

AFRICAN
HUMAN
RIGHTS
LAW
JOURNAL

Volume 13 No 2 2013

Pretoria University Law Press
PULP

2013

African Human Rights Law Journal Volume 13 No 2 2013

Published by:

Pretoria University Law Press (PULP)

The Pretoria University Law Press (PULP) is a publisher, based in Africa, launched and managed by the Centre for Human Rights and the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa that have been peer-reviewed. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa.

For more information on PULP, see: www.pulp.up.ac.za

To order, contact:

Centre for Human Rights
Faculty of Law
University of Pretoria
South Africa
0002
Tel: +27 12 420 4948
Fax: +27 12 362 5125
pulp@up.ac.za
www.pulp.up.ac.za

Printed and bound by:

Ultralitho
Johannesburg

Cover design:

Lizette Hermann, the Centre for Human Rights

ISSN: 1609-073X



The financial assistance of the European Union is gratefully acknowledged

CONTENTS

Editorial.....	iii
Articles	
The tensions between power sharing, justice and human rights in Africa's 'post-violence' societies: Rwanda, Kenya and the Democratic Republic of the Congo <i>by Sadiki Koko.....</i>	254
Combating sexual violence in schools in sub-Saharan Africa: Legal strategies under regional and international human rights law <i>by Christina Beninger</i>	281
The Pan-African Parliament and African Union human rights actors, civil society and national human rights institutions: The importance of collaboration <i>by Bonolo Ramadi Dinokopila.....</i>	302
Transitional justice in Kenya and the UN Special Rapporteur on Truth and Justice: Where to from here? <i>by Evelyne Asaala and Nicole Dicker.....</i>	324
Female genital mutilation as a human rights issue: Examining the effectiveness of the law against female genital mutilation in Tanzania <i>by Camilla Yusuf and Yonatan Fessha.....</i>	356
Identities and citizenship in Sudan: Governing constitutional principles <i>by Nasredeen Abdulbari.....</i>	383
The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective <i>by Nicholas Wasonga Orago.....</i>	415
The application of traditional justice mechanisms to the atrocities committed by child soldiers in Uganda: A practical restorative justice approach <i>by Hope Among.....</i>	441

Recent developments

- So sweet, so sour: A commentary on the Nigerian High Court's decision in *Georgina Ahamefule v Imperial Hospital & Another* relating to the rights of persons living with HIV
by Ebenezer Durojaye 464

Recent publications

- Ernest Ojukwu *et al Handbook on Prison Pre-trial Detainee Law Clinic*
by Stanley Ibe..... 481

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' after the last contribution in this *Journal*.

Also see <http://www1.chr.up.ac.za/index.php/ahrlj-contributors-guide.html> for detailed style guidelines.

2013 Subscriptions

Subscription enquiries and orders to:
Pretoria University Law Press (PULP)
E-mail: pulp@up.ac.za
Fax: +27 12 362 5125

South Africa:
ZAR575-00

Rest of the World:
ZAR745-00

This *Journal* is an open access free online journal and is available for searching and free download at: <http://www.ahrlj.up.ac.za>

Editorial

This is the second issue of the *African Human Rights Law Journal* since we have gone on-line. The editors trust that the new format has increased the readership of the *Journal* and, in particular, the international exposure of academic writing on aspects of human rights in Africa.

This issue appears as the African Union (AU) and Africans celebrate ten years of the Protocol to the African Charter on the Rights of Women (African Women's Protocol). One of the most progressive human rights instruments ever adopted by the AU, the African Women's Protocol was adopted on 11 July 2003, and entered into force on 25 November 2005. (It is sometimes referred to as the 'Maputo Protocol', referring to the city of its adoption.) By 30 November 2013, 36 of the 54 AU member states have become party to the Protocol. Most non-state parties are from North Africa. A country often considered a leading democracy in Africa – Botswana – is also yet to become a party.

On 9 and 10 December 2013 the Centre for Human Rights, University of Pretoria, hosted a conference on Article 14 of the African Women's Protocol, which deals with the sexual and reproductive rights of women. Peer-reviewed papers presented at this conference will be published in the *Journal's* first issue of 2014.

Twenty years have passed since the entry into force of South Africa's interim Constitution on 27 April 1994. The *Journal* aims to devote an issue in 2014 to the celebration of this 20-year milestone. We call, in particular, for papers from other parts of Africa and from Africanist and South Africanist legal scholars outside Africa to critically reflect on the impact of the South African Constitution - a constitution of which the process of drafting, content and the Constitutional Court it establishes is said to be the 'best' and 'most liberal' in the world and an exemplar in the Age of Rights (post-1989). Contributors are invited to reflect on the following:

- the influence of the South African constitution-making process in their countries;
- the influence of South African constitutionalism in political and popular discourse and the questions of sub-imperialism/South African exceptionalism raised by that;
- critiques of the Euro-American character of South African constitutionalism; and
- the influence of the South African constitutional jurisprudence.

On a different note, the editors of the *Journal* note that, following the expiry of the terms of four members of the African Commission on Human and Peoples' Rights, three commissioners (Yeung Kam John Yeung Sik Yuen, Soyata Maiga and Lucy Asuagbor) were re-elected, and a new commissioner was elected. The newly-elected commissioner is Mr Lawrence Murugu Mute, previously a member of the Kenya National Human Rights Commission. Mr Mute is the first person with a disability to be elected to the African Commission. We congratulate him, and express our best wishes for his term on the Commission. The editors also note and congratulate the new Bureau of the Commission consisting of the Chairperson (Kayitesi Zainabo Sylvie) and Vice-Chairperson (Mohamed Béchin Khalfallah).

As in the past, this issue of the *Journal* contains contributions with a general (African) scope, and with a country-specific focus. Two contributions deal with the topic of violence which, in its many manifestations, affects Africa and its people in multiple and profound ways. Koko touches on the challenges to democratic transition in some selected 'post-violence' African countries, while Beninger investigates the possibility of combating violence in sub-Saharan African schools by using legal strategies based on international human rights law. Dinokopila sheds some light on the Pan-African Parliament (PAP), focusing in particular on the need for, and lack of, collaboration between the PAP and the institutions of the African regional human rights system, civil society organisations and national human rights institutions. This contribution adds to the meagre academic discourse that has thus far emerged around the PAP.

The country-specific contributions explore aspects of human rights and democratisation in respect of four countries in East Africa and the Horn of Africa: Sudan, Kenya, Tanzania and Uganda. As in previous issues, matters related to issues of transitional justice and female genital mutilation (FGM) are placed under the spotlight. Against the background of the indictment of Kenyan President Kenyatta and Deputy-President Ruto before the International Criminal Court, Asaala and Dicker enquire as to the significance to Kenya of the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence. Yusuf and Fessha subject the Tanzanian law dealing with FGM (in particular, the Penal Code, as amended in 1998) to scrutiny, asking whether it has been effective in reducing the occurrence of FGM in that country.

Other contributions focus on identity and citizenship in Sudan (Abdulbari); the place of international law in the 2010 Kenyan Constitution (Orago); and the application of traditional justice to achieve restorative justice in respect of crimes committed by child soldiers (Among). In the 'Recent developments' section, Durojaye comments on a recent decision of the Nigerian High Court on the rights of persons living with HIV.

We acknowledge with appreciation and sincerely thank the independent reviewers who gave their time and talents to ensure the

consistent quality of this issue of the *Journal*: Prudence Acirokop; Jean Allain; John Osogo Ambani; Lorette Arendse; Japhet Biegon; Erika de Wet; Christiano D’Orsi; Linette du Toit; Solomon Ebobrah; Precious Eriamiatoe; Yonatan Fessha; Charles Fombad; Ilze Grobbelaar; Thomas Obel Hansen; Laurence Helfer; Faith Kabata; Anton Kok; Tom Mulisa; Rachel Murray; Salima Namusobya; Laurie Nathan; Dennis Ndambo; Charles Ngwena; Kate O’Regan; Ann Skelton; Karen Stefiszyn; Julie Stewart; Cori Wielenga; and Sisay Yeshanew.

The tensions between power sharing, justice and human rights in Africa's 'post-violence' societies: Rwanda, Kenya and the Democratic Republic of the Congo

*Sadiki Koko**

Researcher, Institute for Dispute Resolution in Africa (IDRA), College of Law, University of South Africa

Summary

In recent years, power sharing has been used in Africa as a strategy to ensure national unity and social cohesion in a context of extreme ethnic polarisation (Rwanda), as a peace-making tool designed to end a stale-mated civil war (Democratic Republic of the Congo), and a mechanism to overcome a situation of inter-community violence and socio-political instability created by the mishandling of an electoral process (Kenya). This article argues that power sharing as a result of a stale-mated civil war and a mishandled electoral process tends to undermine the pursuit of justice and the protection and promotion of human rights; and power sharing in the context of a civil war that ended in a military victory is usually unbalanced and promotes victors' justice.

1 Introduction

A characteristic of the wars that have plagued Africa since the end of the Cold War is the internal nature of these wars. Yet, this trend is not new in so far as Africa is concerned. In fact, interstate wars in post-colonial Africa have been rare, the three exceptions being the wars between Somalia and Ethiopia (1977-1978), between Uganda and

* BA (Hons) (Kinshasa), MCOM (Conflict Resolution and Peace Studies) (KwaZulu-Natal); sadikkf@unisa.ac.za. This article is a revised version of a paper presented at the International Expert Seminar on Law, Power Sharing and Human Rights held at the University of Antwerp, Belgium, 10-11 May 2012.

Tanzania (1978-1979), and the Ethiopian-Eritrean war (1998-2002).¹ The post-1990 context is dramatically different from that of the previous period as the end of the Cold War has diminished the incentives of the major powers to prevent or, at best, contain armed conflicts in the developing world, including in Africa. As a consequence, the number of civil wars in Africa quickly soared and, with it, attempts to resolve them. According to Annan:²

In 1996 alone, 14 of the 53 countries of Africa were afflicted by armed conflicts, accounting for more than half of all war-related deaths worldwide and resulting in more than 8 million refugees, returnees and displaced persons.

As elsewhere in the world,³

[t]he pattern of war terminations in sub-Saharan Africa has changed substantially over the past two decades ... The number of state-based conflicts terminating in victories has decreased sharply, while the number ending in negotiated settlements has risen.

Negotiated settlements to end civil wars usually involve power sharing, which has since emerged as the preferred mechanism to end civil war in Africa. However, as has become so evident, the use of power sharing has not been limited to civil war situations. In both Kenya and Zimbabwe, power sharing has been used as a tool to break the deadlock created by contested electoral processes. Still, in the case of post-1986 Uganda and post-1994 Rwanda, power sharing was used by the victorious National Resistance Movement (NRM) and Rwandan Patriotic Front (RPF) as a strategy aimed at preserving a degree of national unity and fostering some kind of social cohesion in the context of state collapse as a result of either prolonged periods of instability (Uganda) or widespread identity-related killings (Rwanda).

This article seeks to investigate the tensions between power sharing, on the one hand, and justice and human rights, on the other, in African societies emerging from protracted violence, specifically Rwanda, the Democratic Republic of the Congo (DRC) and Kenya. The central argument is that, although power sharing as a peace-making tool or a mechanism to foster national unity and social cohesion is likely to contain violence, it raises tensions in so far as the pursuit of justice and the protection and promotion of human rights are concerned. Furthermore, while power sharing as a result of a stalemated civil war and a mishandled electoral process tends to undermine significantly the pursuit of justice and the protection and promotion of human rights, power sharing in the context of a civil

1 O Furley & R May 'Introduction' in O Furley & R May (eds) *Ending Africa's wars: Progressing to peace* (2006) 3.

2 K Annan 'The causes of conflict and the promotion of durable peace and sustainable development in Africa. A report of the United Nations Secretary-General' (1998) <http://www.un.org> (accessed 13 February 2012).

3 A Mack & T Cooper 'A new peace in Africa?' (2008) 4 *Conflict Trends* 9.

war ended in a military victory is usually unbalanced and promotes victors' justice.

Before turning to the specific country discussions, it is necessary to clarify the concept of power sharing and its links to justice and human rights.

2 Power sharing: Clarifying the concept

Power sharing and the different mechanisms designed for its operationalisation, namely, 'government of national unity', 'inclusive government', 'coalition government', 'grand coalition', and so forth, have varied meanings. 'Two, actually separate, strands of research use the term "power sharing", often without recognising the differences in terms of democracy and conflict management.'⁴

The first strand, labelled the 'consociational democracy' school, is concerned with practical strategies of distributing power among socio-political stakeholders in divided societies as a means of guaranteeing adequate group representation and fostering democratic participation. It can be traced back to Lijphart's 1968 article on 'typologies of democratic systems'.⁵ Lijphart was concerned with addressing the exclusion of minorities brought about by a rigorous application of liberal democracy principles and rules in ethnically- and/or religiously-divided societies. He thus proposed the concept of a consociational democracy, a group-based form of democracy, with its four main components, namely,⁶

a grand coalition of the political leaders of all significant segments of the plural society ... the mutual veto or 'concurrent majority' rule, which serves as an additional protection of vital minority interests ... proportionality as the principal standard of political representation, civil service appointments, and allocation of public funds, and ... a high degree of autonomy of each segment to run its own internal affairs.

According to Jarstad,⁷

[w]here people vote along ethnic lines, political parties representing ethnic minorities have no chance of ever forming a majority, and shifting majorities in parliament are therefore unlikely.

Under such conditions, majority rule is not only undemocratic, but also dangerous; it spells majority dictatorship and civil strife rather than democracy.⁸

4 AK Jarstad 'Power sharing: Former enemies in joint government' in AK Jarstad & TD Sisk (eds) *From war to democracy: Dilemmas of peace building* (2008) 108.

5 A Lijphart 'Typologies of democratic systems' (1968) 1 *Comparative Political Studies* 3.

6 A Lijphart *Democracy in plural societies: A comparative exploration* (1977) 25.

7 Jarstad (n 4 above) 110.

8 A Lijphart *Patterns of democracy: Government forms and performance in thirty-six countries* (1999) 32-33.

As can be deduced from the arguments above, Lijphart's concept of power sharing applies to already-liberal democratic societies. At most, it could be extended to others that voluntarily and peacefully embarked on the process of crafting governance institutions consistent with the core values, principles and practice of liberal democracy. 'Although Lijphart takes power sharing and consociationalism as synonymous',⁹ his concept of consociationalism does not necessarily cater for inclusive governance mechanisms emerging as a result of internal wars ending in stalemates, especially if such inclusive governance mechanisms were not based on social identity specificities.

The second strand of research relating to power sharing is rooted in the field of conflict management. 'In this discourse the main function of power sharing is to end violence.'¹⁰ This practice of power sharing emerges in the context of civil (armed) conflict characterised by the inability of either party to defeat the other militarily. In such contexts, parties generally refer to a neutral and impartial third party to facilitate dialogue and possibly help them reach a middle ground as they commit to resolving their dispute through non-violent means. The rationale behind this practice of power sharing is the understanding that, '[b]y dividing power among rival groups during the transition, power sharing reduces the danger that one party will become dominant and threaten the security of others'.¹¹ This is relevant as 'exclusion, rather than greed alone, is the key factor behind most African conflicts'.¹² In this context, it becomes easy to understand why, with its emphasis on the inclusion of non-state stakeholders (rebel groups, political parties, civil society) in transitional mechanisms, power sharing is commended as 'a recipe for peaceful cohabitation'.¹³

This article focuses on the conflict management dimension of power sharing. It examines the practice of power sharing as a result of armed conflict or a contested electoral process. In contrast to the consociational approach that is both preventive and built on a long-term perspective, the conflict management dimension of power sharing is reactive and temporary. It seeks to address the problem of power illegitimacy through accommodative transitional mechanisms entrusted with conducting popular consultations and elections for institutional renewal in 'post-war' or 'post-violence' societies. Provisions of power sharing in this approach are generally derived from peace (or political) agreements signed by parties and, depending on a specific conflict situation, '[guarantee] the

9 R Lemarchand 'Consociationalism and power sharing in Africa: Rwanda, Burundi, and the Democratic Republic of the Congo' (2006) 422 *African Affairs* 106.

10 Jarstad (n 4 above) 108.

11 K Papagianni 'Power sharing, transitional governments and the role of mediation' (2008) *CHD Background Papers* 42.

12 Lemarchand (n 9 above) 2.

13 As above.

participation of representatives of significant groups in political decision making, and especially in the executive, but also in the legislature, judiciary, police and army'.¹⁴ They have 'a demonstrated ability to provide a sense of security to former combatants facing the immediate prospect of working together peacefully after a severe conflict such as a civil war'.¹⁵

However, it has been argued that the '[i]nclusion of warring parties in a power-sharing arrangement does not always end violence'.¹⁶ Furthermore, by excluding the general public from matters affecting national life directly, power sharing is not only elitist but also tends to undermine democratic processes. In countries such as Liberia and the DRC, where the distribution of power encompassed the economic sector (public corporations), power sharing turned out to be an impediment to the countries' economic recovery. Still, by providing rebels with a share of state power, the practice of power sharing¹⁷

creates an incentive structure would-be leaders can seize upon by embarking on the insurgent path as well. As a result, and irrespective of their effectiveness in any given case, power-sharing agreements contribute to the reproduction of insurgent violence.

In the cases of Liberia and Sierra Leone, former Liberian transitional President Amos Sawyer argues that power-sharing governments established to end civil war in these two countries were 'substantially, if not totally, controlled by armed groups whose leaders could hardly find in such arrangements sufficient incentive to blunt their greed and ambition'.¹⁸ This means that by bringing together diverse groups with diverging interests, power-sharing arrangements succeed with regard to inclusiveness without necessarily guaranteeing the effectiveness of these hybrid mechanisms.

Lastly, perhaps the most important discussion regarding power sharing as a peace-making tool relates to its relationship with justice and human rights, on the one hand, and peace and reconciliation, on the other. The protection and promotion of human rights are regarded as building blocks in the emergence of a justice-based society. Justice can be defined as a set of ideas, values and practices seeking to ensure that all individuals forming part of a society are treated in an equal, fair, deserving and righteous manner. Justice, according to Kofi Annan, is 'an ideal of accountability and fairness in

14 Papagianni (n 11 above) 42.

15 Hoddie & Hartzell cited by A Mehler 'Peace and power sharing in Africa: A not so obvious relationship' (2009) 432 *African Affairs* 108 454.

