided during the 17th session. The Committee requested Kenya to report within six months on the measures it has taken to implement the decision.

5 African Peer Review Mechanism

The African Peer Review Mechanism (APRM) is a voluntary process which has a mandate covering political, economic and corporate governance and socio-economic development. The review is based on self-assessment and input from a country review mission constituted of African experts under the supervision of a Panel of Eminent Persons. By the end of 2011, 30 states had signed up to the APRM.⁷⁷ Fifteen states have completed the review process and 12 country review reports and programmes of action have been published, the latest in May 2009.

⁷⁷ <http://www.uneca.org/aprm/CountriesStatus.asp> (accessed 4 April 2012).

The country review mission to Zambia took place in February 2011.⁷⁸ Sierra Leone submitted its self-assessment report in November 2010⁷⁹ and the country review mission visited the country in May and June 2011.⁸⁰ The country review reports had not been discussed by the APRM Forum by the end of 2011.⁸¹ Kenya, one of the first countries to be reviewed, was the first state to receive a second country review mission in July 2011.⁸² Djibouti and Tanzania conducted their self-assessments in 2010 and 2011. Twelve states that have signed up to the APRM have not started the process.⁸³

Human rights feature quite prominently in the review which leads to concrete time-bound national programmes of action to rectify identified shortcomings. Among the members of the APRM Panel of Eminent Persons is a former member of the African Commission, Julienne Ondziel Gnelenga. Despite this, co-operation between the APRM and the African Commission has been lacking.

At its November 2010 session, the African Commission adopted a Resolution on the Co-operation between the African Commission on Human and Peoples' Rights and the African Peer Review Mechanism. This followed the participation of the African Commission's Special Rapporteur on Freedom of Expression, Pansy Tlakula, in a workshop organised by the NGO, Article 19, on how to strengthen issues on freedom of expression in the APRM review. In the resolution, Commissioner Tlakula was appointed as a focal point to co-ordinate and enhance co-operation between the African Commission and the APRM.

6 African Union political organs

At the Summit in January 2011, the Executive Council decided not to authorise the publication of the 29th Activity Report of the African Commission. The Council called on the Commission to 'engage

78 'Zambia: APRM launched', *Zambian Chronicle* 9 February 2011, <http://www.afrimap.org/newsarticle.php?id=2831> (accessed 4 April 2012). See also <http://aprm-au.org/knowledge-network/zambia> (accessed 4 April 2012). The Zambian self-assessment report is available online: <http://www.scribd.com/Zambian-Economist/d/51493595-Zambia-APRM-Country-Self-Assessment> (accessed 4 April 2012).

79 <http://aprm-au.org/knowledge-network/sierra-leone> (accessed 4 April 2012).

80 'President Koroma presents at African Peer Review Mechanism (APRM)' 1 February 2012, <http://www.sierraexpressmedia.com/archives/34593> (accessed 4 April 2012).

81 'Governance: The Zambia Report will not be discussed at the Malabo Summit', <http://www.iag-agi.org/spip/Governance-Zambia-Evaluation.html> (accessed 4 April 2012).

82 <http://www.nepadkenya.org/aprm.html> (accessed 4 April 2012).

83 Angola, Cameroon, Liberia, Republic of Congo, Egypt, Gabon, Malawi, Mauritania, São Tomé and Príncipe, Senegal, Sudan and Togo.

concerned member states' with regard to verification of facts in the report and incorporate responses of states in order to have a balanced view.⁸⁴ At the Summit in July 2011, the Executive Council decided to defer consideration of the 29th and 30th Activity Reports to the next session.⁸⁵ The 29th to 31st Activity Reports were finally adopted at the Summit in January 2012. While it is good that states pay attention to the Commission's work, they are clearly too defensive and happy to use the anachronistic provision on confidentiality in article 59 of the African Charter to their benefit. The Commission could do more to guard its turf and not too easily give in to pressure from states.

In January 2010, the AU Assembly adopted a 'Decision on the prevention of unconstitutional changes of government and strengthening the capacity of the African Union to manage such situations'.⁸⁶ The Decision considered the 'need for a comprehensive approach to the issue of unconstitutional changes of government based on zero tolerance for *coups d'état* but also for violations of democratic standards, the persistence and reoccurrence of which could result in unconstitutional changes'. The Assembly decided that

[i]n cases of unconstitutional changes of government, in addition to the suspension of the country concerned, the following measures shall apply: (a) non-participation of the perpetrators of the unconstitutional change in the elections held to restore constitutional order; (b) implementation of sanctions against any member state that is proved to have instigated or supported an unconstitutional change in another state; (c) implementation by the Assembly of other sanctions, including punitive economic sanctions.

Sanctions were used in 2010 and 2011 to induce the transfer to democratic government with regard to Côte d'Ivoire,⁸⁷ Guinea, Madagascar⁸⁸ and Niger,⁸⁹ with mixed results.⁹⁰

At the July 2010 Summit, the Assembly reiterated its position that AU member states shall not co-operate with the arrest and surrender of President Al-Bashir of Sudan who has been charged with genocide and crimes against humanity by the International Criminal Court (ICC). The Assembly also rejected the request by the ICC to open a liaison office in Addis Ababa. The position of the AU in relation to the ICC is

84 EX.CL/Dec.639(XVIII).

85 EX.CL/Dec.666(XIX).

86 Assembly/AU/Dec.269(XIV) Rev.1.

87 <http://www.reuters.com/article/2011/04/21/us-ivorycoast-idUSTRE73014Z20110421> (accessed 4 April 2012).

88 <http://www.voanews.com/english/news/africa/African-Union-Sanctions-Madagascars-Leaders-88262607.html> (accessed 4 April 2012).

89 <http://www.polity.org.za/article/institutionalising-the-au-sanctions-2010-03-18> (accessed 4 April 2012).

90 See generally K Magliveras 'The sanctions system of the African Union: Part success, part failure' http://aegean.academia.edu/KonstantinosMagliveras/Papers/1159844/THE_SANCTIONING_SYSTEM_OF_THE_AFRICAN_UNION_PART_SUCCESS_PART_FAILURE(accessed 4 April 2012).

regrettable in the light of the fact that 30 African states have ratified the Statute establishing the ICC and are obliged to co-operate with the Court. During 2010 and 2011, President Al-Bashir visited a number of African states which have ratified the ICC Statute and which were thus under an obligation to surrender him to the ICC.

The Assembly at its summits reiterated the call to give criminal jurisdiction to the African Court. A draft protocol was prepared by a consultant and discussed by legal experts of member states, but had by the end of 2011 not yet been adopted by the AU.

At the July 2010 Summit, the Assembly adopted a 'Decision on the promotion of co-operation, dialogue and respect for diversity in the field of human rights'. The Assembly noted 'the importance of respecting regional, cultural and religious value systems as well as particularities in considering human rights issues'. The Assembly further rejected the approach that 'social matters, including private individual conduct' should fall within the ambit of human rights. In an apparent contradiction, the Assembly undertook to support an agenda for the Human Rights Council 'addressing issues of importance for Africa, including fighting racism, racial discrimination, xenophobia and related intolerance, in all their forms'.⁹¹ At the July 2011 Summit, the Assembly endorsed a proposal by Burkina Faso for a UN General Assembly resolution condemning female genital mutilation as a gross violation of human rights.⁹² As noted in the decision, this is in line with the Protocol to the African Charter on the Rights of Women in Africa.⁹³ To leave 'social matters' out of human rights would be a serious setback, in particular for women's rights which are often violated in the private sphere.

The theme of the January 2011 Summit was 'Towards greater unity and integration through shared values'. These shared values include, according to the Assembly, democratic practices, good governance, the rule of law and the protection of human rights.⁹⁴ Clearly, many African states are not in reality subscribing to these values and, in a sinister twist, the President of Equatorial Guinea, a country which is hardly known for good governance, was elected Chairperson of the AU Assembly at the Summit. At the January 2011 Summit, the Assembly adopted the African Charter on Values and Principles of Public Service and Administration.

A human rights strategy for Africa was developed by the AU Commission's Department of Political Affairs as 'a guiding framework for collective action by the AU, RECs [regional economic communities]

91 Assembly/AU/Dec.328(XV).

92 Assembly/AU/Dec.383(XVII).

93 See also Assembly/AU/ Dec.355(XVI) para 7 where the Assembly calls on states to ratify the Protocol and fully implement its provisions.

94 Assembly/AU/ Decl.1(XVI).

and member states'.⁹⁵ The 11-page strategy identifies a lack of co-ordination, limited capacity, insufficient implementation and limited awareness as challenges to the African human rights system.⁹⁶ The strategy and the 2012-2016 action plan attached to it do not provide much guidance as to how these challenges will be addressed.

7 Conclusion

The African Commission can no longer blame its ineffectiveness on a lack of resources. Clearly, the main problem lies with the Secretariat and its leadership, but also with the Commission itself which should reform the way in which the sessions of the Commission are conducted. The Commission met for 82 days during the two years of the review, but has very little to show for it, in particular when it comes to handling communications. More can also be done with regard to visibility, in particular the examination of countries, for example through the state reporting procedure. Recordings of public sessions, in particular the examination of state reports, should be broadcast on the website of the Commission and co-operation sought with broadcasters in the countries under review to relay the broadcast on FM radio.

The African Court must work to establish its relevance. Civil society organisations must also take the opportunity to make use of the Court with regard to the five countries that have made declarations providing for individual and NGO direct access. Other possible avenues are to insist that the Commission refer cases regarding massive violations in states which have ratified the Protocol to the Court, as happened in the case of Libya. Another possibility is requests for advisory opinions.

The African Committee on the Rights and Welfare of the Child adopted its first decision on a communication but, like the African Commission, lacks in visibility.

The political organs of the AU have provided more resources to the human rights bodies than in the past, but have been less supportive of human rights in other decisions, in particular in relation to not allowing the publication of the Activity Report of the Commission. Imposing sanctions with regard to undemocratic change of government is a positive step, but should be extended to the full range of undemocratic practices as well as massive human rights violations and the clear failure to comply with decisions of the human rights bodies established by the AU member states.

There was still much to do to improve the human rights situation in Africa as the continent entered 2012, the year that has been declared by the AU as the year of shared values, values which include human rights.

⁹⁵ <http://au.int/en/dp/pa/content/human-rights-strategy-africa> (accessed 4 April 2012).

⁹⁶ Para 23.

Human rights developments in African sub-regional economic communities during 2011

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Summary

During 2011 there were both negative and positive developments in the human rights work of African sub-regional economic communities. From the negative perspective, the travails of the Southern Africa Development Community Tribunal in 2011 stand out as the most notorious as they brought about a limitation in the effectiveness of this erstwhile budding human rights regime in Southern Africa. Arguably, as a consequence of the suspension of the Tribunal, there was very little human rights activity from Southern Africa to report on. Thus, the focus in this contribution is squarely on developments that occurred in the human rights regimes in East Africa and West Africa. Significantly, there was an increase in human rights litigation activity before the sub-regional courts in both regions. Activities in the judicial sector and other non-judicial human rights activities in the respective regimes of the East African Community and the Economic Community of West African States are analysed critically in this contribution. Developments during 2011 demonstrate the growing confidence of actors and institutions in the human rights regimes of the two sub-regions.

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1 Introduction

Since the early part of this millennium,¹ the subtle expansion of the African human rights system, largely as a result of the emergence of human rights protection regimes within the frameworks of sub-regional economic communities, has been one of the means by which international law has aided the promotion and protection of human rights on the African continent. As challenges such as restricted individual access to the African Court on Human and Peoples' Rights (African Court) increase frustration and dissatisfaction with the continental human rights framework, victims of human rights violations and support organisations (such as non-governmental organisations (NGOs)) have increasingly turned to the nascent regimes in the sub-regions for succour.² The best evidence of this trend is the increasing human rights case load of the most prominent sub-regional judicial institutions.³ Notwithstanding the fact that there is an annual increase in the number of human rights cases that come before some of the sub-regional courts, there has not been an equivalent avalanche of activities in the non-judicial sector. Thus, in the past few years, sub-regional contributions to the African human rights system have been most visible in the judicial sector.

Within the period of observable activity, the sub-regional contribution to the expansion of the scope of human rights realisation in Africa has been spear-headed by the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern Africa Development Community (SADC). It is against this backdrop that stakeholders in the African human rights system have focused their attention on these three sub-regional organisations in developing strategies to accommodate increased sub-regional

1 The idea of the sub-regional realisation of human rights emerged with the resurgence of economic regionalism in the late 1990s as evidenced in the revision of the treaties of regional economic communities or the adoption of new treaties. However, it was the increased involvement of the ECOWAS Community Court of Justice in judicial protection of human rights in 2005 that heralded the entry of RECs in the field of continental protection of human rights that was previously the exclusive preserve of the African Union. Generally, see F Viljoen *International human rights law in Africa* (2012) 469 for a discussion of the realisation of human rights through sub-regional institutions in Africa.

2 Fortunately, the increased use of sub-regional human rights realisation mechanisms does not appear to have negatively impacted on the demands on continental structures such as the African Commission on Human and Peoples' Rights.

3 Eg, the ECCJ is reported to have received 100 cases between 2005 and 2011. See S Ojelade 'ECOWAS Community Court handles 100 cases in six years – President', http://www.nationaldailyng.com/index.php?option=com_content&view=article&id=2378:ecowas-community-court-handled-100-cases-in-six-years-president&catid=372:news-extra&Itemid=617 (accessed 15 May 2012).

presence in human rights.⁴ Accordingly, academic attention has also beamed more on the human rights activities of the EAC, ECOWAS and SADC.

The year 2011 has generally not been significantly different from previous years in terms of sub-regional human rights realisation. However, there are a few areas in which critical developments have taken place. Notorious among such events is the forced withdrawal of the SADC Tribunal from the field.⁵ From a positive perspective, in spite of the difficulties that have been experienced in the effort to actualise the envisaged expanded human rights jurisdiction of the East African Court of Justice (EACJ), the EACJ continued to assert itself as a major player in the field. These and other human rights-related events that occurred in 2011 are the focus of this contribution.

The analysis is undertaken in four broad sections. Section one, the introduction, lays out the framework for the discourse. Sections two and three highlight and analyse major human rights developments in the EAC and ECOWAS. Section four concludes the contribution. As a result of space constraints, the article omits the challenges to the human rights jurisdiction of the SADC Tribunal. This contribution demonstrates that the sub-regional realisation of human rights, especially in the area of judicial protection, is gradually coming of age as the practices of two sub-regional courts in 2011 indicate that there is growing institutional confidence.

2 Developments in the East African Community framework

Since the idea of ‘recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights’ was introduced as a fundamental principle in the 1999 Treaty of the EAC (as amended), the EAC has increasingly developed positive action in the field of human rights.⁶ EAC action in the field over the years has been diverse. For present purposes, the human rights work of the EAC during 2011 can broadly be classified into judicial and non-judicial activities.

4 Eg, the development of strategies on the platform of the African Union has commonly focused on the EAC, ECOWAS and SADC regimes. Similarly, donors and development partners from outside the continent have been more interested in understanding and supporting the human rights work in these three organisations.

5 In May 2011, the operations of the SADC Tribunal were suspended and the Tribunal all but wound up.

6 See ST Ebobrah ‘Human rights developments in African sub-regional economic communities during 2010’ (2011) 11 *African Human Rights Law Journal* 216 for a brief introduction of the nature of the EAC human rights regime.

2.1 Non-judicial developments

Other than the EACJ, there are six major organs in the framework of the EAC that work together towards the realisation of organisational objectives.⁷ The overarching nature of human rights in the EAC obligates all of these organs to play some role or another in the field. During 2011, non-judicial human rights developments occurred in areas such as standard setting, thematic meetings and activities aimed at strengthening democracy within the partner states.⁸

2.1.1 Setting human rights standards

It has to be borne in mind that the EAC is not a regular or conventional human rights organisation to the extent that the realisation of human rights is not enumerated in its main organisational objectives.⁹ Accordingly, up until December 2011, the EAC has yet to develop a dedicated EAC-specific human rights instrument. However, since 2004 when it was first initiated by national human rights commissions in the region (in collaboration with an NGO), the idea of a dedicated bill of rights for the EAC has grown stronger in the region.¹⁰

During 2011 efforts aimed at actualising the adoption of a regional Protocol on Good Governance and the regional Bill of Rights were intensified in the framework of the EAC. Building on fundamental principles set out in article 6 of its Treaty and a growing campaign that links democratic good governance to successful regional integration,¹¹ the EAC initiated national stakeholders' consultative meetings as early as February 2011 to discuss the proposed Protocol.¹² The draft

7 By art 9 of the 1999 EAC Treaty (as amended), the organs of the EAC include the Summit, the Council, the Co-ordination Committee, the Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly and the Secretariat.

8 The classification of activities under these headings is not rigid and is not to suggest that these are standard labels for human rights activities. It has been done liberally (as in previous years) to easily capture connected human rights or rights-related activities under the same heading for the sake of convenience. Hence, a term like 'standard setting' is used here to capture all activities relating to setting new standards through treaty or policy adoption as well as activities aimed at re-affirming existing human rights standards.

9 Art 5 of the 1999 EAC Treaty as (amended) enumerates the objectives of the EAC.

10 See Ebobrah (n 6 above) 216 220-221.

11 The EAC Deputy Secretary-General in charge of Political Federation draws this link probably to justify intensified action in this area. See 'EAC – COMESA – IGAD Observer Mission Interim Report of 2011 General Elections in the Republic of Uganda', <http://www.eac.int/about-eac/eacnews/567-press-release-eac-comesa-igad-observer-mission-interim-report-general-election-republic-of-uganda-2011.html> (accessed 15 May 2012).

12 Pressrelease 'Stakeholders discuss draft Good Governance Protocol and Bill of Rights in Burundi' <http://www.eac.int/about-eac/eacnews/574-press-release-stakeholders-discuss-draft-good-governance-protocol-and-bill-of-rights-in-burundi.html> (accessed 15 May 2012).

Protocol stands on four main pillars which include 'democracy and democratisation processes; human rights and equal opportunities; the rule of law and access to justice; and anti-corruption, ethics and integrity'.¹³ The proposed Bill of Rights creates room for the establishment of an East African Human Rights Commission, which will have the mandate to promote and protect human rights in the region.¹⁴ While the establishment of the regional Commission adds to the proliferation of international human rights supervisory bodies on the continent, it can also be read as an indication that the EAC considers the subject of human rights sufficiently important to warrant the establishment of a department dedicated to its realisation.

In relation to the proposed Protocol on Good Governance, part of its significance lies in the fact that it is expected to provide a platform for actualising expanded jurisdiction for the EACJ which would cover human rights as envisaged in article 27(2) of the EAC Treaty. For instance, stakeholders at the municipal consultation in Burundi took the view that the adoption of the Protocol on Good Governance had to go hand in hand with the expansion of the jurisdiction of the EACJ to cover issues of good governance and human rights.¹⁵ Arguably, the adoption of region-specific standards of good governance potentially increases pressure on the heads of state and government to actualise the expanded jurisdiction of the EACJ. The addition of a region-specific bill of rights could be interpreted to mean that the human rights jurisdiction of the EACJ may be linked to such a document. If this is correct, it would mean that the African Charter on Human and Peoples' Rights (African Charter) may lose its central position as the preferred human rights catalogue in the EAC framework. While this can reduce the potential for a conflicting interpretation of the African Charter, since the EACJ will begin to apply the region-specific instrument rather than the African Charter, it remains to be seen whether it would also lead to lowering the standard of protection that exists under the African Charter regime.

Although the pace at which the Protocol to expand the jurisdiction of the EACJ has been adopted was as slow as the proposed EAC Bill of Rights in previous years, there was significant progress towards the adoption of the proposed Protocol on Good Governance in 2011. Following successful national consultations early in the year, experts converged on the platform of the EAC in May 2011 to finalise the draft Protocol for presentation to a multi-sectoral meeting of ministers of

13 As above.

14 As of the time of writing, the East African Legislative Assembly had passed the Bill of Rights into law. See 'EALA passes bill on human rights', http://www.eac.int/index.php?option=com_content&view=article&id=988:eala-passes-bill-on-human-rights&catid=146:press-releases&Itemid=194 (accessed 28 May 2012).

15 As above.

the partner states.¹⁶ The draft was then presented to and adopted by the sectoral meeting for transmission to the EAC Council of Ministers. Two points are to be noted in relation to the consultation that is being undertaken on the proposed instrument. Firstly, the nature and depth of consultation on the Protocol create some level of legitimacy that previously has not been associated with human rights treaty making in Africa. To some extent there is a prospect for popular ownership of such a treaty in the ratifying states with a consequent expectation of internalisation of norms and standards. The second connected point to be made is that the involvement of both civil society and the different layers of national government is likely to impact on the speed with which states sign and ratify the Protocol.

2.1.2 Thematic meetings

Another form of non-judicial human rights development in the EAC during 2011 was the hosting of meetings on human rights or rights-related subjects. In this regard, the EAC provided a platform for national electoral commissions in the region to meet for the purpose of sharing experiences on improving elections and democratic governance.¹⁷ An important feature of the meeting was that it provided room for collective consideration of the reports of EAC observer missions to partner states that were involved in elections. In addition to providing opportunities for sharing best practices, such meetings could very well serve as naming and shaming devices that would potentially bring peer pressure to bear on electoral umpires and consequently improve performance.

During the period under review, the EAC also hosted a regional conference on good governance. In the context of the EAC, good governance encompasses aspects of human rights as well as respect for the rule of law. The 2011 conference, which built on two previous conferences on good governance, brought together about 200 participants drawn from the governments of partner states, ministries, parliaments, judiciaries, regional and global governance institutions, academia and civil society generally.¹⁸ The conference aimed at linking respect for the rule of law and constitutionalism to regional integration. Considering that the EAC aims to ultimately achieve political integration, hosting such programmes with the potential to impact

16 See 'EAC Protocol on Good Governance in final stages' <http://www.eac.int/about-eac/eacnews/633-protocol-on-good-governance-in-final-stages.html> (accessed 15 May 2012).

17 'EAC heads of NECs discuss best practices in conducting credible elections' <http://www.eac.int/about-eac/eacnews/613-necs-discuss-best-practices.html> (accessed 15 May 2012).

18 'AC Conference on good governance opens in Kampala' <http://www.eac.int/about-eac/eacnews/738-eac-conference-on-good-governance-opens-in-kampala-tomorrow.html> (accessed 15 May 2012).

on domestic democratic cultures appears crucial for the realisation of organisational goals. Programmes such as the conference are more feasible at sub-regional levels than at the continental level, both in terms of practical convenience and overall impact potential. Hence, by hosting such programmes, the EAC unconsciously complements the work of the African Union (AU). Encouraging good governance in the EAC partner states has the potential to enhance the realisation of human rights, both in terms of creating a favourable domestic environment for the enjoyment of rights and ensuring the availability of resources necessary for the provision of certain rights.

2.1.3 Activities to strengthen democracy

A third genre of rights-related activities that the EAC engaged in during 2011 was targeted at promoting and consolidating democracy in the region. Following the now common practice of involving sub-regional organisations in the observation and monitoring of elections, as early as January 2011 the EAC was involved in putting up a 70-member Joint Election Observation Mission (in collaboration with the Common Market for Eastern and Southern Africa (COMESA) and the Intergovernmental Authority on Development (IGAD)), to observe the general elections in Uganda.¹⁹ This joint election observation exercise was at the invitation of Uganda and is part of a regional political integration programme to promote political best practices and democracy in the region. The EAC takes the view that election observation is a tool for conflict prevention as it enables the organisation to track and resolve politically-motivated conflicts as early as possible.²⁰

An outcome of increased EAC action in election observation and monitoring is the decision to adopt an EAC Election Monitoring and Observation Manual that aims to guide practice in this area. It should be noted that under the African Charter on Democracy, Elections and Governance (Democracy Charter),²¹ the AU is expected to observe and monitor elections in African states that are party to the Democracy Charter.²² While the involvement of more than one international organisation in observing elections in a state is not uncommon, there may be a need for co-ordination between sub-regional bodies such as the EAC and the AU in this regard, at least to reduce and save costs. It should also be noted that conducting a joint election observation

19 'EAC, COMESA, IGAD plan joint election observation for Uganda' <http://www.eac.int/about-eac/eacnews/533-joint-election-observation-for-uganda.html> (accessed 15 May 2012).