16 Jarstad (n 4 above) 117.

17 Mehler (n 15 above) 455.

18 A Sawyer cited by Mehler (n 15 above) 463.

the protection and vindication of rights and the prevention and punishment of wrongs'.¹⁹

Although the ideals of human rights and the promotion of justice seem to be shared by all human beings in different societies, practice does not always match theoretical pronouncements. In the case of societies emerging from civil war, the pursuit of justice and the protection and promotion of human rights raise the philosophical question of the feasibility of peace and reconciliation and the avoidance of relapse into violence. In its negative and positive conceptualisations, peace is regarded not only as the absence of direct violence, but also a societal condition that emphasises the resolution of inter-personal and inter-community conflicts through peaceful means. For its part, reconciliation is a complex process that aims at bringing former conflicting parties together in a mutual recognition of their misdeeds, their readiness to forgive one another and their commitment to transform their relationships. It entails 'finding a way to live alongside former enemies'.²⁰

So, the main question in societies emerging from protracted civil conflicts revolves around the extent to which justice and human rights can be pursued and protected without jeopardising the peace and reconciliation processes. As Järvinen puts it, '[o]ne of the greatest challenges to any post-conflict society is how to deal with past crimes ... and other human rights abuses'.²¹

In much of the literature relating to the question of justice in post-conflict societies, emphasis has been put on transitional justice as the most suitable perspective of justice that ought to be pursued. Transitional justice can be defined as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.²² Its mechanisms are both judicial (trials) and non-judicial (truth and reconciliation commissions, amnesties, parliamentary or other inquiries, lustrations, reparations). Due to this combination of judicial and non-judicial mechanisms of pursuing justice, transitional justice is viewed as less antithetical to peace and reconciliation in post-conflict societies than a justice perspective exclusively focused on retributive mechanisms. Yet, it ought to be admitted that the balance between judicial and non-judicial mechanisms of post-conflict transitional justice is deemed to vary from one society to another, taking into consideration – among other things – the specific nature of a conflict and the mode of its termination. The next three sections analyse the

19 K Annan *The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General* (2004) 4.

20 D Bloomfield 'Reconciliation: An introduction' in D Bloomfield *et al* (eds) *Reconciliation after violent conflict: A handbook* (2003) 12.

21 T Järvinen 'Human rights and post-conflict transitional justice in East Timor' (2004) *UPI Working Papers* 47 36.

22 Annan (n 19 above) 4.

dynamic relationship between power sharing, justice and human rights in Rwanda, the DRC and Kenya.

3 Power sharing after a civil war: The case of Rwanda

3.1 Background to the conflict

The power-sharing dispensation implemented in Rwanda between 1994 and 2003 emerged in the aftermath of the country's 1994 genocide during the civil war that started in October 1990. According to Lemarchand,²³

[a]lthough there is general agreement among Rwanda specialists that the roots of conflict lie in the transformation of ethnic identities that has accompanied the advent of colonial rule, the chain of events leading to the killings begins with the Hutu revolution of 1959-62 ...

Enduring consequences of the revolution were the abolition of the Rwandan Tutsi-based kingship and the establishment of a Hutu-controlled republic in 1962 at independence, followed by the exile of thousands of Tutsi Rwandans to neighbouring countries, including Uganda, the DRC and Tanzania and beyond.

After a three-decade long exile, emigrated Tutsi formed the backbone of the RPF that would launch an armed insurrection from Uganda against the predominantly Hutu government of President Juvénal Habyarimana. The justification for the war thus stemmed from the prolonged confiscation of political power and the attending socio-economic privileges by successive Hutu regimes coupled with the marginalisation of the Tutsi minority.

A lack of meaningful preparation, inadequate manpower and military assistance from Mobutu's Zaire (DRC) to the Habyarimana regime, among other things, ensured that the RPF's early offensive in 1990 was a failure. However, three years later, emboldened military power on the part of the RPF, coupled with persistent tensions within the Habyarimana regime, led to a military stalemate, providing the ground for the Arusha peace talks in Tanzania. While the parties prepared for the negotiation process through the Arusha talks, in March 1992 an interim coalition government was put in place to manage the country until the completion of the negotiations. It encompassed representatives of Habyarimana's party, *Mouvement National Révolutionnaire pour le Développement et la Démocratie* (MNRDD), as well as opposition parties, including the *Mouvement Démocratique Républicain* (MDR), the *Parti Social-Démocrate* (PSD) and the *Parti Libéral* (PL). In spite of the signing of the Arusha Peace Accord in 1993 and clear indications of the unravelling of the transitional government starting a month earlier with the dismissal of interim Prime Minister Dismas Nsengiyaremye, the implementation of

23 R Lemarchand *The dynamics of violence in central Africa* (2009) 81.

the agreement failed to materialise, mainly due to stalling tactics by parties on both sides as well as the difficulty of 'wringing resources out of a reluctant international community already fatigued by three years of post-Cold War nation-building experiments'.²⁴ According to Mamdani,²⁵

[t]he Arusha Agreement was signed stillborn, mainly because it failed to take account of the extremist CDR [*Coalition pour la Défense de la République*], either by including it or by containing it. Instead, the peace agreement wholly excluded the CDR, even from the transitional government. Strong in both the government and the army, the extremists faced a double loss: of the government to the opposition and of the army to the RPF.

The stage was thus set for the very unravelling of the Arusha Agreement itself. Only a trigger was needed for the cataclysm to befall the country. This came in the form of the assassination of President Juvénal Habyarimana on 6 April 1994.

3.2 The power-sharing mechanism

The power-sharing mechanism established in Rwanda in the aftermath of the country's genocide was peculiar in that it emerged in spite of one of the conflicting parties, namely the RPF, winning the war and assuming power militarily. The official explanation as put forward by the new RPF's rulers was that the spirit of the Arusha Peace Accord signed on 4 August 1993 by all Rwandan parties to the peace talks ought to be preserved. In fact, the RPF's emphasis on inclusiveness was so appealing that it earned the party praises, even from academic quarters, as illustrated by the long quote below:²⁶

The government that was inaugurated on July 19, 1994, was a genuine government of national unity. It was fully in the spirit of the Arusha Peace Agreements of August 1993 which the *génocidaire* regime had sought to destroy. The new president, Pasteur Bizimungu, was an RPF Hutu who had been a government civil servant in the 1980s. Of the twenty-one ministries, the lion's share (eight) had gone to the RPF; the rest were evenly distributed, with four ministries going to the ... MDR ... three to the ... PSD, three to the Liberals, two to independent personalities, and one to the small Christian Democratic Party. In ethnic terms fifteen of the new ministers were Hutu and only six were Tutsi. After such a catastrophe the new cabinet looked like a small miracle of reason in a sea of madness.

However, in spite of the official proclamations and the external appearances, the newly-designed power-sharing mechanism was an expected far cry from the original compromise contained in the Arusha Accord that provided for a more balanced distribution of

24 G Khadiagala 'UN peacekeeping in the Great Lakes region: The DRC, Rwanda and Burundi' in A Adebajo (ed) *From global apartheid to global village: Africa and the United Nations* (2009) 312.

25 M Mamdani *When victims become killers: Colonialism, nativism, and the genocide in Rwanda* (2001) 211.

26 G Prunier *Africa's world war: Congo, the Rwandan genocide, and the making of a continental catastrophe* (2009) 7.

power among all actors in both the civilian sphere and the security sector. Furthermore, more than the quote above reveals, in reality the new balance of power had significantly tilted in favour of the victorious RPF, following a declaration made on 17 July 1994 by the latter that²⁷

profoundly modified the nature of the political regime agreed in Arusha: It introduced a strong executive presidency, engineered the dominance of the RPF in the government and redrew the composition of the parliament. The new fundamental law was in effect a piece of subtle constitutional engineering, which attempted to hide the monolithic nature of political power.

The RPF's prominence within the new Rwandan inclusive transitional framework was not limited to legal aspects; it was equally consistent with the manner in which power was exercised. The latter was characterised by a 'closely controlled political environment'²⁸ in which the RPF reigned supreme and the very narrow power base which was made up of 'the army and the security services, the party officials ... and a fraction of the urban population ... in particular from Uganda, which returned to the country in the wake of RPF's victory'.²⁹

The gap between the RPF's professed adherence to the spirit and letter of the Arusha Accord and the reality of their exercise of power in the context of a morally-shattered society contributed to the erosion of the Rwandan post-genocide power-sharing project. According to Prunier, the 'collapse of the national unity government'³⁰ came in late August 1995 with the sacking of Prime Minister Faustin Twagiramungu alongside four ministers, namely, Seth Sendashonga (Interior), Immaculée Kayumba (Transport and Communications), Alphonse-Marie Nkubito (Justice) and Jean-Baptiste Nkuriyongoma (Information). Of course, as Prunier later notes, in spite of this radical shift, the government of national unity continued to exist for eight more years until the April 2003 presidential elections, albeit 'with diminishing credibility'.³¹

But the credibility of a regime is not solely derived from its legislative intents and style of exercising power. It also owes to the perception it instils among its citizens as well as its bilateral and multilateral partners. In this context, the commitment on the part of the RPF-controlled transitional government of Rwanda (1994-2003) to bringing a sense of normalcy and statehood to the country in the aftermath of a blatant failure on the part of the United Nations (UN), helped legitimise the transitional process in the eyes of the international community. Internally, memories of the horror brought

27 F Reyntjens *The great African war: Congo and regional geopolitics, 1996-2006* (2009) 24.

28 As above.

29 As above.

30 Prunier (n 26 above) 42.

31 Prunier 46.

about by the genocide and the feeling of guilt they instilled among the country's Hutu population in the context of an increasingly police state were key in not only quelling any militant fervour among Hutu politicians, but also in aligning the civil society movement and the general public to the imperatives of the new power wielders. This new reality had significant implications on all aspects of the evolution of post-genocide Rwanda, including in the areas of justice and human rights.

3.3 Implications for justice and human rights

The Rwandan crisis posed a daunting challenge to any idea of pursuing justice as well as protecting and promoting human rights in its aftermath. As a collective action, the genocide defied the very essence of the feasibility of 'modern' justice while raising the question of the possibility of a human rights-based regime amid inter-community polarisation. This was mainly due to the very scale of the violence. Firstly, the violence killed around one million people, the majority of whom were targeted simply because of their 'ethnic' identity. Secondly, although it was instigated by the elite and coordinated by middle-level party and government officials, the genocide was actually executed by ordinary community members.³²

Four processes are worth analysing in so far as the pursuit of justice and reconciliation as well as the protection and promotion of human rights in post-genocide Rwanda are concerned, namely, the International Criminal Tribunal for Rwanda (ICTR); the national judicial process; the *Gacaca* courts; as well as the National Unity and Reconciliation Commission (NURC). From the onset it ought to be noted that the design of these processes was largely influenced by the mode of conflict termination in the country. As Brown argues:³³

Given the RPF's victory on the battlefield and its virtual monopoly of political power, unchallenged in any significant way by local civil society and legitimated and reinforced by international donors, Rwanda's efforts in the area of justice and the rule of law closely reflect the ruling party's interests.

The ICTR was established by the UN Security Council through Resolution 955, adopted on 8 November 1994. Its purpose was to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other

32 Strauss estimates the total number of perpetrators of genocide in Rwanda to be 'between 175 000 and 210 000'. He defines a perpetrator as 'someone who participated in an attack that killed another person, even if the individual did not himself kill'. See S Strauss 'Rwanda's security trap and participation in the 1994 genocide' in JP Chrétien & R Banégas (eds) *The recurring Great Lakes crisis: Identity, violence and power* (2008) 174.

33 S Brown 'The rule of law and the hidden politics of transitional justice in Rwanda' in CL Sriram *et al* (eds) *Peacebuilding and the rule of law in Africa: Just peace?* (2011) 179.

such violations committed in the territory of neighbouring states, between 1 January and 31 December 1994.³⁴

Overall, the ICTR has been reasonably effective in holding key perpetrators accountable for their crimes. Its retributive functions can be said to have thus contributed to the rule of law, albeit on a very limited scale, since it is only mandated to try a relatively small set of perpetrators of the worst atrocities under the international law. [I]t also discredited Hutu ... extremists and obstructed their efforts to reorganize abroad, as well as dissuaded Tutsi reprisals. The tribunal ... could potentially also have a deterrent effect, albeit a modest one, against future crimes on a massive scale.³⁵

However, despite its achievements, the ICTR has received several criticisms. 'Located in Arusha, Tanzania, the tribunal has been both physically and psychologically distant from the people of Rwanda.'³⁶ Equally, the speed of trials has been alarmingly low.³⁷ In fact, between January 1997 and May 2012, the ICTR has only completed 62 trials, with 54 convictions and eight acquittals.³⁸ In the meantime, the cost of operations has nonetheless been very high. In its first decade (January 1997 to April 2007), the ICTR spent about US\$1 billion in 33 prosecutions, an average of about \$30 million per completed case.³⁹ Rapprochement between the tribunal and the Rwandan government have been fraught with tension, especially with regard to witnesses' protection. The ICTR views this protection as the responsibility of Rwandan authorities while the latter have repeatedly complained of not being kept informed of witnesses' movements between Rwanda and Arusha. Furthermore, '[t]he impact of the ICTR on reconciliation (an explicit objective of the tribunal) and broader peace building has been minimal'.⁴⁰ This perception is fuelled by the fact that not only all those prosecuted thus far before the tribunal have been Hutu, but also the Rwandan government has clearly opposed any attempt by the tribunal to investigate RPF's soldiers for their role in the conflict. Further criticisms have included 'a lack of qualified and competent personnel from the very beginning [and] allegations of mismanagement of funds and inefficiency'.⁴¹ Lastly, some have gone as far as questioning the very relevance of the ICTR. According to Rwandan President Paul Kagame, the ICTR was 'established by the UN against the wishes of the Rwandan

34 Brown (n 33 above) 183.

35 Brown (n 33 above) 183-184.

36 Brown (n 33 above) 183.

37 SF Musungu & L Louw 'The pursuit of justice in post-genocide Rwanda: An evaluation of the international and domestic legal responses' (2001) 2 *East African Journal of Peace and Human Rights* 203.

38 British Broadcasting Corporation 'Rwanda "Gacaca" genocide courts finish work' <http://www.bbc.co.uk/news/world-africa-18490348> (accessed 18 June 2012).

39 Brown (n 33 above) 183.

40 Brown (n 33 above) 184.

41 NA Jones *The courts of genocide: Politics and the rule of law in Rwanda and Arusha* (2010) 184.

government'.⁴² In this context, the international community's rush in establishing the ICTR is viewed as a face-saving scheme for its blatant failure to prevent or stop the genocide. According to Uvin and Mironko, the ICTR plays 'above all a symbolic role, a concrete demonstration of the international community's moral concern'.⁴³

At the national level, the Organic Law on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity, enacted on 1 September 1996, provides for Rwandan national courts to prosecute individuals accused of crimes of genocide or crimes against humanity committed between 1 October 1990 and 31 December 1994. But the problem with the national justice system was that it faced serious infrastructure and logistical problems due to mismanagement under the previous regimes as well as a major personnel shortage as a direct consequence of the genocide. The majority of its personnel were either killed or had chosen exile because of their involvement in the genocide and/or fear of reprisals.⁴⁴ Yet, the system was able to process as many as 10 000 cases between 1997 and 2004.⁴⁵

However, just like the international mechanism, the national justice system has also had its critics. It lacked capacity, especially in its early stages, while the quality of justice it serves has been described as 'poor due to inadequate defence representation, lack of resources, and especially political interference'.⁴⁶ A report released by Human Rights Watch in July 2008 found that the Rwandan judiciary was 'largely subordinate to the executive branch and even to elite unofficial actors who enjoy both economic and partisan political power'.⁴⁷ Furthermore, in spite of continuous efforts, the national judicial system remained, over a decade after the genocide, compounded by the large number of suspects awaiting trial and overcrowding in prisons this leads to. As of 2006, Brown writes:⁴⁸

A dozen years after the genocide, about 80,000 Rwandans were incarcerated without having been convicted of any crime, still awaiting a verdict or in most cases for their cases to be heard – a clear violation of their right to a speedy trial. Conditions in highly overcrowded Rwandan prisons constitute in themselves a human rights violation.

If anything, the virtual impossibility on the part of government to process all genocide suspects through the national judicial system led to the establishment of *Gacaca* courts in 2001 'to achieve truth,

42 P Kagame 'Preface' in P Clark & ZD Kaufman (eds) *After genocide: Transitional justice, post-conflict reconstruction and reconciliation in Rwanda and beyond* (2008) xxv.

43 Cited by Brown (n 33 above) 184.

44 Musungu & Louw (n 37 above) 205.

45 Brown (n 33 above) 185.

46 L Wardof cited by Brown (n 33 above) 184.

47 Cited by Brown (n 33 above) 184.

48 Brown (n 33 above) 185.

justice and reconciliation among Rwandans'.⁴⁹ After a trial period between 2002 and 2004, the *Gacaca* courts were in 2005 launched countrywide. According to Rwandan President Paul Kagame, *Gacaca* jurisdictions constitute a⁵⁰

revived and reformed traditional conflict resolution system that involves the population intimately in the prosecution of genocide suspects. All Rwandans own *Gacaca*, a system which allows those accused of lesser crimes to face their accusers, and permits in turn their communities to participate in deciding whether to acquit or punish those charged with genocide crimes.

However, although⁵¹

often portrayed as 'traditional' community-based justice, contemporary *gacaca* mechanisms differ fundamentally from the traditional form, which did not, for instance, habitually deal with serious cases such as murder, and emphasised collective restitution over punishment.

According to Waldorf, although⁵²

few of the 'customary' features remain ... [the *Gacaca* system constitutes] an official state institution intimately linked to the state apparatus of prosecutions and incarceration, and applying codified, rather than 'customary' law.

Hence the *Gacaca* courts are administered through the national Ministry of Justice.

There can be no doubt as to the contribution of *Gacaca* courts in clearing the backlog of genocide cases, delivering both retributive and restorative justice, facilitating processes of truth telling and truth hearing as well as initiating processes of healing, forgiveness and reconciliation and thus providing for positive peace in Rwanda.⁵³ Yet,⁵⁴

the lack of representation for the accused violates international standards and the provisions of the Charter of the African Union and the Rwanda Constitution, which [are] antithetical to the concept of the rule of law.

Lastly, the transitional government of Rwanda established the National Unity and Reconciliation Commission (NURC) in March 1999 in an effort to rebuild a sense of national cohesion among all Rwandans. The NURC was conceived to prepare and co-ordinate national programmes for the promotion of national unity and reconciliation, educate the population on issues relating to national unity and reconciliation, conduct research and disseminate publications relating to peace, national unity and reconciliation as well

49 British Broadcasting Corporation (n 38 above).

50 Kagame (n 42 above) xxv.

51 Brown (n 33 above) 185.

52 Cited by Brown (n 33 above) 185.

53 P Clark *The Gacaca courts, post-genocide justice and reconciliation in Rwanda: Justice without lawyers* (2010) 342.

54 Brown (n 33 above) 186.

as serve as a vanguard in denouncing and fighting acts, writings and utterances intended to promote discrimination, intolerance and xenophobia.⁵⁵ The NURC's activities have encompassed the organisation of meetings, workshops, conferences and national summits targeting different segments of the population and whose major themes specifically address civic education, conflict resolution and support to community initiatives aiming to achieve unity and reconciliation.⁵⁶

4 Power sharing to end a civil war: The case of the Democratic Republic of the Congo

4.1 Background to the conflict

The DRC conflict that led to the 2003-2006 power-sharing dispensation being analysed hereunder started on 2 August 1998. It followed on a decision by Laurent-Désiré Kabila to send back to their country Rwandan troops that had assisted him in toppling the Mobutu regime a year earlier. In response to Kabila's decision, the Rwandan government took upon itself to topple its former ally and install a new and friendly leader in its giant neighbour. As was the case in 1996, it subsequently helped set up a Congolese rebellion, the *Rassemblement Congolais pour la Démocratie* (RCD), to make the whole initiative look 'authentically Congolese',⁵⁷ before being joined by Uganda and Burundi.