20 See the comments of the EAC Deputy Secretary-General in charge of Political Federation (n 11 above).

21 Adopted by the AU in 2007, reproduced in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 108.

22 See art 19 of the Democracy Charter.

mission prevented a situation where all three sub-regional bodies to which Uganda belongs could have conducted separate and independent missions. Such co-operation between international organisations with overlapping membership is important in the face of the proliferation of sub-regional organisations. It is also significant that African governments and international organisations are beginning to find common ground on an issue as politically volatile as elections, especially against the background that such issues were previously considered to be exclusive domestic affairs by fiercely nationalistic post-independence African leaders. Overall, the activities in this area show that the work of the EAC has gone way beyond the narrow area of economic integration.

2.2 Judicial protection of human rights

The 1999 Treaty of the EAC recognises the EACJ as the judicial organ of the EAC. The EACJ consists of a First Instance Division and an Appellate Division.²³ By article 27(2) of the EAC Treaty, human rights jurisdiction is envisaged for the EACJ 'as will be determined by the Council at a suitable subsequent date'. Despite the fact that the envisaged human rights jurisdiction is yet to be conferred on the EACJ, this Court had previously engaged in creative judicial practice to adjudicate on matters touching on human rights.²⁴ Perhaps as a result of the uncertain nature of the human rights in the scheme of the EACJ's jurisdiction, not too many human rights-related cases were submitted to the Court. However, during 2011 a number of human rights-related cases were received and dealt with by the EAC. The next section briefly analyses the most important of those cases.

2.2.1 *Independent Medical Unit v Attorney-General of Kenya and Others*²⁵

Between 2006 and 2008, over 3 000 Kenyans in the Mount Elgon district of Kenya were allegedly tortured and inhumanly treated. In this action, the Independent Medical Unit (an NGO) contended that Kenyan

23 Arts 9(e) & 23 1999 EAC Treaty.

24 The case of *Katabazi & Others v Secretary-General of the EAC & Others* was the first case where the EACJ faced the challenge of addressing complaints of human rights violations in spite of the absence of a human rights jurisdiction.

25 Unreported suit, reference 3 of 2010, ruling delivered on 29 June 2011. It must be noted that the significance of the findings in this case have been greatly watered down by the fact that the decision has been overruled in the appellate decision in *Attorney-General of Republic of Kenya v Independent Medical Legal Unit*, Appeal 1 of 2011, judgment of 15 March 2012. This later case falls outside of the temporal scope of this article, hence it has not been discussed.

officials²⁶ and the Secretary-General of the East Africa Community (as 1st to 5th defendants) failed in their respective duties to prevent, investigate and punish the perpetrators of the wrongs against the 3 000 Kenyans. Basing its action on article 30 of the 1999 EAC Treaty (as amended),²⁷ the International Medical Unit (IMU) argued that the failure of the relevant Kenyan officials to act was in violation of several international human rights conventions, the Kenyan Constitution and the EAC Treaty. Similarly, IMU argued that the failure of the Secretary-General of the EAC to investigate and take the necessary action against Kenya was a violation of article 71(d) the EAC Treaty. The respondents opposed the action and raised a preliminary objection to challenge its competence before the EACJ on the grounds that the Court lacked jurisdiction to receive human rights cases, that certain parties were wrongly joined, that the action was statute-barred and that certain procedural regulations had not been complied with.

Three of the grounds upon which the preliminary objection was raised are fundamental issues that touch on the very foundation of the current state of human rights litigation before the EACJ. First, the question was raised whether, in spite of article 27(2) of the EAC Treaty which attaches the exercise of human rights jurisdiction by the EACJ on the making of a yet-to-be-made protocol, the EACJ can still determine cases that partially or fully complain that human rights had been violated by a partner state. As will be seen shortly, this point recurs in all the cases alleging violations of human rights. Second, seeing that article 30 of the EAC Treaty has become the main entry point for human rights-related cases before the EACJ, the question of limitation of time is brought into light as article 30(2) stipulates that actions hinged on article 30 need to be instituted within two months of the occurrence of the wrong. Third, the respondents' objection raised the question as to who can properly be brought as a respondent in an action before the EACJ, especially if the action is based on article 30 of the Treaty.

The first point tackled by the EACJ was the question of jurisdiction. Considering the EACJ's decision in the case of *Katabazi and Others v Secretary-General of the East African Community and Another*,²⁸ that the Court will not shy away from determining cases touching on human rights in spite of article 27(2) of the Treaty, the objection raised in this

26 The officials include the Attorney-General (official legal representative of the state), the Minister of Internal Security of the Republic of Kenya, The Chief of General Staff of the Republic of Kenya and the Commissioner of Police of the Republic of Kenya.

27 Art 30(1) of the 1999 EAC Treaty (as amended) provides that, subject to art 27 of the Treaty, any resident of a partner state may refer for the determination of the EACJ, the legality of any Act, regulation, directive, decision or action of a partner state or an institution of the Community on the ground that such was unlawful or is an infringement of the provisions of the Treaty.

28 (2007) AHRLR 119 (EAC 2007).

matter was a subtle invitation to the EACJ to strongly motivate the legal basis for its exercise of human rights jurisdiction.²⁹ In its response to the objection, the EACJ apparently took an easy way out by pointing out that a similar objection was raised in the *Katabazi* case, yet the Court's panel in that case declared that it would not abdicate its duty to interpret the Treaty simply because the reference includes allegations of a human rights violation. Aligning itself with the panel in the *Katabazi* case, the Court asserted that it will also not abdicate its duty merely because an allegation that human rights have been violated is made.³⁰ The approach taken by the Court on this issue was a lost opportunity since the introduction of article 30 as the basis for the action should have prompted the Court to make a clear pronouncement as to whether allegations of human rights violations can be accommodated under article 30, especially as the article is expressly made subject to article 27.³¹ As it stands, this decision provides authority for human rights-related cases to be brought before the EACJ under article 30 of the Treaty.

On the question of limitation, although the applicant's response to the objection was that the complaint involved allegations of a criminal nature and concerned good governance, justice and the rule of law and therefore could not be subject to limitation, the EACJ invoked the concept of continuing violation to reach a decision. According to the Court, the matters complained of 'are failures in a whole continuous chain of events' and therefore 'could not be limited by mathematical computation of time'.³² The concept of continuing violation is not new to international human rights jurisprudence and its invocation by the EACJ is probably an indication that the Court will not encourage states to claim immunity for state officials on very flimsy grounds.

Regarding the objection on the joinder of individual officials of Kenya, the EACJ pointed out that article 30 related to actions of partner states and community institutions but not individual officials.³³ The

29 As ST Ebobrah 'Litigating human rights before sub-regional courts in Africa: Prospects and challenges' (2009) 17 *African Journal of International and Comparative Law* 91 argued, it was evident from *Katabazi* that, in the absence of an unequivocal grant of human rights jurisdiction, the EACJ treads on a thin and delicate line when it is faced with cases alleging human rights violations. Hence, practitioners and litigants need to carefully couch claims before the court whenever a human rights violation is involved.

30 See p 6 of the *IMU* decision.

31 As at the time of writing, the Appellate Division of the EACJ, sitting on appeal over the present case, had criticised the First Instance Division for failing to properly analyse the basis for its claim of jurisdiction beyond the 'lone reference to the *Katabazi* decision'. Even though the Appellate Division considered *Katabazi* to be sound law, it felt that the question of jurisdiction raised issues of mixed law and fact and therefore required deeper evaluation and analysis. See *Attorney-General of Republic of Kenya* (n 25 above).

32 See p 10 of the *IMU* decision.

33 See p 7 of the *IMU* decision.

appearance of non-state actors as defendants or co-defendants in human rights cases before an African sub-regional court is an issue that the ECOWAS Community Court of Justice has also had to deal with in the last few years.³⁴ While it conceded that the present decision of the EACJ is based specifically on article 30 of the EAC Treaty (as amended), the decision is consistent with the current posture of the ECOWAS Court which has moved from accepting non-state actors as defendants to insisting that non-state actors are not proper defendants before an international court.³⁵ Although there is room for application to intervene in the EACJ regime, in order to maintain its status as an international court, the EACJ needed to clarify the point that only states can validly be respondents before it. Whatever its shortcomings might have been, this decision is a clear statement by the Court that human rights matter in its scheme of things, despite the delay in process to enlarge the jurisdiction of the Court.

2.2.2 *Sebalu v Secretary-General of the EAC and Others*³⁶

The applicant in the *Sebalu* case was a candidate at the elections in Uganda who unsuccessfully challenged the results of the elections before municipal courts in Uganda. Basing his claim before the EACJ on articles 6, 7(2), 8(1)(c), 23, 27(1) and 30 of the EAC Treaty, the applicant claims a right of appeal to the EACJ. The applicant contends that the failure of the institutions and organs of the EAC to convene and adopt the necessary legal instrument to confer appellate jurisdiction on the EACJ over decisions of municipal courts was in violation of the Treaty, especially as it concerns 'fundamental principles of good governance, adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally-acceptable standards of human rights'.³⁷

Although a number of issues involved in this case have very remote connections with human rights, certain points of importance were raised and addressed. In relation to the question whether a cause of action existed in favour of the applicant to warrant the action, the EACJ outlined the distinction between a cause of action under common law and a cause of action under statute and legislation (perhaps this is to be read to include a treaty).³⁸ Relying on an earlier decision of the EACJ

34 See, eg, the case of *Ukor v Layele*, unreported Suit ECW/CCJ/APP/01/04, as well as the cases of *David v Uwechue*, unreported Suit ECW/CCJ/APP/04/09 and *SERAP v The President of Nigeria & 8 Others*, unreported Suit ECW/CCJ/APP/07/10 (discussed by Ebobrah (n 6 above) 216).

35 See *David v Uwechue* (n 34 above).

36 Unreported, reference 1 of 2010, judgment delivered on 30 June 2011. The 2nd, 3rd and 4th respondents are the Attorney-General of Uganda, one Hon Sam Njuba (the winner of the election) and the Electoral Commission of Uganda.

37 See p 2 of the *Sebalu* decision.

38 See p 16 of the *Sebalu* decision.

in the case of *Prof Peter Anyang' Nyong'o and Others v Attorney-General of Kenya and Others*, the Court emphasised that in an action under article 30 of the EAC Treaty, there is no requirement for the claimant to show a right or interest or damage suffered before a cause of action will exist in favour of such a claimant.³⁹ By necessary implication, from a human rights perspective, the EACJ appears to be saying that under article 30, there is no victim requirement in actions before the court. Accordingly, human rights defenders with little or no connection with victims other than the general interest of the public at heart can rely on article 30 to bring actions in defence of human rights.

The decision in this case also provided an opportunity for the EACJ to stress that, as presently constituted, the Court cannot exercise appellate jurisdiction over municipal courts as its current appellate jurisdiction is merely internal. There is an underlying suggestion that a future EACJ would not merely play a supervisory role over partner states' compliance with treaty obligations, but will probably actively review the decisions of municipal courts. The feasibility and desirability of such a role in the field of human rights need to be properly investigated and assessed. For now, it is sufficient to observe that the EACJ regime provides a prototype for the creation of appellate divisions in international court systems in Africa.

On the merits of the case itself, the EACJ agreed with the contention that the delay in adopting the protocol necessary to expand the jurisdiction of the Court has a negative effect on the fundamental principles of good governance, adherence to the principles of democracy and the rule of law.⁴⁰ Considering that the same protocol is expected to confer an explicit human rights jurisdiction on the EACJ, this decision may very well be saying that the delay in granting a human rights jurisdiction to the Court is itself a violation of the EAC Treaty. In fact, the EACJ holds the view that 'endless consultative meetings without tangible results is (*sic*) unproductive'.⁴¹

Another crucial point made by the EACJ in the *Sebalu* case relates to its finding on the justification for sub-regional courts to play a role in human rights adjudication. The EACJ noted that partner states had a treaty obligation not to jeopardise the objective of integration.⁴² The Court apparently considers good governance and human rights to be vital for successful integration. Hence, after stressing that national courts had a primary obligation to promote and protect human rights, the EACJ went on to state as follows:

But supposing human rights abuses are perpetrated on citizens and the state in question shows reluctance, unwillingness or inability to redress the abuse, wouldn't regional integration be threatened? We think it

39 See pp 17 to 19 of the *Sebalu* decision.

40 See p 19 of the *Sebalu* decision.

41 See p 32 of the *Sebalu* decision.

42 See p 29 of the *Sebalu* decision.

would. Wouldn't the wider interests of justice, therefore, demand that a window be created for aggrieved citizens in the community partner state concerned to access their own regional court, to wit, the EACJ, for redress? We think they would.

Having established a basis for its intervention, the EACJ appeared to have recognised its present limitations as a forum for human rights litigation. It acknowledged that it could only make declarations on whether human rights have been violated in disregard of treaty obligations. Thus, the Court stated that '[t]he EACJ is a legitimate avenue through which to seek redress, even if all the Court does is to make declarations of illegality of the impugned acts, whether of commission or omission'.⁴³ Hopefully, after a declaration is made by the EACJ, other authorities, including partner states and EAC institutions, will ensure that states act to right such established wrongs.

2.2.3 *Mjawasi and 748 Others v Attorney-General, Republic of Kenya*⁴⁴

In the *Mjawasi* case, brought under articles 27 and 30 of the EAC Treaty, 749 people claimed that Kenya's refusal and failure to pay to them pensions and other benefits for services they rendered to the defunct East African Community was a violation of articles 6(d) and 7(2) of the EAC Treaty. The claimants specifically sought a declaration that the omissions were a 'travesty upon the recognition, promotion and protection of their rights as enshrined in the African Charter on Human and Peoples' Rights of 1981' and a failure to 'maintain universally-accepted standards of human rights'.⁴⁵ In his objection, the respondent *inter alia* raised issues relating to a lack of jurisdiction, non-retroactivity of the Treaty and the failure of the claimant to exhaust local remedies.⁴⁶ As a result of the fact that a similar claim had been brought by the claimants and rejected by the High Court in Kenya, the objection to the exercise of jurisdiction in this matter relates to the absence of the instrument necessary to confer appellate as well as human rights jurisdiction on the EACJ. Expectedly, on the issue of jurisdiction, the claimants' response was hinged on the decision in the *Katabazi* case.

In addressing the challenges raised by the respondent, the EACJ pointed out the necessity to read articles 23 and 27 together in locating the jurisdiction of the Court. The Court then went on to concede that in the face of article 27(2), it has neither an appellate jurisdiction nor a jurisdiction to adjudicate on disputes concerning violations of

⁴³ See p 41 of the *Sebalu* decision.

⁴⁴ Reference 2 of 2010, ruling delivered on 29 September 2011.

⁴⁵ See p 1 of the *Mjawasi* decision.

⁴⁶ See p 3 of the *Mjawasi* decision.

human rights *per se*.⁴⁷ However, it came to the conclusion that it has competence to make a determination whether a state or institution of the EAC had acted in violation of the Treaty. In effect, the Court sought to draw a distinction between cases involving human rights *per se* and cases in which allegations of violations of human rights are invoked but are peripheral to the central theme of an alleged violation of the Treaty. Clearly, such a distinction does not ordinarily mean much. However, in the context of the realities under which the Court currently operates, it is crucial for the determination whether the EACJ is acting *ultra vires* its Treaty powers. From another perspective, the position of the Court is a subtle restatement of the obvious fact that the EAC Treaty is not a human rights document.

On the question of exhaustion of local remedies, the EACJ restated the rationale for the rule as well as the exceptions to the rule. It then acknowledged that a requirement to exhaust local remedies featured in international human rights instruments, including the African Charter, but emphasised that there was no express requirement under the EAC Treaty that local remedies be exhausted. Making reference to the *N'yongo* case, the Court pointed out that even the provisions relating to reference from municipal courts could not be read to mean the existence of a requirement to exhaust local remedies.⁴⁸ This position is similar to the attitude of the ECOWAS Community Court of Justice and effectively lays to rest any speculation that the EACJ may read in such a requirement to exhaust local remedies. Finally, applying article 28 of the Vienna Convention on the Law of Treaties, the EACJ also ruled that the Treaty did not apply retrospectively. Although the EACJ threw out the *Mjawasi* claim, it used the opportunity of the case to clarify certain grey areas regarding practice before it.

2.2.4 *Ariviza and Another v Attorney-General of the Republic of Kenya and Another*⁴⁹

The *Ariviza* case is a fall-out of the constitutional amendment process in Kenya. The claimants, who took issue with aspects of the constitutional review process, originally brought the challenge before municipal courts (including an *ad hoc* Independent Constitutional Dispute Resolution Court) in Kenya. In the action before the EACJ, the claimants sought a declaration that the referendum law and the process of constitutional amendment were not in respect of, and in compliance with, the rule of law and therefore amounted to a violation of the EAC Treaty by Kenya. It was also claimed that the failure of the Secretary-General of the EAC to take action in the face of the alleged violation by Kenya amounted to a violation of the Treaty by the Secretary-General.

47 See pp 5 & 6 of the *Mjawasi* decision.

48 See p 8 of the *Mjawasi* decision.

49 Unreported, reference 7 of 2010, judgment delivered 30 November 2011.

Along with their substantive action, the claimants sought provisional relief to prevent Kenya from passing and implementing legislation to give effect to the new Constitution.

In its formulation of issues for determination, the EACJ *inter alia* indicated an intention to determine whether due process had been followed and, if not, whether Kenyan law and, by extension, the EAC Treaty, had been violated. On this point, the EACJ concluded that the claimants had not made out a successful case. From an international law perspective, it is open to debate whether the EACJ ought to concern itself with allegations that the municipal law of a given state has been infringed. The EACJ also elected to determine whether there was a failure on the part of the Interim Independent Constitutional Dispute Resolution Court (IICDRC) to resolve the claimants' petition following its decision to dispose of the matter before a hearing on the merits. Taking judicial notice of the IICDRC's ruling that there was no valid petition before it,⁵⁰ the EACJ concluded that it had no competence to determine the correctness or otherwise of that decision since it was a judicial decision. The Court took pains to engage in an analysis to show that municipal judicial decisions were not part of items listed in article 30 of the EAC Treaty for which the jurisdiction of the EACJ could be triggered.

While it appears that the EACJ's aim was to avoid friction with the municipal courts of partner states, it is common for international human rights supervisory mechanisms to insist that they do not sit on appeal against national courts. Once again, the ECOWAS Court provides a prime example of such an attitude. In its decision in cases such as *Ugokwe v Nigeria*⁵¹ and *Amouzou and Others v Côte d'Ivoire*,⁵² the ECOWAS Court has made a conscious effort to point out that it has no power to review the decisions of municipal courts of state parties. Hence it is not surprising that the EACJ finally concluded on this point that it had neither appellate nor review jurisdiction over national courts.⁵³ An additional point worthy of observation is the EACJ's decision not to penalise unsuccessful litigants before it by requiring them to pay costs. The EACJ's apparent motivation was that persons acting in the public interest ought not to be discouraged.⁵⁴ In view of the notorious reluctance of states and their officials to monitor compliance with human rights obligations, reliance on persons acting in the public interest is critical and needs to be encouraged and sustained.

50 See p 24 of the *Ariviza* judgment.

51 Community Court of Justice ECOWAS Law Reports (2004-2009) 35.

52 Unreported, role general. ECW/CCJ/APP/01/09.

53 See pp 24 to 25 of the *Ariviza* judgment.

54 See p 30 of the *Ariviza* decision.

2.2.5 *Plaxeda-Rugumba v The Secretary-General of the EAC and Another*⁵⁵

The claimant in this case brought the action on behalf of her brother, a lieutenant-colonel in the Rwandan army, who was allegedly a victim of unlawful arrest and detention by Rwandan authorities. The victim had been held in an unknown destination without access to family or lawyers. It was against this background that the action was brought pursuant to articles 6(9), 7(2) and 30(1) of the EAC Treaty as well as Rule 24(1) of the EACJ Rules of Procedure. In her action, the claimant invited the EACJ to declare that both the arrest and detention of Lieutenant-Colonel Ngabo by Rwanda and the failure of the Secretary-General of the EAC to investigate the failure of Rwanda were in breach of the fundamental principles of the community.

Based on the facts supplied by the claimant, five broad issues were formulated for determination by the Court.⁵⁶ These include the questions whether the EACJ could exercise jurisdiction over the claim, whether the matter was not filed out of time and whether local remedies ought to be exhausted before the claim could be heard by the EACJ.⁵⁷ Effectively, the case provided an opportunity for the EACJ to reaffirm its position on the nature of actions that could be accommodated under article 30 of the EAC Treaty.

On the question of jurisdiction, the Court reaffirmed and aligned itself with the position under the *Katabazi* and *Mjawasi* cases. However, the Court went on to point out that by its interpretation of the claim, the claimant was merely seeking interpretation of the Treaty to know whether the acts complained about infringed Treaty obligations.⁵⁸ As far as the Court was concerned, the request fell squarely within the boundaries of article 27(1), so that the Court would be offending its oath of office if it failed to make the enquiry that the claimant sought.⁵⁹ According to the EACJ, notwithstanding reference to the African Charter, 'the use of the words "other original, appellate, human rights and other jurisdiction" is merely in addition to, and not in derogation to, existing jurisdiction to interpret matters set out in articles 6(d) and 7(2)', thus, 'the applicant is quite within the Treaty in seeking such interpretation and the Court quite within its initial jurisdiction in doing so and it will not be shy in embracing that initial jurisdiction'.⁶⁰ The EACJ added that the claimant was seeking a declaration of rights rather than an enforcement of human rights before it.⁶¹ Clearly, the

55 Unreported, reference 8 of 2010, judgment of 1 December 2011.

56 See pp 11 to 12 of the *Plaxeda-Rugumba* decision.

57 As above.

58 Para 23 of the *Plaxeda-Rugumba* case.

59 As above.

60 As above (my emphasis).

61 Para 24 of the *Plaxeda-Rugumba* case.

EACJ is eager to ensure that the current state of EAC Treaty law does not shut out cases touching on human rights.

On the question of time, the EACJ agreed with the claimant's position that cases involving issues that are criminal and continuous in nature do not lend themselves to mathematical computation of time for the purpose of determining a limitation of time. This is similar to the position that the Court took in the earlier case of *Independent Medical Unit v Attorney-General of Republic of Kenya*. On the question of exhaustion of local remedies, the EACJ reaffirmed that there was no such requirement under its legal regime.

The cases considered by the EACJ during 2011 show the EACJ to be a court that is becoming bolder in its determination to promote and protect human rights in spite of the obvious jurisdictional challenge that the current state of EAC law throws at it. It should also be noticed that, probably as a result of the perception of a bolder court, civil society in East Africa is encouraged to approach the Court to protect human rights.

3 Developments in the Economic Community of West African States framework

As is the case with the EAC, the idea of recognising, promoting and protecting human rights as a fundamental principle for economic integration under the ECOWAS Treaty framework was only introduced when the decision to revise the 1975 original Treaty was made.⁶² Under the current Treaty regime,⁶³ in addition to a preambular reference to human rights and the recognition that the realisation of human rights is a fundamental principle for integration,⁶⁴ ECOWAS member states undertake under article 56(2) to 'co-operate for the purpose of realising the objectives of the African Charter'. On the strength of these treaty foundations, a budding human rights regime centred on the African Charter has since emerged under the ECOWAS framework. During 2011, the bulk of human rights activities in the Community took place by way of the judicial protection of human rights. However, there were some non-judicial human rights activities worthy of note in the period under review.

62 See generally Viljoen (n 1 above) 498; 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.

63 The revised ECOWAS Treaty was adopted in 1993.

64 Art 4(g) 1993 revised ECOWAS Treaty.

3.1 Non-judicial human rights developments

The year 2011 was somewhat stormy for the ECOWAS community with political upheavals in certain ECOWAS member states attracting the focus of the organisation. Despite these distractions, some activities of a human rights nature occurred within the framework of the ECOWAS Commission.⁶⁵ These were mostly in the areas that can broadly be termed thematic meetings and activities aimed at strengthening democracy in the ECOWAS region.