However, the *blitzkrieg* Rwanda and the RCD had initially hoped for never materialised, mainly thanks to Kabila's ability to secure military assistance from Zimbabwe, Namibia and Angola, setting the stage for the five-year second Congo war. The war brought into Congolese territory seven national armies supporting either government (Angola, Chad, Namibia and Zimbabwe) or the rebellion (Burundi, Rwanda and Uganda). While Rwanda fully supported and controlled the mainstream RCD headquartered in the far-eastern city of Goma, Uganda sought to cast its own zone of influence by helping establish the *Mouvement de Libération du Congo* (MLC) before endorsing RCD's splintering groups, namely, the RCD-Kisangani/*Mouvement de Libération* (RCD-K/ML) and the RCD-National (RCD-N).

Still, the second war was also a confluence of foreign non-state armed groups pursuing a regime-change agenda against their respective countries. They included the *União para Independência Total de Angola* (UNITA); the *Alliance pour la Libération du Rwanda* (ALiR, later known as the *Forces Démocratiques pour la Libération du Rwanda*

55 See the NURC's official website on <http://www.nurc.gov.rw/index.php?id=10> (accessed 21 October 2012).

56 National Unity and Reconciliation Commission *Annual report of activities by the National Unity and Reconciliation Commission: February 1999-June 2000* (2000) 2.

57 Prunier (n 26 above) 396.

or FDLR); the *Conseil National pour la Défense de la Démocratie/Forces de Défense de la Démocratie* (CNDD-FDD/Burundi); and so on. Ultimately the war failed to produce a clear winner on the battlefield, setting the stage for the ceasefire and negotiation processes that would pave the way to the 2003–2006 power-sharing transitional mechanism analysed below.

4.2 The power-sharing dispensation

The 2003-2006 power-sharing dispensation in the DRC was derived from the Global and Inclusive Agreement on Transition in the Democratic Republic of Congo, signed on 17 December 2002 through the Inter-Congolese Dialogue (ICD) process. The ICD was held in South Africa between February-April and September-December 2002. It was aimed at providing an opportunity for Congolese socio-political stakeholders to resolve the intractable crisis triggered by the second Congo war. The all-inclusive transitional mechanism it produced was inaugurated on 30 June 2003 when incumbent Joseph Kabila was sworn in as the transitional head of state. It was based upon a very sophisticated power-sharing equation that took into account not only the warring parties (the former government, RCD-Goma, RCD-K/ML, RCD-N, MLC and *Mai-Mai*), but also representatives of civil society and political parties. It provided for a president seconded by four vice-presidents. National government positions were proportionally shared among the parties. The same principle applied to the two houses of the transitional parliament, namely, the National Assembly and the Senate. Provision was made equally for power sharing at the provincial level, in the diplomatic corps as well as in state-owned enterprises. Power sharing was even extended to 'democracy supporting institutions', namely, the Independent Electoral Commission, the National Media Authority, the Truth and Reconciliation Commission, the National Human Rights Commission and the Commission on Ethics and Fight against Corruption. The security sector (national army and national police) was exclusively earmarked for warring parties. The transition was designed to last between two and three years, culminating in the organisation of free and fair elections throughout the country.

Despite some failures, the core provisions of the transitional mechanism as expressed in the Global and Inclusive Agreement were implemented. On account of this mechanism, the DRC was able not only to regain its territorial integrity after five years of a *de facto* balkanisation, but also, and more importantly, to hold the first free and fair elections in 41 years. Yet, these encouraging end results should not obstruct the disappointing shortcomings that represented the permanent features of the transitional dispensation. First, the transitional dispensation was fraught with exorbitant operational costs due to the large number of personnel it brought about at all levels. The national executive was made up of 60 ministers and deputy ministers, beside the president and his four deputies. The National

Assembly had 500 members and the Senate had 120, all unelected. Second, the transitional dispensation was in every regard ineffective and lacked internal cohesion. Throughout the transition, all inclusive institutions remained fractious. Ultimately, the transitional dispensation only held because of the persistence and commitment of the UN peace-keeping mission (MONUC)⁵⁸ deployed in the country, as well as other key international stakeholders. As Reyntjens rightly observed, '[w]hile MONUC has been rightly criticised for its lack of robustness, its sheer presence ... has been crucial in preserving the transition'.⁵⁹ However, he remarked that '[t]he externally-induced nature of the transition [was] also its weakness'. In fact, he argues:⁶⁰

During the second war, regional powers, South Africa in particular, imposed a settlement and, together with international players, put the DRC under a *de facto* trusteeship and imposed elections on a reluctant domestic political class.

4.3 Implications for justice and human rights

With a death toll of between 3,5 and 5 million people, the second Congo war has been rightly dubbed the bloodiest armed conflict in the world since World War II.⁶¹ The conflict equally displaced millions more, both within and beyond Congo's national borders. Narratives of the war are replete with accounts of alleged mass atrocities, war crimes, crimes against humanity and other large-scale human rights violations by warring parties on both sides of the conflict spectrum. In this context, it was expected that the end of the civil war would provide an opportunity for perpetrators of the most grievous human rights violations to be prosecuted and some form of justice to be dispensed to their victims.

However, from the onset the transitional mechanism deployed in the DRC following on the provisions of the Global and Inclusive Agreement did not emphasise the pursuit of justice and the promotion of human rights. The fact that the war ended through a negotiated settlement with representatives of all warring parties assuming strategic positions in all spheres of power brought about the paradigmatic dichotomy of peace versus justice. If anything, it was unrealistic to expect a commitment to justice from the very people who stood to be prosecuted in the first place. Instead, consistent with the Global and Inclusive Agreement, President Kabila enacted Decree-Law 03-001 of 15 April 2003, granting amnesty for all minor infringements to rules of war as well as political and opinion crimes

58 *Mission de l'Organisation des Nations Unies en République Démocratique du Congo* or United Nations Mission in the Democratic Republic of Congo.

59 Reyntjens (n 27 above) 263.

60 Reyntjens 7.

61 E Rogier 'Democratic Republic of Congo: Problems of the peacekeeping process' in O Furley & R May (eds) *Ending Africa's wars: Progressing to peace* (2006) 99.

committed between 2 August 1998 and 4 April 2003.⁶² Although the amnesty law clearly avoided covering war crimes, genocide and crimes against humanity, there was no guarantee that the country's dilapidated justice infrastructure combined with the lack of commitment to justice on the part of all transitional actors would help in making any significant difference.

Cognisant of the difficulty of pursuing retributive justice within the context of power sharing, parties to the Global and Inclusive Agreement called for a South African-style Truth and Reconciliation Commission (TRC). According to Law 04/018 of 30 July 2004 establishing the TRC, the latter was conceived as a dialogue framework, as opposed to a judicial process, designed to unite the Congolese people. The proposed TRC process emphasised disclosure, forgiveness and reparation. Like other transitional institutions, the TRC's composition was designed to be inclusive of all parties to the Global and Inclusive Agreement.⁶³ In spite of the enactment of Law 04/018 followed by the actual appointment of all 21 members of the Commission, the latter was never operational due to a lack of funds and, more importantly, the lack of commitment from all actors. The same fate befell the National Human Rights Commission, established by Law 04/019 of 30 July 2004.⁶⁴ Its main objective consisted of protecting and promoting human rights. Both commissions failed to live up to their noble missions. As transitional institutions, they were formally phased out on 6 December 2006 when Joseph Kabila was sworn in as the first president of the Third Republic in the DRC.

Besides its unwillingness to pursue effective justice, whether retributive or restorative, the transitional dispensation in the DRC was unable to protect and promote people's human rights. The signing of the Global and Inclusive Agreement as well as the subsequent deployment of a power-sharing mechanism did not necessarily translate into absolute stabilisation of the DRC. Continued low-intensity violence, especially in the eastern parts of the country – combined with the disappointing incoherence and ineffectiveness characteristic of all transitional institutions including in the security sector – meant that, for many Congolese, the signing of the Global and Inclusive Agreement did not bring much significant improvement in so far as their human rights were concerned. Even more disturbing was the fact that transitional leaders were not only unwilling to

62 See 'Présidence de la République, Décret-Loi no 03-001 du 15 avril 2003 portant amnistie pour faits de guerre, infractions politiques et d'opinion' *Journal Officiel* Numéro Spécial 17 April 2003.

63 See 'Présidence de la République, Loi no 04/018 du 30 juillet 2004 portant organisation, attributions et fonctionnement de la Commission Vérité et Réconciliation' *Journal Officiel* Numéro Spécial 1 August 2004.

64 See 'Présidence de la République, Loi no 04/019 du 30 juillet 2004 portant organisation, attributions et fonctionnement de l'Observatoire National des droits de l'Homme' *Journal Officiel* Numéro Spécial 1 August 2004.

commit to protecting and promoting human rights, but were also responsible for violating them.

The ineffectiveness displayed by the transitional government in pursuing justice and protecting and promoting human rights paved the way to the International Criminal Court (ICC) to intervene in pursuit of Congolese war crimes suspects. With government co-operation, the ICC was able to arrest Thomas Lubanga and Mathieu Ngudjolo Chui in connection with the 2002-2003 inter-community violence in the Ituri district in North Eastern DRC. However, it ought to be mentioned that the inter-community violence in Ituri did not form part of the conflict network dealt with by the Global and Inclusive Agreement. Furthermore, government has refused to execute an ICC arrest warrant against Bosco Ntaganda, former commander of the *Congrès National pour la Défense du Peuple* (CNDP), arguing that this would jeopardise the peace process agreed upon in 2009 between government and the CNDP. However, three years after the signing of the Goma Peace Agreement between government and the CNDP, insecurity still persists in eastern DRC, as symbolised by the emergence of the Movement of 23 March (M23) in April 2012. The M23 is a new rebel group made up of former CNDP combatants and civilian officials. It officially claims to have been established as a result of the Congolese government's stalling on the effective implementation of the 2009 Goma Agreement. However, as subsequent developments have demonstrated, this official line of explanation masks the real motives behind the establishment of this rebel movement which ought, instead, to be found in President Kabila's 'attempt ... to rotate ex-CNDP soldiers out of the Kivus in a bid to [both] smash the ex-CNDP parallel chains of command' within the North Kivu military region and 'to break up the "mafia" controlling the east of the country'.⁶⁵

5 Power sharing after a contested electoral process: The case of Kenya

5.1 Background to the post-electoral violence

It would be mistaken to envisage the 2007-2008 violence that engulfed Kenya following the controversial December 2007 elections as a mere case of post-electoral violence, especially if one takes into consideration the variations in patterns of violence observed in different locations of the country. Although it is true that the violence was triggered by the disputed result of the presidential election, it ought to be acknowledged that the violence was equally an expression of the major contradictions besetting Kenyan society and

⁶⁵ P Jones 'Rwanda's connection to the M23 rebels must not be ignored' <http://www.opendemocracy.net/opensecurity/> (accessed 31 May 2013).

which have their root causes in the country's colonial legacy compounded by its peculiar post-colonial political experiences.

Kenya was a British protectorate and later became a colony between 1895 and 1963. The main pattern of British colonisation in Kenya was its policy of establishing white settler communities around the Rift Valley region, the homeland of, amongst others, the Kalenjin. The formation of settler communities thus formed part of the colonial urbanisation and socio-economic development drive. Hence, it targeted the country's most fertile lands and most development-prone region. The formation of settler communities was directly linked to large population movements, both as a deliberate colonial policy for the provision of cheap labour and as an ongoing private initiative as people sought to take advantage of opportunities brought about by urbanisation and the development of white settlements. The white settlement policy and its attending large-scale population movements contributed to disrupting patterns of land ownership in a society where land right was primarily a collective or communal right. This development triggered a two-pronged response on the part of those who lost their ancestral land. On the one hand, it fed anti-colonial sentiment, a precursor to nationalist awakening for the end of colonisation. On the other hand, it fed inter-ethnic resentment between 'migrant' ethnic groups (Kikuyu) and Rift Valley's 'native' communities (Kalenjin).

In this context, independence was regarded as an ideal moment to redress colonisation-orchestrated injustices, especially with regard to the land question. However, '[l]and policy in "independent" Kenya has faithfully perpetuated the colonial land tenure system'.⁶⁶ As far as the Rift Valley region is concerned, this has through the years translated into feelings of land dispossession among local groups (including the Kalenjin) in the hands of the 'economically and politically dominant Kikuyus, who redistributed government-held land to their own advantage after independence'.⁶⁷ But since land right was collective in its essence, protests for land restitution were deemed to be collective. In the process, they fuel inter-community tensions between 'original owners' and 'actual occupants'. Nevertheless, both the Kenyatta regime (1963-1978) and the Moi regime (1978-1992) prior to the introduction of multiparty politics were able to contain inter-community tensions borne out of colonial and post-colonial uneven development policies and access to land.

However, the introduction of multiparty politics in 1992 removed the lid that had helped contain inter-community conflicts thus far. This became even more problematic when it clearly appeared that 'government was [directly] involved in provoking ... ethnic violence for political purposes and [had] taken no adequate steps to prevent it

66 Anonymous *Independent Kenya* (1982) 106.

67 K Moghalu 'Electoral conflicts in Africa: Is power-sharing the new democracy?' (2008) 4 *Conflict Trends* 33.

from spiralling out of control'.⁶⁸ According to Abdullahi, both the 1992 and 1997 elections were preceded by large-scale violence as a deliberate strategy of the Kenyan government under the ruling Kenya African National Union (KANU) to displace populations belonging to the Luo, Kikuyu and Kamba communities – considered hostile to the ruling party – and thus render them incapable of exercising their voting rights. The 2002 elections were less violent; yet they claimed between 116 and 209 lives.⁶⁹

The December 2007 elections in Kenya thus took place against the backdrop of a legacy of election-related inter-community violence fuelled by the state. More importantly, they took place within a context of entrenched impunity in so far as election-related violence was concerned. In fact,⁷⁰

[t]he Akiwumi Judicial Commission of Inquiry into Ethnic Violence, set up in 1998, had identified key politicians, civil servants and business people who may have been involved in the violence in certain parts of the country between 1991 and 1997. [Yet,] [n]o action was taken on the recommendations of the report.

Although the pre-election period was filled with tensions fed by ethnocentric propaganda by some media houses⁷¹ and by inflammatory remarks by certain politicians, the bulk of the violence was only unleashed after the Chairperson of the Electoral Commission of Kenya (ECK) announced that incumbent President Mwai Kibaki had won the presidential elections. Overall, violence took at least three patterns. First, there were clashes between state security forces and supporters of the Orange Democratic Movement (ODM) whose leader and presidential candidate, Raila Odinga, claimed to have won the elections. Second, there were direct violent confrontations between supporters of the ODM and Kibaki's party, the Party for National Unity (PNU). Third, there were widespread ethnic-based reprisals targeting ordinary people – mainly but not exclusively in informal settlements and impoverished locations. According to Njogu,⁷²

[t]he narratives show ... that whereas some of the post-election violence was spontaneous, much of it was organised and planned by political leaders and systematically targeted members of specific communities.

68 K Njogu (ed) *Healing the wound: Personal narratives about the 2007 post-election violence in Kenya* (2009) 7.

69 AM Abdullahi 'State creation of internally displaced persons in Kenya, 1991-98: The process and political dimensions' (2004) 1 *East African Journal of Peace and Human Rights* 10 1.

70 Njogu (n 68 above) 2-3.

71 A survey conducted in 2009 found that 'certain sections of Kenyan media were unethical and unprofessional before, during and after the elections and they may have contributed to ethnic polarization and accentuated violence'; Njogu (n 68 above) 9.

72 Njogu (n 68 above) 2.

This latter trend was the most vicious of all as it could hardly be contained, let alone prevented successfully by security forces. It was responsible for the large majority of deaths and displacements. It flowed from long-held inter-community resentments having their origins in colonial era policies but fuelled by ethnocentric policies implemented by post-colonial administrations.

In nearly two months, the violence had caused about 1 220 deaths as well as the displacement of over 300 000 people within the country and of scores of others to neighbouring countries.⁷³ Eventually the crisis was resolved through the signing of the National Dialogue and Reconciliation Accord by Mwai Kibaki and Raila Odinga on 28 February 2008 under the auspices of the African Union (AU). The Accord provided for an equitable sharing of government positions between the PNU and the ODM for the entire office term or until such time when the next general elections are held in the country.

5.2 Power-sharing dispensation

As argued above, the power-sharing mechanism for Kenya was provided for in the National Dialogue and Reconciliation Accord signed on 28 February 2008. It focused exclusively on the national government. This was mainly because neither the PNU nor the ODM disputed the results of the parliamentary elections as announced by the ECK. In fact, according to the ECK, the ODM had won 99 out of 210 parliamentary seats against 43 seats for the PNU. Yet, in spite of the ODM's overwhelming parliamentary victory, its presidential candidate, Raila Odinga had, according to the ECK, lost the presidential vote with 43 per cent to Kibaki's 47 per cent. If anything, the vast discrepancy between the parliamentary and presidential results – with both elections held the same day – contributed to strengthening the ODM's case that the presidential elections were indeed rigged, a view supported by several international election observers.

The National Dialogue and Reconciliation Accord was thus based on a power-sharing principle. It called upon the PNU and the ODM to form a government of national unity, the composition of which should reflect the parliamentary strength of the coalition members. The Accord also created the post of Prime Minister to be awarded to the leader of the largest party of the governing coalition as represented in the National Assembly. Concomitantly, there would be two Deputy Prime Ministers, one from each of the coalition partners.⁷⁴

Furthermore, the contestants signed several side agreements to establish separate commissions: a Constitutional Review Commission [CRC]; a Commission of Inquiry on Post-Election Violence (CIPEV) ... a Truth, Justice

73 G Maina 'Mediating to governments of national unity – A conflict transformation approach' (2011) 3 *ACCORD Policy and Practice Brief* 2; Njogu (n 68 above) 2.

74 Mehler (n 15 above) 469.

and Reconciliation Commission (TJRC); and an Independent Review Commission (IREC) to examine long-standing sources of grievance.

On 18 March 2008, the newly-elected Kenyan Parliament unanimously passed⁷⁵

the National Accord and Reconciliation Bill (which outlines the concept of power sharing) and a Constitutional Amendment Bill (which creates the post of the Prime Minister and of the two deputy prime ministers).

Although provisions regarding the appointment of the new Prime Minister and his two deputies were fully implemented, the outlook of the new cabinet failed to reflect the balance of forces within parliament. Instead, the 42-member cabinet was constituted on an equal basis between the PNU and the ODM. Furthermore, the Constitutional Amendment Bill 'fell short of specifying the functions of the Prime Minister'.⁷⁶

The signing of the 2008 Accord was instrumental in quelling the widespread post-electoral violence in Kenya. The subsequent Government of National Unity (GNU) has since provided an opportunity for co-operation between the PNU and the ODM. This was evident during the constitutional reform and referendum processes in 2009 to 2010. Both parties backed the new Constitution in contrast to the 2005 referendum when the ODM succeeded in mobilising the majority of Kenyan voters against a PNU-sponsored Constitution.

However, by its nature and the process through which it was arrived at, the GNU as designed in Kenya was 'a deterrent to democracy and a mockery of the choice made by voters'.⁷⁷ It represented a major setback to the Kenyan democratic consolidation process that had shown signs of maturation during the 2002 elections. The establishment of the GNU did not take into account the concerns of ordinary Kenyans, confirming thus the assumption of sceptic observers that Kenyan politics remained elitist in spite of the choreographed public consultations. Power sharing in Kenya represented a threat for good governance as it denied the country an opposition that could keep government in check. No wonder it has been blamed of being 'ineffective due to continued political tension, violence and corruption'.⁷⁸

5.3 Implications for justice and human rights

There is no doubt that the immediate cause of the 2007-2008 post-electoral violence in Kenya was the inability of the ECK to withstand political pressure emanating from the ruling PNU and to perform its role impartially. It is equally true that the post-electoral crisis fed into

75 As above.

76 As above.

77 Maina (n 73 above) 5.

78 Maina (n 73 above) 5.

both Kenya's legacy of election-related violence as well as the country's history of unequal access to socio-economic opportunities and key resources, including land, among communities, prompting inter-ethnic resentments and tensions. However, perhaps the most compelling reason for the mayhem was the general lack of trust by the Kenyan public in the country's judiciary. In fact, in spite of the electoral law providing for judicial courts as the only mechanism to challenge election results, the ODM deliberately decided not to follow such a route. According to Njogu, the Kenyan judiciary⁷⁹

has over the years been perceived as not a true arbiter in electoral grievances. Attempts by presidential candidates in 1992 and 1997 to challenge the election of Daniel Arap Moi were not fruitful and over the years Kenyans have lost confidence in the judiciary, viewing it as corrupt and easy to manipulate by the state.

In this context, it is therefore not surprising that Kenyans opted to add the 'justice' dimension to their version of a truth and reconciliation commission. Still, the pursuit of justice in post-2007 Kenya has proven a difficult task. The Commission of Inquiry related to Post-Election Violence (CIPEV) published its report on 15 October 2008. Although it provided detailed accounts of violence and divided responsibilities between the ODM and the former PNU government, the report fell short of naming individuals that were behind the violence. The report has been qualified in human rights advocacy circles as 'a half-baked job that attempts to cover up offences committed by people who deserve no such protection'.⁸⁰ Njogu has observed the same trend in so far as the report published by the Kenya National Commission on Human Rights (KNCHR) in August 2009 is concerned. He laments that the report failed⁸¹

to capture the chronology of events leading to the post-election violence and ... detail specific violence-related activities of national and local leaders as well as retired military and police officers during the carnage.

However, it ought to be admitted that both the report by the CIPEV (also known as the Waki Report) and the report by the KNCHR provided a list of alleged perpetrators of the violence. The Waki report actually handed to Kofi Annan a sealed envelope containing the names of those believed to have played the largest role in the post-election violence. The envelope (containing the names of six key suspects) was later passed by Kofi Annan to the prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo.

The Kenyan national unity government has not been able to institute judicial actions against those suspected of being behind the 2007-2008 post-election violence in the country. Nor has it provided the necessary leadership for the Truth, Justice and Reconciliation

79 Njogu (n 68 above) 3-4.

80 D Branch *Kenya: Between hope and despair, 1963-2011* (2011) 280.

81 Njogu (n 68 above) 2.

Commission to play its role effectively. By June 2012, only one individual, 24 year-old Peter Ruto, has been convicted by a Kenyan court for crimes committed during the 2007-2008 post-electoral violence. Ruto received a life in prison sentence at Nakuru High Court on 12 June 2012 for killing his 67 year-old neighbour, Kamau Thiong'o, in January 2008.⁸² This state of affairs is a clear indication of the lack of commitment to justice on the side of Kenyan parties to the power-sharing government. As Branch observed,⁸³

[b]oth the perpetrators and the organisers had escaped justice. Efforts to establish a tribunal to try the main organisers of the violence failed to get through parliament, not least because many MPs feared prosecution.

The reluctance on the part of Kenyan officials to set up a national prosecution mechanism for the post-election violence led to the International Criminal Court becoming involved in the process. The ICC has since singled out four individuals (from the original list of six), namely, Deputy Prime Minister and Finance Minister Uhuru Kenyatta, former Public Service chief Francis Muthaura, Kass FM radio presenter, Joshua Arap Sang, as well as Eldoret North Member of Parliament (MP), William Ruto, as suspects in the case. Although it remains unclear if these individuals will ever stand trial before the ICC, many Kenyans initially welcomed the ICC's move that they viewed as susceptible of 'detering politicians from hate speech and ensuring that they remain accountable for their actions'.⁸⁴

In so far as human rights in post-2007 Kenya are concerned, it is worth mentioning the case of people who lost their lives and those who were displaced as a result of the violence. Just as the government of national unity has failed to ensure justice for the dead and their families, so has it betrayed the vast majority of the internally-displaced people (IDPs). Until the official end of term of office of the coalition government as symbolised by the March 2013 elections, IDPs were still awaiting relocation to promised settlements and compensation for their material losses during the crisis. Perhaps the most encouraging aspect of the March 2013 elections, as far as the victims of the 2007-2008 electoral process are concerned, has been their relative peacefulness. They did not bring about fresh cases of internal

82 W Macharia 'Court convicts Kenyan over poll chaos' <http://www.nation.co.ke/News/politics/> (accessed 27 June 2012).

83 Branch (n 80 above) 283.

84 Maina (n 73 above) 6. However, it ought to be noted that the initially mostly favourable Kenyan public opinion toward the ICC prosecution seems to have been reversed by the March 2013 general elections, as reflected by the triumph of the Jubilee Coalition (represented by Uhuru Kenyatta and William Ruto), which campaigned against the ICC.

displacement, providing hope that existing victims may still have their concerns addressed by the new government.

6 Lessons learned and the way forward

As much as the nature of wars has changed from interstate confrontations fought by professional armies (generally along the borderlines) to internal wars with high levels of civilian participation and victimisation, so have mediated or negotiated processes emerged as the most common mechanism to end civil wars. In this new environment, power sharing has become a key tool in helping war-torn societies to transit from violence to peace and stability. The three cases analysed in this article provide the lessons below, highlighting nuances in patterns of power sharing in post-violence African societies and their interaction with justice and human rights.

- *Power sharing has not solely been used as a peace-making tool, nor has it only apply to societies emerging from civil war.*

In post-genocide Rwanda, power sharing was *voluntarily* chosen as a governance model by the victorious RPF as a proof of its unwavering commitment to building a new Rwandan society entrenched in the principles of inclusiveness, social cohesion and national unity. In post-2007 Kenya, power sharing emerged as a necessity suggested to the two main protagonists, namely, the ODM and the PNU, by international third parties as a mechanism to address the impasse brought about by the mishandling of the presidential elections by the country's electoral commission. The Rwandan and Kenyan cases did not thus fall into the 'classical' model of power sharing as applied in the DRC where it served as a peace-making tool designed to end the five-year second Congo war. The main objective of the DRC's power-sharing model was to provide the different stakeholders with a stake in the transitional dispensation so as to win their support for the peace and stabilisation processes that included the profound renewal of the country's ruling class through free and fair elections.

- *In spite of their shared perspective with regard to distributing power among the main socio-political stakeholders, power-sharing mechanisms implemented in post-genocide Rwanda, post-election Kenya and 'post-war' DRC differed very significantly in terms of their content and scope, a direct consequence of the different contexts in which they were applied.*

In Rwanda, the fact that the RPF had won the war and the defeated Habyarimana bureaucracy and security forces had almost entirely relocated outside the country not only imposed the RPF as the sole agenda setter in terms of the power-sharing mechanism, but also confined the latter to the national executive and legislature. In Kenya, power was only shared in the national executive because the post-electoral dispute only focused on the result of the presidential elections. However, in the DRC, power sharing was all-encompassing,

extending to spheres and sectors as different as the national and provincial executives, the national legislature, the diplomatic corps, the public enterprises, the national army and the national police as well as transitional institutions designed to support the democratic process, including the electoral commission.

- *Although acknowledged as a precious peace-making tool and a mechanism to foster inclusiveness, social cohesion and national unity, power sharing does not always perform well in the areas of justice and human rights in 'post-violence' societies.*

In post-genocide Rwanda, the military victory of the RPF on the battlefield provided an ample opportunity to the country's new leadership for the pursuit of justice and the punishment of human rights violations perpetrated during the war and the genocide. Seizing this opportunity, the international community established the ICTR while Rwandan authorities used the national judicial system, the *Gacaca* courts and the NURC, to prosecute human rights violations committed during the country's crisis and/or work toward national reconciliation. The ICTR, the national judicial system, as well as the *Gacaca* courts have all ensured that justice has been served for the victims of the genocide and that the perpetrators of human rights violations during Rwanda's darkest episode have been punished. However, it ought to be acknowledged that this only became possible because of the method of war termination in Rwanda (ending in military victory). Furthermore, although impunity has been avoided in Rwanda, the justice that has been served by the international and the national processes has been criticised as being one-sided, and as a victors' justice applying only to the losers.

In the DRC and Kenya, power sharing contributed to turning former conflicting parties and alleged perpetrators of human rights violations into key actors in the search for political stability and peace. As such, although it brought about relative peace and stability, power sharing quickly became a major stumbling block to the pursuit of retributive justice. Still, the same actors have equally displayed a disturbing lack of interest in pursuing restorative justice by undermining the reconciliation commissions and processes. In both countries, power sharing has turned into a shield designed to protect the elite from prosecution for their misdeeds. It has led to systemic impunity, raising the prospects for the direct and enhanced involvement of the ICC as a justice mechanism of last resort for the Congolese and Kenyan victims of human rights abuses at the hands of their self-styled rulers.

In conclusion, the cases of Rwanda, Kenya and the DRC analysed in this article thus highlight the need for

- further academic research into the concept of 'post-violence' power sharing in order to distinguish among different strands and their respective implications for justice and human rights;
- resolving the peace versus justice dilemma in post-violence societies through the formulation of a justice and human rights

- model compatible with power-sharing mechanisms, especially in societies where the latter imposed themselves as the only possible peace-making tools; and
- learning from the Rwandan experience that power sharing can be adhered to voluntarily as a mechanism to foster inclusiveness, social cohesion and national unity – especially in societies divided along identity lines and emerging from protracted violence – while at the same time pursuing justice for the victims and punishing the perpetrators of past human rights violations.

Combating sexual violence in schools in sub-Saharan Africa: Legal strategies under regional and international human rights law

*Christina Beninger**

Legal Policy Advisor, Ministry of Social Services, Community Development and Gender Affairs, Government of Dominica

Summary

Although schools are generally regarded as a 'safe haven' for children, the reality for many girls is that schools can be a place of sexual discrimination, harassment and violence, perpetrated by fellow male students and teachers alike. The widespread problem of sexual and gender-based violence, particularly sexual violence, in schools has been well-documented in a range of studies and reports in sub-Saharan Africa. Sexual and gender-based violence in schools not only violates girls' fundamental rights to dignity and equality, and their rights to be free from violence, but it also undermines their rights to education, particularly when, as is often the case, states fail to take measures to protect girls. Although there is a growing body of empirical research documenting the nature and extent of this problem, particularly in various sub-Saharan African countries, how regional and international human rights law applies to protect girls in this situation appears to have received limited consideration. This article attempts to fill this gap in the literature, by providing an analysis of the problem of sexual and gender-based violence in schools within the framework of regional and international human rights law. The article's objective is to identify and discuss rights-based legal strategies to combat this pervasive human rights violation, specifically within the sub-Saharan African context, with an emphasis on regional developments and regional responses.

* BA LLB (Windsor), LLM (Essex); christinabeninger@yahoo.ca. I gratefully acknowledge the guidance and input of Dr Aoife Daly to an earlier draft of this article and the generous support of the Law Foundation of British Columbia Graduate Fellowship Programme.

1 Introduction

Although schools are generally regarded as a 'safe haven'¹ for children, the reality for many girls is that schools can be a place of discrimination and sexual abuse.² The widespread problem in schools of sexual and gender-based violence (SGBV) – particularly sexual violence – has been well-documented in a range of studies and reports, particularly in various countries throughout sub-Saharan Africa.³ Sexual violence in schools not only violates girls' fundamental rights to dignity and equality, and their rights to be free from violence, but it also undermines their rights to education, particularly when, as is often the case, states fail to take measures to protect girls. Although there is a growing body of research documenting this issue, particularly in sub-Saharan African countries, how regional and international human rights law applies to protect girls in this situation appears to have received limited consideration.⁴ This article considers SGBV in schools within the framework of international human rights law, with the objective of identifying rights-based legal strategies to combat this pervasive human rights violation, specifically within the sub-Saharan African context, and with an emphasis on regional developments and regional responses. Part 2 begins with an overview of the nature, extent, causes and consequences of the problem of SGBV in schools in a range of countries across sub-Saharan Africa. In part 3, the article turns to a discussion of the relevant international human rights law framework. Finally, part 4 explores a few relevant legal strategies to enforce state obligations to ensure the equal rights of girls to education free from sexual violence, while part 5 offers some final concluding thoughts on implementing comprehensive rights-based legal approaches to combat this pervasive problem. As the causes of sexual violence in schools are complex, systemic and rooted in social, cultural, economic and institutional dynamics, it is clear that a legal response is only one aspect of an effective strategy. Broad-based preventive measures, institutional strengthening of education systems and staff sensitisation training, public education and awareness raising, and comprehensive victim support services are

1 This phrase is drawn from United Nations Educational, Scientific and Cultural Organisation (UNESCO) Global Monitoring Report: 'Gender and Education for All: The Leap the Equality' (2003) 143.

2 USAID 'Unsafe schools: A literature review of school-related gender-based violence in developing countries' (2003); PS Pinheiro 'UN World Report on Violence against Children' UN Doc A/61/299 (2006).

3 Amnesty International *Safe schools: Every girl's right* (2008); Human Rights Watch *Scared at school: Sexual violence against girls in South African schools* (2001); F Leach *et al An investigative study into the abuse of girls in African schools* (2003); C Mitchell & I Mothobi-Tapela *Taking action: Gender-based violence in and around schools in Swaziland and Zimbabwe* (2003).

4 For a detailed discussion of the applicability of international human rights law in these cases, see Human Rights Watch (n 3 above); E George 'Instructions in inequality: Development, human rights, capabilities and sexual violence in schools' (2005) 26 *Michigan Journal of International Law* 1139.

all essential. Ultimately, however, legal measures are a critical first step, laying the groundwork with binding legal protections and enforcement mechanisms and establishing a comprehensive normative framework to better protect girls in schools.

2 Sexual and gender-based violence in schools in sub-Saharan Africa

Gender-based violence (GBV) is 'violence that is directed against a woman because she is a woman or that affects women disproportionately'.⁵ GBV encompasses a wide range of different types of violence, including psychological, physical, economic and sexual. However, the focus of this article is on sexual violence specifically, as it has been identified as a particularly widespread and harmful problem facing girls in schools throughout the region. The World Health Organisation (WHO) defines sexual violence as 'any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances ... using coercion, threats of harm or physical force, by any person regardless of relationship to the survivor, in any setting'.⁶ All children are vulnerable to abuse, and boys, as well as girls, may be subjected to sexual violence. However, the undeniable reality is that 'girls are far more likely to be the victim of certain kinds of gender-based violence, such as sexual harassment and sexual assault'.⁷ Thus, although recognising the seriousness of all violence against children, boys or girls, the focus of this article is on sexual violence in schools, experienced overwhelmingly by girls.

2.1 Nature and scope of sexual and gender-based violence in schools

SGBV in schools occurs worldwide and in countries across the global north and global south alike,⁸ it is certainly not limited to countries of sub-Saharan Africa, which are of course widely diverse. However, this article focuses on this region generally due to the wide range of localised research on this issue,⁹ which establishes it as a widespread regional problem, as well as the uniquely relevant legal protections found in the African human rights instruments. A growing body of research from countries across sub-Saharan Africa indicates that

5 CEDAW Committee 'General Recommendation 19: Violence against women' (1992) para 6.

6 Population Council *Sexual and gender-based violence in Africa: Literature review* (2008) 4.

7 Amnesty International (n 3 above) 1.

8 USAID (n 2 above) i; Pinheiro (n 2 above).

9 The concentration of donor and lending programmes in this region helps to explain the comparatively high number of research studies: M Dunne *et al* 'Gender and violence in schools' background paper prepared for the Education for All Global Monitoring Report 2003/4, Gender and education for all: The leap to equality UN Doc 2004/ED/EFA/MRT/PI/19 5.

gender-based sexual violence in schools is both widespread and generally tolerated.¹⁰ This issue was noted as a major area of concern in regional consultations held for the United Nations (UN) World Report on Violence against Children.¹¹ A number of qualitative studies indicate that girls suffer abuse in schools ranging from verbal harassment, including propositioning for sexual favours, inappropriate touching, and forced sexual activity, including rape. Within the schools, such abuse is perpetrated both by male classmates and teachers or other school staff. It is most likely to occur in 'unsafe' areas such as toilets or dormitories.¹² Encounters or relationships between teachers and students sometimes occur under threat or on the promise of good grades or money.¹³ Thus, students living in poverty are particularly vulnerable.¹⁴ In countries where teenage pregnancy is common, teachers are sometimes identified as the father.¹⁵ For example, of girls who dropped out of school due to pregnancy in Namibia during 2011, in at least 31 cases teachers were recorded as the father of the baby.¹⁶ Further, reports indicate that girls who become pregnant due to sexual abuse by a teacher or classmate are often expelled from school.¹⁷

A 2003 study in Zimbabwe, Ghana and Malawi¹⁸ concluded that sexual aggression from male classmates was common, and generally tolerated within the schools.¹⁹ There was also evidence of teacher sexual harassment: Of 28 school girls interviewed in-depth in Ghana, 27 per cent indicated that they had been propositioned by a teacher.²⁰ In Malawi, over half of the girls interviewed stated that they knew of girls who had been propositioned by a teacher,²¹ and that it was common for girls to become pregnant by their teachers.²² A 2012 study in Zambia found that 57 per cent of schoolgirls interviewed had personally experienced sexual harassment or violence from a teacher, male student, or a man they encountered while traveling to school.²³ More than half stated they knew of teachers who had sexually harassed or abused female students, while 14 per

10 N Jones *et al* 'Painful lessons: The politics of preventing sexual violence and bullying at school' (Working Paper 295) (Overseas Development Institute 2008) viii 16.