3.1.1 Thematic meetings

Unlike previous years, ECOWAS meetings on human rights-related matters were few. Two important thematic areas that were covered in 2011 were children and humanitarian assistance. In March 2011, two meetings relevant for the protection of the rights of children were held under the ECOWAS platform. First was a meeting to review the West Africa Regional Plan of Action for the elimination of child labour in the region.⁶⁶ As is the case in most parts of Africa, child labour is a huge concern in West Africa. With widespread poverty in the region, the engagement of children in the informal sector is a common sight in most countries. Hence, the involvement of ECOWAS is likely to attract attention to the issue and enhance collective action to tackle challenges. Also in March 2011, ECOWAS convened a workshop on the protection of children in an educational setting. The programme focused on developing and strengthening protection for vulnerable children in the school environment. The focus on the protection of children in the region is a critical addition to the human rights agenda in ECOWAS, especially considering that the African Committee of Experts on the Rights of the Child in Africa is not sufficiently equipped to cover the entire continent in detail.

Another area in which ECOWAS thematic meetings were convened in 2011 was in the area of humanitarian assistance. Probably as a result of the many conflicts that the region has experienced, over the years ECOWAS has collaborated successfully with donor organisations and other inter-governmental organisations to improve the quality of assistance that it is able to offer to people in conflict and post-conflict settings. During 2011, the major ECOWAS activity in the area was the Ministerial Conference on Humanitarian Assistance and Internal

65 The ECOWAS Commission is one of the main institutions of ECOWAS and the nerve centre of most of the organisation's activities. By art 6 of the 1993 revised ECOWAS Treaty, other institutions include the Authority of Heads of State and Government, the Council of Ministers, the Community Parliament, the Economic and Social Council, the Community Court of Justice, the Fund for Co-operation, Compensation and Development and the Specialised Technical Commissions.

66 <http://news.ecowas.int/presseshow.php?nb=046&lang=en&annee=2011> (accessed 15 May 2012).

Displacement in West Africa.⁶⁷ One of the main achievements of the meeting was the development of strategies to encourage universal ratification of the AU Convention for the Protection and Assistance of Internally-Displaced Person adopted in 2009. About 11 out of 15 ECOWAS member states have signed the convention as a result of the awareness created by the ECOWAS institutions on the subject.

Engagement on the platform of sub-regional organisations such as ECOWAS contributes in no small measure to the promotion and protection of human rights in Africa as the AU continues to struggle with the size of the continent and the challenge of an insufficient direct involvement of states in the implementation of strategies for human rights realisation.

3.1.2 Activities aimed at strengthening democracy

During 2011, ECOWAS faced some of the biggest challenges to its efforts to enthrone democracy in the region. As early as January, an ECOWAS election observer mission was dispatched to supervise legislative elections in Niger.⁶⁸ Coming soon after the military incursion into governance in Niger, the elections themselves were a testimony to the success of ECOWAS intervention in the country.⁶⁹ The monitoring of the elections was followed by similar missions to monitor the presidential elections in Nigeria in April 2011 as well as the elections in Cape Verde and Liberia in August and October respectively.⁷⁰ In each case, while citing minor irregularities, observer missions endorsed the elections.⁷¹

One of the most significant developments in the area of democratisation and strengthening democracy within the ECOWAS framework during 2011 occurred in November 2011 when the ECOWAS authorities refused to deploy any mission to monitor the elections in The Gambia. In its communication to the President of The Gambia, the ECOWAS Commission stated that it took the decision because 'the preparations and political environment for the said election are adjudged by the Commission not to be conducive

67 <http://www.comm.ecowas.int/> (accessed 15 May 2012).

68 'ECOWAS observers deployed to supervise the 2011 legislative and presidential elections in Niger', <http://www.comm.ecowas.int/> (accessed 15 May 2012).

69 In early 2010, then President Mamadou Tandja of Niger was overthrown by a military *coup* after he tried to amend the Constitution of Niger in order to extend his stay in power beyond the stipulated two terms.

70 'Former Liberian leader to head ECOWAS observer mission to Nigeria's presidential election' <http://www.comm.ecowas.int/> (accessed 15 May 2012); 'ECOWAS Head of Mission advises Cape Verdeans on run-off presidential elections' <http://www.comm.ecowas.int/> (accessed 15 May 2012).

71 Reports of ECOWAS election observation missions are available at the ECOWAS Commission, Abuja, Nigeria.

for the conduct of free, fair and transparent polls'.⁷² Citing reports of its fact-finding mission and the ECOWAS Early Warning System, the ECOWAS Commission stressed that 'a picture of intimidation, an unacceptable control of the electronic media by the party in power, the lack of neutrality of state and parastatal institutions, and an opposition and electorate cowed by repression and intimidation' prevailed in The Gambia.⁷³ Accordingly, it was decided that the minimum standard under the ECOWAS Protocol on Democracy and Governance had not been met to warrant the dispatch of an observer mission to The Gambia for the elections. At the very least, the action by ECOWAS is a statement of disapproval and constitutes pressure on the government in The Gambia to democratise. In view of the perception that external monitors to African elections are merely rubber stamps to validate elections that are widely considered to be irregular, this action is bold and reassuring. However, it must be noted that the action taken here contrasts sharply with the Community's failure to act to enforce the decision of the ECOWAS Court against The Gambia.⁷⁴

A final point to be noted under this heading is the active involvement of ECOWAS in the resolution of politically-motivated crises in some states in the region. Worthy of note is the pressure brought to bear on the former government in Côte d'Ivoire following the announcement of results in that country's presidential elections. Although it has been subjected to criticism, the decision taken by the ECOWAS Authority of Heads of State and Government to intervene to restore democratic rule in Côte d'Ivoire is an indication that the political will exists among ECOWAS leaders to maintain democracy as an acceptable form of government in the region. With the resurgence of military *coups* in Africa, firm actions by international organisations should send the right message to prospective coupists. As would be shown shortly, the decision by the ECOWAS authority to engage in military intervention was the subject of litigation before the ECOWAS Court and led to the issuing of provisional measures to prevent that action. It is not clear whether the provisional measure issued by the ECOWAS Court partly or wholly motivated the decision not to follow through with the threat of ECOWAS military action in Côte d'Ivoire.

72 'ECOWAS statement on the 24 November 2011 presidential elections in The Gambia', <http://www.comm.ecowas.int/> (accessed 15 May 2012).

73 As above.

74 The decision against The Gambia in the case of *Ebrimah Manneh v The Gambia*, Community Court of Justice, ECOWAS Law Report (2004-2009) 181 has remained unenforced as The Gambia declined to comply.

3.2 Judicial protection of human rights by the ECOWAS Community Court of Justice

Articles 6 and 15 of the 1993 revised ECOWAS Treaty establish the ECCJ as the judicial organ of the ECOWAS community.⁷⁵ Under the 1991 Protocol adopted by ECOWAS Heads of State and Government to set up the ECCJ,⁷⁶ the Court was not clothed with human rights jurisdiction and individuals did not have direct access to the Court. All of that changed in 2005 with the adoption of a Supplementary Protocol which opened up direct individual access to the ECCJ and endowed the Court with jurisdiction over cases that allege violations of human rights in ECOWAS member states.⁷⁷ Since the adoption of the 2005 Supplementary Protocol, the ECCJ has become a viable forum for the resolution of disputes alleging human rights violations in ECOWAS member states. During 2011, as the review of cases will show, the Court consolidated its human rights work, showing signs that it is becoming a formidable judicial force in the field of human rights.

3.2.1 *Aboubacar v La Banque Centrale des Etats de L'Afrique de L'Ouest*⁷⁸

In November 2009, Mr Aboubacar brought an action against the *Banque Centrale des Etats de L'Afrique de L'Ouest* (BCEAO) and the Republic of Niger alleging that Niger had violated his right to property as guaranteed in article 17(2) of the Universal Declaration of Human Rights (Universal Declaration), articles 14 and 21 of the African Charter as well as the Constitution of the Republic of Niger. Acting on a 2003 decision of the West African Economic and Monetary Union (UEMOA),⁷⁹ which directed the withdrawal of a range of bank notes from circulation, the BCEAO released new bank notes and authorised financial authorities of member states to exchange notes between 15 September and 31 December 2004. However, citing social reasons, the exchange window was extended from 17 January to 18 February 2005.

Having failed to conclude the exchange of his notes within the specified period, Mr Aboubacar tried and failed to get his notes exchanged by the financial authorities in Niger. He contended that, in view of the fact that BCEAO had released money to the Nigerien

75 The ECCJ was originally established by art 4(1)(d) of the 1975 ECOWAS Treaty as the 'Tribunal of the Community'.

76 Protocol A/P.1/7/91 adopted and provisionally entered into force in July 1991.

77 Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 relating to the Community Court of Justice.

78 Unreported Role Generale ECW/CCJ/APP/18/08; Arret ECW/CCJ/JUD/01/11, judgment delivered on 9 February 2011.

79 The *Union Economique et Monetaire Ouest Afrique* (UEMOA) is the monetary and economic union of francophone West African countries.

authorities and there was no rigidity in the period stipulated for the exchange of bank notes, the refusal to exchange his old notes amounted to an infringement of his right to property and protection from arbitrary disposal of property.⁸⁰ According to him, Niger had applied the funds released by BCEAO to other purposes and this was a violation of his rights. Both BCEAO and the Republic of Niger challenged the competence of the Court and the admissibility of the action on different grounds. While BCEAO contended that it did not come within the jurisdiction of the ECCJ, Niger argued that no *prima facie* case of a violation had been established and, further, that article 15 of the Rules of Procedure of the UEMOA Court of Justice conferred exclusive jurisdiction on that court over disputes arising from acts and omissions of the organs of UEMOA.⁸¹

In its analysis, the ECCJ reaffirmed that, insofar as a complaint contained allegations of the violation of human rights within the territory of an ECOWAS member state, its jurisdiction as a court would be triggered. However, recognising that BCEAO fell outside the scope of its jurisdiction, the ECCJ did not hesitate to accept Mr Aboubacar's withdrawal of his claims against BCEAO.⁸² The ECCJ further recognised the exclusive jurisdiction of the UEMOA Court of Justice and accordingly declined to exercise jurisdiction on the matter.⁸³ While it may not appear significant, this case provided an opportunity for the ECCJ to demonstrate the viability of internal provisions in international treaties as tools to manage conflicting jurisdictions of international courts. By implication, it arguably shows that in the application of the African Charter, the ECCJ will respect the competence and jurisdiction of other specialised courts should the need arise.

3.2.2 *Ibrahim and Others v Niger*⁸⁴

In February 2011, the ECCJ delivered its ruling in a case brought by successors at law of the late Sidi Ibrahim who was a victim of torture and assassination in Niger. In terms of the facts brought before the Court, Sidi Ibrahim and his fellow travellers were murdered in cold blood after they were dispossessed of their goods soon after they had followed the travel advice of representatives of the Nigerien defence force. The plaintiffs contended that the failure of the Nigerien authorities to investigate, capture and try the perpetrators despite repeated demands was a violation of article 4(g) of the 1993 revised ECOWAS Treaty; articles 1, 4, 5 and 7(1)(a) of the African Charter; articles 3, 5, 8 and 13 of the Universal Declaration; articles 2(1), 3(a)(b), 6(1) and 7 of

80 See paras 1 to 6 of the *Aboubacar* decision.

81 Paras 15 to 19 of the *Aboubacar* decision.

82 Paras 20 to 21 of the *Aboubacar* decision.

83 Paras 31 to 35 of the *Aboubacar* decision.

84 Unreported Role Generale ECW/CCJ/APP/12/09, Arret ECW/CCJ/JUD/11.

the International Covenant on Civil and Political Rights (ICCPR); as well as articles 2(1), (2), (3), 12, 13 and 14 of the Convention Against Torture (CAT). Based on the conflicting facts before the ECCJ, the Court had to determine the admissibility of the case, the qualification of counsel for the state to appear before the court, the right of the plaintiffs to effective remedy in Niger, and the responsibility of Niger to find and prosecute the murderers of the late Ibrahim and his companions.⁸⁵

On the question of admissibility, the ECCJ had no difficulty in finding that the matter was admissible since there had been compliance with articles 9(4) and 10(d) of the 2005 Supplementary Protocol of the ECCJ.⁸⁶ With the abandonment of the objection to the admissibility of the pleadings submitted by counsel whose qualification was contested and the replacement of the counsel, the Court had no need to make a pronouncement on the issue. This is a lost opportunity as it would have clarified the right of audience of counsel before the ECCJ. On the question of an effective remedy within Niger, the ECCJ considered the argument that the plaintiffs had failed to take advantage of a municipal rule of criminal procedure which allowed them to seek civil relief on the claim where the authorities decline to pursue criminal action. After a detailed analysis of the procedure suggested by Niger as unexplored by the plaintiffs, in the context of international human rights law, the ECCJ concluded that the right to an effective remedy had been violated.⁸⁷ The Court's analysis is illuminating and is a clear indication of the growing confidence and competence of the ECCJ in the field of human rights.

The ECCJ's consideration of the question whether the Nigerien amnesty law provided a shield for the state from demands to investigate, arrest and charge the perpetrators of the murder is a further demonstration of how the Court is embracing its role as a human rights court. Making clear reference to international criminal law, the Court considered the enactment of blanket amnesty laws as a violation of the right to an effective remedy.⁸⁸ However, it is worth noting that the Court did not consider itself competent to order the state to charge anyone. Instead, the ECCJ found the state responsible for the murder of the victims. The Court's appreciation of the limits of its powers and the alternatives that it has in international law has a potential to increase user confidence in the ECCJ. However, it is also important to point out that a failure to make specific orders after a finding that protected rights have been violated carries a risk of lowering the perception of effectiveness of the ECCJ.

85 See para 29 of the *Ibrahim* decision.

86 Para 30 of the *Ibrahim* decision.

87 Paras 37 to 45 of the *Ibrahim* decision.

88 See paras 50 & 51 of the *Ibrahim* decision.

3.2.3 *Mrakpor v Five Others*⁸⁹

Following the receipt of three suits filed on the same subject matter, each filed independently, at a sitting on 10 March 2011 the ECCJ decided to consolidate the three matters. The ruling delivered on 18 March 2011 addressed preliminary issues raised in the individual cases. Relying on articles 9(1)(a) and (c) of the 2005 Supplementary Protocol of the ECCJ, on 24 December 2010, three NGOs⁹⁰ registered under the laws of Côte d'Ivoire requested the ECCJ to closely examine a decision of the ECOWAS Authority of Heads of State and Government (ECOWAS Authority) reached on 7 December 2010. On 31 December 2010, Godswill Mrakpor, a Nigerian national domiciled in Abuja, Nigeria, submitted another application against the ECOWAS Authority and the United Nations (UN) operations in Côte d'Ivoire (UNOCI) seeking for a declaration that the decision of the ECOWAS Authority to issue a threat to resort to the use of military action was illegal. Mr Mrakpor relied on articles 4(g), 15 and 56 of the revised ECOWAS Treaty, articles 9(1)(a)(c) and 10(d) of the 2005 Supplementary Protocol as well as articles 1, 2, 3(2), 4, 18(4), 23, 27, 29(2) and (8) of the African Charter.

A third application was one jointly submitted on 31 January 2011 by the Republic of Côte d'Ivoire and Mr Laurent Gbagbo in which they requested the Court to closely examine the 7 and 24 December 2010 decisions of the ECOWAS Authority to take military action against Côte d'Ivoire. In addition to their applications, both Mr Mrakpor, on the one hand, and Côte d'Ivoire and Mr Gbagbo, on the other, filed applications for interim measures to restrain the ECOWAS Authority from resorting to military action while their respective actions were pending.⁹¹ Although the ECOWAS Authority did not respond to the applications filed by the Ivorian NGOs and by Côte d'Ivoire and Mr Gbagbo, the Authority raised preliminary objections to Mr Mrakpor's action on the grounds that Mr Mrakpor lacked *locus standi* to bring the action and further that the matter was an electoral dispute over which the ECCJ could not exercise jurisdiction.⁹²

In its analysis of the objections, the ECCJ made reference to article 9(1) of the 2005 Supplementary Protocol and concluded that it had jurisdiction to adjudicate on disputes involving the interpretation and application of the regulations, directives, decisions and other subsidiary

89 Unreported consolidated Suit ECW/CCJ/APP/17/10; ECW/CCJ/APP/01/11, judgment ECW/CCJ/ADD/01/11, judgment of 18 March 2011.

90 The Foundation Ivoirienne pour l'Observation et la Surveillance des Droits de l'Homme et de la Politique (FIDHOP), the Actions pour la Protection des Droits de l'Hommes (APDH) and the Fideles à la Democratie et à la Nation de Côte d'Ivoire (FIDENACI) combined to submit the application to the ECCJ.

91 See para 4 of the *Mrakpor* ruling.

92 See paras 5 to 6 of the *Mrakpor* ruling.

instruments adopted by ECOWAS.⁹³ The Court's position is necessary since it is likely that national courts would decline jurisdiction over the acts and decisions of an organ of an international organisation. However, as regards the *locus standi* of Mr Mrakpor, the ECCJ considered article 10(c) of the 2005 Supplementary Protocol and reasoned that it only opened access to individuals and corporate bodies whose rights have been violated. In response to the argument that ECOWAS Community citizenship clothes Mr Mrakpor with standing, the Court stressed that 'the status of a Community citizen and that of a human rights activist are not sufficient in themselves to confer the status of an applicant who is qualified to seek annulment of the ... decision'.⁹⁴ Accordingly, the entire action submitted by Mr Mrakpor was declared inadmissible. By this ruling, the ECCJ has given judicial endorsement to the position that victim status is required for access to the Court under article 10(c) of the Supplementary Protocol. One possible effect is that any speculation that NGOs acting in the public interest could access the Court on the basis of 10(c) is now extinguished. However, the decision is silent on whether an individual or corporate body authorised by a victim would be able to access the Court. In some ways, this decision gives an impression of inconsistency in the ECCJ's jurisprudence on *locus standi*. In earlier cases, notably in the case of *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The President of the Federal Republic of Nigeria and 8 Others (SERAP case 2)*,⁹⁵ it would be recalled that the ECCJ did not consider it fatal that the entity bringing the action was not directly affected by the violation and was not acting in a representative capacity. It is necessary for the ECCJ to be consistent in order to maintain its judicial hegemony in the region. However, the differences in the Court's position on standing could be based on the fact that the present action was brought under article 10(c) and not article 10(d) of the 2005 Supplementary Protocol.

The ECCJ took the opportunity in the *Mrakpor* case to outline the conditions that need to be fulfilled before an application for interim measures is granted. According to the Court, it must first satisfy itself that it is competent *prima facie* to adjudicate on the substantive claim or that it is not manifestly incompetent to adjudicate on the substantive claim. Secondly, the Court must satisfy itself that the substantive application is *prima facie* admissible or at least is not manifestly inadmissible. Thirdly, the Court must be satisfied that there is urgency given the circumstances of the case and that the law invoked lends itself to the granting of interim measures.⁹⁶ Applying these conditions to evaluate the application submitted by Côte d'Ivoire

93 Para 12 of the *Mrakpor* ruling.

94 Para 15 of the *Mrakpor* decision.

95 Suit ECW/CCJ/APP/08/09; Ruling ECW/CCJ/APP/07/10, ruling delivered on 10 December 2010.

96 See para 17 of the *Mrakpor* decision.

and Mr Gbagbo, the Court found the existence of a basis for making an order of provisional measures. Thus, the Court made an order that member states and institutions of the Community comply with article 23 of the 2005 Supplementary Treaty, which requires member states to refrain from action that will aggravate the situation once the ECCJ is seized of a matter.⁹⁷

3.2.4 *Centre for Democracy and Development (CDD) and Another v Tandja and Another*⁹⁸

The case brought by the Centre for Democracy and Development and the Centre for the Defence of Human Rights and Democracy was prompted by the political and constitutional crisis in the Republic of Niger following Mr Mamadou Tandja's bid to extend his stay in office as President of Niger. In their action before the ECCJ, the plaintiffs contended that Mr Tandja had imposed himself on the people of Niger by seeking to extend his stay in office and that this was in violation of articles 36 and 136 of the Nigerien Constitution as well as article 13 of the African Charter. It was contended further that the invitation of the military by Mr Tandja to quash demonstrations was a violation of articles 9, 10 and 11 of the African Charter.⁹⁹

The defendants (Mr Tandja and the Republic of Niger), for their part, raised a preliminary objection to contest the admissibility of the case. The defendants argued that the plaintiffs lacked *locus standi* to act on behalf of the people of Niger and therefore did not satisfy article 10(d) of the 2005 Supplement Protocol of the ECCJ. Invoking articles 5 and 6 of the Nigerian Constitution, the defendants argued further that sovereignty belonged to the people of Niger and the plaintiff had not shown that they had been given a mandate by the people of Niger to act on their behalf.¹⁰⁰ Citing the ECCJ case of *Koraou v Niger*,¹⁰¹ the defendants argued that the ECCJ could not exercise jurisdiction in the abstract and, lastly, that the Court was not competent to rule on the internal political process of an ECOWAS member state.¹⁰²

In its analysis of the issues raised, the ECCJ first pointed out that the plaintiffs had failed to indicate the basis on which they were triggering the jurisdiction of the Court.¹⁰³ Minor as this may appear, the Court appears to attach some seriousness to the need for parties to indicate what was the legal basis for their actions before the Court. The ECCJ

97 See para 29 of the *Mrakpor* decision.

98 Unreported Role Generale ECW/CCJ/APP/07/09, Arret ECW/CCJ/JUD/05/11, judgment of 9 May 2011.

99 See paras 4 to 15 of the *CDD* decision.

100 Para 18 of the *CDD* decision.

101 (2008) AHRLR 182 (ECOWAS 2008).

102 Para 19 of the *CDD* decision.

103 Para 22 of the *CDD* decision.

then made a crucial point: that it was not competent by any of its empowering laws to rule on the constitutionality or legality of acts of national government that fall within the sphere of their national laws.¹⁰⁴ However, the Court pointed out that it could become competent if it is alleged that human rights are violated in the process. Effectively, the ECCJ is rehearsing the traditional respect of international courts for the sovereignty of states while claiming the exception that international human rights law has introduced to dent the shield of sovereignty. This additional point is crucial to the extent that it would avoid a situation where ECOWAS member states will hasten to categorise all future actions as acts based on national laws that should be immune from the scrutiny of the ECCJ.

Other important points addressed by the ECCJ in the *CDD* case relate to the *locus standi* and competence of the parties before it. In relation to the plaintiffs, the Court emphasised that by article 10(d) of the 2005 Supplementary Protocol, only victims of human rights violations or persons authorised by such victims could trigger its jurisdiction.¹⁰⁵ In the instant case, the Court held that the plaintiffs had not shown that they fall in either category. The ECCJ added that human rights by their nature could only be enjoyed by natural persons.¹⁰⁶ A last point to be noted is the reaffirmation by the ECCJ that only states may be respondents before it.¹⁰⁷ Accordingly, the Court ruled that the case against Mr Tandja was inadmissible before ruling that the entire action was inadmissible.

3.2.5 *Akeem v Nigeria*¹⁰⁸

Mr Alimu Akeem, a private in the Nigerian army, brought this action against the Federal Republic of Nigeria, alleging that his rights as guaranteed in articles 5 and 6 of the African Charter had been violated by reason of his unlawful detention and torture by the Nigerian army on allegations that he had been indicted by a native doctor in the case of a missing rifle.¹⁰⁹ In the course of the proceedings, the Nigerian army brought an application to be joined as an interested party.¹¹⁰ Both the government of Nigeria and the Nigerian army then raised preliminary objections to contend that the case was inadmissible as the ECCJ lacked jurisdiction. It was contended on behalf of the government of Nigeria and the Nigerian army that local remedies had

104 Para 24 of the *CDD* decision.

105 Paras 27 to 28 of the *CDD* decision.

106 Para 30 of the *CDD* decision.

107 Para 31 of the *CDD* decision.

108 Unreported Suit ECW/CCJ/APP/03/09, judgment ECW/CCJ/RUL/05/11, ruling delivered on 1 June 2011.

109 Paras 1 to 4 of the *Akeem* ruling.

110 Para 9 of the *Akeem* ruling.

not been exhausted and that the plaintiff was detained following the order of a competent military tribunal before which the case against him was still pending.

In its ruling on both the application for joinder and the objections raised, the ECCJ emphasised that human rights disputes before it must necessarily be between ‘an applicant and a member state’ and third parties could only join as interveners on the basis of interest in the main application.¹¹¹ The Court insisted that, apart from the word ‘intervention’, there was no other means by which third parties could be brought in. Consequently, the ECCJ read the army’s application for joinder as an application to intervene and applied the rules for intervention that it had laid down in the *Habré v Senegal* case.¹¹² Clearly, the ECCJ has an attachment to the wording of its enabling laws and counsel appearing before the Court need to be mindful of this fact. Importantly, the ECCJ emphasised in the *Akeem* ruling that it is a court that applies international law, which it applies only against states and not against organs or institutions of states.¹¹³ Thus, the application for joinder was rejected. The Court also wasted no time in rejecting the other grounds of objection. Accordingly, the ECCJ granted an extension of time for the respondent (Nigeria) to file its reply to enable the matter to be heard on its merits.

3.2.6 *Ocean King Limited v Senegal*¹¹⁴

This matter arose from maritime proceedings in which a sea vessel allegedly purchased by a Nigerian was towed by a private Spanish vessel off the coast of Cape Verde to a port in Senegal and detained until it was sold off, after the parties failed to reach agreement on the terms of their transactions, which included legal proceedings before Senegalese courts. In this action before the ECCJ, the plaintiff sought a declaration that the seizure, detention and subsequent sale of their vessel were a violation of the African Charter.¹¹⁵ The defendant raised a preliminary objection, contending that the matter was inadmissible as local remedies had not been exhausted by the plaintiff. The defendant contended further that article 10(d) of the 2005 Supplementary Protocol does not apply to corporate entities and could not be applied by the plaintiff to access the Court, stressing that a corporate body cannot be the victim of human rights violations.¹¹⁶

111 See para 29 of the *Akeem* ruling.

112 Unreported Gen List ECW/CCJ/APP/07/08; judgment ECW/CCJ/APP/02/10, ruling delivered 14 May 2010.

113 Paras 34 to 36 of the *Akeem* ruling.

114 Unreported Suit ECW/CCJ/APP/05/08, judgment ECW/CCJ/JUD/07/11, judgment of 8 July 2011.

115 Para 5 of the *Ocean King Limited* decision.

116 Paras 7 to 99 of the *Ocean King Limited* decision.

Taking the preliminary objection together with its judgment on the case, the ECCJ reaffirmed that the exhaustion of local remedies was not a requirement under the ECCJ human rights regime.¹¹⁷ The Court then engaged in an analysis to show that cases strictly between corporate bodies could only be brought before it where a prior agreement to that effect was in place. An important point made by the ECCJ relates to the distinction it drew between individuals as contained in article 10(d) and corporate bodies which are accommodated in article 10(c) of the 2005 Supplementary Protocol.¹¹⁸ The determination of the ECCJ to show that human rights cannot be enjoyed by corporate bodies is evidenced strongly in the case of *Starcrest Investment Limited v President, ECOWAS Commission and Three Others*,¹¹⁹ where the Court stressed the distinction between articles 10(c) and 10(d) of the 2005 Supplementary Protocol before going on to argue that the Universal Declaration itself is emphatic on the fact that human rights are to be enjoyed by human beings.¹²⁰ Despite its observations, the ECCJ went on to determine whether the plaintiff had been denied a fair hearing by the Senegalese authorities. The Court concluded that there had been no denial of a fair hearing.

3.2.7 *Ameganvi and Others v Togo*¹²¹

In October 2011, the ECCJ delivered its judgment in a case brought by a group of Togolese former national legislators against the Republic of Togo in which they alleged that their removal from parliament had been a violation of articles 1 and 33 of the ECOWAS Protocol on Democracy and Good Governance as well as articles 7(1)(c) and 10 of the African Charter. The plaintiffs had been removed from office as national legislators after they had resigned from their original political party to form their own (new) party. Relying on letters of resignation they had signed before they won the elections, the President of the Togolese Parliament triggered the Constitutional Court of Togo to affirm their removal from Parliament. Aggrieved, the plaintiffs insisted that they had not been given a fair hearing as their alleged resignation letters were irregular. They contended further that Togo had violated their obligation to respect the rule of law as stipulated in the ECOWAS Protocol on Democracy and Good Governance.

The defendant argued that due process had been followed according to Togolese laws and, therefore, that the ECCJ was not competent to hear the matter. The defendant contended that, by

117 Paras 39 to 41 of the *Ocean King Limited* decision.

118 Para 47 of the *Ocean King Limited* decision.

119 Unreported Suit ECW/CCJ/APP/01/08, judgment ECW/CCJ/JUD/06/11, judgment of 8 July 2011.

120 Paras 15 to 16 of the *Starcrest Investment* decision.

121 Unreported Role Generale ECW/CCJ/APP/12/10, Arrêt ECW/CCJ/JUD/09/11, judgment of 7 October 2011.

its Constitution, the decisions of its Constitutional Court are final and binding and that, by its own jurisprudence, the ECCJ could not sit on appeal against decisions of national courts.¹²² It was further argued that the process by which the plaintiffs were removed from office was not part of legal proceedings that required adherence to principles of fair hearing.

In its analysis of the matter, the ECCJ noted the allegation that human rights had been violated and that natural persons were the alleged victims, noting further that international human rights instruments had been invoked.¹²³ The ECCJ then pointed out that, although it recognises that the President of Parliament referred the process to the Constitutional Court, it was still necessary to subject the procedure of removal of the plaintiffs to the scrutiny of international human rights law.¹²⁴ After looking closely at the provisions of the Internal Regulations of the Togolese Parliament on which the removal was based, the ECCJ concluded that the procedure adopted violated the right of the plaintiffs to be heard.¹²⁵ The Court also found that the plaintiffs' rights to freedom of association as guaranteed in the African Charter had been violated.

A few issues arise from this case. First, it appears that the ECCJ refused to be cowed by the argument that due process, in which the Constitutional Court of Togo played a significant role, had been followed according to national law. This is a shift from the observation in earlier cases that the ECCJ was not too eager to adjudicate on a matter in which national courts had been involved. It is a positive development that the ECCJ recognises the need to subject certain national acts to the scrutiny of due process standards of international law, even where national courts have played a role in the national action complained of. A second point to be noted is that the Court did not hesitate to look closely at the provisions of national law. This gives the impression that merely waving sovereignty at the Court will not suffice in cases where a *prima facie* violation of human rights has been established. Overall, it is reassuring that the ECCJ will not shy away from its responsibility to protect human rights in the region.

4 Conclusion

A common but generally unspoken fear in human rights circles in Africa has been whether shifting human rights protection to the sub-regional international organisations would not result in lowering the quality of protection that victims of human rights violations enjoy

122 Paras 25 to 45 of the *Amegabvi* decision.

123 Paras 49 to 53 of the *Amegabvi* decision.

124 Para 55 of the *Amegabvi* decision.

125 Paras 58 to 67 of the *Amegabvi* decision.

under the more familiar continental structures. This fear mostly has been expressed in informal settings where the nascent but growing sub-regional human rights regimes are analysed.¹²⁶ The review of human rights developments in sub-regional organisations during 2011 shows that such fears are largely unfounded. Hopefully, this article has shown that, although they have not been eager to adopt new human rights standards, the sub-regional human rights regimes have enhanced the project of human rights in Africa by applying existing standards closer to the citizens of their various states.

In terms of non-judicial human rights developments, this contribution has shown that sub-regional organisations in Africa have made contributions that would have been impossible, or at least would have been extremely difficult, were the business of human rights protection left entirely to the structures of the AU human rights architecture. In terms of the judicial protection of human rights, it is clear that certain cases which may have been difficult to come before continental structures are captured by the sub-regional regimes. It is also apparent from this contribution that in some areas, sub-regional courts are still grappling with the challenge of adjudicating on human rights. Inconsistencies and unexplained departures from earlier judicial positions have been noticed and pointed out. However, in specific terms, during 2011 the EACJ consolidated its credentials as a viable forum for human rights protection. Although in a few areas the infancy of its practice was obvious, the EACJ appeared to have overcome the initial restrictions that arose from the current absence of a clear human rights mandate. It was also evident from its practice in 2011 that the ECCJ has become bolder in its engagement with the restricting concept of sovereignty. The ECCJ has also begun to clearly delineate the contours and boundaries of its human rights practice. Gradually, sub-regional human rights regimes are coming of age in Africa. Insofar as they continue to complement and not compete with the continental structures, these sub-regional regimes will only make the African human rights system stronger and more useful.

¹²⁶ Eg, such fears were expressed to the author during a visit to the seat of the EACJ in 2010. Similar fears have also been expressed by former students of the LLM (Human Rights and Democratisation in Africa) programme of the Centre for Human Rights, University of Pretoria in 2010.

Developments in international criminal justice in Africa during 2011

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Summary

Africa experienced seismic political shifts in 2011 that had a significant effect on the development of international criminal justice on the continent. The year 2011 saw the finalisation of several noteworthy cases before the International Criminal Tribunal for Rwanda and the conclusion of the case against Charles Taylor before the Special Court for Sierra Leone. The International Criminal Court was also in the spotlight, because of new events – the second referral by the Security Council of a head of state before the ICC; the transfer of the former head of state of Côte d'Ivoire to the ICC; as well as existing events – a co-operation request in the ICC situation in Kenya against the background of an upcoming general election; the ongoing proceedings in the situation in the Democratic Republic of Congo and continuing complexities in the situation in Darfur. The article reviews the developments in these courts as well as the international community's response aimed at combating piracy off the coast of Somalia.

1 Introduction

In this review of the developments in international criminal justice in Africa during 2011, we address the implementation of international

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criminal law against a backdrop of dramatic political upheavals, particularly evident in the investigations of the prosecutor of the International Criminal Court (ICC). Although there was no progress in the cases before the ICC concerning the situation in Uganda, there were marked judicial developments in the situations in the Democratic Republic of the Congo (DRC) and Kenya. The article also examines the ongoing complexities surrounding the prosecution of President Omar Hassan Ahmad Al Bashir, as well as the two new situations before the ICC, concerning Libya and Côte d'Ivoire.

After over three years, 2011 also marked the historic conclusion of the trial against Charles Taylor before the Special Court for Sierra Leone (SCSL). The review of the SCSL examines some of the salient elements of the defence's final arguments in the case, as well as issues related to the SCSL's residual mechanism.

The review of the International Criminal Tribunal for Rwanda (ICTR) examines the jurisprudence in significant cases recently completed before the ICTR, as well as the groundbreaking developments in the prosecution's repeated requests for transfer of cases to Rwanda under Rule 11*bis*. This article touches on developments in the international community's continued fight against piracy.

2 Rwanda

In Resolution 1966 (2010), the United Nations (UN) Security Council requested that the ICTR make every effort to complete all its cases by the end of 2014.¹ The ICTR made considerable progress in 2011 by delivering six appeal judgments² and completing six trials: four lengthy and complex multi-accused cases – the *Government II*, *Military II*, *Karemera and Others*, and *Butare* cases,³ and two single-accused cases – *Gatete* and *Ndahimana*.⁴ In accordance with article 2 of the Transitional Arrangements for the ICTR and the Residual Mechanism, any cases in which the notice of appeal is filed before 1 July 2012 are

1 Security Council Resolution 1966 (2010) adopted on 22 December 2010.

2 *Théoneste Bagosora & Others v The Prosecutor* Case ICTR-98-41-A; *The Prosecutor v Yussuf Munyakazi* Case ICTR-97-36A-A; *Tharcisse Muvunyi v The Prosecutor* Case ICTR-2000-55A-A; *Dominique Ntawukulilyayo v The Prosecutor* Case ICTR-05-82-A; *Tharcisse Renzaho v The Prosecutor* Case ICTR-97-31-A; *Ephrem Setako v The Prosecutor* Case ICTR-04-81-A.

3 *The Prosecutor v Casimir Bizimungu & Others* Case ICTR-99-50-T (*Government II*); *The Prosecutor v Nindiliyimana & Others* Case ICTR-00-56-T (*Military II*); *The Prosecutor v Édouard Karemera & Others* Case ICTR-98-44-T (*Karemera*); *The Prosecutor v Pauline Nyiramasuhuko & Others* Case ICTR-98-42-T (*Butare*).

4 *The Prosecutor v Jean-Baptiste Gatete* Case ICTR-2000-61-T; and *The Prosecutor v Gregoire Ndahimana* Case ICTR-2001-68-T.

to be heard by the ICTR, and any appeals filed after that date are to be heard by the Residual Mechanism.⁵

As of 31 December 2011 there were three trials in progress, one case awaiting trial, and seven cases on appeal. The ICTR had thus far completed trials involving 73 accused and appeals involving 41 persons, referred three cases to national jurisdictions, acquitted 10 persons, and released seven persons who had served their sentences.⁶ There remain nine fugitives – Bernard Munyagishari having been arrested in the DRC in May 2011. Three of the nine fugitives, who are considered senior-level fugitives, will be tried by the Residual Mechanism.⁷ The prosecution seeks to preserve evidence for the trials of these fugitives through Rule 71*bis* proceedings, to ensure that future cases do not fail due to the death of witnesses, memory loss, or the destruction of evidence.⁸ The other six fugitives may be tried in a national jurisdiction upon referral by the ICTR or by the Residual Mechanism.⁹ By the end of 2011 there were three pending applications for the referral of cases to Rwanda.¹⁰

Further, in 2011, the ICTR acquitted and ordered the immediate release of Casimir Bizimungu (a former Minister of Health) and Jerome-Clement Bicamumpaka (a former Minister of Foreign Affairs),¹¹ bringing the total number of acquitted persons to 10.

In December 2011, the General Assembly elected 25 judges to the roster of judges of the Residual Mechanism.¹² Many are former or serving ICTR/ICTY judges, greatly enhancing the maintenance of

5 Art 2 of the Transitional Arrangements, Annex 2 to Security Council Resolution 1966 (2010), (Transitional Arrangements).

6 See ICTR Status of Cases, <http://www.unict.org/Cases/StatusofCases/tabid/204/Default.aspx> (accessed 30 April 2011).

7 Art 1 of the Statute of the International Residual Mechanism for Criminal Tribunals, annex to Security Council Resolution 1966 (2010). The three fugitives are Felicien Kabuga, Protais Mpiranya and Augustin Bizimana.

8 Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, S/2011/731 (16 November 2011) (Completion Strategy Report) paras 19-21. In these closed-session proceedings, both the Prosecutor and lawyers for the fugitives present evidence so that it may be entered into the court record and preserved for use when the fugitives are arrested and tried. This is an innovative approach in international criminal justice.

9 Art 1 Transitional Arrangements.

10 *The Prosecutor v Bernard Munyagishari* Case ICTR-05-89-R11*bis*, Prosecutor's Request for the Referral of the Case of Bernard Munyagishari to Rwanda Pursuant to Rule 11*bis* of the Rules of Procedure and Evidence, *The Prosecutor v Fulgence Kayishema* Case ICTR-01-67-R11*bis*, Prosecutor's Request for the Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11*bis* of the Rules of Procedure and Evidence and *The Prosecutor v Charles Sikubwabo* Case ICTR-95-1D-R11*bis*, Prosecutor's Request for the Referral of the Case of Charles Sikubwabo to Rwanda Pursuant to Rule 11*bis* of the Rules of Procedure and Evidence.

11 *Government II* (n 3 above).

12 Ten of the judges are from Africa.

jurisprudential and institutional knowledge and continuity.¹³ With the ICTR branch of the Residual Mechanism scheduled to commence operations on 1 July 2012, we look forward to seeing how the different challenges identified in the review of the developments in international criminal law in Africa during 2010 will be addressed by the ICTR, the Residual Mechanism and their parent body, the Security Council.¹⁴

2.1 Judicial developments

During 2011, the ICTR issued judgments in four major cases concerning senior members of the Rwandan government, political and military establishments.¹⁵ In each of the cases, the Trial Chambers addressed charges of conspiracy to commit genocide and complicity in the genocide. Interestingly, in all four cases, the prosecution failed to demonstrate that a conspiracy to commit genocide existed prior to April 1994. Specifically, in *Government II*, the Trial Chamber held that the evidence was equivocal as to whether a genocidal plan existed, or was necessarily complete among members of the interim government when it was formed on 9 April 1994.¹⁶ The prosecution struggled to meet the threshold mainly because it relied on circumstantial evidence which was open to inferences that were not consistent with a finding of a conspiracy to commit genocide against the Tutsi before April 1994.¹⁷ Indeed, in *Karemera*, the Trial Chamber considered it reasonable to infer that the large-scale attacks on Tutsis began on 7 April 1994, possibly as a reaction to the assassination of President Habyarimana.¹⁸

However, the Trial Chambers made different findings as regards events after the assassination of the President, indicating that the

13 Art 7 of the Transitional Arrangements permits the president, judges, prosecutor, registrar and staff of the Residual Mechanism to work simultaneously as president, judge, prosecutor, registrar or staff, respectively, of the ICTR or ICTY.

14 See W Mwangi 'Developments in international criminal justice in Africa during 2010' (2011) 11 *African Human Rights Law Journal* 251-254-258.

15 In *Government II* (n 3 above), four members of the interim government, Casper Bizimungu (Minister of Health), Justin Mugenzi (Minister of Trade and Industry), Jérôme Bicamumpaka (Minister of Foreign Affairs) and Prosper Mugiraneza (Minister of Civil Service); in *Military II* (n 3 above), Augustin Nindiliyimana (former Chief Staff of the *Gendarmerie nationale*), Augustin Bizimungu (former Chief of Staff of the Rwandan army), Francois-Xavier Nzuwonemeye (Commander of the Reconnaissance battalion (RECCE) of the Rwandan army during the events of 1994), and Innocent Sagahutu (the Commander of Squadron A of RECCE battalion); in *Karemera* (n 3 above), Edouard Karemera (First Vice-President of the MRND (*le Mouvement Révolutionnaire National pour le Développement*), member of the MRND Executive Bureau and Minister of the Interior and Communal Development for the interim government) and Matthieu Ndirumpatse (Chairperson of the MRND National Party and of the MRND Executive Bureau); and in *Butare* (n 3 above), Pauline Nyiramasuhuko (Minister of Women's Development).

16 *Government II* (n 3 above) paras 811-814.

17 *Military II* (n 3 above) paras 5 & 241-245.

18 *Karemera* (n 3 above) para 1448.

massacres were planned, organised and co-ordinated. For example, in *Butare*, the Chamber found that Nyiramasuhuko, the only female accused at the ICTR, entered into an agreement with members of the interim government on or after 9 April 1994 to kill Tutsis within Butare *préfecture* with the intent to destroy in whole or in part the Tutsi ethnic group.¹⁹ Mugenzi and Mugiraneza were also found liable in *Government II* for conspiracy to commit genocide and for direct and public incitement to commit genocide based on their participation in a public meeting in Butare, where President Sindikubwabo made an inflammatory speech and incited the killing of Tutsis.²⁰ In *Karemera*, the Trial Chamber held that a Joint Criminal Enterprise (JCE) materialised on 11 April 1994 and was composed of: political leaders, including Karemera and Ngirumpatse, persons of authority within the military, the *Interahamwe*, and the territorial administration, and influential businessmen, including Felicien Kabuga. The Trial Chamber was convinced that the common purpose was the destruction of the Tutsi population in Rwanda.²¹ However, not every member of the interim government was found guilty of participating in the conspiracy. In *Government II*, the Chamber acquitted Bizimungu and Bicamumpaka on all counts, not having found any allegations proven against them.²²

The trial judgments delivered in 2011 have also enriched the ICTR jurisprudence on sexual offences as crimes against humanity. Of particular note is *Karemera*, in which the Trial Chamber found that the rape and sexual assault of Tutsi women and girls by soldiers, *gendarmes* and militiamen, including the *Mouvement républicain national pour la démocratie et le développement* (MNRD) *Interahamwe*, was a natural and foreseeable consequence of a JCE to destroy the Tutsi ethnicity. Karemera and Ngirumpatse incurred liability in the extended form of the JCE for the rapes and sexual assaults committed after 18 April 1994 by the *Interahamwe*, soldiers and others. The fact that the perpetrators of the rapes and sexual assaults were not members of the JCE was irrelevant as it was foreseeable that these non-members would commit the rapes and sexual attacks as part of the destruction of the Tutsi population in Rwanda, which was the common purpose of the JCE. The Trial Chamber found that Karemera and Ngirumpatse were aware that the rapes and sexual assaults were possible consequences of the implementation of the JCE and they willingly took the risk that

19 *Butare* (n 3 above) paras 5676-5678.

20 *Government II* (n 3 above) paras 1936-1947 & 1976-1987.

21 *Karemera* (n 3 above) paras 1453-1458.

22 *Government II* (n 3 above) paras 1948 & 1963.

they would be committed.²³ In *Butare*, Nyiramasuhuko and her son Ntahobali were found guilty of rape as a crime against humanity.²⁴ They both bore superior responsibility for rapes committed by the *Interahamwe*. In addition, Ntahobali bore responsibility as a principal perpetrator for raping a Tutsi girl and Tutsi women, for ordering *Interahamwe* to commit rapes, and also for aiding and abetting rapes.²⁵ Finally, in *Military II*, the Trial Chamber convicted Bizimungu of rape as a crime against humanity and rape as a violation of article 3 common to the Geneva Conventions and of Additional Protocol II.²⁶

At the appellate level, in *Bagosora*, the ICTR Appeals Chamber reversed some of Colonel Théoneste Bagosora's convictions and, as a result, reduced his sentence from life imprisonment to 35 years' imprisonment.²⁷ Being *directeur de cabinet* in the Ministry of Defence, Colonel Bagosora was the most senior official after the Minister in the Rwandan Ministry of Defence. In fact, he was in charge of the Ministry between 6 and 9 April 1994 when Augustin Bizimana, the Minister of Defence, was on an official mission in Cameroon. Colonel Bagosora was generally perceived to have been the mastermind of the genocide, and is reported to have said a few years earlier that he was planning the apocalypse. It is quite ironic that the person considered the chief villain by many will end up serving a shorter sentence than other less infamous and notorious persons convicted by the ICTR.

2.2 Referrals

After numerous unsuccessful attempts, the ICTR granted the prosecution its request to refer the case of Jean-Bosco Uwinkindi for trial in Rwanda under Rule 11*bis* of the ICTR Rules of Procedure and Evidence.²⁸ Only two cases had been transferred to a national

23 *Karemura* (n 3 above) paras 1474-1490. The Trial Chamber reasoned that during a campaign to destroy, in whole or in part, a national, ethnic, racial, or religious group, a natural and foreseeable consequence of that campaign will be that soldiers and militias who participate in the destruction will resort to rapes and sexual assaults unless restricted by their superiors.

24 *Butare* (n 3 above) paras 6093-6094.

25 *Butare* (n 3 above) para 6086. In general, see paras 6074–6094.

26 *Military II* (n 3 above) paras 67 & 2159-2161.

27 Similarly, the Appeals Chamber reversed some of Nsengiyumva's convictions and reduced his sentence from life to 15 years' imprisonment.

28 *The Prosecutor v Jean Bosco Uwinkindi* Case ICTR-2001-75-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (*Uwinkindi Referral Decision*) and *Uwinkindi v The Prosecutor* Case ICTR-01-75-AR11*bis*, Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions (*Uwinkindi Referral Appeal Decision*). The cases that the prosecution was unable to transfer to Rwanda under Rule 11*bis* are *The Prosecutor v Yussuf Munyakazi* Case ICTR-97-36-R11*bis* (*Munyakazi Referral*); *The Prosecutor v Jean-Baptiste Gatete* Case ICTR-00-61-R11*bis* (*Gatete Referral*); *The Prosecutor v Idelphonse Hategekimana* Case ICTR-00-55-R11*bis* (*Hategekimana Referral*); *The Prosecutor v Gaspard Kanyarukiga* Case ICTR-02-78-R11*bis* (*Kanyarukiga Referral*); and *The Prosecutor v Clement*

jurisdiction since 2004 and this is the first time that the ICTR has referred a case to Rwanda and to an African country.²⁹ This referral decision provides helpful guidance as regards the necessary criteria that states must fulfil to receive referral cases from the ICTR.