11 Pinheiro (n 2 above).

12 Leach (n 3 above) 44 81.

13 Pinheiro (n 2 above) 120.

14 George (n 4 above) 1150.

15 Leach (n 3 above) 83.

16 D Kisting 'Close to 1 500 pregnant girls drop out in 2010' *The Namibian* 18 January 2011.

17 Pinheiro (n 2 above) 120.

18 Leach (n 3 above).

19 Leach (n 3 above) 44 81.

20 Leach (n 3 above) 45.

21 Leach (n 3 above) 81.

22 Leach (n 3 above) 83.

23 Women and Law in Southern Africa-Zambia *et al* 'They are destroying our futures': *Sexual violence against girls in Zambia's schools* (2012) 18.

cent had personally experienced this.²⁴ A 2004 study in Zimbabwe and Swaziland by the United Nations Children's Fund (UNICEF) also confirmed the problem of sexual abuse of girls, both by teachers and male classmates.²⁵ In focus group discussions, 'the girls showed how teachers "touch touch" them, especially in secluded places like a storeroom, teacher's quarters or dark corners and the sports ground',²⁶ and reported verbal sexual harassment such as propositioning from teachers as a common occurrence.²⁷ The girls also indicated that they suffered abuse from boys, and that teachers who were aware of this behaviour did nothing to intervene.²⁸ Small-scale, localised studies from Lesotho²⁹ and Namibia³⁰ report similar findings, while a small study in Kenya found that 95 per cent of 20 high school girls interviewed had experienced sexual harassment or violence at school, mostly perpetrated by male students.³¹ A 1998 study on the frequency of rape among South African women found that of women who reported being victims of child rape (under the age of 15), 33 per cent had been raped by teachers.³² A study by Human Rights Watch in 2001 confirmed that 'sexual abuse and harassment of girls by both teachers and students is widespread in South Africa', and highlighted the serious implications for girls trying to exercise their right to education.³³ In a particularly extreme incident of school sexual violence in 1991, male students broke into the girls' dormitory at a boarding school in Kenya and raped over 70 schoolgirls; during the rampage; 19 of the girls were killed.³⁴

Overall, the research overwhelmingly points to widespread tolerance of SGBV among school staff and officials; rarely are perpetrators, whether teachers or other school staff or male students, punished. A study conducted between 2003 and 2009 in Kenya revealed that, while 12 660 girls were sexually abused by their teachers, only 633 teachers were ultimately charged with sexual offences.³⁵ In the South African context it has been noted that '[g]irls who did report abuse felt that school officials responded with

24 WLSA (n 23 above) 18.

25 Mitchell (n 3 above) 51-53.

26 Mitchell (n 3 above) 51.

27 Mitchell (n 3 above) 52.

28 Mitchell (n 3 above).

29 MV Ngakane *et al* 'Experiencing violence in schools: Voices of learners in the Lesotho context' (2012) 14 *Anthropologist* 39-48.

30 S Felton *et al* *Girls' education in Rundu educational region: A report on a field assessment* (2002).

31 BA Abuya *et al* 'A phenomenological study of sexual harassment and violence among girls attending high schools in urban slums, Nairobi, Kenya' (2012) 11 *Journal of School Violence* 331.

32 R Jewkes *et al* 'Rape of girls in South Africa' (2002) *The Lancet* 319.

33 Human Rights Watch (n 3 above) 5-6.

34 F Banda *Women, law and human rights: An African perspective* (2005) 177.

35 Integrated Regional Information Networks (IRIN) 'Analysis: Sex abuse in Kenyan schools' 30 May 2011 http://www.ecoi.net/local_link/161054/264816_en.html (accessed 20 February 2013).

indifference, willed disbelief, and hostility'.³⁶ As one report observes, '[s]chools in many countries turn a deaf ear to the female students' complaints and many girls do not even complain because of a fear of reprisals, especially from teachers, but also because they believe that nothing will be done'.³⁷ Indeed, it is generally assumed that the vast majority of incidents are never reported. One study from Zambia found that although 57 of the 105 schoolgirls interviewed had experienced sexual harassment or abuse, only three had reported the incidents.³⁸ The prevailing perception that such abuse is commonly viewed as an 'inevitable part of daily school life',³⁹ contributes to a lack of political will to address the issue and a failure of various levels of government to take responsibility.⁴⁰ As George puts it, '[I]f unchecked, sexual violence serves to offer clear instruction that legitimates violence and reinforces gender inequality'.⁴¹ Such widespread impunity serves to further normalise such behaviour, and undoubtedly perpetuates the cycle of violence. According to one study, '[i]f it is not difficult to see that in a context where schools take no action to discipline aggressive behaviour or sexual misconduct, where the majority of cases go unreported and prosecutions are rare, it can easily thrive'.⁴²

2.2 Causes and consequences of sexual and gender-based violence in schools

The causes of sexual violence in schools are complex and deeply rooted in social, cultural, economic and institutional factors. As one report notes:⁴³

School-based violence is not a problem confined to schools but a complex, multifaceted societal issue. Schools are social spaces within which the power relationships, domination and discrimination practices of the community and wider society are reflected.

An in-depth discussion on the myriad causes of sexual violence in schools is beyond the scope of this article, but it is helpful to outline in broad strokes some of the most significant factors. Social and cultural norms that entrench patriarchal gender relations and perpetuate discrimination and inequality of girls are underlying causes of gender-based violence generally, and contribute to the often systemic nature of sexual violence in schools. The imbalance of power between girls and male teachers and staff members in positions of trust and

³⁶ George (n 4 above) 1155.

³⁷ USAID (n 2 above) iii.

³⁸ WLSA (n 23 above) 35.

³⁹ Leach (n 3 above) 64.

⁴⁰ UNESCO (n 1 above) 145.

⁴¹ George (n 4 above) 1201.

⁴² Leach (n 3 above) ix.

⁴³ UNICEF, Plan West Africa, Save the Children Sweden West Africa & ActionAid *Too often in silence: A report on school-based violence in West and Central Africa* (2010) 42.

authority is particularly significant. A UNICEF study of West and Central Africa concluded that '[t]he most frequently-cited situations of sexual abuse in the 23 countries are based directly on the position of authority occupied by teachers'.⁴⁴ Poverty is also a notable factor. As noted above, studies have found that some girls engage in transactional sex with teachers under economic pressure in order to afford school fees or obtain spending money, or to secure good grades.⁴⁵ As outlined above, institutional weaknesses within the education system, such as severely under-resourced schools, underpaid and undertrained teachers, poorly-designed school grounds (with toilets or hostels in isolated areas, for example), poor disciplinary standards and a culture of impunity for sexual misconduct by both students and staff, are major contributing factors.⁴⁶ Unfamiliarity with legal remedies and/or fear or mistrust of the police and court system on behalf of victims and their families also contribute to underreporting and impunity, as noted above. One commentator observes that, in some countries, informally settling cases rather than reporting to the police or schools for formal investigation is the most common response.⁴⁷ The range of entrenched and systemic causes of sexual violence in schools indicates a need for a wide range of responses in addition to legal measures, focused on prevention and victim services, including public education and awareness raising regarding legal prohibitions and remedies, provision of appropriate police services and victim support services, teacher training and sensitisation, and institutional strengthening of education systems.

For those students who are subjected to it, the consequences of sexual violence in schools are severe. There is obviously a serious emotional and psychological impact for girls who experience abuse.⁴⁸ Physical health consequences are a critical concern, particularly with regard to unwanted youth pregnancy and the spread of sexually-transmitted infections, especially HIV.⁴⁹ In addition, SGBV severely affects the ability of girls to participate in school and therefore fully access their rights to education. It perpetuates gender discrimination and inequality in the classroom, especially when it goes unnoticed and unpunished, as is often the case. As one report notes:⁵⁰

A number of studies stress that fear or experience of sexual violence in schools is a major reason behind some girls' underperformance in schools and/or dropping out of school, which is reflected in girls' lower enrolment rates at the secondary school level.

44 N Maalla M'jid *Sexual abuse and exploitation of children in West and Central Africa* (2008) 17.

45 UNICEF *et al* (n 43 above) 28.

46 As above.

47 Maalla M'jid (n 44 above) 19.

48 Jones (n 10 above) 11.

49 USAID (n 2 above) iii.

50 Jones (n 10 above) 17.

In some cases, parents choose to keep children out of school for fear of their safety.⁵¹ Although incidents of SGBV are often not reported, or even considered to be gender-based violence as distinct from general school violence, 'there is no doubt that underachievement and high drop-out rates for some children are linked to gender-based violence'.⁵² Moreover, because education is a 'multiplier right' which enhances the realisation of other fundamental rights, a denial of education carries life-long consequences.⁵³

3 International and regional human rights framework

SGBV in schools, especially when it is tolerated with impunity, implicates a number of overlapping and interrelated fundamental human rights protected under international human rights law: the right to dignity; the right to equality and non-discrimination; the right to be free from violence; and the right to education. This discussion focuses on the international and African regional human rights treaties that specifically protect women and children broadly across the African continent: the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);⁵⁴ the UN Convention on the Rights of the Child (CRC);⁵⁵ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol);⁵⁶ and the African Charter on the Rights and Welfare of the Child (African Children's Charter).⁵⁷ In addition, sub-regional bodies have introduced relevant binding instruments pertaining to women's rights and sexual violence, such as the South African Development Community's binding Protocol on Gender and Development (SADC Protocol).⁵⁸

The right to equality and non-discrimination on the basis of sex is a fundamental right protected in all human rights instruments.⁵⁹ Article 2 of CEDAW specifically prohibits all forms of discrimination against

51 Jones (n 10 above) 11.

52 UNESCO (n 1 above) 144.

53 L Mwambene 'Implementing the girl child's right to education in selected countries in Africa' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 219.

54 (1979) 1249 UNTS 13. All but three African states are party to CEDAW.

55 1577 UNTS 3 (in force 2 September 1990). All African states except Somalia are party to CRC.

56 (2003) Assembly/AU/Dec 14(II) (in force 2005). Of Africa's 54 states, 31 are party to the Protocol.

57 (1990) OAU Doc CAB/LEG/TSG/Rev 1. Forty-six African states are party to the African Children's Charter.

58 SADC Protocol on Gender and Development (2008).

59 Eg, art 2 Universal Declaration of Human Rights, GA Res 217 (III), UN GAOR, 3d sess Supp 13, UN Doc A/810 (1948); arts 2, 3 & 26 International Covenant on Civil and Political Rights (1969) 999 UNTS 171 (in force 1976); art 2 African Charter on Human and Peoples' Rights (1981) OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (in force 1982).

women, and imposes duties upon states to implement measures prohibiting discrimination in all spheres, while article 3 obligates states to take measures to ensure women's equality. Similarly, article 2 of the African Women's Protocol imposes an obligation upon all state parties to eliminate discrimination against women. Note that the African Women's Protocol expressly applies to all 'persons of female gender, including girls'.⁶⁰ Article 2 of CRC requires that the state guarantee all rights within the treaty without discrimination, and take measures to ensure that children are protected from all forms of discrimination. There is clear international consensus that gender-based violence constitutes discrimination against women.⁶¹ According to the CEDAW Committee, the body tasked with monitoring implementation of the treaty, 'gender-based violence is a form of discrimination' on the basis of sex.⁶² Thus, the SGBV that girls experience in schools in sub-Saharan Africa (and elsewhere) is itself regarded as a form of discrimination.

The African Women's Protocol goes further than CEDAW and expressly prohibits all forms of violence against women, including sexual violence. Article 3(4) protects the right to dignity, which includes the state's duty to protect women from 'all forms of violence, particularly sexual and verbal violence'.⁶³ Article 4 protects the right to integrity and security of the person, which includes a duty upon states to 'enact and enforce laws to prohibit all forms of violence against women, including unwanted or forced sex whether the violence takes place in private or public'.⁶⁴ Most importantly, article 12(1) expressly obligates states to take all appropriate measures to 'protect women, especially the girl-child, from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices'.⁶⁵ This is the strongest and most explicit articulation of the right of girls to be free from sexual violence in schools in any international instrument.

Article 19 of CRC requires states to take all appropriate measures to protect children from all forms of violence, including sexual abuse, 'while in the care of parents, legal guardians, or any other person who has the care of the child',⁶⁶ which includes school personnel.⁶⁷ Article 34 further provides that 'states parties undertake to protect the child from all forms of sexual exploitation and sexual abuse'. Article 16(1) of

60 Art 1(k) African Women's Protocol.

61 CEDAW GR 19 (n 7 above) para 1; *Opuz v Turkey* ECtHR, Application 33401/02, judgment of 7 June 2009; *Gonzalez v Mexico* judgment (IACtHR, 16 November 2009).

62 CEDAW GR 19 (n 7 above) para 1.

63 Art 3(4) African Women's Protocol.

64 Art 4(2)(a) African Women's Protocol.

65 Art 12(1)(c) African Women's Protocol.

66 Art 19(1) CRC.

67 CRC General Comment 13: The right of the child of freedom from all forms of violence UN Doc CRC/C/GC/13 (2011) para 33.

the African Children's Charter also requires states to take specific measures to protect the child from mistreatment, including sexual abuse, 'while in the care of a parent, legal guardian or school authority or any other person who has the care of the child', expressly including 'school authority'. In addition, article 27 generally requires states 'to protect the child from all forms of sexual exploitation and sexual abuse'. Specifically, states must take measures to prevent 'the inducement, coercion or encouragement of a child to engage in any sexual activity'.

The right to education is recognised as a fundamental right in a number of international treaties.⁶⁸ According to the internationally-recognised '4A' framework, education must be available, accessible, acceptable and adaptable.⁶⁹ The requirement of accessibility is particularly relevant to this discussion because it requires the elimination of discrimination in access to and benefit from education, in law and in fact.⁷⁰ Consequently, states have a duty to 'take measures to redress any *de facto* discrimination' in schools.⁷¹ The importance of addressing gender discrimination in access to education has been recognised by the international community: The Dakar Framework on Education emphasises that 'gender-based discrimination remains one of the most intractable constraints to realising the right to education'.⁷² Consequently, 'achieving gender equality in education by 2015, with a focus on ensuring girls' full and equal access to and achievement in basic education',⁷³ was reaffirmed as a Millennium Development Goal.⁷⁴

States have a range of obligations to ensure the equal rights of all children to education without discrimination. Article 10 of CEDAW specifically requires 'state parties to take all appropriate measures to eliminate discrimination against women to ensure to them equal rights with men in the field of education'. Article 12(1)(a) of the African Women's Protocol also obligates states to 'eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training', and expressly prohibits sexual violence in schools.⁷⁵ The Women's Protocol also provides that states have a duty to 'provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment'⁷⁶ in schools. Similarly, the SADC Protocol expressly

68 See art 13 International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3 (in force 1976); African Charter (n 59 above).

69 ESCR Committee General Comment 13: The right to education UN Doc E/C.12/1999/10 (8 December 1999) para 6.

70 ESCR Committee General Comment 13 (n 69 above) paras 6 & 37.

71 ESCR Committee General Comment 13 (n 69 above) para 37.

72 Dakar Framework for Action *Education for all: Meeting our collective commitments* (2000) 16.

73 Dakar Framework (n 72 above) art 7(v).

74 Millennium Declaration, GA Res 55/22 (2000).

75 Art 12(1)(c) African Women's Protocol.

76 Art 12(1)(d) African Women's Protocol.

requires Southern African states to 'adopt and implement gender-sensitive educational policies and programmes addressing gender stereotypes in education and gender-based violence'.⁷⁷ CRC also protects the right to education in article 28. Article 29(1) goes on to specify that the education of the child shall be directed to specific aims, including respect for human rights⁷⁸ and gender equality.⁷⁹ The Committee on the Rights of the Child (CRC Committee) highlights the consequences of discrimination for a child's dignity and the ability to benefit from the right to education.⁸⁰ The Committee has also stated that the failure to prevent violence in schools and to protect students within schools could deny the right to education guaranteed under articles 28 and 29.⁸¹ The African Children's Charter protects the right to education in article 12. In an important expansion of the right to education beyond that guaranteed in CRC, the African Children's Charter provides that states have an obligation to 'take special measures in respect of female ... children, to ensure equal access to education for all sections of the community'.⁸²

As Human Rights Watch argues:⁸³

Failure to prevent and redress persistent gender-based violence in all its forms – from rape to sexual harassment – operates as a *de facto* discriminatory deprivation of the right to education for girl children in violation of international and national legal obligations.

However, the right to education also necessarily includes the right to equality, and freedom from gender discrimination and violence. The overlapping and interrelated nature of the rights outlined above is obvious. Moreover, the right to education extends beyond simple access to school to include the equal rights of girls to enjoy their rights *within* education, free from gender-based violence.

4 Legal strategies to combat gender-based violence in schools

4.1 State obligations

The comprehensive international normative framework prohibiting SGBV in schools does not necessarily translate into effective implementation in practice at the domestic level. However, states that are party to any of the human rights treaties discussed above have a

77 Art 14 SADC Protocol (n 58 above).

78 Art 28(1)(b) CRC.

79 Art 28(1)(d) CRC.

80 CRC General Comment 1: The aims of education UN Doc CRC/GC/2001/1 (2001) para 10.

81 CRC 'Day of General Discussion on Violence against Children within the Family and in Schools' UN Doc CRC/C/111 para 679 (b).

82 Art 11(3)(e) African Children's Charter.

83 Human Rights Watch (n 3 above) 111; George (n 6 above) 1148.

resulting positive duty to take measures to implement their treaty obligations. Article 2 of both CEDAW and the African Women's Protocol requires all states parties to take all appropriate measures, including legislation, to ensure the elimination of all forms of sex discrimination and realisation of all treaty rights. Moreover, the state has a duty to ensure the right to a remedy for any violations of rights guaranteed in the treaties. For example, the African Women's Protocol obligates the state to 'provide for appropriate remedies to any woman whose rights or freedoms ... have been violated'.⁸⁴ Article 1 of the African Children's Charter, likewise, obligates states to adopt legislative or other measures to ensure the protection of the treaty rights. The CRC Committee outlines the comprehensive duties to protect children under article 4 in detail, including⁸⁵

due diligence and the obligation to prevent violence or violations of human rights, the obligation to protect child victims and witnesses from human rights violations, the obligation to investigate and to punish those responsible, and the obligation to provide access to redress human rights violations.

When states fail to take appropriate measures, and to exercise due diligence, to prevent, protect and punish violent actions, even if perpetrated by private persons, it can give rise to responsibility under international law.⁸⁶ Although non-binding, the UN Declaration on the Elimination of Violence against Women provides that states have a duty to '[e]xercise due diligence to prevent, investigate and ... punish acts of violence against women, whether those acts are perpetrated by the state or by private persons'.⁸⁷ These obligations have been applied in leading international jurisprudence to find violations in cases where state authorities failed to take appropriate measures and exercise due diligence to protect women at risk of violence from private actors and punish perpetrators.⁸⁸ In *Zimbabwe Human Rights NGO Forum v Zimbabwe*,⁸⁹ a case regarding amnesty for perpetrators of political violence, the African Commission on Human and Peoples' Rights (African Commission) adopted and affirmed the 'due diligence' principle explained above, stating that '[h]uman rights law imposes obligations on states to protect citizens or individuals under their jurisdiction from the harmful acts of others'.⁹⁰ The decision specifically cited the UN Declaration on the Elimination of Violence against Women as a source for this standard at international law,⁹¹ and

84 Art 25 African Women's Protocol.

85 CRC General Comment 13 (n 67 above) para 5.

86 C Benninger-Bludel (ed) *Due diligence and its application to protect women from violence* (2008) 13; *Velasquez Rodriguez v Honduras*, judgment (IACtHR, 29 July 1988).