The *Uwinkindi* Referral Decision sets out the reasons for the ICTR's change of heart, namely, (i) the fact that Rwanda's laws on sentencing are now consistent with the ICTR's rules on sentencing;³⁰ (ii) Rwandan judges are sufficiently qualified and experienced to handle referred cases and international or non-Rwandan judges will be able to participate in the adjudication of the referred cases;³¹ (iii) Rwanda has improved its witness protection programme, including the creation of an additional witness protection unit under the auspices of the judiciary for transferred cases;³² (iv) testimony may be given via deposition in Rwanda, via video link before a judge at trial or in a foreign jurisdiction, or via a judge sitting in a foreign jurisdiction;³³ and (v) the availability of competent Rwandan lawyers and government-funded legal aid, as well as the possibility of support from international non-governmental organisations (NGOs).³⁴

Although the referral decision signifies confidence in Rwanda's ability to conduct fair trials, there are credible concerns, some of which were acknowledged by the ICTR Referral Chamber. For instance, the Referral Chamber accepted that there has been harassment, threats and the arrest of lawyers for accused charged with genocide.³⁵ It is also implicit in the *Uwinkindi* Referral Decision that there are concerns about the expansive interpretation and application of Rwanda's law on genocidal ideology, which could have a chilling effect on defence lawyers and witnesses, as they may be afraid of being prosecuted for pursuing a line of defence or giving testimony that goes against the accepted narrative of the genocide.³⁶ Further, the Referral Chamber noted that the new witness protection unit, created specifically for

Kayishema Case ICTR-95-01-R11bis (*Kayishema Referral*).

29 *The Prosecutor v Wenceslas Munyeshyaka* Case ICTR-05-87-R11bis, Decision on Prosecutor's Request for Referral of *Wenceslas Munyeshyaka's* Indictment to France and *The Prosecutor v Laurent Bucyibaruta* Case ICTR-05-81-R11bis, Decision on Prosecutor's Request for Referral of *Laurent Bucyibaruta's* Indictment to France. The referral of the case of *The Prosecutor v Michel Bagaragaza* Case ICTR-05-86-R11bis was revoked at the request of the Prosecutor due to jurisdictional concerns. For a previous discussion on referrals, see C Aptel & W Mwangi 'Developments in international criminal justice in Africa during 2008' (2009) 9 *African Human Rights Law Journal* 274-287.

30 *Uwinkindi Referral Decision* (n 28 above) paras 49 & 51.

31 Paras 177-196.

32 Paras 128-132.

33 Paras 109-110.

34 Paras 136-146.

35 Paras 159-160.

36 Paras 95-96.

referred cases, had not yet been tested, and so its effectiveness could not be evaluated.³⁷ The *Uwinkindi* Referral Decision offers Rwanda an opportunity to show that the improvements it has made to its judicial and correctional system will be effective in practice, and that it is able to deal with the above concerns satisfactorily if they should materialise during the proceedings.

Pursuant to Rule 11*bis*, the Referral Chamber decided that the African Commission on Human and Peoples' Rights (African Commission) should monitor the proceedings of the transferred case in Rwanda. In addition to setting out monitoring guidelines for the African Commission, the Referral Chamber requested Rwanda to facilitate effective monitoring of not only the proceedings but also detention conditions.³⁸ The choice of the African Commission is not entirely surprising in light of previous referral decisions, whereby the ICTR held that the African Commission had the necessary 'qualifications' to monitor trials.³⁹ The African Commission's involvement demonstrates one of the roles that African regional organisations may play in advancing international criminal justice on the continent.

The African Commission or the accused may request the revocation of a referral or other remedial measures if they consider that there is a material violation of the rights of the accused. While an application for revocation, if granted, in itself would not stay the proceedings in Rwanda, Rwanda would be obliged to return the case to the ICTR or the Residual Mechanism.⁴⁰ Surprisingly, however, without basis in either the Statute of the ICTR or that of the Residual Mechanism, the Referral Chamber stated that it would only consider revocation as a remedy of last resort, because revoking a referral and restarting the proceedings elsewhere would affect the accused's right to an expeditious trial.⁴¹ Although raised on appeal, the Appeals Chamber chose not to address the question.⁴² While the right to an expeditious trial is a fundamental

37 Para 131.

38 Paras 209 & 212-213. The Appeals Chamber strengthened the monitoring system by instructing the African Commission to submit monthly reports (instead of reporting every three months as requested by the Referral Chamber) and clarifying that the accused shall have access to the monitoring reports unless the President of the ICTR or the Residual Mechanism determines that there is good cause to limit such access: *Uwinkindi* Referral Appeal Decision (n 28 above) paras 52 & 85.

39 *Munyakazi Referral*, Decision on the Prosecutor's Appeal Against Decision on Referral under Rule 11*bis*, 8 October 2008, para 30; *Kanyarukiga Referral*, Decision on the Prosecutor's Appeal Against Decision on Referral Under Rule 11*bis*, 30 October 2008, para 38; *Hategekimana Referral*, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis* (AC), 4 December 2008, para 29.

40 Rwanda would be under an obligation to comply with a request to defer to the ICTR or the Residual Mechanism, pursuant to art 28 of the ICTR Statute and art 28 of the Statute of the Mechanism, respectively.

41 *Uwinkindi Referral* Decision (n 28 above) para 217.

42 *Uwinkindi Referral* Appeal Decision (n 28 above) para 81.

one, it should not be the only consideration in the determination of whether a case should be revoked. If other equally important fair trial guarantees are not met, it would surely be unreasonable to decline revocation solely on the grounds of protecting the right to an expeditious trial.

Of related interest is the extradition case from Sweden, currently before the European Court of Human Rights.⁴³ Sylvere Ahorugeze, a former head of the Rwandan Civil Aviation Authority, left Rwanda in 1994 and settled in Denmark. He was arrested in Sweden in 2008 in compliance with an international arrest warrant issued by the Rwandan government, according to which he was charged with genocide, complicity in genocide, conspiracy to commit genocide, murder, extermination, and formation, membership, leadership and participation in an association of a criminal gang, whose purpose and existence were to do harm to people or their property. The Swedish government decided to extradite him following a Supreme Court decision that there were no impediments to the extradition under Swedish law. Ahorugeze appealed to the European Court on 15 July 2009, claiming that his extradition to Rwanda would violate article 3 (torture and inhumane treatment) and article 6 (fair trial guarantees) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). On 27 October 2011, the European Court held that there were no substantive grounds for believing that Ahorugeze faced a real risk of torture or inhuman or degrading treatment and punishment. It also found that he would not face a real risk of a flagrant denial of justice, that is, of a trial that is manifestly contrary to the fair trial guarantees in article 6 of the European Convention. In its decision, the European Court considered ICTR referral cases and specifically stated that the referral decision had to be given considerable weight.⁴⁴ The matter is now pending before the Grand Chamber of the European Court. The *Ahorugeze* judgment clearly illustrates that the *Uwinkindi* Referral Decision has already begun to soften previous reluctance to extradite suspects to Rwanda.

2.3 Acquitted persons

Five of the ICTR acquitted persons remain under the protection of the ICTR in Tanzania. They are unable to return to Rwanda because of personal security reasons, and the states in which their families reside are reluctant to grant them entry. There are no mechanisms or procedures under the ICTR Statute that would enable the Tribunal to compel any state to accept acquitted persons, or persons who have completed serving their sentences – even in cases of family reunification. Moreover, acquitted persons and persons who have

43 *Ahorugeze v Sweden* 37075/09 ECHR (27 October 2011) (*Ahorugeze* judgment).

44 *Ahorugeze* judgment (n 43 above) para 127.

completed serving their sentences currently are not considered refugees under the Convention Relating to the Status of Refugees of 1951 (1951 Refugee Convention). Article 1F of the 1951 Refugee Convention excludes from the Convention's protection any person in respect of whom there are serious concerns for considering that he or she committed a crime against the peace, a war crime, or a crime against humanity. A literal interpretation suggests that a person who has been acquitted still has to meet the other requirements for refugee status under the Convention, and may be excluded under article 1F in relation to crimes that were not covered by the indictment and subsequent acquittal. This is a real possibility for persons acquitted by the ICTR because they could be subject to other charges in Rwanda.

The problem will become increasingly acute when the ICTR closes because the Residual Mechanism will have neither the capacity nor the political weight to advocate effectively for the relocation of such persons. In 2011, the ICTR President raised this matter before the General Assembly and the Security Council⁴⁵ and called upon the Security Council to find a sustainable solution.⁴⁶ As the clock ticks, one possible solution could be the UN High Commission for Refugees revisiting its guidelines on the interpretation and application of the exclusion clauses under article 1F of the 1951 Refugee Convention, which currently appear not to address persons acquitted by international criminal tribunals. By failing to find a solution to this issue, the international community has relegated those acquitted and those who have completed their sentences to *de facto* imprisonment, in violation of those individuals' rights to family, privacy and freedom of movement.⁴⁷

3 Sierra Leone

3.1 Charles Taylor case

In 2011, the lack of a Hollywood drama (that was exhibited in 2010) was compensated for when the SCSL achieved one of its most significant milestones: the conclusion on 11 March 2011 of the case against Charles Taylor after three and a half years, 115 witnesses, and

45 Annual Report of the International Criminal Tribunal for Rwanda, A/66/209-S/2011/472 (29 July 2011) para 54.

46 Completion Strategy Report, para 67.

47 W Mwangi 'The International Criminal Tribunal for Rwanda: Reconciling the acquitted' in CL Srivam & S Pillay (eds) *Peace vs justice: The dilemmas of transitional justice in Africa* (2010).

approximately 1 110 exhibits. This marked the end of the first-ever trial of a former African head of state by an international court.⁴⁸

One of the theories that the defence espoused from the very beginning of the case was that Taylor's prosecution was politically motivated. In its opening statement, the defence stated that Taylor had been indicted and arrested only because of the interests of, and pressure by, the US government.⁴⁹ Two months before closing arguments, the defence successfully persuaded the Court to admit into evidence two confidential and classified US cables leaked by Wikileaks,⁵⁰ which it claimed supported the theory that the prosecution of Taylor was politically motivated and deliberately designed to keep him out of West Africa.⁵¹ Inevitably, the defence reiterated this theory in their closing arguments, asserting that the prosecution had turned the case into a twenty-first century form of neo-colonialism and that the trial was an abuse of legal process to achieve a predetermined end, namely, the conviction of Taylor and his lengthy imprisonment.⁵² The defence further submitted that⁵³

tribunals which are but an instrument of diplomacy in the hands of powerful states are, in fact, not administering law at all but, instead, providing spurious cover for their paymasters, thereby prostituting the legal process.

Not surprisingly, the presiding judge and the prosecution challenged the defence's submissions, and the Trial Chamber's views on these pronouncements may well feature in the final written judgment.⁵⁴

48 *Prosecutor v Charles Ghankay Taylor*, SCSL-03-1-T (*Taylor*). The trial judgment was delivered on 26 April 2012. Taylor was found guilty of planning, aiding and abetting the commission of war crimes and crimes against humanity, <http://www.sc-sl.org/LinkClick.aspx?fileticket=86r0nQUtK08%3d&tabid=53> (accessed 30 April 2012). At the time of writing, the full written judgment had not yet been issued. The judgment will be reviewed in the next update. Apart from the Taylor trial, the only other judicial proceedings at the Special Court concerned contempt of court charges against five people accused of interfering with prosecution witnesses. The contempt of court proceedings will take place in 2012.

49 *Taylor* Defence Opening Statement 24290-24294 & 24318-24319.

50 *Taylor*, Decision on the Urgent and Public with Annexes A-C Defence Motion to re-open its case in order to seek admission of documents relating to the relationship between the United States government and the Prosecution of Charles Taylor, 27 January 2011. The cables, dated 10 March 2009 and 15 April 2009, were published respectively at <http://www.guardian.co.uk/world/us-embassy-cables-documents/196077> and <http://www.guardian.co.uk/world/us-embassy-cables-documents/202468>.

51 *Taylor*, Defence Motion to re-open its case in order to seek admission of documents relating to the relationship between the United States government and the prosecution of Charles Taylor, 10 January 2011, 3. The defence argued that the indictment and trial of Mr Taylor was an extension of the US foreign policy interests in West Africa.

52 *Taylor*, Trial Transcript, 9 March 2011 490389-490390.

53 *Taylor* (n 52 above) 490396.

54 *Taylor*, Trial Transcript, 11 March 2011 49572-49573.

Attempts to question the impartiality of the Special Court have been dismissed in previous cases, and rightly so.⁵⁵ International criminal courts certainly have political elements. This is because they emanate from political decisions by states (expressed through either treaties or Security Council resolutions), they are funded by states (either by voluntary contributions or through the UN-assessed contributions), and their management is subject to the oversight of states (through the Management Committee in the case of the Special Court, the General Assembly and the Security Council in the case of the ICTY and ICTR, and the Assembly of States Parties in the case of the ICC). However, despite these political aspects, international criminal tribunals remain independent and impartial in the exercise of their judicial functions.

3.2 Residual mechanism

Upon conclusion of the Taylor trial, the SCSL will be replaced by a small Residual Special Court for Sierra Leone (RSCSL) established by an agreement between the UN and the government of Sierra Leone, which was ratified by the Sierra Leone Parliament in December 2011.⁵⁶ The RSCSL will have the same jurisdiction as the SCSL, and will continue the functions, rights and obligations of the SCSL.⁵⁷ Thus, the RSCSL will have the power to prosecute the only remaining fugitive, Johnny Paul Koroma, or to refer his case to a competent national jurisdiction. Even though Koroma is believed to be deceased, it was essential to make provision for a possible trial or referral of his case in order to avoid any impunity should he turn up alive after the closure of the SCSL.⁵⁸

The RSCSL will initially be based in The Hague, with a small sub-office in Freetown, mainly for witness protection.⁵⁹ This will enable co-location with the archives of the SCSL, which are currently housed in the Dutch National Archives together with the archives of the International Military Tribunal at Nuremburg. Copies of all the public records will be accessible to the public, in print form and electronically, at the Peace Museum which is being established on part of the SCSL site. It is expected that the original archives will be returned to Sierra

55 *Prosecutor v Norman* SCSL-04-14-AR72(E)-34, Decision on Preliminary Motion based on Lack of Jurisdiction 13 March 2004, and *Prosecutor v Sesay & Others* SCSL-04-15-T-363, Decision on Sesay – Motion Seeking Disclosure of the Relationship Between Government Agencies of the United States of America and the Office of the Prosecutor 2 May 2005.

56 Art 1(1) of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone (RSCSL Agreement). The Statute of the Residual Special Court for Sierra Leone is annexed to and forms part of the Agreement.

57 Art 1(2) RSCSL Agreement.

58 Arts 1 & 7 RSCSL Statute.

59 Art 6 RSCSL Agreement.

Leone when there is a suitable facility for the long-term preservation and security of the archives.⁶⁰

4 International Criminal Court

4.1 General comments

As of December 2011, the ICC was conducting investigations and prosecutions in seven situations: three situations referred to the ICC by the states themselves – Uganda, the DRC and the Central African Republic; the situations in Libya and in Darfur, Sudan, referred to the ICC by the UN Security Council; and the situations in Kenya and Côte d'Ivoire, where the prosecutor *proprio motu* sought and was granted authorisation to initiate investigations concerning crimes against humanity. In addition, the ICC was conducting preliminary examinations in, amongst others, Guinea and Nigeria.⁶¹ In the above situations, the prosecutor has brought charges against 23 individuals. There remain outstanding arrest warrants in the situations in Uganda, DRC, Sudan and Libya. By the end of 2011, there was no judicial activity in the situation in Uganda⁶² and the prosecution continued to present its case in the case against Jean-Pierre Bemba Gombo in the situation in Central African Republic.⁶³

4.2 Democratic Republic of the Congo

In 2011 in respect of the situation in the DRC, there were three active cases. The presentation of evidence in the case against Thomas Lubanga Dyilo was concluded,⁶⁴ the defence in the case against Germain Katanga and Mathieu Ngudjolo Chui commenced⁶⁵ and Callixte Mburashimana was transferred to The Hague where proceedings commenced against him. Bosco Ntanganda remains a fugitive.⁶⁶

The case against Mburashimana never promised to be a conventional one, and this is starkly demonstrated in the Confirmation of

60 Art 7(3) RSCSL Agreement.

61 See, in general, UN General Assembly, 66th session Report of the International Criminal Court to the United Nations for 2009/10 19 August 2011 (A/66/309).

62 ICC-02/04.

63 ICC-01/05.

64 The judgment in the *Lubanga* case was issued on 14 March 2012. A chronological analysis of the case and the judgment will therefore be examined in 2013.

65 *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07).

66 *The Prosecutor v Bosco Ntanganda* (ICC-01/04-02/06).

Charges Decision analysed below.⁶⁷ On 4 January 2011, pursuant to article 627-10 of the French Code of Criminal Procedure, the French Court of Cassation authorised the surrender of Mburashimana to the ICC.⁶⁸ Mburashimana was charged under article 25(3)(d) of the Rome Statute as criminally responsible for five counts of crimes against humanity (rape, murder, torture, inhumane acts and persecution) and eight counts of war crimes (attacks against the civilian population, murder, mutilation, torture, rape, inhuman treatment, destruction of property and pillaging). In accordance with the Document Containing the Charges (DCC), the prosecution alleged that Mbarushimana was associated with the *Forces Démocratiques de Libération du Rwanda* (FDLR) in the DRC, a rebel group believed to be seeking to oppose the Rwandan government. Mbarushimana was considered the highest-ranking member of the FDLR as of 2010 and therefore responsible in part for the implementation of the strategy of bringing attention to the FDLR's claims by attacking civilian populations in the Kivu region in the DRC.⁶⁹ Mbarushimana was transferred to the ICC from France on 25 January 2011 and made his initial appearance before the ICC Pre-Trial Chamber on 28 January 2011.

In the lead-up to the Mburashimana Confirmation of Charges Decision, the Pre-Trial Chamber also examined the question of the identification of 72 'potentially privileged' documents seized at Mbarushimana's premises in France, within the meaning of rule 73(1) of the ICC Rules of Procedure and Evidence (Rules), Mbarushimana's repeated requests for interim release and his challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute.⁷⁰ The Pre-Trial Chamber

67 See Mwangi (n 14 above) 265; 'ICTR/Mbarushimana – File of former UN official suspected of genocide transferred to Rwanda' *Hirondelle* 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 2 March 2012). See also United Nations Administrative Tribunal Judgment 1192 (*Mbarushimana*) of 30 September 2004.

68 Information from the French authorities in relation to the surrender of Callixte Mbarushimana, *Mbarushimana* (ICC-01/04-01/10-34) 14 January 2011.

69 Decision on the Confirmation of Charges, *Mbarushimana* (ICC-01/04-01/10-465-Red), Pre-Trial Chamber I, 16 December 2011 (*Mbarushimana Confirmation of Charges Decision*) paras 2-5.

70 See Decision on the Defence Challenge to the Jurisdiction of the Court, *Mbarushimana* (ICC-01/04-01/10-451), Pre-Trial Chamber 1, 26 October 2011 (*Mbarushimana Jurisdictional Challenge Decision*) 39, 42-45 & 50; Decision on the 'Defence Request for Interim Release' *Mbarushimana* (ICC-01/04-01/10-163), Pre-Trial Chamber I, 19 May 2011; Decision on the 'Second Defence Request for Interim Release' *Mbarushimana* (ICC-01/04-01/10-319), Pre-Trial Chamber I, 28 July 2011; and Review of Detention and Decision on the 'Third Defence Request for Interim Release' *Mbarushimana* (ICC-01/04-01/10-428), Pre-Trial Chamber I, 16 August 2011.

rejected the latter two and, specifically in relation to Mbarushimana's jurisdictional claim, held that the crimes contained in Mbarushimana's arrest warrant were 'sufficiently linked to the situation of crisis existing in the DRC at the time of and underlying the Referral', irrespective of the fact that the object of the prosecution's investigations was not 'active throughout the duration of the relevant time-frame'. Thus, the jurisdiction of the Court was triggered and the matter fell within the scope of the Court's jurisdiction.⁷¹ On 11 August 2011 the Pre-Trial Chamber authorised the participation of 130 victim applicants in the proceedings.⁷²

The confirmation of charges hearings were held from 16 to 21 September 2011.⁷³ On 16 December 2011, the Pre-Trial Chamber, with presiding judge Monageng dissenting, decided not to confirm the charges against Mburashimana, ordering his release from custody upon completion of the necessary arrangements.⁷⁴ This review includes a brief summary of Judge Monageng's dissenting opinion, which essentially turned on the interpretation of the standard of 'substantial grounds to believe' as provided for in article 61(7) of the ICC Rome Statute in light of the jurisprudence of the Court.

First, the Pre-Trial Chamber raised its concerns regarding the prosecution's attempt in the Document Containing the Charges to:

keep the parameters of its case as broad and general as possible, without providing any reasons as to why other locations where the alleged crimes were perpetrated cannot be specifically pleaded and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure established under article 61(9) of the Statute.

Accordingly, the Pre-Trial Chamber found that 'the location and dates of alleged crimes are material facts which, pursuant to regulation 52(b) of the Regulations, must be pleaded in the DCC'. The words 'include but are not limited to' were therefore considered 'meaningless' and the Pre-Trial Chamber decided to only assess charges related to locations specified under each count.⁷⁵

Second, the majority noted that the charges and associated facts in relation to the eight counts of war crimes were 'articulated in such vague terms that the chamber had serious difficulty in determining or could not determine at all, the factual ambit of a number of charges'.⁷⁶

71 *Mbarushimana* Jurisdictional Challenge Decision (n 70 above) paras 39, 42-45 & 50.

72 Decision on the 138 applications for victims' participation in the proceedings *Mbarushimana* (ICC-01/04-01/10-351), Pre-Trial Chamber I, 11 August 2011.

73 *Mbarushimana* Confirmation of Charges Decision (n 69 above) para 32.

74 *Mbarushimana* Confirmation of Charges Decision (n 69 above).

75 *Mbarushimana* Confirmation of Charges Decision (n 69 above) paras 79-85.

76 Paras 108-110.

It added that the ‘evidence was so scant that the Chamber cannot properly assess, let alone satisfy itself to the required threshold, whether any of the war crimes charged by the prosecution were committed by the FDLR’ in the identified villages.⁷⁷ The majority, upon examination of the charges and the relevant evidence, found that there was sufficient evidence establishing grounds to believe that acts amounting to war crimes were committed in five out of the 25 occasions alleged by the prosecution.⁷⁸

Third, the Pre-Trial Chamber examined the five counts of crimes against humanity allegedly committed.⁷⁹ Referring to the ICC Elements of Crimes,⁸⁰ the Pre-Trial Chamber first analysed whether the contextual elements of crimes against humanity were satisfied. In its findings, the majority was not satisfied that on the basis of the evidence, the threshold of substantial grounds to believe that the FDLR had pursued a policy of attacking the civilian population within the meaning of article 7 was met, and concluded that the attacks could not be considered part of a larger organised campaign specifically designed to be directed at a civilian population.⁸¹ In this regard, the majority further noted that the four attacks against the civilian population that the Pre-Trial Chamber found to have been committed were retaliatory attacks against the FARDC/Mai Mai for attacks on the FDLR and/or Rwandese civilians, all launched with the aim of targeting FARDC military objectives, not civilian populations. Having found that the ‘essential requirement that the crimes were committed pursuant to or in furtherance of an organisational policy to commit an attack directed against the civilian population, as set out in articles 7(1) and (2)(a) of the Statute’, was absent, the majority found it ‘unnecessary to analyse the remaining elements of the crimes against humanity charged by the prosecution’.⁸² It is of note that although dissenting, Judge Monageng also declined to confirm torture and persecution as crimes against humanity.⁸³

Judge Monageng, however, found that the majority ‘attached too much weight to [evidential] inconsistencies’ in their conclusions. He

77 Para 113.

78 Paras 108-239. For ease of reference, see n 69 above fn 638.

79 *Mbarushimana* Confirmation of Charges Decision (n 69 above) para 242.

80 The ICC Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales E.03.V.2 and *corrigendum*), part II.B. The Elements of Crimes as adopted at the 2010 Review Conference may also be found in the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010 (International Criminal Court publication, RC/11).

81 *Mbarushimana* Confirmation of Charges Decision (n 69 above) paras 244-267.