87 UN Doc A/RES/48/104 (1994) art 4(c).

88 See *Opuz* (n 61 above); *Gonzalez* (n 61 above).

89 (2006) AHRLR 128 (ACHPR 2006).

90 *Zimbabwe Human Rights NGO Forum* (n 89 above) para 143.

91 *Zimbabwe Human Rights NGO Forum* (n 89 above) fn 153.

concluded that 'a state can be held complicit where it fails systematically to provide protection of violations'.⁹²

Consequently, the duty on the state to exercise due diligence to prevent, protect and punish SGBV in schools applies both in respect of teachers who, as public employees, could potentially be considered agents of the state, and other students, as private persons. The responsibility to ensure due diligence extends to all members of the state who are involved: teachers, school staff, principals, school boards, government education and justice officials, and police and law enforcement. Thus, the focus of this section is to outline, briefly and in broad strokes, possible legal strategies to ensure that states fulfil their treaty obligations to combat SGBV in schools. These legal responses fall into two main categories: legislative and policy measures and strategic litigation.

4.2 Legislative and policy measures

Legislative reform and policy measures focused on building a legal and policy framework that broadly criminalises all forms of sexual harassment, abuse and violence, expressly prohibits teacher sexual contact with students, and imposes duties upon teachers and school administration to protect students and respond effectively to reports of abuse, are necessary to ensure compliance with the duty to exercise due diligence to protect girl students. In practice, some countries are taking notable steps in this regard, offering important instructive examples for the region, but approaches remain *ad hoc* and uneven across the region overall. As one report notes, '[o]nly rarely is violence against children in and around schools addressed holistically or systematically in national legal instruments'.⁹³ In some states, rights commonly protected under national constitutions, such as the right to equality and bodily integrity, could apply to offer legal protection in gender-based violence in schools cases. In addition, many African states expressly recognise the right to education in their constitutions,⁹⁴ such as the Constitution of South Africa.⁹⁵

Common criminal or penal code offences of defilement, rape and sexual abuse will often be applicable. For example, Namibia's Combating of Rape Act introduces comprehensive definitions of rape, and provides for aggravated sentences for offences involving minors when perpetrated by a person in a position of trust or authority, which would apply to a teacher.⁹⁶ However, criminal laws in some countries do not include expansive and broad definitions of sexual offences, including sexual harassment, and therefore do not offer adequate protection to all victims. Compliance with the general duty

92 Zimbabwe Human Rights NGO Forum (n 89 above) para 160.

93 UNICEF *et al* (n 43 above) 42.

94 Mwambene (n 53 above) 224.

95 Sec 29 Constitution of the Republic of South Africa 1996.

96 Sec 3(a)(iii)(cc) Act 8 of 2000,.

to implement legal measures to ensure the equal rights of girls to access and benefit from education free from discrimination would require, for example, legislation prohibiting and imposing sanctions for sexual harassment and sexual abuse of girls generally, including in school, whether by teachers, other school staff or fellow students. For example, until Zambia enacted legislative reforms, including the Anti-Gender-Based Violence Act in 2011, sexual harassment and sexual assaults other than rape, attempted rape and indecent assault were not offences under the law.⁹⁷ It is necessary that the domestic legal and policy framework takes an expansive and broad approach to defining sexual offences, and imposes duties upon teachers to report violations that occur and to refrain from engaging in sexual conduct with students.

Given the scope and scale of the problem of sexual violence in schools, some countries are responding with targeted law and policy measures specifically geared to teachers and schools. A UNICEF study found that 16 countries across West and Central Africa have introduced legal prohibitions on sexual violence in schools.⁹⁸ For example, in response to high levels of sexual violence in schools and elsewhere, Benin introduced legislation that prohibits sexual harassment in various places, specifically including schools.⁹⁹ In addition to the general provisions of the criminal law or children's acts, these prohibitions on sexual violence in schools are often found in regulations or policy directives under education legislation governing teacher conduct. For example, in Ghana, section 27 of the Code of Professional Conduct for the Ghana Educational Service states that '[n]o teacher should indulge in immoral or sexual relations with a pupil or student in any educational institution', and provides for disciplinary measures. According to one report, sexual offences involving students are deemed 'major misconduct' in Ghana and could result in the suspension or termination of the teacher or school staff member's contract.¹⁰⁰ Similarly, in Namibia, regulations governing teacher conduct under the Education Act expressly state that a teacher 'may not become involved in any form of romance or sexual relations with a learner or sexual harassment or abuse of a learner'.¹⁰¹ Similar policies have been adopted in Kenya, which impose an obligation on teachers to report any cases of sexual abuse

97 WLSA (n 23 above) 45.

98 UNICEF *Sexual abuse, exploitation and violence of children at school in West and Central Africa* (2006). The countries listed are Benin, Burkina Faso, Cameroon, Central African Republic, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo.

99 USAID *Women's legal rights Initiative: Final report* (2007) 14.

100 Child Research and Resource Centre *Report on the study of child sexual abuse in schools* (2009) 18.

101 Ministry of Education Amendment of regulations made under the Education Act, 2001 Government Notice 15 (2004) sec 62(2)A(a)(o).

against a student and require disciplinary action against any teacher perpetrating sexual abuse.¹⁰²

Further, some countries have addressed sexual violence in schools in national action plans and related policy instruments. Both Senegal and Burkina Faso address school-based violence in action plans on child sexual abuse.¹⁰³ In The Gambia, the government responded to high levels of sexual violence in schools with a targeted sexual harassment policy and specifically highlighted the need for schools to enforce the policy and to develop disciplinary committees to address sexual violence in schools in the national education policy.¹⁰⁴ In Nigeria, the government targeted all forms of violence in primary schools, including sexual violence, with the development of a National Strategic Framework on Violence-Free Basic Education.¹⁰⁵ These are all important approaches, developing normative standards and building awareness of teacher and school obligations in relation to combating sexual violence in schools. However, legal and policy responses remain inconsistent and often incomplete across the region. Given the scope of the problem of SGBV in schools, and the associated impunity in many countries, it is suggested that the international treaty bodies consider developing guidelines at the regional or international level to articulate the nature of states' responsibilities to develop legislative and other measures to protect children from sexual abuse in schools.

4.3 Strategic litigation

4.3.1 Domestic courts

The goal and main advantage of strategic litigation is to provide justice and redress to the victim while targeting a systemic problem, with the broader effect of raising public awareness about and enforcing state accountability for sexual violence in schools. For example, successful legal cases involving school sexual abuse and resulting media attention in Uganda drew attention to the issue and prompted the government to pledge to take action.¹⁰⁶ Strategic litigation strategies could draw on either criminal or civil law, such as claims for negligence or breach of duty of care, for matters where no criminal charges were laid. For example, in a 2006 landmark case in Zambia, a 13 year-old student who was raped by her teacher successfully sued the teacher and her school for negligence due to the

102 Teachers Service Commission, Circular 3/2010 *Protection of pupils from sexual abuse* (2010).

103 UNICEF 2006 (n 98 above).

104 Department of State for Education *Education policy 2004-2015* (2004) 29.

105 UNICEF, Plan West Africa, Save the Children Sweden West Africa & ActionAid *Addressing violence in schools: Selected initiatives from West and Central Africa* (2010) 6.

106 Mwambene (n 53 above) 227.

school's failure to take any action.¹⁰⁷ The headmaster had been advised of the incident, but did not report the teacher to the police. The complainant argued that the case was a 'novel' opportunity for the court to move the government to 'strengthen its school policy on the protection of the girl child against sexual abuse'.¹⁰⁸ Importantly, she cited the African Women's Protocol, noting that Zambia is party to the treaty and has resulting obligations. The court rejected the teacher's argument that it was a consensual relationship and held that by assaulting the complainant, the teacher violated his duty of care.¹⁰⁹ The court further concluded that the failure of the school to protect her and to discipline the perpetrator was a negligent breach of the duty of care owed by the school towards students. The court also criticised the police for failing to take any action when they became aware of the incident. The judgment awarded substantial damages for pain and suffering, and 'implored' the government to introduce regulations to prevent such situations in the future.¹¹⁰ This is an important ground-breaking decision that clearly demonstrates that schools have a duty to protect students in their care from violence, especially violence perpetrated by teachers. Moreover, it demonstrates that the civil law can be a viable pathway for strategic litigation, and obtaining justice and redress for child victims, particularly if no criminal charges were laid in the matter.

A similarly strong stance was taken by a South African court in a criminal case involving the rape of a nine year-old girl on school grounds by a school employee. The court commented on the special position of trust school employees hold:¹¹¹

What is glaring is that the complainant was raped at her school, a place where she was expected to be safe. The accused, an employee of the school, as a gardener, was in a position of trust in relation to the complainant. He was expected to protect her.

The court went on to strongly criticise the school for failing to take adequate action after the rape complaint was made as 'a serious dereliction of duty on the part of the principal and her school'.¹¹² In the court's view, 'this state of affairs should be brought to the attention of the appropriate education authorities'.¹¹³ The court concluded that '[s]urely, a school is an institution entrusted to ensure the safety of pupils, and their moral and educational development and can hardly be seen to condone sexual abuse of pupils'.¹¹⁴

107 *Katakwa v Hakasenke & Others* High Court of Zambia, Case 2006/HP/0327 (2008) (RM case).

108 *Katakwa* (n 107 above) 6.

109 *Katakwa* (n 107 above) 10.

110 *Katakwa* (n 107 above) 12.

111 *S v Zothile* [2008] ZAGPHC 288 (12 May 2008) para 5.

112 *Zothile* (n 111 above) para 19.

113 *Zothile* (n 111 above).

114 As above.

Both cases indicate the willingness of some domestic courts to react strongly against incidents of sexual violence in schools, particularly when the school authorities failed to take action. These examples demonstrate the potential impact of domestic strategic litigation on this issue.

4.3.2 International and regional treaty bodies

If domestic legal remedies prove unsatisfactory, or are unavailable or ineffective, the international and regional treaty bodies also allow individuals to bring complaints for human rights violations. Recourse to a treaty body is permitted only after admissibility criteria are satisfied, including the requirement that domestic remedies, as the preferable enforcement mechanism, have been exhausted, unless they are unavailable or ineffective.¹¹⁵ Although the decisions of quasi-judicial treaty bodies are technically non-binding, they are generally regarded as authoritative.¹¹⁶ They also have the invaluable benefit of raising public awareness and publicly 'shaming' a state for failure to respect its human rights obligations. For example, under the Optional Protocol, the CEDAW Committee has the authority to hear individual complaints.¹¹⁷ Although the Committee has not considered a complaint based on the right to education, it has issued several ground-breaking decisions affirming the duty of the state to protect women from violence in the domestic sphere. In two separate complaints against Austria, the CEDAW Committee agreed that the repeated failure of the police and prosecutors to protect two women who were eventually killed by their abusive husbands amounted to a breach of CEDAW.¹¹⁸ Similarly, in *AT v Hungary*, the Committee concluded that Hungary's failure to enact specific legislation to combat domestic violence and protect the complainant, who had repeatedly complained to the police of serious abuse by her husband, constituted a breach of its obligations under article 2.¹¹⁹ As a result, Hungary introduced a range of new legislative and policy measures to combat domestic violence.¹²⁰ It can be argued that the failure of the state to protect girls and punish perpetrators in cases where it is known that they are being routinely subjected to sexual violence in schools, whether by teachers or fellow students, is analogous to the domestic violence cases as a breach of due diligence and would attract the same state responsibility at international law.

Although the CRC Committee currently lacks the power to hear individual complaints, an Optional Protocol introducing this

115 F Viljoen *International human rights law in Africa* (2007) 336.

116 D Moeckli *et al* (eds) *International human rights law* (2010) 413.

117 GA Res 54/4 (1999) (in force 2000).

118 *Goekce v Austria* UN Doc CEDAW/C/39/D/5/2005 (2007); *Yildirim v Austria* UN Doc CEDAW/C/39/D/6/2005 (2007).

119 UN Doc CEDAW/C/32/D/2/2003 (2005) para 9.3.

120 CEDAW 'Sixth periodic report of Hungary to the CEDAW Committee' UN Doc CEDAW/C/HUN/6 (2006) 47-52.

mechanism has been approved by the UN General Assembly and is expected to come into force in the near future.¹²¹ The Committee has often criticised states during the state reporting procedure¹²² for failure to effectively respond to SGBV in schools. For example, in Concluding Observations to Cameroon in 2001, the CRC Committee expressed its concern at 'the very high prevalence of violence against, and sexual abuse of children in schools'.¹²³ The Committee called upon the state to take measures 'against teachers who are violent and abusive towards students' and 'to prevent bullying and sexual abuse of students by other students'.¹²⁴ Similarly, in recommendations to Malawi, the CRC Committee expressly called upon the state to ensure safe schools by 'taking all necessary steps to prevent abuse and exploitation of children by school personnel', including 'taking effective disciplinary measures against school personnel who have committed those offences and reporting these incidences to the competent authorities'.¹²⁵ Similar concerns and recommendations have been expressed also by the Committee in Concluding Observations to Kenya¹²⁶ and Zambia.¹²⁷ The Committee's recognition of this problem and its criticism of states which fail to take adequate measures to protect children in schools suggest that it would be receptive to individual complaints concerning sexual abuse in schools.

The jurisprudence of the CEDAW and CRC Committees in regards to sexual violence, especially in schools, highlights the potential of the state reporting process to be a very effective mechanism for advocacy and awareness raising. Non-governmental organisations (NGOs) commonly submit parallel shadow reports outlining concerns with compliance in relation to specific issues, which often are incorporated into the concluding observations of the Committee. This approach could be an effective means to draw attention to sexual violence in schools, and 'shame' states into taking measures in response to the Committee's criticisms, as occurred in the examples described above. For example, in 2012 a coalition of civil society organisations in Zimbabwe submitted a shadow report to the CEDAW Committee highlighting the problem of sexual violence in schools as a barrier to

121 Resolution A/RES/66/138 (2011). The Optional Protocol is currently open for signature and will come into force upon ratification by ten states.

122 State parties to CEDAW and CRC have a duty to submit reports every four years to provide updates outlining measures taken to ensure compliance with treaty obligations.

123 CRC 'Concluding observations: Cameroon' UN Doc CRC/C/15/Add.164 (2001) para 54.

124 CRC Cameroon (n 123 above) para 55(d).

125 CRC 'Concluding observations: Malawi' UN Doc CRC/C/15/Add.174 (2002) para 56(i).

126 CRC 'Concluding observations: Kenya' UN Doc CRC/C/15/Add.160 (2001) para 54.

127 CRC 'Concluding observations: Zambia' UN Doc CRC/C/15/Add.206 (2003) para 57(h).

girls' education, during that country's review period.¹²⁸ In response, the CEDAW Committee's Concluding Observations specifically recommended that Zimbabwe 'institute measures to protect girls from sexual harassment and violence on their way to and from schools' and 'establish reporting and accountability mechanisms to ensure that perpetrators of sexual abuse and harassment in schools are prosecuted and punished'.¹²⁹ This example illustrates effectively the potential strategic impact of making use of the reporting mechanism to draw attention to systemic problems of sexual violence in schools and the need for concrete government action.

Within the African regional system, the implementation of the African Children's Charter is monitored by a Committee of Experts. Although the Committee has been slow to begin its work, in its first decision in 2011, the Committee found a wide range of violations against Kenya for systemic discrimination against children of Nubian descent.¹³⁰ The Committee found a violation of the right to education under article 11(3), concluding that 'there is *de facto* inequality in their access to available education services and resources' as compared to children of other communities.¹³¹ Consequently, '[t]heir right to education has not been effectively recognised and adequately provided for'.¹³² The Committee thus took a broad and inclusive approach to interpreting the practical requirements necessary for accessing the right to education free of *de facto* discrimination. The situation of girls effectively denied access to education as a result of SGBV that goes unpunished can similarly be argued as *de facto* discrimination in violation of article 11. Both the African Commission and the African Court on Human and Peoples' Rights (African Court) can also receive complaints of human rights violations brought by individuals or organisations, although technically the African Women's Protocol is to be enforced at the African Court, rather than the Commission.¹³³

Thus, there are several regional and international treaty bodies that could potentially consider a complaint concerning SGBV in schools. Strategic considerations will determine which is appropriate in a given case. However, as the African Women's Protocol offers the most comprehensive and detailed protections relevant to the specific rights violated by SGBV in schools, and is specifically geared to the African context, it is the preferable instrument upon which to base a

128 Zimbabwe Women Lawyers Association 'Zimbabwe Civil Society's Shadow Report to the CEDAW Committee' (2012).

129 CEDAW Concluding observations: Zimbabwe' UN Doc CEDAW/C/ZWE/CO/2-5 (2012) art 30.

130 *Institute for Human Rights and Development in Africa v Kenya*, Decision 002/Com/002/2009 (ACERWC 2011).

131 *Institute for Human Rights* (n 130 above) para 65.

132 As above.

133 Art 27 African Women's Protocol.

complaint.¹³⁴ Since the African Court came into existence in 2006,¹³⁵ it has rendered only two decisions; nonetheless, it is a promising mechanism for future human rights advocacy, particularly as it issues binding judgments. The African Commission's consideration of the right to education has been limited, and it has not heard any cases regarding gender-based violence or sex discrimination. However, as noted, the Commission has already adopted and affirmed the due diligence principle, citing the Declaration on the Elimination of Violence against Women.¹³⁶ Therefore, although a complaint about SGBV in schools would be novel, it arguably finds support in the law and jurisprudence of the African system.

5 Conclusion

Pervasive sexual violence in schools, particularly when it is tolerated by the authorities, violates international human rights law on a number of grounds. When states fail to meet their fundamental obligations to protect girls in schools, there are severe consequences. The obvious failure to uphold international legal obligations requires a comprehensive legal response. Yet, effectively addressing sexual violence in schools entails more than legal considerations. As discussed, the causes of sexual violence in schools are complex, systemic and multifaceted, and a holistic approach is essential. This requires a range of non-legal strategies, including: public awareness initiatives, gender sensitivity training of teachers and school personnel, school-based preventive efforts to foster gender equality and freedom from violence, effective training of law enforcement officials, access to information regarding protection mechanisms and remedies, and counselling and medical treatment services for victims.¹³⁷ Moreover, it is recognised that, for many individuals, particularly child victims of sexual violence in schools, legal strategies such as litigation may be impractical or simply inaccessible; certainly, there are limitations to these approaches. A wide range of measures are critical to help address the fundamental imbalance of power which underlies the vulnerability of girls in schools where sexual violence occurs and is tacitly condoned. With awareness and education regarding the law, rights and remedies and support services comes the empowerment of students, schools and communities and the capacity to demand accountability from government. As this article has demonstrated, international and regional human rights law establishes the critically-

134 See the detailed analysis in Solidarity for African Women's Rights Coalition *A guide to using the Protocol on the Rights of Women in Africa for legal action* (2011) 42-46.

135 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human Rights (1998) OAU/LEG/AFCHPR/PROT (III).

136 *Zimbabwe Human Rights NGO Forum* (n 89 above) para 143.

137 Plan International *Learn without fear: The global campaign to end violence in schools* (2008) 29-30.

important normative framework; the minimum basic standards of protection that states are obligated to provide. This robust framework provides the basis upon which obligations upon states to take seriously their duties to protect children in schools, and to implement the myriad measures required to deliver on this duty, can be enforced through the legal strategies outlined above. As states ultimately bear the responsibility for meeting their human rights commitments domestically, ensuring the effective implementation of these international obligations requires political will and commitment from national governments. Indeed, 'leadership at every level is vital to create an education system free of gender bias and sexual violence'.¹³⁸ What is at stake are the most fundamental rights of girls to dignity, bodily integrity, equality, freedom from violence and the right to access education, in schools that truly are 'safe havens' for the education of all children.

138 Human Rights Watch (n 3 above) 3.

The Pan-African Parliament and African Union human rights actors, civil society and national human rights institutions: The importance of collaboration

*Bonolo Ramadi Dinokopila**

Assistant Registrar and Master of the High Court of Botswana, Gaborone;
doctoral candidate, Centre for Human Rights, University of Pretoria, South Africa

Summary

This article looks at possible areas of collaboration between the Pan-African Parliament and other human rights bodies within the African human rights system, national human rights institutions and civil society. This is done with reference to the manner in which the Pan-African Parliament has and is likely to co-ordinate its human rights activities.

1 Introduction

The creation of the Pan-African Parliament (PAP) is fundamentally linked to the transformation of the Organisation of African Unity (OAU) into the African Union (AU). This is largely because the Assembly of the AU adopted, in 2000, the Constitutive Act of the AU with the PAP as one of the organs of the AU. Under the AU Constitutive Act, the PAP is tasked with ensuring the full participation of African peoples in the development and economic integration of Africa.² The legal basis of the PAP is located in the Protocol to the Treaty Establishing the African Economic Community (AEC) Relating

* LLB (Botswana), LLM (Human Rights and Democratisation in Africa) (Pretoria); dinoksbr@yahoo.com. This article is based on the author's doctoral research, undertaken under the supervision of Prof Frans Viljoen, Centre for Human Rights, University of Pretoria, whose comments on work forming the basis of this article are highly appreciated.

2 Art 17 AU Constitutive Act; see also art 4 of the African Charter on Democracy,

to the Pan-African Parliament (PAP Protocol) and the AU Constitutive Act.³

In a move that was hailed by many as a true sign of integration in Africa, 18 March 2004 saw the inauguration of the much-anticipated continental parliamentary body in Africa – the PAP. The inaugural session of the PAP was held amidst great fanfare at the United Nations (UN) Economic Commission for Africa Conference Centre in Addis Ababa, Ethiopia. The then nascent parliamentary body was seen as bringing to life the ideals of pan-Africanism once pursued by many, among them Kwame Nkrumah, one of the great leaders of post-colonial Africa. The inauguration of the PAP was also seen as heralding the end of non-participation of Africans in the continental decision-making processes.

Most of the AU documents emphasise some form of collaboration between the various institutions within the African human rights system. In short, the designers of the AU human rights system demand institutional co-operation and links. Unfortunately, one of the most regrettable institutional mishaps of the AU human rights system is the failure of these architects to clearly and succinctly provide for the relationship between the various AU institutions. For example, the relationship between the African Court on Human and Peoples' Rights (African Human Rights Court) and the African Commission on Human and Peoples' Rights (African Commission) remained unclear until well after 2010. This lack of attention to detail continues to characterise the AU human rights system and is likely to inhibit its growth. That is why it is not only important to put forward the PAP as a human rights actor within the AU, but also to explain how it can effectively work with other human rights institutions to promote human rights.

This article, therefore, takes a look at the relationship between the PAP and other organs of the AU, in particular other human rights protection bodies. The discussion focuses on the manner in which the PAP has and is likely to co-ordinate its human rights activities. It concludes by calling for an improved relationship between the Parliament and other institutions dealing with human rights.

2 Background to the Pan-African Parliament

2.1 Establishment of the Pan-African Parliament

The AEC Treaty provided the modalities for the establishment of the African Economic Community in light of the Lagos Plan of Action, echoing the commitment of African leaders to have, by the year 2000,

Elections and Governance, putting forward participation through universal suffrage as an inalienable right for Africans.

3 Arts 2(3)(i) & 11 PAP Protocol; KD Magliveras & GJ Naldi 'The Pan-African Parliament of the African Union: An overview' (2003) 3 *African Human Rights Law Journal* 223.

a fully-fledged African Economic Community. The aim of the Community was to foster economic, social and cultural integration, increased economic self-reliance and self-sustained development in Africa.⁴ In order to attain the objectives of the Community as set out in the AEC Treaty and in accordance with the relevant provisions of the Treaty, it was resolved that the Community would, by stages, strengthen the existing regional economic communities, the harmonisation and co-ordination of policies among existing regional and future sub-regional or regional economic communities, and the harmonisation of national policies in order to promote Community activities, particularly in the fields of agriculture, industry, transport and communication, and human resources.⁵

The objectives of the Community, as aforementioned, were to be implemented through stages; at each stage specific activities were to be implemented concurrently.⁶ With respect to the PAP, it was agreed that it was to be set up and its membership determined by universal suffrage within five years after the establishment of an African common market.⁷ The 1991 AEC Treaty provides that the sixth stage would include the final setting up of the structure of the PAP and the election of its members by continental universal suffrage.⁸ In other words, the AEC Treaty, as such, did not in any way elaborate on the form or the nature of the envisaged Parliament. Instead, it simply provided that the PAP's powers, composition, organisation and functions were to be set out under the Protocol to be adopted at a later stage.⁹

When the AU replaced the OAU, the AU Constitutive Act left intact the AEC Treaty as long as it did not run contrary to the provisions of the AU Constitutive Act.¹⁰ With respect to the PAP, the Constitutive Act listed it as one of the organs of the AU,¹¹ and proceeded to echo the provisions of the 1991 AEC Treaty.¹² For example, it underscored the relevance of the participation of Africans in the development and economic integration of the continent.¹³

The 36th ordinary session of the Assembly of Heads of State and Government of the OAU – which was held from the 10 to 12 July 2000 in Lomé, Togo – led to the approval and adoption of the AU Constitutive Act. Almost a year later, on 1 March 2001, the PAP Protocol was adopted in Sirte, Libya,¹⁴ and was opened to all member

4 Art 4(1) AEC Treaty.

5 Art 4(2)(e).

6 Art 6(2).

7 Art 6(2)(f)(iv).

8 Art 6 read with art 7.

9 Art 14(2).

10 Art 33(2) AU Constitutive Act.

11 Art 5(c).

12 Art 14 AEC Treaty.

13 Art 17 AU Constitutive Act.

14 As above.

states of the AU for signature and ratification.¹⁵ The instruments of ratification or accession were deposited with the Secretary-General of the defunct OAU.¹⁶ The PAP Protocol came into force after Senegal deposited the 24th ratification instrument.¹⁷ Not all member states of the AU and the AEC have ratified the PAP Protocol. By 30 November 2013, seven AU member states had not ratified the PAP Protocol. These states are Côte d'Ivoire, Democratic Republic of the Congo, Eritrea, São Tomé and Príncipe, Somalia, Liberia and South Sudan.¹⁸ Of the seven, Eritrea, Somalia and South Sudan also never became members of the AEC.¹⁹ All seven countries have, however, ratified the AU Constitutive Act, meaning that they have accepted and agreed, under article 5, that the PAP is one of the organs of the AU. Having become part of the AU only in 2011, it remains to be seen whether South Sudan will ratify the PAP Protocol in the near future. It further remains to be seen how the non-ratification of the PAP Protocol by these seven countries will affect the integration process and movement towards supra-nationalism in Africa.

2.2 Objectives, functions and powers of the Pan-African Parliament

Article 3 of the PAP Protocol sets out nine objectives of the PAP and reflect what African leaders had in mind, especially in so far as integration in Africa is concerned.²⁰ The essence of the objectives of the PAP as set out under article 3 of the PAP Protocol is primarily to facilitate the effective implementation of the policies and objectives of the then OAU/AEC and ultimately those of the AU. Its objectives are further to educate the peoples of Africa about the objectives and policies aimed at integrating the African continent within the larger framework of the AU, to promote self-reliance, co-operation, peace and security in Africa. Most importantly, the objective of the PAP is to encourage good governance and to promote the principles of human rights and democracy in Africa. These objectives mirror, in substance, the Preamble of the PAP Protocol and the provisions of the 1991 AEC Treaty in that they mention the same aspects, except that the PAP Protocol expands on what is mentioned in both Preambles by setting out in specific terms the powers and functions of the PAP.

15 Art 21 PAP Protocol.

16 Art 21(2).

17 This is because art 22 of the PAP Protocol provides that the Protocol will enter into force after the deposit of the instruments of ratification by a simple majority of the 42 member (AEC) states; <http://allafrica.com/stories/200311210503.html> (accessed 16 February 2011).

18 C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 14-17; see generally <http://www.au.int/en/treaties> (accessed 23 April 2013) 503-508.

19 As above.

20 Art 3 PAP Protocol.

One of the objectives confirms that the PAP is intended to 'promote the principles of human rights and democracy in Africa'.²¹ Unlike the European Parliament (EP), the PAP has been mandated explicitly to promote human rights in Africa.²² The EP was set up without a specific mandate to promote or protect human rights and none of the founding treaties of the EP makes specific reference to human rights.²³ Both the 1952 Treaty of Paris²⁴ and the 1957 Treaty Establishing the European Economic Community (EEC) (Treaty of Rome)²⁵ are silent about human rights. Before the significant amendment, which introduced the co-decision procedures of the EU, was made by the Maastricht Treaty, the EP had to operate with the little powers that were conferred upon it by the founding treaties.²⁶ It can be concluded that, compared to the EP, the PAP actually finds itself in a better position in so far as the potential to promote human rights is concerned. In this respect, the PAP is more akin to the Parliament of the Council of Europe (PACE), which also has an explicit human rights mandate.

The Protocol further provides that during its first five years, the PAP will be able to discuss or express an opinion on any matter raised by its members or at the request of one of the other policy organs.²⁷ After deliberations, the PAP is free to make such recommendations as it deems appropriate and is mandated to make such recommendations on 'any matter', including issues pertaining to the respect for human rights, the consolidation of democracy, the promotion of good governance in Africa and the promotion of the rule of law.²⁸

21 Art 3(2).

22 T Demeke 'The new Pan-African Parliament: Prospects and challenges in view of the experience of the European Parliament' (2004) 4 *African Human Rights Law Journal* 62. Between the EP, the PAP and the PACE, it appears that the PACE's commitment to human rights issues is more pronounced as it is rooted in the founding documents of the Council of Europe. See generally LM de Puig *International parliaments* (2008) 52-53; B Haller *Assembly for Europe* (2006) 66-101.

23 As above.

24 The Treaty Establishing the European Coal and Steel Community (ECSC) was signed in Paris by Belgium, France, Italy, the Federal Republic of Germany, Luxembourg and The Netherlands. It entered into force for a 50-year period; <http://www.europarl.europa.eu/parliament/archive/staticDisplay.do?id=77&pageRank=13&language=EN> (accessed 26 June 2010).

25 Also known as the Treaty of Rome, signed 25 March 1957. Original Founding Treaty of the EEC, since renamed the European Community (EC), and integrated as part of the European Union (EU). The main provisions of the treaty still apply, but it has been amended by later treaties, so it should not be regarded as a current version. Various provisions have been reworded and renumbered; <http://www.britannica.com/EBchecked/topic/508886/Treaty-of-Rome> (accessed 13 March 2011).

26 M Shackleton 'The European Parliament' in J Peterson & M Shackleton (eds) *The institutions of the European Union* (2003) 107.

27 Art 11(1) PAP Protocol.

28 As above.

As one of the 'legislative' organs of the AU, the PAP is supposed to have an oversight role over the AU executive.²⁹ As of now, its mandate is limited to deliberating on issues and adopting reports and non-binding recommendations.³⁰ However, 'its evolution into a legislative organ is anticipated as regional integration is strengthened and the need for the harmonisation of laws in Africa increases'.³¹ The legislative mandate of the PAP remains one of the most important mandates of the continental body and, as such, is important in so far as the promotion of human rights in Africa is concerned. The acceptance of this mandate is also highlighted by the debates surrounding its functions and powers after it had concluded its inaugural five-year term.³²

The PAP is mandated to discuss its own budget and the budget of the AEC/AU and to make recommendations before the approval of the budget by the Assembly.³³ It is further mandated to work towards the harmonisation and co-ordination of laws of the member states,³⁴ policies, measures, programmes and other activities of Regional Economic Communities (RECs),³⁵ as well as the parliamentary *fora*, and to promote the programmes and objectives of the AU in the constituencies of member states. The PAP can make recommendations aimed at contributing to the attainment of the objectives of the AEC/AU and draw attention to the challenges facing the integration process in Africa as well as make recommendations on how to deal with such challenges.³⁶ It can also request officials of the AU to attend its sessions, produce documents or assist in the discharge of its duties, adopt its rules of procedure, elect its president and decide on such matters as the size of the AU Assembly as well as on the required staff of the PAP. The PAP is also allowed to undertake such duties that it might deem necessary or appropriate to achieve the objectives set out in the Protocol.³⁷

Since its establishment, the PAP has undertaken several activities pursuant to fulfilling or performing its functions under the PAP Protocol. The Parliament has held two ordinary sessions per year since its inauguration in 2004. It is during these sessions that the Parliament

29 Resolution on Oversight (AU Doc PAP-Res 004/04); F Viljoen *International human rights law in Africa* (2012) 186.

30 Press statement 'LLM students in human rights and democratisation in Africa' Centre for Human Rights, University of Pretoria <http://www.chr.up.ac.za> (accessed 20 September 2008); see also Centre for Human Rights 'The role of the PAP in conflict resolution and peacemaking in Africa' <http://www.chr.up.ac.za> (accessed 20 September 2008).

31 Viljoen (n 29 above) 184.

32 South African Institute of International Affairs *Pan-African Parliament: Evaluating an evolution* (2009).

33 Art 11(2) PAP Protocol.

34 Art 11(3).

35 Art 11(7).

36 Art 11(4).

37 Art 11(9) read with art 3 PAP Protocol.

debates motions and questions tabled before it. Following these debates, the Parliament has passed recommendations and resolutions on issues such as elections, the economy, culture and co-operation. Some of these resolutions and recommendations are country-specific. Several fact-finding missions to a number of countries have been undertaken by the PAP, with reports of such missions tabled before the Parliament once the mission has been completed.

2.3 Institutional framework of the Pan-African Parliament relevant to the promotion of human rights

Membership of the PAP is open to those countries who are members of the AU or are state parties to the AEC Treaty. Each member state is represented by five representatives, usually elected from the respective national parliaments or deliberative organs. All member states' representatives to the PAP together make up the Plenary, which is the cornerstone and central organ of the Parliament. All the functions and powers of the PAP, as elaborated and specifically provided for under the PAP Protocol, are carried out by the Plenary.³⁸ One specific function of the Plenary is to debate the various issues and questions tabled before the Parliament. The Plenary addresses various issues of concern to Africans and passes resolutions which are taken to be the voice of Africans through the PAP.

To assist with dealing with issues that are placed before the Parliament, the PAP initially created ten Permanent Committees.³⁹ It appears that the ten Permanent Committees were created in order to allow the Parliament to co-ordinate the various activities of the PAP on the continent dealing with different aspects of life in Africa. In particular, the PAP established the following committees: the Committee on Rural Economy, Agriculture, Natural Resources and Environment; the Committee on Monetary and Financial Affairs; the Committee on Trade, Customs and Immigration Matters; the Committee on Co-Operation, International Relations and Conflict Resolutions; the Committee on Transport, Industry, Communication, Energy, Science and Technology; the Committee on Health, Labour and Social Affairs; the Committee on Education, Culture, Tourism and Human Resources; the Committee on Gender, Family, Youth and People with Disabilities; the Committee on Justice and Human Rights; and the Committee on Rules, Privileges and Discipline.

Permanent Committees are made up of not more than 30 members, with each region appointing at least three members to the Committee.⁴⁰ When making such an appointment, the Rules of Procedure enjoin the region to take into account gender balance.⁴¹ However, the Rules do not provide for any quota for the women that

38 Art 11 PAP Protocol, read with Rule 4 of the PAP Rules of Procedure.

39 Rule 22 PAP Rules of Procedure.

40 Rule 22(5) PAP Rules of Procedure.

41 As above.

are expected to be appointed by the region to any of the Permanent Committees. One of the limitations imposed on membership to the various Permanent Committees is that one member is not allowed to serve in more than one committee at the same time.⁴² The general functions of these Permanent Committees are set out under the PAP Rules of Procedure,⁴³ which provide at the outset '[t]hat the President shall, on the advice of the Bureau, determine the business to be handled by the Committees' and that the Parliament may allocate any other matter to any committee it deems appropriate.⁴⁴ The specific functions of the committees are then set out in Rule 26 of the PAP Rules of Procedure.

The Permanent Committee on Justice and Human Rights (PCJHR) is responsible for assisting the PAP in its role of harmonising and co-ordinating the laws of member states.⁴⁵ Considering what the PAP has done as regards human rights, it is not clear what exactly the architects of the PAP envisaged in relation to the duty of the PCJHR to harmonise the laws of the member states. It is, however, conceivable that they referred to harmonisation in the context of the duty of the PAP to ensure consistency amongst the laws of the member states with a view to ensuring a common standard across the continent. This conception of harmonisation envisages the possibility of having uniform laws on the continent.

The PCJHR is also responsible for promoting the respect and development of sound principles of freedom, civil liberties, justice, human and peoples' rights and fundamental rights within the AU.⁴⁶ The Permanent Committee on Gender, Family, Youth and People with Disabilities is largely responsible for considering issues relating to the promotion of gender equality, and is supposed to oversee the development of policies and activities of the AU relating to family, youth and people with disabilities. One notable function of the Permanent Committee on Co-Operation, International Relations and Conflict Resolutions is to assist the Parliament in its efforts of conflict prevention and resolution.⁴⁷

The more general functions of the PCJHR are to handle business as determined by the President of the Parliament on the advice of the Bureau,⁴⁸ and further to handle business that is ordinarily handled by the corresponding specialised technical committee responsible to the Executive Council in accordance with article 14 of the Constitutive Act. More specifically, the PCJHR must (a) assist Parliament in its role of harmonising and co-ordinating the laws of the member states, and

42 Rule 22(11).

43 As above.

44 Rule 25(3).

45 Rule 26(9)(a).

46 Rule 26(9)(b).

47 Rule 26(4)(d).

48 Rule 25.

(b) promote respect and the development of sound principles of freedom, civil liberties, justice, human and peoples' rights and fundamental freedoms within the AU.⁴⁹ The foregoing are the provisions pertaining to the mandate of the PCJHR as discernible from the Rules of Procedure. A cursory look at the functions of the PCJHR as provided for under the PAP Rules of Procedure⁵⁰ is likely to lead one to the conclusion that the mandate of the PCJHR is somewhat limited. However, upon closer inspection, the Rules of Procedure reveal that the Committee is empowered to do more with regard to human rights issues.