82 Paras 264-266.

83 *Mbarushimana* Confirmation of Charges Decision (n 69 above) Dissenting Opinion paras 29-30 & 33-38.

opined that ‘relevant witness statements’ as well as other indirect evidence, such as reports of Human Rights Watch, consistently referred to, or confirmed, FDLR orders to target civilian populations as a way to pressure the Rwandan government to discuss their political demands.⁸⁴ In his view, the majority incorrectly relied on evidence that the attacks were launched in retaliation, opining that there are substantial grounds to believe that there was an organisational policy to commit attacks against civilians⁸⁵ and that the crimes established in the case were part of a widespread and systematic attack on civilians.⁸⁶ With reference to the ICC Elements of Crimes, Judge Monageng held that there was sufficient evidence to establish substantial grounds to believe that murder, rape and other inhumane acts as crimes against humanity within the meaning of article 7 of the Rome Statute occurred.⁸⁷

Fourth, the Pre-Trial Chamber examined Mbarushimana’s individual criminal responsibility for the alleged crimes further to article 25(3)(d) of the Rome Statute.⁸⁸ In its deliberations, the Pre-Trial Chamber clarified the difference between joint criminal enterprise and liability under article 23(3)(d) and held that ‘in order to be criminally responsible under article 25(3)(d) of the Statute, a person must make a significant contribution to the crimes committed or attempted’, but could also be liable by ‘contributing to a crime’s commission after it has occurred, so long as this contribution had been agreed upon by the relevant group acting with a common purpose and the suspect prior to the perpetration of the crime’.⁸⁹ In relation to Mbarushimana, the majority took the view that there were no substantial grounds to believe that the FDLR leadership constituted ‘a group of persons acting with a common purpose’ within the meaning of article 25(3)(d) of the Statute, in particular in light of the requirement that the common purpose pursued by the group must have ‘at least an element of criminality’.⁹⁰

Notwithstanding, the majority nevertheless examined each of Mbarushimana’s alleged contributions in view of his functions in the FDLR and concluded that Mbarushimana ‘did not provide any contribution to the commission of such crimes, even less a “significant” one’.⁹¹ The majority found that in accordance with article 25(3)(d), there was no evidence that Mbarushimana (i) had any power over the FDLR forces on the ground or that his role as leader of the FDLR

84 *Mbarushimana* Confirmation of Charges Decision (n 69 above) paras 2-8.

85 Paras 9-20.

86 Paras 21-26.

87 Paras 27-38.

88 Paras 268-290.

89 Paras 282, 285 & 287.

90 Para 291.

91 Paras 292-340.

significantly contributed to the commission of crimes by the FDLR;⁹² (ii) denied crimes committed by the FDLR with knowledge of them in furtherance of a policy of the organisation;⁹³ (iii) in his role as the point of contact for external actors, contributed to the commission of crimes by the FDLR;⁹⁴ and (iv) encouraged FDLR 'troop' morale through his press releases and radio messages, thus contributing to the commission of crimes.⁹⁵

Judge Monageng disagreed with the 'very foundation of the majority's conclusion with respect to a group acting with a common purpose'. He was of the opinion that there were substantial grounds to believe that (i) the FDLR had a common plan to direct attacks against the civilian population of the Eastern DRC to pressurise the governments of Rwanda and DRC; and to simultaneously conduct an international media campaign to conceal FDLR's responsibility for the attacks;⁹⁶ and (ii) there existed an identified 'group of persons' within the meaning of article 25(3)(d) of the Rome Statute, including Mbarushimana, who had the authority to exercise control over the FDLR forces on the ground and were aware of the crimes the FDLR committed.⁹⁷ Judge Monageng concluded that this group of persons, through the FDLR soldiers under their command, committed the crimes detailed by the prosecution within the meaning of article 25(3)(d).⁹⁸ Judge Monageng believed that the majority failed to discuss critical pieces of evidence, stating that there were substantial grounds to believe that (i) Mbarushimana used an international media campaign to conceal the criminal activities of the FDLR;⁹⁹ (ii) the media campaign was used to encourage FDLR forces to continue the military effort and remain faithful to the FDLR's goals;¹⁰⁰ (iii) Mbarushimana's conduct constitutes an intentional and significant contribution to the crimes committed to a degree that warrants individual responsibility;¹⁰¹ and (iv) Mbarushimana acted with the aim of 'furthering criminal activity and criminal purpose of the FDLR leadership ... [and] ... in the knowledge of the intention of the FDLR leadership to commit the crimes within the scope of the common purpose'.¹⁰²

92 Paras 293-303.

93 Paras 304-315.

94 Paras 316-320.

95 Paras 321-339.

96 *Mbarushimana* Confirmation of Charges Decision (n 69 above) Dissenting Opinion, paras 40-47.

97 Paras 48-63.

98 Para 49.

99 Paras 66-79.

100 Paras 80-101.

101 Paras 102-114.

102 Paras 116-133.

The Pre-Trial Chamber, by majority, declined to confirm the charges against Mbarushimana and ordered his release. The prosecution appealed the Mbarushimana Confirmation of Charges Decision and the Pre-Trial Chamber's rejection of its 'Request for stay of order to release Callixte Mbarushimana'.¹⁰³ On 20 December 2012, the Appeals Chamber dismissed the prosecution's appeal on all grounds.¹⁰⁴ In its reasons, the Appeals Chamber reaffirmed its jurisprudence that neither the Decision on the Confirmation of Charges nor the Decision on the Request for Stay of Release were 'decision[s] granting or denying release' and therefore could not be appealed under article 82(1)(b) of the Rome Statute.¹⁰⁵ Mbarushimana was released from ICC custody on 23 December 2011.¹⁰⁶ This decision by the Pre-Trial and Appeals Chambers appears to be a serious indictment of the manner in which the prosecution prepared the case against Mbarushimana.¹⁰⁷ On 26 December 2011 the Rwandan government indicated that it would file charges of genocide against Mbarushimana.¹⁰⁸

Of interest will be the effect, if any, that this denial of confirmation of charges will have on two cases pending before the German national courts featuring the President of the FDLR, Ignace Murwanashyaka, and the Vice-President, Straton Musoni. Murwanashyaka and Musoni were arrested in Germany in November 2009 and the case against them commenced in Stuttgart, Germany, on 4 May 2011. Pursuant to the German Code of Crimes against International Law (CCAIL), perpetrators of grave human rights violations, such as crimes against

103 Prosecution's Appeal against 'Decision on the Confirmation of Charges' and Request for Suspensive Effect in the alternative, Prosecution's Appeal against 'Decision on the Prosecution's request for stay of order to release Callixte Mbarushimana', *Mbarushimana* (ICC-01/04-01/10-470), Pre-Trial Chamber I, 19 December 2011.

104 Decision on the appeal of the Prosecutor of 19 December 2011 against the 'Decision on the confirmation of the charges' and, in the alternative, against the 'Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana' and on the victims' request for participation, *Mbarushimana* (ICC-01/04-01/10-476), Appeals Chamber, 20 December 2011.

105 Reasons for 'Decision on the appeal of the Prosecutor' of 19 December 2011 against the 'Decision on the confirmation of the charges' and, in the alternative, against the 'Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana' and on the victims' request for participation of 20 December 2011, *Mbarushimana* (ICC-01/04-01/10-483) Appeals Chamber, 24 January 2012.

106 Callixte Mbarushimana is released from the ICC custody, ICC press release, 23 December 2011 <http://www.icc-cpi.int/NR/exeres/4D4FA434-3060-4EF7-8E5C-AD5C53540E64.htm> (accessed 2 March 2012).

107 Decision on the Confirmation of Charges, *Abu Garda* (ICC-02/-5-02/09-243-Red) Pre-Trial Chamber I, 8 February 2010. As a result of insufficient evidence, on 8 February 2010, the Pre-Trial Chamber, without prejudice for the prosecution, declined to confirm the charges against Bahar Idriss Abu Garda in the Situation in Darfur. However, the accused in that case was not physically present before the Court.

108 'Rwanda: State to file genocide charges against Mbarushimana' *The New Times* 27 December 2011 <http://allafrica.com/stories/printable/201112270738.html> (accessed 3 March 2012).

humanity and war crimes, can be prosecuted in Germany under the principle of universal jurisdiction, even in the absence of a connection to the state where the crimes occurred. In the first case to be tried under the CCAIL, both Murwanashyaka and Musoni face 26 counts of crimes against humanity and 39 counts of war crimes allegedly committed by FDLR forces in Eastern DRC over a 22-month period between January 2008 and November 2009. They are also charged with being members of a terrorist group.¹⁰⁹

4.3 Darfur, Sudan

The ICC arrest warrant issued against President Bashir of Sudan continues to pose legal, political and diplomatic problems for African states. On the one hand, state parties to the Rome Statute have a general obligation under article 86 to co-operate fully with the ICC in its investigation and prosecution of crimes falling within its jurisdiction. In addition, article 89 of the Rome Statute provides that state parties shall comply with the Court's request for the arrest and surrender of a person found in their territory.¹¹⁰ On the other hand, heads of state are entitled under customary international law to immunity, including immunity from arrest by other states.¹¹¹ To complicate matters further, members of the African Union (AU) are obliged to comply

109 See *Mbarushimana* Confirmation of Charges Decision (n 69 above) para 5; 'Rwanda: Ignace Murwanashyaka and Straton Musoni tried' *BBC* 4 May 2011 <http://www.bbc.co.uk/news/world-africa-13275795> (accessed 3 March 2011); Amnesty International "'Germany: Briefing to the Committee Against Torture'" <http://www.amnesty.org/en/library/asset/EUR23/002/2011/en/e27f73a1-dc3c-44ac-af5d-9cd1d58635f0/eur230022011en.pdf> (accessed 3 March 2012); Human Rights Watch 'Germany: Groundbreaking Trial for Congo War Crimes' 2 May 2011 <http://www.hrw.org/news/2011/05/02/germany-groundbreaking-trial-congo-war-crimes> (accessed 3 March 2012).

110 Where the charges include genocide, as in the *Bashir* case, African countries that are parties to the Convention on the Prevention and Punishment of the Crime of Genocide have an additional obligation, under art 1 of the Convention, to punish genocide. See also *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ (26 February 2007) ICJ Reports 43.

111 See Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v Belgium*), ICJ judgment of 14 February 2002, paras 51-58. In this case, the ICJ, *in obiter dicta*, observed that a foreign minister who enjoys immunity before national courts may be subject to criminal proceedings before certain international courts, including the ICC, but stopped short of stating that the foreign minister could be arrested by other states (para 61). In the *Taylor* trial, the SCSL Appeals Chamber went further, holding that Charles Taylor did not enjoy immunity from prosecution before the SCSL and that any processes issued in the course of, or for the purposes of, the proceedings against him could not be vitiated by claims of immunity (see *Taylor*, Decision on Immunity from Jurisdiction' 31 May 2004). However, it is arguable that this SCSL decision, the prosecution of Slobodan Milosevic by the International

with decisions of the AU.¹¹² One such decision, adopted by the AU Assembly, is that AU member states shall not co-operate for the arrest and surrender of Bashir to the ICC.¹¹³

Against this legal background, in 2011 Bashir attended the inauguration ceremony of the President of Chad and a meeting of the Common Market for Eastern and Southern Africa (COMESA) in Malawi. Since both countries are state parties to the Rome Statute, the ICC Registrar reminded them of their obligations under the Rome Statute and asked for their co-operation for the arrest and surrender of Bashir. The Registrar also invited the two countries to consult with the Court if they were facing any difficulties in executing the co-operation request, as required by article 97 of the Rome Statute.¹¹⁴ Chad and Malawi did not consult the Court and did not arrest Bashir. In observations submitted to the ICC, Chad stated that in view of the AU position on the arrest warrant against Bashir and Chad's membership of the AU, it could not implement the request to arrest and surrender Bashir and the provisions of article 87(7) of the Rome Statute could not be pursued.¹¹⁵ Malawi justified its decision not to arrest Bashir on two grounds, namely, (a) that, as a sitting head of a state not party to the Rome Statute, Bashir enjoyed, under established principles of public international and under national law, immunity from arrest and prosecution; and (b) that as a member of the AU, Malawi fully aligned itself to the AU's position on the indictment of sitting heads

Tribunal for the Former Yugoslavia, and the ICC indictment of Muammar Gaddafi and Laurent Gbagbo do not constitute sufficient practice to support a definitive conclusion that immunity is waived automatically, nor that under customary international law, a head of state does not enjoy immunity from arrest by another state in the event that an international criminal tribunal such as the ICC issues a warrant for their arrest.

- 112 Pursuant to art 23(2) of the Constitutive Act of the African Union, any member state that fails to comply with the decisions and policies of the AU may be subject to sanctions.
- 113 Decision on the Report of the Commission on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court, Assembly/AU/Dec 245(XIII) adopted by the 13th ordinary session of the Assembly of Heads of State and Government.
- 114 *Note Verbale*, Annex 4 to ICC document ICC-02/05-01/09-136-Conf and *Note Verbale*, Annex 2 to ICC document ICC-02/05-01/09-131 Conf. Art 97 states in part that '[w]here a state party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that state shall consult with the Court without delay to resolve the matter'.
- 115 '*Les Observations de la Republique du Tchad*,' annex 1 to '*Rapport du Greffe relative aux observations de la Republic du Tchad*', ICC document ICC-02/05-01/09-135. Art 87.7 provides that '[w]here a state party fails to comply with a request to co-operate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'.

of state and government of countries that are not party to the Rome Statute.¹¹⁶

In two separate decisions,¹¹⁷ the Pre-Trial Chamber rejected these explanations and held that Malawi and Chad had failed to (i) comply with their obligations to consult with the Chamber by not bringing the question of immunity to the Chamber for its determination; and (ii) co-operate with the ICC by failing to arrest and surrender Bashir. The Pre-Trial Chamber held that, in accordance with article 119(1) of the Rome Statute, it had the sole authority to decide whether immunities are applicable in a particular case.¹¹⁸ The Pre-Trial Chamber concluded that¹¹⁹

customary international law creates an exception to head of state immunity when international courts seek a head of state's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore article 98(1) of the Statute does not apply.

In explaining the consequences of its findings for state parties, the Pre-Trial Chamber took the view that 'the unavailability of immunities with respect to prosecutions by international courts applies to any act of co-operation by states which forms an integral part of those prosecutions'.¹²⁰ In both cases, the Pre-Trial Chamber decided to refer the matter to the Security Council and the Assembly of State Parties. It remains to be seen whether or not these bodies will take any action against the two countries.

Perhaps the only positive aspect of the ICC decisions on Chad and Malawi is a reinforcement of the principle that state parties must consult the ICC when they face difficulties in implementing a co-operation request. Otherwise, the decisions are far from satisfactory, for a number of reasons. First, it appears that the Pre-Trial Chamber conflated the

116 'Observations from the Republic of Malawi', confidential annex 2 to the Registry's 'Transmission of the observations from the Republic of Malawi', ICC document ICC-02/05-01/09-138. The relevant part of the observations is reproduced in Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Co-operation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Bashir* (ICC-02/05-01/09) Pre-Trial Chamber I, 12 December 2011 (*Malawi Decision*).

117 *Malawi Decision* (n 116 above) and *Le Procureur c. Omar Hassan Ahmad Al Bashir*, Decision rendue en application de l'article 87-7 du Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de coopération délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir, *Bashir*, (ICC-02/05-01/09) La Chambre Préliminaire I, 13 December 2011, (*Chad Decision*). The discussion in this paper is based on the *Malawi Decision* because it contains more detailed reasoning and was applied in the *Chad Decision*.

118 *Malawi Decision* (n 116 above) para 11. Art 119.1 provides that any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

119 *Malawi Decision* (n 116 above) para 43.

120 *Malawi Decision* (n 116 above) para 44.

issues of criminal responsibility and immunities and there is no sufficient legal basis for concluding that customary international law creates an exception to head of state immunity when an international court seeks the arrest of the head of state for international crimes. Second, there was no discussion of the effect, if any, of the Security Council referral on Bashir's immunity and the obligations of state parties to arrest and surrender him.¹²¹ In particular, the Pre-Trial Chamber should have examined whether Security Council Resolution 1593 (2005), adopted under chapter VII of the UN Charter, implicitly waives Bashir's immunity – the resolution does not expressly address immunity. The Pre-Trial Chamber should also have considered whether, by urging all states to co-operate fully with the ICC in relation to the referral, Resolution 1593 (2005) imposes an obligation on states to arrest Bashir.¹²² Such an obligation would prevail over any obligations under the Constitutive Act of the AU and the COMESA treaty by virtue of article 103 of the UN Charter, but would not affect head of state immunity accorded under customary international law.¹²³ Third, the Pre-Trial Chamber did not consider that the logical result of its conclusions rendered article 98(1) of the Rome Statute ineffective. And finally, while accepting the Pre-Trial Chamber's discretion in whether to schedule oral hearings to assist its deliberations, it is remarkable that these decisions were taken based solely on the written observations, without the benefit of hearing from the parties or relevant *amici curiae*.¹²⁴

The Malawi and Chad decisions failed to resolve the legal conundrum faced by AU member states, namely, one of conflicting

121 For a discussion of the effect of the referral, see D Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of International Criminal Justice* 333-352 and, on Bashir's immunity generally, see P Gaeta 'Does President Bashir enjoy immunity from arrest?' (2009) 7 *Journal of International Criminal Justice* 315.

122 Operative para 2 of Resolution 1593 (2005) reads: '*Decides* that the government of Sudan and all other parties to the conflict in Darfur, shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognising that states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and other international organisations to co-operate fully.'

123 Art 103 provides that '[i]n the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. But this would not have an effect on obligations under customary international law.

124 See D Akande 'ICC issues detailed decision on Bashir's immunity ... at long last ... but gets the law wrong' 15 December 2011 <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%e2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/> (accessed 7 May 2012), D Jacobs 'A sad homage to Antonio Cassese: the ICC's confused pronouncements on state compliance and head of state immunity' 15 December 2011 <http://dovjacobs.blogspot.com/2011/12/sad-hommage-to-antonio-cassese-iccs.html> (accessed 7 May 2012) and W Schabas 'Obama, Medvedev and Hu Jintao may be prosecuted by International Criminal Court, Pre-Trial Chamber concludes' 15 December 2011 <http://www.ahrlj.org/>

legal obligations which cannot be simultaneously complied with.¹²⁵ There is no hierarchy in international law between the obligations under the Rome Statute and the obligations under the AU Constitutive Act. Moreover, the conventional obligation to comply with an ICC request to arrest and surrender a person does not trump the customary international law rules granting a sitting head of state immunity from personal arrest. Article 27(1) of the Rome Statute regulates the vertical relationship between the ICC and an accused who is a national of a state party. As a general rule, it is not applicable to, and therefore not binding on, non-state parties, like Sudan and their nationals.¹²⁶ That is why, according to article 98(1) of the Rome Statute, in the case of a national of a non-state party who enjoys immunity, the ICC must first obtain the non-state party's co-operation and waiver of immunity before proceeding to request the surrender of its national by another state.¹²⁷ As it is not self-evident that the Security Council referral waives Bashir's immunity, or negates the requirement to seek Sudan's co-operation for a waiver under article 98(1), or imposes an obligation on states to co-operate in the arrest of Bashir, the question is whether the ICC acted consistently with article 98(1) when, without first obtaining Sudan's co-operation for the waiver of the immunity of Bashir, it requested Chad and Malawi to arrest and surrender him.

4.4 Case against Abdallah Banda Nourain and Saleh Mohammed Jerbo Jamus

Of note in the case of Nourain and Jamus in 2011 was the Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons on 16 May 2011, stating that the accused will only contest certain specified issues at trial, relating to the attack on the African Union Mission in the Sudan

humanrightsdoctorate.blogspot.com/2011/12/obama-medvedev-and-hu-jintao-may-be.html (accessed 7 May 2012). The African Union issued a press release noting with grave concern the ICC's decisions on Chad and Malawi, and asserting that they were *per incuriam* because they grossly ignored the two countries' obligations to comply with decisions and policies of the African Union: Press Release 002/2012.

125 This is a continuing problem as Bashir might visit Malawi again for the AU Summit in June 2012.

126 A treaty does not create either obligations or rights for a third state without its consent: art 34 of the Vienna Convention on the Law of Treaties, 1969.

127 Art 98(1) of the Rome Statute reads: 'The Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the co-operation of that third state for the waiver of the immunity.'

(AMIS) peacekeepers on 29 September 2007.¹²⁸ The case appears to turn on whether AMIS was a peacekeeping operation in accordance with the Charter of the United Nations at the time of the attacks. In the joint submission, the accused indicate that should the Chamber determine that AMIS was a peacekeeping mission established in accordance with the Charter of the UN, the attack itself was unlawful and that the accused persons were aware of the factual circumstances that established the unlawful nature of the attack, the accused persons will plead guilty to the charges against them without prejudice to their right to appeal the Chamber's decision on other issues specifically agreed.¹²⁹

4.5 Domestic prosecutions in Darfur

In July 2011, the government of Sudan and the Liberation and Justice Movement signed a protocol agreement committing themselves to the Doha Document for Peace in Darfur (DDPD), a framework for the comprehensive peace process in Darfur.¹³⁰ In chapter V, on Justice and Reconciliation, the DDPD provides for the possibility of the Sudanese judiciary to establish a Special Court for Darfur (Special Court) with jurisdiction over gross violations of human rights and serious violations of international humanitarian law committed in Darfur since February 2003.¹³¹ Under the DDPD, the Sudanese government is obliged to appoint a prosecutor of the Special Court, to create conducive conditions to enable the Special Court to undertake its functions in conducting investigations and trials, and to provide the Court with the necessary resources.¹³² A team of specialised experts from the UN and the AU, selected in consultation with the government, shall observe the court proceedings to ensure that they meet the relevant international standards.¹³³ The Special Court will apply the Sudanese criminal law, international criminal law and international humanitarian and human rights laws.¹³⁴ Further, the DDPD provides that immunities enjoyed by persons by virtue of their official status or functions shall

128 Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons, *Nourain & Jamus* (ICC- 02/05-03/09-148) 16 May 2011, paras 3-4.

129 Joint Submission by the Office of the Prosecutor and the Defence (n 128 above) para 4.

130 The DDPD is the culmination of two and half years of negotiations, dialogue and consultations with the major parties to the Darfur conflict, all relevant stakeholders and international partners. It is supported by the African Union and the Arab League. The DDPD can be accessed at <http://unamid.unmissions.org/Portals/UNAMID/DDPD%20English.pdf>.

131 DDPD (n 130 above) art 59.

132 As above.

133 As above.

134 As above.

not obstruct the speedy dispensation of justice, nor shall they prevent the combating of impunity.¹³⁵

This development should be seen against the background of previous attempts at domestic prosecutions, which have been ineffective. In 2009, the AU High-Level Panel on Darfur called for the establishment of a hybrid criminal court within the Sudanese justice system, which Sudan rejected, opting instead for the appointment of a Special Prosecutor.¹³⁶ However, no charges have been made, no trials involving serious international crimes have taken place, and the second Special Prosecutor resigned in 2011, citing personal reasons. The relationship between the existing Special Criminal Court on Events in Darfur and Special Prosecutor for Darfur and the new proposals under the DDPD remains to be clarified. Moreover, the creation of new institutions and offices will be meaningless if the Sudanese government has no real political will to prosecute the crimes.

4.6 Libya

The dramatic and revolutionary wave of the Arab Spring in 2011 resulted in the referral of the situation in Libya to the ICC. In accordance with article 13(1) of the Rome Statute, on 26 February 2011 the UN Security Council, acting under chapter VII of the Charter of the United Nations, unanimously adopted Resolution 1970, entitled Peace and Security in Africa, and referred the situation in Libya to the ICC.¹³⁷

Six days later, the prosecution opened an investigation into the situation in Libya and after two months, on 16 May 2011, filed an application requesting the issuance of warrants of arrest for Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi. In the application, the prosecution alleged that the suspects were criminally responsible, through the Libyan state apparatus and security forces, for the commission of murder and persecution as crimes against humanity in violation of article 7 of the Rome Statute in Libya from 15 January 2011. It was alleged that the accused were also responsible as principals to those crimes in accordance with article 25(3)(a) of the Rome Statute.¹³⁸

The Pre-Trial Chamber on 27 June 2011 issued its Decision on the Prosecutor's Application and issued arrest warrants for the three

¹³⁵ DDPD (n 130 above) art 56.

¹³⁶ 'Darfur: The quest for peace, justice and reconciliation' Report of the African Union High-Level Panel on Darfur, (AUDP) as presented to the African Union Peace and Security Council on 29 October 2009, PSC/AHG/2(CCVII). See also C Aptel & W Mwangi 'Developments in international criminal justice in Africa during 2009 (2010)' 10 *African Human Rights Law Journal* 280.

¹³⁷ UN Security Council 'Resolution 1970 (2011)' (referral of the situation in Libya to the ICC) 26 February 2011 (S/RES/1970 (2011)).

¹³⁸ Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (ICC-10/11-01/11-4-Red), 16 May 2011 (*Gaddafi et al* Prosecutor's Application).

accused.¹³⁹ The Pre-Trial Chamber confirmed that the case fell within its jurisdiction, despite the fact that the case involved nationals of a state not party to the Rome Statute, one of whom was the *de facto* head of state. In this regard, referring to its jurisprudence in the *Bashir* case, the Pre-Trial Chamber held that ‘the official position of an individual [irrespective of whether they are a national of a state party] has no effect on the Court’s jurisdiction’.¹⁴⁰

In determining whether the crimes alleged were within the jurisdiction of the Court, the Pre-Trial Chamber first found that, although Muammar Gaddafi did not hold an official title, there were reasonable grounds to believe that he was the *de facto* head of the Libyan state, organising and controlling the state apparatus in the regime that monitored and punished any expression of dissent against his regime.¹⁴¹ The Pre-Trial Chamber found reasonable grounds to believe that, further to a state policy aimed at quelling the February 2011 demonstrations against the Gaddafi regime, a widespread and systematic ‘attack’ carried out by the Libyan security forces within the meaning of article 7(1) of the Statute occurred, targeted at members of the civilian population, and concluded that the contextual elements of the alleged crimes were satisfied.¹⁴²

Upon examination of the materials provided by the prosecution, the Pre-Trial Chamber determined that there were reasonable grounds to believe murders constituting crimes against humanity were committed in various parts of Libya from 15 February 2011 by the Libyan security forces as part of an attack against the civilian demonstrators or alleged dissidents to the Libyan regime. The Pre-Trial Chamber also found that there was a campaign to cover up these events.¹⁴³

The Pre-Trial Chamber further concluded that there were reasonable grounds to believe that acts of persecution constituting crimes against humanity were committed in Libya from February 2011. It noted that civilians were targeted and attacked by the Libyan security forces and subjected to inhumane acts that severely deprived them of their fundamental rights based on their political opposition to the Gaddafi regime.¹⁴⁴

In this case, the Pre-Trial Chamber chose not to be bound by the prosecutor’s legal characterisation of the conduct of the accused in its consideration of their culpability under article 25(3)(a) of the

139 Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’ *Gaddafi et al* 27 June 2011 (*Gaddafi et al* Decision on the Prosecution’s Application) (ICC-01/11-12).

140 *Gaddafi et al* Decision on the Prosecution’s Application (n 139 above) paras 6-10.

141 Paras 17-24.

142 Paras 25-35.

143 Paras 36-41.

144 Paras 42-65.

Statute. Referring to its consistent jurisprudence on the criterion of distinguishing between principal and accessorial liability,¹⁴⁵ the Pre-Trial Chamber found reasonable grounds to believe that (i) Muammar and Saif Gaddafi were mutually responsible as principals to the crimes committed in Libya pursuant to article 25(3)(a) of the Statute, as ‘indirect co-perpetrators’ of the alleged crimes due to their absolute control over the Libyan state apparatus and their contribution to the implementation of the plan to deter and quell, by all means, the civilian demonstrations against the regime which began in Libya in February 2011;¹⁴⁶ and (ii) Al-Senussi was responsible as principal to the crimes committed in Benghazi, Libya, as an ‘indirect perpetrator’ of the alleged crimes. The Pre-Trial Chamber added that the ‘existence of a chain of command’ and the fact that Al-Senussi was following orders did not prevent the ‘attribution of principal responsibility’ due to his position in the Libyan hierarchy.¹⁴⁷

In conclusion, the Pre-Trial Chamber determined that the issuance of arrest warrants was necessary pursuant to article 58(1)(b) of the Statute. It concluded that, based on the positions held by each of the accused, it was unlikely that any of them would willingly appear before the Court unless arrested, and may continue to resort to their respective powers to direct further commission and destruction of evidence.¹⁴⁸ The warrants of arrest were issued the same day.¹⁴⁹

However, on 20 October 2011, the Libyan people were deprived of the opportunity to make the once infamous dictator accountable for his alleged role in the commission of the alleged crimes. Muammar Gaddafi was confirmed dead, allegedly murdered by angry Libyan fighters in Sirte.¹⁵⁰ This naturally raises questions concerning Libya’s transition from chaos to the rule of law and the treatment of Saif Al-Islam Gaddafi, who was reportedly captured and detained by anti-Gaddafi forces on 19 November 2011 in Southern Libya.¹⁵¹ The Libyan National Transitional Council has indicated its intention to prosecute Saif Gaddafi domestically, triggering the debate on the

145 *Gaddafi* (n 139 above) fn 134 for ease of reference.

146 *Gaddafi* (n 139 above) paras 66-83.

147 Paras 66-71 & 84-90.

148 Paras 90-100.

149 Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi *Gaddafi et al* 27 June 2011 (ICC-01/11-13); Warrant of Arrest for Saif Al-Islam Gaddafi *Gaddafi et al* 27 June 2011 (ICC-01/11-14); Warrant of Arrest AbduHah Al-Senussi *Gaddafi et al* 27 June 2011 (ICC-01/11-15).

150 ‘Gaddafi killed in hometown, Libya eyes future’ *Reuters* 20 October 2011 <http://www.reuters.com/article/2011/10/20/us-libya-idUSTRE79F1FK20111020> (accessed 21 March 2012); ‘Muammar Gaddafi killed as Sirte falls’ *Al-Jazeera* 20 October 2011 <http://www.aljazeera.com/news/africa/2011/10/20111020111520869621.html> (accessed 21 March 2012).

151 ‘Gaddafi’s son Saif al-Islam captured in Libya’ *BBC* 19 November 2011 <http://www.bbc.co.uk/news/world-middle-east-15804299> (accessed 21 March 2012).

principle of complementarity.¹⁵² At this stage, it is important that Libya co-operates with the ICC and effects the transfer of Saif Gaddafi to the ICC. The transfer would not preclude the new Libyan government from prosecuting him for crimes allegedly committed before or after 15 February 2011. However, should Libya seek to prosecute Saif Gaddafi domestically for the alleged crimes committed since 15 February 2011, 'demonstrating an ability to fairly prosecute [him] would likely require swift and substantial reform of the [Libyan] judicial system'.¹⁵³ Moreover, it is 'indispensable that this discussion takes place before the Chambers of the ICC, and that it takes place not in the language of diplomacy, but in the language of law'.¹⁵⁴

The doctrine of 'responsibility to protect' has been ubiquitously used to justify the use of force in 2011 in Libya, resulting in a debate on the selective use of the doctrine and its potential use for political as opposed to humanitarian grounds.¹⁵⁵ Observers warn that the biggest questions surrounding the mission in Libya are about its objectives, its

152 United Nations 'Statement by Ms Patricia O'Brien Under-Secretary-General for Legal Affairs The Legal Counsel at the 29th Annual Seminar for Diplomats on International Humanitarian Law' 14 March 2012, 10. (*OLA IHL statement*) http://untreaty.un.org/ola/media/info_from_lc/POB%20Statement%2029th%20NYU-ICRC%20seminar.pdf (accessed 2 April 2012).

153 Human Rights Watch 'Libya: Surrender Saif Al-Islam Gaddafi to ICC' 19 November 2011 <http://www.hrw.org/news/2011/11/19/libya-surrender-saif-al-islam-gaddafi-icc> (accessed 21 March 2012).

154 OLA IHL statement (n 152 above) 10.

155 UN Security Council 'Resolution 1970' 26 February 2011 (*S/RES/1970* (2011)) and 'Resolution 1973' 17 March 2011 (*S/RES/1973* (2011)). See also, United Nations 'Current legal issues facing the United Nations' Statement by Ms Patricia O'Brien, Under-Secretary-General for Legal Affairs The Legal Counsel 7 March 2012, 9-10 http://untreaty.un.org/ola/media/info_from_lc/POB%20Columbia%20Law%20School%20030712.pdf (accessed 2 April 2012) and P O'Brien 'The United Nations and the responsibility to protect': Remarks made at the 'Military Intervention and the Law of Peace' panel at the 106th annual meeting of the American Society of International Law' 5 April 2012 <http://www.intlawgrls.com/2012/04/united-nations-responsibility-to.html> (accessed 5 April 2012). Other discussions about the Libyan intervention by the Legal Counsel can also be found here 'Information and Speeches from the Legal Counsel of the United Nations' http://untreaty.un.org/ola/legal_counsel1.aspx (accessed 2 April 2012). For discussions on Libya and the use of the doctrine of responsibility to protect, selectively see: Council on Foreign Relations 'Libya and the Responsibility to Protect' 24 March 2011 <http://www.cfr.org/libya/libya-responsibility-protect/p24480> <http://www.cfr.org/libya/libya-responsibility-protect/p24480> (accessed 31 March 2012); International Coalition for the Responsibility to Protect 'Impact of action in Libya on the responsibility to protect' May 2011 <http://www.responsibilitytoprotect.org/RtoP%20in%20Light%20of%20Libya%20FINAL.pdf> (accessed 31 March 2012); United States Institute for Peace 'Libya and the responsibility to protect' 1 March 2011 <http://www.usip.org/publications/libya-and-the-responsibility-protect> (accessed 31 March 2012); Austrian Institute for International Affairs 'The responsibility to protect (R2P) and Libya' July 2011 http://www.oii.ac.at/fileadmin/Unterlagen/Dateien/Kurzanalysen/Responsibility_to_Protect_and_Libya.pdf (accessed 31 March 2012); Economist 'The lessons of Libya' 19 May 2011 <http://www.economist.com/node/18709571> <http://www.economist.com/node/18709571> (accessed 31 March 2012).

command structure, and its likely duration. There is no clarity over end goals or criteria for success, and in the current civil war, ‘there is little reason to be confident ... the opposition will be able to constitute a benign, national alternative’.¹⁵⁶

4.7 Côte d’Ivoire

Côte d’Ivoire, which is not party to the Rome Statute, accepted the jurisdiction of the ICC on 18 April 2003 and, more recently, on 14 December 2010 and 3 May 2011 the Presidency of Côte d’Ivoire reconfirmed the state’s acceptance of this jurisdiction.¹⁵⁷ The case against Laurent Koudou Gbagbo in the situation in Côte d’Ivoire was a result of post-electoral violence that ensued for a period of about six months following the presidential elections in 2011. On 3 October 2011, the Pre-Trial Chamber authorised the prosecution’s request to *proprio motu* commence an investigation into the situation in Côte d’Ivoire pursuant to article 15 of the Rome Statute.¹⁵⁸ Pursuant to article 58 of the Rome Statute, the prosecution filed an application for a warrant of arrest against Gbagbo, alleging that the former head of state was criminally responsible pursuant to article 25(3)(a) of the Statute for crimes against humanity of murder, rape and other forms of sexual violence, persecution, and inhumane acts under article 7(1) of the Statute. Moreover, the prosecution alleged that Gbagbo adopted a policy of widespread and systematic attacks on his political opponents and his supporters, ‘the objective being to retain power by all means, including by lethal force’ (the ‘policy’). This policy was apparently implemented through pro-Gbagbo forces, under the joint command of Gbagbo and his inner circle.¹⁵⁹

The Pre-Trial Chamber determined that it had jurisdiction over the matter, based on Côte d’Ivoire’s acceptance of the ICC jurisdiction, and reasonable grounds to believe that the crimes alleged against Gbagbo constituted crimes under article 7 of the Statute.¹⁶⁰

156 Council on Foreign Relations ‘Libya and the responsibility to protect’ 24 March 2011 <http://www.cfr.org/libya/libya-responsibility-protect/p24480> (accessed 31 March 2012).

157 See the Declaration of Acceptance of 18 April 2003 and the letters of December 2010 and May 2011 confirming acceptance of jurisdiction <http://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf> (accessed 21 March 2012).

158 Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, *Gbagbo* 3 October 2011 (ICC-02/11-14). Note that a *corrigendum* to the decision was issued on 15 November 2011 (ICC-02/11-14-Corr.)

159 Prosecutor’s Application Pursuant to Article 58 as to Laurent Koudou Gbagbo, *Gbagbo* 25 October 2011 (ICC- 02/11-24-US-Exp) (*Prosecutor’s Application*) paras 1-4.

160 Decision on the Prosecutor’s Application Pursuant to Article 58 as to Laurent Koudou Gbagbo, *Gbagbo*, 30 November 2011 (ICC-02/11-01-11-9 Red) paras 8-16 (*Gbagbo* Decision on the Prosecution’s Application).

In determining whether the crimes alleged fell within the jurisdiction of the Court, the Pre-Trial Chamber concluded that there were reasonable grounds to believe that in the aftermath of the presidential elections in Côte d'Ivoire, pro-Gbagbo forces targeted and attacked civilian populations believed to be supporters of the political opposition, often directed at specific ethnic or religious communities, in various parts of the state,¹⁶¹ and that these widespread and systematic¹⁶² attacks were committed in furtherance to a 'state or organisational policy to commit such attack'. Regarding the latter, the Pre-Trial Chamber noted that there were reasonable grounds to believe that Gbagbo 'never intended to relinquish power' and adopted a policy to launch violent attacks against his opposition 'to retain [this] power by all means'.¹⁶³ Accordingly, and based on the materials before it, the Pre-Trial Chamber concluded that there were reasonable grounds to believe that the four counts of crimes against humanity were committed in Côte d'Ivoire in the period between 16 December 2010 and 12 April 2011 against a civilian population within the meaning of article 7(1) of the Statute.¹⁶⁴ Although the prosecution had exclusively limited Gbagbo's criminal responsibility pursuant to article 25(3)(a) to 'indirect co-perpetrator', the Pre-Trial Chamber found it 'undesirable' at this stage to 'limit the options that may exist for criminal responsibility' under the Statute, not yet having heard all arguments from the parties. Nonetheless, the Pre-Trial Chamber found that the 'substantial test, as advanced by the prosecutor, is therefore made out' but cautioned that the Gbagbo's 'suggested liability ... may well need to be revisited in due course'.¹⁶⁵

In conclusion, noting that although Gbagbo was already in detention in Côte d'Ivoire, he had the political contacts, economic resources and local support to abscond, the Pre-Trial Chamber determined that the continued arrest of Gbagbo was necessary pursuant to article 58(1)(b) of the Statute. In addition, the Pre-Trial Chamber was satisfied that the continued arrest of Gbagbo was necessary to ensure his appearance and that he would not use his political or economic resources to obstruct investigations or commit further crimes.¹⁶⁶ The Pre-Trial Chamber also acceded to the prosecution's request to issue its decision under seal to protect the ongoing investigations, victims and witnesses and to facilitate Gbagbo's transfer to the ICC.¹⁶⁷ The

161 *Gbagbo* Decision on the Prosecution's Application (n 160 above) paras 28-37.

162 Paras 49-56.

163 Paras 37-48.

164 Paras 48-70.

165 Paras 71-77.

166 Paras 78-87.

167 Paras 88-90.

sealed warrant of arrest was issued on 23 November 2011.¹⁶⁸ On 30 November 2011, Gbagbo was transferred to the ICC and his initial appearance happened on 5 December 2011.¹⁶⁹

Considering that Côte d'Ivoire consented to ICC jurisdiction in 2003 and in light of the use of his *proprio motu* powers in the referral of the situation in Kenya, it remains unclear as to why the prosecution appeared reluctant to flex its *proprio motu* muscle in the case of Côte d'Ivoire, seeking instead a 'safe' state referral from West African states.¹⁷⁰ It is also notable that there are currently no indictments related to crimes allegedly committed by Outtara's forces against Gbagbo's supporters.¹⁷¹ As the prosecution considers other cases to try in this situation, it is hoped that the pursuit of justice will be blind to political partialities.

4.8 Kenya

On 7 and 8 April 2011, the accused in the situation in Kenya made their initial appearances before Pre-Trial Chamber II.¹⁷² The highlight of the proceedings in the two cases in the situation in Kenya was the request for co-operation from the government of the Republic of Kenya.

On 21 April 2011, the government of Kenya filed a request for co-operation pursuant to article 93(10) and rule 194, in which it sought transmission of¹⁷³

all statements, documents or other types of evidence obtained by the Court and the prosecutor in the course of the ICC investigations into the

168 Warrant of Arrest for Laurent Kudou Gbagbo *Gbagbo* 23 November 2011 (ICC-02/11-26-US-Exp).

169 ICC 'Situation in the Republic of Côte d'Ivoire' <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/icc0211/> (accessed 31 March 2012).

170 See AP 'Intl court prosecutor wants Ivory Coast probe' 4 April 2011 <http://www.sify.com/news/intl-court-prosecutor-wants-ivory-coast-probe-news-others-leja4fcjdgf.html&hl=en&strip=1> (accessed 28 February 2012) and Justice in Conflict 'The ICC and Ivory Coast: *Proprio motu* is the way to go' 11 April 2011 <http://justiceinconflict.org/2011/04/11/the-icc-and-ivory-coast-proprio-motu-is-the-way-to-go/> (accessed 28 February 2012).

171 See Foreign Policy 'Ivory Coast's new leader Alassane Ouattara: Hero or villain?' 9 April 2011 http://turtlebay.foreignpolicy.com/posts/2011/04/09/ivory_coasts_new_leader_alassane_ouattara_hero_or_villain (accessed 28 February 2012) and Human Rights Watch 'Côte d'Ivoire: Ouattara should act to control troops' 3 April 2011 <http://www.hrw.org/en/news/2011/04/02/c-te-d-ivoire-ouattara-should-act-control-troops> (accessed 28 February 2012).

172 Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang *Ruto et al* (ICC-01/09-01/11-1) 3 March 2011; Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali *Mutharua et al* (ICC-01/09-02/11-1) 3 March 2011.

173 Request for Assistance on behalf of the government of the Republic of Kenya pursuant to art 93.10 and rule 194, 21 April 2011 (ICC-01/09-58), paras 1-2 (*Kenya Co-operation Request*).

post-election violence in Kenya, including into the six suspects presently before the ICC.

What followed was a series of submissions by the government of Kenya, the prosecution, Kosgey, Ruto, Sang and Ali.¹⁷⁴ On 29 June 2011, the Pre-Trial Chamber rejected the government of Kenya's request for co-operation.¹⁷⁵ On procedural matters, the Pre-Trial Chamber noted that the request for co-operation 'was filed in record of the situation' and not in the respective cases, and as such the accused lacked *locus standi* to reply to the prosecutor's response.¹⁷⁶ On the substantive issues, the Pre-Trial Chamber found that a literal reading of article 98(10) places the Chamber under no obligation to comply with a request for co-operation submitted by a state, and that requests for co-operation and assistance were only granted in relation to material or evidence in the possession of the ICC organ addressed in the request, in this case, the Pre-Trial Chamber. Accordingly, the Pre-Trial Chamber was not able to provide materials or evidence in the possession of the prosecution.¹⁷⁷ Secondly, in relation to the material in its possession, the Pre-Trial Chamber found that Kenya had not satisfied the necessary requirements, namely by demonstrating that there is or has been an ongoing investigation with respect to either 'conduct' constituting a crime set out in article 5 of the Statute, or in relation to a serious crime under the national law of the requesting state. The Pre-Trial Chamber dismissed Kenya's application.¹⁷⁸

On 4 July 2011, Kenya appealed this Decision on Co-operation and, referring to its right of appeal under articles 82 and 19 of the Statute, claimed that the Decision constituted a decision on 'admissibility, which may be appealed as of right pursuant to article 82(1)(a) of the Statute'.¹⁷⁹ The Appeals Chamber clarified that the right to appeal specified in articles 19 and 82 of the Statute 'is intended to be limited only to those instances in which a Pre-Trial or Trial Chamber issues a ruling specifically on the jurisdiction of the Court or the admissibility of the case',¹⁸⁰ and it is the 'nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls

174 See Decision on the Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to art 93.10 and rule 194, 29 June 2011 (ICC-01/09-63), paras 5-12 (Kenya Co-operation Decision).

175 Kenya Co-operation Decision (n 174 above).

176 Kenya Co-operation Decision (n 174 above) paras 14-18.

177 Paras 24-32.

178 Paras 33-34.

179 Decision on the admissibility of the 'Appeal of the Government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to art 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence'' *Kenya* (ICC-01/09-78) (Appeal Decision on Co-operation) paras 4-10.

180 Kenya Appeal Decision on Co-operation (n 179 above) para16.

under article 82(1) of the Statute'.¹⁸¹ On this basis, the Appeals Chamber found that the Pre-Trial Chamber's Decision on Co-operation was based solely on the state's request for co-operation, and whether the state had met the requirements of article 93(1). It did not address issues of admissibility. Accordingly, the Appeals Chamber dismissed the Appeal, observing that in the event Kenya submits that 'refusal to decide on or grant the Request for Assistance constitutes a procedural error vitiating a decision with respect to admissibility', then it would be for Kenya to raise such an error in an appeal.¹⁸²

On a lighter note, readers may be interested in the discussion on Sang's request that the proceedings be conducted in Kalenjin (a Kenyan local dialect) as a language that he was 'more familiar and comfortable with'.¹⁸³ In its decision, the Pre-Trial Chamber rejected the request, noting that the Registry's assessment of Sang's proficiency concluded that he had an advanced knowledge of English. It also observed that, based on open source video material, several broadcasts by Sang illustrated his 'near-native command of English' and the fact that his higher education was conducted in higher institutions where the language of instruction was English, including his current degree in journalism, was a compelling basis to conclude that he 'fully understands and speaks' English within the meaning of articles 67(1) (a) and (f).¹⁸⁴

5 Piracy

Piracy off the coast of Somalia continues to be an international problem. According to the International Maritime Organisation (IMO), in 2011 there were 286 attacks against ships in the waters off the coast of Somalia, of which 31 were successful. In April 2011, after its consideration of the report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia,¹⁸⁵ the Security Council requested the Secretary-General to report on the modalities for the establishment of specialised Somali courts to

181 Para 17.

182 Paras 18-21.

183 Registry's assessment of Mr Joshua Arap Sang's English proficiency level, 31 March 2011, Annexes 1-3 (Registry's Submission).

184 Decision on Joshua Arap Sang's Request for Translation and Interpretation into Kalenjin *Sang* (ICC-01/09-01/11-42) 6 April 2011 paras 10-13.

185 Report of the Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, Annex to Security Council document S/2011/30 of 24 January 2011. For a discussion of the report and in particular Proposal 25 on the establishment of specialised courts in Somalia as well as an extra-territorial Somali court in a third state in the region, which would be transferred eventually to Mogadishu, see W Mwangi 'Developments in international criminal justice in Africa during 2010' (2011) 11 *African Human Rights Law Journal* 251 285.

try suspected pirates both in Somalia and in the region, including an extra-territorial Somali specialised anti-piracy court, consistent with applicable human rights law.¹⁸⁶

The Secretary-General's report, issued on 15 June 2011,¹⁸⁷ neither addressed the feasibility of the establishment and operation of the courts, nor recommended particular action to the Security Council. Rather, it limited its analysis to legal, financial and other practical modalities for the establishment of specialised and piracy courts in Somalia and the region. From the discussions in the Security Council, and the absence of steps towards adopting a resolution on the way forward, it seems that there is no agreement between key members of the Council on the modalities of prosecuting persons suspected of piracy off the coast of Somalia. It appears that some members prefer the establishment of an extra-territorial Somali court, while others favour prosecutions by national courts in Somalia and regional states.¹⁸⁸

The establishment of an extra-territorial court would have to be consistent with the provisions of the 1960 Somalia Constitution and the Somali Transitional Federal Charter. Somalia would also have to conclude an agreement with the host state to regulate their respective rights and obligations in relation to the extra-territorial court, including enforcement of sentences in Somalia. However, Somali authorities are opposed to the idea of an extra-territorial Somali anti-piracy court, preferring that capacity-building efforts are conducted in the state.¹⁸⁹ Tanzania would be willing to host an extra-territorial court under certain conditions, including the enforcement of sentences outside the state. As the ICTR draws down, existing facilities could be made available for such a court. However, there are security implications associated with this proposition and the distance between Arusha and the coast makes the transportation of suspects costly and problematic.¹⁹⁰

The Secretary-General's report highlights UN efforts in building the capacity of the existing judicial and correctional structures in 'Somaliland' and 'Puntland' to ensure prosecutions of piracy and other serious crimes that meet minimum international standards, and enable the transfer of suspected pirates to these regions. It is not envisaged that additional anti-piracy courts at the federal or regional level will be established.¹⁹¹

186 Security Council Resolution 1976 (2011) adopted on 11 April 2011 (S/RES/1976 (2011)).

187 Secretary-General's report on the modalities for the establishment of specialised Somali anti-piracy courts of 15 June 2011 (S/2011/360) (Secretary-General's report of 2011).

188 See Record of the Security Council discussion of the Secretary-General report, 21 June 2011, S/PV.6560.

189 Secretary-General's report of 2011 (n 187 above) paras 52-53.

190 Secretary-General's report of 2011 (n 187 above) paras 77-78.

191 Secretary-General's report of 2011 (n 187 above) para 9.

In the meantime, pending the metamorphosis of the judicial and correctional structures in Somalia, prosecutions of pirates continue in certain regional states, such as Kenya and the Seychelles.¹⁹² In addition, Mauritius entered into an agreement with the European Union on 14 July 2011 to accept the transfer of pirates for prosecution¹⁹³ and the international community hopes that Tanzania will follow suit. Developments in the Seychelles are of particular note. Seychelles is currently in negotiations to host a regional prosecution centre. If Seychelles' conditions are met, which includes a post-trial transfer arrangement, this regional centre would act as a focal point for regional and international support for the prosecution of piracy suspects and provide a location offering relative logistical ease for their transfer by naval forces. Plans also include a Regional Anti-Piracy Prosecution and Intelligence Co-ordination Centre, under the auspices of the Indian Ocean Commission, to develop expertise for tracking piracy finances and develop cases capable of prosecution in Seychelles or elsewhere.

Of note also are the developments regarding piracy off the coast of West Africa, in particular the Gulf of Guinea and off the coast of Benin. In this case, concerned states in Central and West Africa have taken their own steps to counter the maritime crime.¹⁹⁴ There are no foreign navies operating in the area, no suggestions of extra-territorial courts, and no working groups focused on the problem. However, similar to Somalia, the UN has emphasised the importance of addressing the root causes of the problem and the development and implementation of regional strategies.¹⁹⁵

6 Concluding remarks

The development of international criminal law jurisprudence in Africa in 2011 was phenomenal. Before the ICTR, judgments in four

192 The Report of the Secretary-General on specialised anti-piracy courts in Somalia and other states in the region of 20 January 2012 (S/2012/50)), sets out in detail what is being done in the regional states and the efforts towards increasing capacity to carry out prosecutions.

193 n 192 above, para 82.

194 These include joint naval patrols by Nigeria and Benin off the coast of Benin, initiatives taken by the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Gulf of Guinea Commission (GCC), and the Maritime Organisation for West and Central Africa (MOWCA) to enhance maritime safety and security in the Gulf of Guinea. See UN Security Council Resolution 2039 (2011), 29 February 2012, by which the Security Council has urged states in the region to develop a common maritime security strategy, including a legal framework for prosecutions.

195 Report of the United Nations assessment mission on piracy in the Gulf of Guinea (7 to 24 November 2011), of 19 January 2012 (S/2012/45). The mission was sent pursuant to Security Council Resolution 2018 (2011) adopted on 31 October 2011.

significant multi-accused cases were issued, convicting individuals that held the most senior positions in the former Rwandan interim government, the military and the ruling party. The trial of Charles Taylor, a former Liberian head of state, was concluded in The Hague. This was quickly followed by the issuance of ICC arrest warrants for two heads of state, resulting in a loud and resounding message that *no-one is above the law* or, in the words of article 6(2) of the ICTR Statute, '[t]he official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment'. The ICTR and SCSL cases establish for the Rwandan and Sierra Leonean people a historical record of the extent to which the accused influenced and were involved in planning, executing and overseeing the serious crimes committed in Rwanda and in Sierra Leone. Such historical developments deserve accolades as the international courts and tribunals flex their judicial muscles and the international community is slowly ushered, often kicking and screaming, into a new era in the fight against impunity.

However, such achievements should not result in complacency. The perception that the ICC engages in selective persecution in situations such as those in the DRC and Uganda by not prosecuting state officials or officials of the armed forces who also allegedly committed serious crimes is not new. The similarities with the criticisms against the ICTR for not prosecuting members of the Rwandan Patriotic Front are evident. However, in order to resonate with the concerns of the victims and affected communities, justice needs to be seen to be done on all fronts.¹⁹⁶ As seen in the Mbarushimana case, if the case is not properly prepared, the scales of justice will reject it. Another area that deserves attention is the relationship between the AU and the ICC. The check-mate between these two bodies needs to be resolved, or the positions that certain member states will take, such as was the case with Malawi and Chad, will result in detrimental consequences in other aspects such as negotiations for aid, and may serve to entrench these differences further.

The fight against piracy appears to be causing waves on and off the waters off the coast of Somalia. While the number of attacks against ships off the coast of Somalia, as well as farther east and south, has increased, the international community does not appear ready to adopt a unified approach in addressing this scourge, let alone the prosecution

¹⁹⁶ T Murithi & A Ngari 'The ICC and community-level reconciliation: In-country perspectives' 21 & 22 February 2011 7 http://www.iccnw.org/documents/IJR_ICC_Regional_Consultation_Report_Final_2011.pdf (accessed 2 March 2012). See also Human Rights Watch 'Unfinished business: Closing gaps in the selection of ICC cases' 15 September 2011 <http://www.hrw.org/news/2011/09/15/icc-case-selection-leaves-unfinished-business> (accessed 2 March 2012). The comments in these reports resonate with those previously made about the prosecution of members of the Rwandan Patriotic Front by the ICTR.

of those suspected of having engaged in piratical acts. By the end of 2011, it was clear that discussions on the creation of an extra-territorial court had stalled, and the bulk of prosecutions were to be carried out in an *ad hoc* manner by national jurisdictions, primarily by states in the region. Arguably, the Seychellois initiative could play an important role in the prosecution of pirates. However, the establishment of extra-territorial courts and the *ad hoc* nature of the regional prosecutions of suspected pirates are not tenable solutions to this problem in the long run. It is therefore imperative that a more sustainable solution is identified if there is to be a consistent and effective approach to the prosecution of those suspected of piracy.

Finally, we close with an interesting question posed at the annual 2012 American Society of International Law meeting,¹⁹⁷ relating to the prospect of prosecuting companies for crimes that fall within the jurisdiction of the Rome Statute, and in particular prosecuting pillage as a war crime.¹⁹⁸ While the most important precedents derive from World War II, the potential for the prosecution of companies and individuals that illegally trade in conflict communities is evident when one examines the nature of the civil wars that have ravaged states rich in resources, such as Liberia, Sierra Leone, Angola, the DRC and the Central African Republic.

197 The Annual Ben Ferencz Panel on Africa and the International Criminal Court, the 106th Annual Meeting of the American Society of International Law 'Confronting Complexity', 28-31 March 2012 <http://www.asil.org/am12/> (accessed 2 April 2012).

198 J Stewart *Corporate war crimes* (2011).

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The book critically analyses the unprecedented right of the African Union (AU) to intervene in a member state in respect of grave crimes by placing it within the broader context of international law governing intervention. It begins by providing a historical background to the study, defining its methodology and sources of law, and presenting the AU's normative and institutional framework. It then focuses on the principle of the AU providing for the AU's right 'to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity' (article 4(h) of the Constitutive Act of the AU). The book meticulously dissects and discusses the constituent elements of article 4(h), evaluates its 'legality' in international law, and grapples with issues of its operationalisation and application. In the substantive parts of the book, chapter three clarifies the meaning and grounds of the AU's right to intervene and addresses the issue of whether there is a need for a UN Security Council authorisation to implement the right. Chapter four mainly examines the legality of the use of military force against a state under the right of the AU to intervene in light of the prohibition on the use of force under the United Nations (UN) Charter. In a part that deals with the operationalisation of article 4(h), the book discusses the procedure of implementation of the right to intervene and tests its applicability to the atrocities committed in the Darfur region of Sudan.

The genesis of article 4(h) is found in the costs of stringent adherence to the principle of non-interference under the Organisation of African

Unity (OAU) (such as the Rwandan genocide of 1994) and precedents of military intervention within sub-regional arrangements in Africa. By locating the article within the broader debate on intervention, the author interprets its provisions as allowing military and non-military forcible measures by the member states of the AU as a collective in a state which is unable or unwilling to protect its people from the grave crimes. In connection with non-military forcible measures, the author appears to overlook the weak economic and communication linkages among African states that minimise the effectiveness of sanctions. He also argues for the delegation of the power to pass the final decision on intervention from the AU Assembly of Heads of State and Government to the AU Peace and Security Council (PSC). While this may expedite the process, it would detract from the level of legitimacy that is meant to be ensured through the backing of a decision to intervene by all member states of the AU.

The AU's right to intervene is juxtaposed with the prohibition on the use of force and the power of the UN Security Council to take measures against any threat to international peace and security under the UN Charter. It is argued that the consent of member states of the AU to allow intervention through their ratification of the Constitutive Act excludes a conflict with the prohibition on the use of force under article 2(4) of the UN Charter. According to the author, such consent justifies the use of force that is exercised within the substantive and operational limits of article 4(h). He argues that intervention that breaches the limits of prior consent in a way that threatens the sovereignty of a target state may be considered a material breach of the Constitutive Act. This may lead to its suspension and a claim for reparations and related remedies. He is not, however, clear as to what constitutes a 'threat to sovereignty'. In relation to the power of the UN Security Council, on the other hand, the author comes to the conclusion that the AU Assembly must, as a rule, get the authorisation of the Council prior to the use of military force in a state that has rejected its decision to allow intervention (124). It is further argued that the AU Assembly must inform the UN Security Council of all circumstances and facts of the military or non-military intervention it contemplates.

In relation to the mandate of the PSC to recommend intervention, the book considers the absence of mechanisms for the investigation and analysis of atrocities inside a state and for the determination of their legal status as genocide, crimes against humanity or war crimes in international law to be a serious impediment to the operationalisation of the AU's right to intervene. Recommending formal co-operation with such institutions as the African Commission on Human and Peoples' Rights, the Continental Early Warning System and the Pan-African Parliament in the investigation of atrocities, the author proposes that a special organ be established under the PSC for the swift determination of whether atrocities qualify as crimes under article 4(h). In this regard, it is not clear why the author opted for the establishment of yet another

special organ, the attributes of which he does not specify, over the determination of the status of atrocities by the PSC itself based on the legal opinion of the African Court of Justice and Human Rights, which should respond swiftly to such requests.

In connection with the identification and implementation of forcible measures, the author emphasises that the PSC should adopt detailed guidelines on possible non-military forcible measures and a mechanism of monitoring the implementation of military forcible measures. However, he finds the adoption of the 'lead nation concept' under the African Standby Force problematic in terms of finding a militarily and economically-capable lead state and making sure that such a state does not have interests of its own. He further underscores the need for enhancing the capability of the ASF to carry out interventions without relying on a lead state and the necessity of equipping it with a predictable and sustainable source of funding by AU member states. While recognising the importance of co-operation with sub-regional organisations in cases of military intervention, the book points to the absence of a formal co-operation framework and the institutional, financial and logistical constraints of the organisations.

Finally, the AU's right to intervene is seen *vis-à-vis* the atrocities committed in the Darfur region of Sudan. The author advises the AU member states 'to consider intervention inside Sudan' relying mainly on the findings of the African Commission on Human and Peoples' Rights and the UN International Commission of Inquiry on Darfur, both of which established the commission of crimes against humanity and war crimes in Darfur, and the unwillingness of the Sudanese government to protect the people of Darfur. He argued against military intervention based on the non-satisfaction of the criteria of 'reasonable prospects' and 'last resort' and recommended political, diplomatic and military sanctions against the Sudanese government, the *Janjawiid* militia as well as the responsible rebel groups. In addition to questioning the effectiveness of sanctions in Africa, a reader of the last chapter may require more facts and explanations exemplifying the practical application of the detailed legal framework for the AU's right to intervene.

In sum, the book is very well written and clearly structured. It is a wonderful study with a clear focus, great depth of detail and meticulous reasoning. As a major research work on the novel right of a regional organisation (the AU) to intervene in relation to grave crimes, it stands out as a seminal contribution to the literature in international law relating to intervention in a state. A reader would be able to get a clear picture of how the AU, in general, and the PSC, in particular, operate in practice and also of the challenges they face. As any outcome of academic research, the book includes some subjective arguments with which a reader may beg to differ. While I attempted to articulate a couple of such differences, they may not at all be raised as fundamental weaknesses of the book.

DM Chirwa *Human rights under the Malawian Constitution*

Juta (2011) 555 pages

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1 Introduction

What is the nature and significance of the 1994 Malawian Bill of Rights? What changes has it brought about? How have the courts through their jurisprudence and parliament through legislation interpreted the Bill of Rights? Have they promoted or undermined it? Have the courts developed consistent jurisprudence that gives appropriate regard to the Bill? How can any inconsistencies be rectified? These are the main issues that Chirwa addresses. The aim of the book is to provide ‘a comprehensive and systematic analysis of the provisions of the Malawian Bill of Rights’,¹ thereby enhancing ‘our understanding of [their] meaning, significance and implications’.² Ultimately, the book is aimed at contributing to the development of local human rights jurisprudence. It sets out to achieve this goal by critically examining case law and legislation that have been generated by the Bill of Rights.

The adoption of the Constitution of the Republic of Malawi,³ on 18 May 1994, marked the dawn of a new era in Malawi. In particular, the Bill of Rights contained in chapter IV of the Constitution envisages fundamental changes to all aspects of the legal system. Considerable case law has been generated, dealing with various provisions of the Bill. Similarly, there has been a lot of law reform taking place, largely due to the work of the Malawi Law Commission, which has led to the amendment, repeal and passing of various statutes. It is these developments that Chirwa aptly describes as ‘a rich reservoir of an “unexamined” legal knowledge’.⁴ *Human rights under the Malawian Constitution* seeks to pioneer a systematic examination of this knowledge.

It is impossible to deal in detail with the contents of the book here. The note attempts to provide a brief overview of the book and to mark its significance. It focuses on a few concepts that are put forward in

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- 1 DM Chirwa *Human rights under the Malawian Constitution* (2011) 2.
 - 2 As above.
 - 3 Act 20 of 1994.
 - 4 Chirwa (n 1 above) 2.

the book which has 19 chapters, 16 of which are devoted to analyses of specific rights in the Bill.

2 Overview of the book

In chapter 1, the book presents an overview of the Bill of Rights and the application of the rights contained therein. The chapter discusses the beneficiaries of rights and demonstrates that the Bill of Rights binds the state and non-state actors. It is pointed out that the Bill of Rights is unique in its explicit application to non-state actors.⁵ Chapter 2 deals with section 11 of the Constitution, which stipulates how it must be interpreted. It is pointed out that courts must embrace the use of foreign case law and the role of international law as an 'interpretative aid' and a 'source of law' when interpreting the Constitution. This is particularly important in light of Malawi's short record of human rights litigation.⁶

The limitations and derogations from the rights in the Constitution are dealt with in chapter 3. An interesting argument put forward in this chapter is that, contrary to what the courts have decided, none of the rights in the Constitution is illimitable.⁷ Thus, although section 44(1) of the Constitution lists a number of rights that cannot be derogated from, restricted or limited, Chirwa argues that it is incorrect to interpret this provision literally to conclude that the rights in section 44(1) cannot be limited in peace time.⁸ This is because some of the rights included in section 44(1) are already limitable under other sections of the Constitution.⁹ For instance, the right to life, which is included in section 44(1), can be limited by application of the death penalty as provided in section 16 of the Constitution. It is further argued that some of the 'supposedly illimitable rights'¹⁰ are not truly absolute. The right to equality, for example, can be limited on the basis of mental capacity or age.¹¹ Similarly, the right to *habeas corpus* can be limited in the interests of justice.¹²

Chirwa further buttresses the view that all rights are not absolute by invoking 'the notion of interdependence, indivisibility and interrelatedness of all human rights'.¹³ He notes that the prohibition

5 17-22.

6 27.

7 40-43.

8 40. Chirwa cites as an example the case of *Attorney-General & Another v Malawi Congress Party & Others* (1997) 2 MLR 181, 223 (SCA).

9 40.

10 41.

11 40.

12 As above. See sec 42(2)(e) of the Constitution.

13 41.

of torture and cruel, inhuman or degrading treatment or punishment is inextricably connected to the right to human dignity and yet, the latter is not included in section 44(1) while the former is.¹⁴ It is further pointed out that the reference to derogation, restrictions and limitation in section 44(1) is 'more of a drafting error than deliberate choice' since, by comparing the lists under section 45(3)(a) of the Constitution which deals with derogable rights, it becomes clear that the non-derogable rights, as can be deduced from those not included in section 45(3)(a), would include rights not included in section 44(1). This creates uncertainty as to the intention of the drafters.¹⁵ Derogations and limitations are distinct concepts in international law.¹⁶

These considerations lead Chirwa to conclude that section 44(1) of the Constitution 'should be interpreted as meaning that the rights listed thereunder, while not subject to derogations, are subject to limitations or restrictions in accordance with [sections] 44(2) and (3) of the Constitution'. More specifically, the words 'limitations and restrictions' are superfluous and, as a consequence, the rights enumerated in that section should be regarded as non-derogable for purposes of [section] 45. In turn, this means that [sections] 44(1) and 45(3)(a) of the Constitution should be read together to determine rights from which derogations may not be permitted.¹⁷ This conclusion, that all rights are subject to the general limitations clause in sections 44(2) and (3) of the Constitution, 'does not undermine the integrity of the Bill of Rights' since these provisions do not allow for restrictions lightly.¹⁸

These observations on the proper interpretation of section 44(1) of the Constitution are particularly important since some scholars have argued that it creates internal conflict within the Constitution itself. For instance, it has been said that 'there is an apparent conflict between' the proviso to section 16, allowing for the death penalty, and section 44(1), which makes the right to life illimitable and prohibits cruel and inhuman punishment.¹⁹ However, Chirwa's analysis makes a strong argument that the right to life is not absolute to begin with, hence there is no internal inconsistency in the provisions. The reference in section 16 to arbitrary deprivation of life implies that there are situations that can 'justify certain deprivations of the right to life'.²⁰

Starting with a discussion of section 41, which protects the right to recognition as a person before the law, access to court and an effective

14 As above.

15 41-42.

16 42-43.

17 43.

18 As above.

19 See eg M Chigawa 'The death penalty under the laws of Malawi and the law of human rights' (2009) 3 *Malawi Law Journal* 70 82.

20 95. See further 92-94.

remedy, the next 16 chapters of the book analyse the substantive provisions of the Bill of Rights. The book emphasises the central role of human dignity in the new constitutional order. The right to human dignity is the 'new blueprint of administrative justice' which informs all sectors.²¹ This marks a decisive break from the historical context where criminals were treated with contempt.²² A 'person must ... be treated with respect during investigations, trial, sentencing, appeal or parole procedures'.²³ This demands a reassessment of procedural rules and evidence which demean accused persons. More importantly, the forms of punishment must also be revised. Indeed, the right to human dignity can be used to challenge mandatory punishments. The automatic commutation of the death sentence to life imprisonment can also be challenged on this ground as it amounts to a mandatory penalty.²⁴ The objectification of prisoners sentenced to such punishments is an affront to human dignity. In fact, the objectives of punishment must be carefully applied to avoid violating human dignity by using prisoners 'solely as a means to an end in the administration of justice'.²⁵

Apart from being a justiciable right,²⁶ the right to human dignity is an interpretative aid which must infuse several if not all the rights.²⁷ The book also states that the role of *ubuntu* should not be sidelined in our understanding of human dignity, despite criticism that *ubuntu* as a concept is vague.²⁸ *Ubuntu* can 'deepen our understanding of the constitutionalised concept of human dignity and other human rights in general, by challenging dogmatic conceptions of the self, identity, justice, rights and responsibilities'.²⁹ Human dignity also acts as a 'residual right' when no other right is 'primarily implicated by the case at hand or when the right implicated by the facts is not expressly recognised'.³⁰ The courts should therefore not adopt a parsimonious use of human dignity as this will undermine the importance attached to it by the Constitution.³¹ The residual function of human dignity can be used as a tool to support socio-economic rights.³²

A major concern with the Constitution is the fact that it does not adequately provide for socio-economic rights. The Constitution does not provide for adequate housing, food, sufficient water, social security,

21 126.

22 As above.

23 127.

24 134.

25 127.

26 Sec 19(1) of the Constitution.

27 125.

28 124.

29 As above.

30 125 (emphasis in original).

31 125-126.

32 126.

an adequate standard of living and the highest attainable standard of health. Most of the rights have been stated as 'principles of national policy'.³³ The book deals with this apparent deficiency in great length. It states that, while some of the principles are mirrored in the Bill of Rights,³⁴ the courts will 'most likely imply socio-economic rights in the right to life'.³⁵ The case of *Gable Masangano v Attorney-General*,³⁶ where the High Court held that the right to human dignity requires the state to provide food, adequate clothing and medical services to prisoners, is cited in support of this view. In addition, the principles of national policy cannot be wholly non-justiciable, since the right to development enshrined in section 30 of the Constitution is provided for 'in such broad terms as to encompass all the economic, social and cultural rights that have not been expressly recognised'.³⁷

Another significant argument put forth in the book is in the area of administrative justice. For a long time, the courts have tended to rely on the Rules of the Supreme Court of England as the legal basis for judicial review, indeed, even post the Constitution.³⁸ Chirwa stresses that this practice is no longer justifiable, since section 43 of the Constitution provides for the right to administrative justice and hence creates a new constitutional basis for judicial review.³⁹ It creates new grounds for judicial review, namely, lawfulness, procedural fairness, the giving of reasons and justifiability. This replaces the narrower common law grounds of illegality, irrationality and the principles of natural justice. This provision thus relegates the significance of the common law in administrative law to that of an interpretative aid.⁴⁰ This 'revolutionary'⁴¹ impact of the Bill of Rights in respect of administrative law is yet to be grasped by the courts.⁴²

3 Conclusion

This brief review serves to show that Chirwa's book provides insight into the Malawian Bill of Rights and thus contributes significantly to constitutional law in Malawi. It has come at a time when Malawian courts are dealing with more human rights cases than before. Being the first of its kind in Malawian literature, it is geared to become an

33 See ch III of the Constitution.

34 259.

35 97.

36 Constitutional Case 15 of 1997.

37 259. The right to development is specifically discussed at 265-268.

38 459-460.

39 459-461.

40 460.

41 461.

42 458.

authority on Malawian constitutional law, more so as it explores new ideas on controversial aspects of the Bill of Rights and brings together a wide range of case law, including that which is yet to be reported in the official law reports. Its significance is amplified by the fact that it deals with practically each provision in the Bill of Rights, offering new discourse and provoking further discussion on the Bill of Rights in general. Therefore, the book is undoubtedly a necessity for scholars, lawyers, judges and other persons interested in constitutional law in general and human rights issues in particular. It has rightly been claimed that the relevance of the book extends to African constitutional law in general and is thus essential reading for a wider readership than Malawi.⁴³

⁴³ See comments on the book by Dennis Davis, Judge of the High Court of South Africa and Honorary Professor of Law at the University of Malawi and Professor Boyce Wanda, University of Fort Hare (both appear as blurbs at the back of Chirwa's book).

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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			24/08/11
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			11/07/11
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	05/10/11	
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		27/10/09	
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			17/06/11
Guinea-Bissau	04/12/85	27/06/89	19/06/08		19/06/08	23/12/11
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		04/10/11
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	01/12/11
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	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	53	45	46	26	32	15

* Additional declaration under article 34(6)
Ratifications after 31 July 2011 are indicated in bold