To date, the Committee has been involved in several activities that are aimed at furthering the respect for human rights in Africa. The activities of the Committee are largely characterised by workshops, fact-finding missions, elections observer missions as well as lobby work in relation to the ratification of human rights instruments as well as capacity building. A perusal of the Committee's 2009 action plan and budget for the years 2007 to 2010, for example, indicates that the Committee has classified its activities as observation, fact-finding activities, institutional exchange and partnership activities, promotion activities, research, study and documentation activities and activities relating to international justice.⁵¹ This is clearly in line with the mandate of the Committee, which is essentially to act as a vehicle for the Parliament to promote respect for human rights and justice in Africa. A further perusal of the available Committee reports reveals that there is no particular format that the reports follow so as to make more nuanced the above demarcation of its mandate. The end result is that the reports come across as incoherent and in the process failing to really make known the important work that the Committee undertook.

3 Pan-African Parliament and African Union institutions dealing with human rights

3.1 Introduction

The human rights mandate of the PAP is primarily promotional. Closer collaboration between the PAP and AU institutions dealing with human rights could result in a marked improvement in the promotion of human rights. So far, the Parliament has been involved in

49 Rule 26(9)(b).

50 Rule 29.

51 The budget for the years 2007-2010 of the Committee on Justice and Human Rights relating to the Work Plan on the basis of the Strategic Plan of the Pan-African Parliament; Committee on Justice and Human Rights – Action Plan 2008 – 2009 (both on file with the author).

numerous fact-finding missions⁵² and election observer missions⁵³ and has carried out a number of human rights-oriented workshops and symposia. The PAP's resolutions and recommendations have over the years sought to encourage member states to ratify some of the African human rights treaties.⁵⁴ The PAP thus offers these institutions the platform to disseminate and encourage member states to ratify and domesticate human rights treaties. In that sense, the possible areas for collaboration between the PAP and other institutions are vast and should be nurtured.

The long-term benefits of the collaboration envisaged here are that the PAP will provide other institutions with the platform to advocate the protection and promotion of human rights at the domestic level. In turn, the Parliament will benefit from the expertise offered by these bodies and thus improve its efforts in the promotion of human rights. For example, the African Commission could assist the PCJHR on such issues as handling the parliamentary petitions, while the Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) may prove to be useful to the Committee on Gender, Family, Youth and People with Disabilities. The exchange of ideas on areas such as fact finding and election observer missions will go a long way towards improving the PAP's efforts in those areas.

The PAP Rules of Procedure make provision⁵⁵ for the relationship between the Parliament and other organs of the AU. The other article 5 organs of the AU are the Assembly of the AU; the Executive Council; the Court of Justice; the Commission; the Permanent Representatives' Committee; the Specialised Technical Committees; the Economic, Social and Cultural Council; and the financial institutions.⁵⁶ In addition to these institutions, there are those which can be referred to as 'AU treaty-based institutions', namely, the African Commission and the African Children's Committee. These are protective bodies aimed at monitoring the implementation of the rights established under the African Charter and the African Charter on the Rights and Welfare of the Child (African Children's Charter).

Despite the PAP's limited use of its mandate with respect to human rights, it should be viewed as forming part of those organs of the AU specifically mandated to deal with human rights. Understanding the mandate of the PAP in that fashion has its advantages. Chief among them is the recognition from other AU human rights institutions of its

52 To date, it has undertaken about 10 missions to different countries in Africa. Countries to which these fact-finding missions have been undertaken include the Democratic Republic of the Congo, Mauritania, Sudan, Côte d'Ivoire, Rwanda, Chad, Central African Republic, Tunisia and Libya.

53 Some of the countries that the PAP sent elections observer missions to include the Democratic Republic of the Congo, Ghana, Kenya, Swaziland and Zimbabwe.

54 Eg Resolution on Ratification of Protocol on Women's Rights in Africa, PAP Res 006/04, adopted by the PAP during its 2nd ordinary session, 13-24 November 2006, Midrand, South Africa.

55 Part XIV PAP Rules of Procedure.

56 Arts 5(1)(a)-(i) AU Constitutive Act.

strategic position, value or potential. Further, it will create greater room for the establishment of synergies likely to ensure augmented human rights promotion and protection in Africa. Against this background, the following paragraph provides a discussion of the actual and potential relationship between the PAP and other AU human rights institutions.

3.2 Pan-African Parliament and the quasi-judicial and judicial institutions of the African Union

The African human rights system is mainly made up of the African Commission, the African Children's Committee and the African Human Rights Court. These institutions, the primary custodians of human rights in Africa, have elicited considerable academic energy.⁵⁷ Considering that the PAP has a human rights mandate, the question may well be posed as to how it will co-exist with these institutions for the effective promotion of human rights on the continent. The following discussion will be speculative, considering that currently there is little, if any, actual relationship between the PAP and these institutions. It is possible that the drivers of these institutions are not aware that the Parliament has a promotional human rights mandate.

It is argued here that the relationship between the PAP and other organs of the African human rights system may be manifested in two ways. First, the relationship may manifest itself through the litigation powers of the PAP, that is, instances where the Parliament is able to seek recourse before those institutions with a quasi-judicial or judicial mandate. Second, the promotional mandate of the PAP may be exercised in conjunction with the AU's quasi-judicial and judicial bodies. It is therefore appropriate to highlight how the PAP may relate with other actors within the African human rights system.

The provisions of the PAP Protocol relating to the functions and powers of the Parliament do not make any reference to the ability of the PAP to submit any matter for adjudication to the quasi-judicial or judicial bodies of the AU. Without belabouring the point, it appears that the PAP cannot submit any communication or any request for an advisory opinion to the African Commission and the African Children's Committee. Considering that both institutions predated the PAP, it is

57 ANM Abdullahi 'Human rights protection in Africa: Toward effective mechanisms' (1997) 3 *East African Journal of Peace and Human Rights* 1-31; EEO Alemika 'Protection and realisation of human rights in Africa' (2001) 1 *The Constitution – A journal of constitutional development* 41; DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157; SA Dersso 'The jurisprudence of the African Commission with respect to peoples' rights' (2006) 6 *African Human Rights Law Journal* 358; F Viljoen 'The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *Comparative and International Law Journal of Southern Africa* 198; F Viljoen & E Baimu 'Courts of Africa: Considering the co-existence of the African Court on Human and Peoples' Rights and the African Court of Justice' (2004) 22 *Netherlands Quarterly of Human Rights* 254.

not at all surprising that the Parliament is not explicitly mandated to submit any communications to these two bodies. Individual communications to the African Commission are limited to individuals, groups of persons or non-governmental organisations (NGOs).⁵⁸ Communications to the African Children's Committee may be submitted by individuals, groups or NGOs recognised by the OAU/AU member states and the UN.⁵⁹

The PAP Protocol only makes reference to the African Court of Justice. Considering that the African Court of Justice and the PAP both emanate from the AEC Treaty of 1991, this should not be surprising. The PAP Protocol provides that the African Court of Justice will be empowered to adjudicate over matters relating to the interpretation of the PAP Protocol.⁶⁰ However, following the decision of the AU to merge the African Human Rights Court and the Court of Justice into the African Court of Justice and Human Rights,⁶¹ and pending the entry into force of the Protocol Establishing the African Court of Justice and Human Rights, such matters will be submitted to the AU Assembly for resolution.⁶² Currently, the relationship between the PAP and the African Human Rights Court is limited to the exchange of information through presentations and seminars. However, the Parliament is at liberty to seek advisory opinions from the African Human Rights Court on matters relating to the African Charter or any other relevant human rights instruments.⁶³ This is based on the fact that, in addition to its contentious jurisdiction, the African Court has been vested with advisory powers. Such advisory opinions, however, may not be sought with respect to cases that have been submitted to the African Commission for adjudication.⁶⁴

While it is clear that at the moment the PAP cannot institute matters against other organs of the AU before the African Human

58 Viljoen (n 29 above) 304.

59 Art 44 African Children's Charter.

60 Art 20 PAP Protocol.

61 For a detailed discussion on the merger of the African Court on Human and Peoples' Rights and the African Court of Justice, see F Viljoen 'AU Assembly should consider human rights implications before adopting the Amending Merged Court Protocol' (posted 23 May 2012) <http://africlaw.com/tag/african-court-on-human-and-peoples-rights/> (accessed 31 January 2013); Viljoen & Baimu (n 57 above) 241; CM Peter 'The proposed African Court of Justice: Jurisprudential, procedural, enforcement problems and beyond' (1993) 1 *East African Journal of Peace and Human Rights* 117; NJ Udombana 'An African Human Rights Court and an African Union Court: A needful duality or a needless duplication' (2003) 28 *Brooklyn Journal of International Law* 811. The list of countries that have signed, ratified or acceded to the Protocol on the Statute of the African Court of Justice and Human Rights, downloaded from the website of the AU <http://www.africa-union.org> on 19 April 2010, shows that as at that date, 21 states had signed the Protocol, but only two states had ratified/acceded and deposited their instruments with the African Union Commission (AUC), namely, Libya and Mali.

62 As above.

63 Art 4(1) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

64 As above.

Rights Court, a reading of the provisions of the Protocol on the Statute of the African Court of Justice and Human Rights indicates otherwise. Once the merged court becomes operational, it will be able to receive and consider cases relating to, among other things, the interpretation of the AU Constitutive Act and all acts, decisions, regulations and directives of the organs of the AU.⁶⁵ Further, the Court will be able to adjudicate over disputes pertaining to a breach of an obligation owed to a state party or to the AU.⁶⁶ The PAP, together with the AU Assembly and other organs of the AU, will be able to submit cases to the Court for adjudication.⁶⁷ This will be in relation to the interpretation and application of the AU Constitutive Act, other AU treaties, questions of international law as well as acts, decisions, regulations and directives of the organs of the AU.⁶⁸ With the notable exception of the AU Assembly and the PAP, other organs of the AU will have to seek authorisation from the Assembly to submit cases before the African Court of Justice and Human Rights.⁶⁹ Thus, a holistic interpretation of the aforementioned provisions clothes the African Court of Justice and Human Rights with jurisdiction to entertain matters submitted by the PAP as against member states and other AU organs.

The position adopted under the Protocol on the Statute of the African Court of Justice and Human Rights is similar to the position adopted by the EU with respect to the EP's powers of litigation. The ability of the PAP to submit cases before the African Court of Justice and Human Rights is particularly important as it will, in the long term, allow the Court to interpret, and where necessary delineate, the powers of the PAP as well as define the relationship between the PAP and other organs of the AU. As mentioned, the EP was vested with the power to litigate by the Lisbon Treaty so as to ensure that the consultation procedure is adhered to by other members of the EU, in particular the Commission.⁷⁰ The consultation procedure of the EU is a well-established method of consultation that ensures the involvement of the EP in EU legislation.⁷¹ According to this procedure, the EU Commission and the Council consult the EP by submitting to it whatever piece of legislation under consideration before it is made law.⁷² The EU Commission and the Council have no duty to follow, or even read, the response of the EP, but they are under a duty to respect the co-decision procedure and thus to wait for the response of

65 Arts 28(a)-(h) Protocol to the African Charter on Human and Peoples' Rights on the Statute of the African Court of Justice and Human Rights.

66 As above.

67 Art 29(1)(b) African Court of Justice Protocol.

68 Art 28.

69 Art 29(b).

70 N Neill *The government and politics of the European Union* (2006) 242.

71 As above.

72 As above.

the EP on the proposed law.⁷³ In the famous *Isoglucose* case,⁷⁴ the EU Commission and Council failed to wait for the EP's opinion under the consultation procedure. The gist of the case submitted before the Court was that the Council had not exhausted all the possibilities open to it for getting the EP's opinion and, in particular, it had not requested an extraordinary parliamentary session as it had the right to. It was in that context that the EP succeeded in getting the EU Court to annul the decision which was made without the consultation procedure having been properly followed.

The PAP Protocol is currently undergoing review with particular emphasis being placed on the possibility of expanding its legislative competence. Still, the 2011 Draft Revised PAP Protocol does not clothe the PAP with the power to submit contentious disputes against any of the AU organs before any judicial organs of the AU.⁷⁵ It only makes provision for relations between the PAP, parliaments of the RECs and national parliaments or other deliberative organs.⁷⁶ It further provides that the PAP may solicit the interpretation of legal instruments of the AU by the African Court of Justice and Human Rights.⁷⁷ In essence, the provision of this Draft Revised PAP Protocol mirrors, in so far as advisory jurisdiction of the Court is concerned, the provision of the Protocol of the Statute of the African Court of Justice and Human Rights. These additions to the Draft Revised PAP Protocol, if they are to be carried forward, are unlikely to make any significant changes to the *status quo*. This is because it appears that the Draft Revised PAP Protocol merely mentions the African Court of Justice and Human Rights, a matter which has already been provided for by the Protocol to the African Court of Justice and Human Rights.

The Draft Revised PAP Protocol should have specifically spelled out the PAP's ability to launch proceedings before the AU's judicial bodies as against other AU organs, as is the case with the EP. Demeke argues that, due to the problem of violation of human rights in Africa, it is important that the PAP should be 'granted *locus standi* to bring a case against other institutions of the AU before the two regional courts'.⁷⁸ Unfortunately, the current Draft Revised Protocol does not seem to address this *lacuna*.

3.3 Pan-African Parliament and the New Partnership for Africa's Development and the African Peer Review Mechanism

The African Peer Review Mechanism (APRM) and the PAP have both been identified as being geared towards ensuring an Africa that

73 As above.

74 *SA Roquette Freres v Council* [1980] ECR 3333 3424.

75 Art 21 Draft Revised Protocol, Exp/Legal/AUC-Auth/4(v)Rev.1, <http://www.au.int/.../Draft%20Protocol%20/PAP> (accessed 31 October 2013).

76 Art 20 Draft Revised Protocol.

77 Art 21.

78 Demeke (n 22 above) 60.

respects and protects the rights of its citizens. Both appear as a sign of Africa's commitment to governance. As already indicated, the PAP is clearly mandated to promote human rights on the continent. The APRM was established to 'monitor and assess the compliance of African governments with the norms of governance and human rights'.⁷⁹ The APRM, which was conceived by the New Partnership for Africa's Development (NEPAD),⁸⁰ is in essence a voluntary exercise through which selected members of the AU subject themselves to assessment by other member states on issues of democracy, good governance and socio-economic development.⁸¹

An extensive discussion of the processes and procedures of the APRM is beyond the ambit of this article. In fact, a large body of scholarly work has been dedicated to the establishment,⁸² the processes and procedure of the APRM,⁸³ as well as its effectiveness.⁸⁴ As it has been rightly noted, the APRM 'is arguably the strongest tool for members of Parliament to promote and monitor governance in Africa'.⁸⁵ This fact has been appreciated by the Parliament, and was codified into the PAP's strategic plan 2006-2010.⁸⁶ This plan identified 'the consolidation of the APRM process in all member states'⁸⁷ as an opportunity worth pursuing. The PAP has even

79 T Murithi 'Institutionalising Pan-Africanism: Transforming African Union values and principles into policy and practice' Institute for Security Studies (ISS) occasional paper, June 2007 143.

80 See generally O Jonas 'The quest to achieve African Renaissance: Reflections on NEPAD' (2012) 5 *Journal of Pan-African Studies* 83.

81 M Killander 'The role of the African Peer Review Mechanism in inducing compliance with human rights' unpublished LLD thesis, University of Pretoria, 2009 7.

82 R Kanbur 'The APRM: An assessment of concept and design' (2004) <http://www.arts.cornell.edu/poverty/kanbur/APRM.pdf> (accessed 16 August 2012); Z Kebonang 'African Peer Review Mechanism: An assessment' (2005) 61 *India Quarterly* 138; R Herbert & S Gruzd *The African Peer Review Mechanism: Lessons from the pioneers* (2008) <http://unpan1.un.org/intradoc/groups/public/documents/amdin/unpan036022.pdf> (accessed 8 January 2013).

83 See generally M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41; F Gaer 'A voice not an echo: UPR and the UN treaty body system' (2007) 7 *Human Rights Law Review* 109; A Abebe 'Of shaming and bargaining of African states: African states and the UPR of the UN Human Rights Council' (2009) 9 *Human Rights Law Review* 1.

84 J Akokpari *Policing and preventing human rights abuses in Africa: The OAU, the AU, the NEPAD Peer Review* (2004) 32; AMB Mangu 'What future for human and peoples' rights under the African Union, New Partnership for Africa's Development, African Peer Review Mechanism and the African Court?' (2004) 29 *South African Yearbook of International Law* 136; M Hansungule 'Overview paper on the role of the APRM in strengthening governance in Africa: Opportunities and constraints in implementation' (undated), http://www.sarpn.org.za/documents/d0003007/APRM_review_Hansungule.pdf (accessed 16 August 2012) 6.

85 S Gruzd 'PAP and peer review: Enhancing involvement, adding value' South African Institute of International Affairs, <http://www.saiia.org.za/governance-and-aprm-opinion/pap-and-peer-review-enhancing-involvement-adding-value.html> (accessed 16 August 2012).

86 2006-2010 PAP Strategic Plan 7.

87 As above.

adopted resolutions and recommendations on the APRM, highlighting the importance of the APRM and the relevance of the Parliament to the APRM processes and urging member states to be part of the process.⁸⁸ In particular, the Parliament emphasised that adherence to the process was a sign that a state was committed to democracy and good governance.⁸⁹ The Economic Commission for Africa has highlighted that the participation of parliaments in the APRM is important for the success of the process.⁹⁰ This is so because parliamentarians are in a suitable position to influence government decisions and policies, and to enhance public ownership of the APRM.⁹¹ Parliamentarians are able to act as a bridge between citizens, civil society and the APRM processes, thereby creating space for improved public participation.⁹²

The PAP is enjoined to promote the harmonisation and co-ordination of the AU programmes.⁹³ This obviously includes the activities of NEPAD and the APRM. Perhaps recognising the importance of the eventual participation of the PAP in the activities of the APRM, the base document provided that '[s]ix months after [each country review report (CRR)] has been considered by the Heads of State and Government of the participating member countries, it should be formally and publicly tabled in key regional and sub-regional structures such as the Pan-African Parliament'.⁹⁴ It is expected that the report will not only be tabled, but will be debated by the PAP MPs before adoption.

The activity reports of the PAP indicate that there has been little participation of the PAP in the work of the APRM. In fact, it has been observed that the PAP's interaction with NEPAD has been 'peripheral'. 'Although these institutions are housed within a few kilometres of each other in Midrand, South Africa, they appear to exist miles apart.'⁹⁵ Living up to its 'talk shop' status or perhaps utilising its promotional mandate, the Parliament has held workshops with the United Nations Economic Commission for Africa (UNECA) aimed at

88 Resolution on Signing of the Adherence to the African Peer Review Mechanism - PAP-RES 001/05; Resolution for the awareness building of activities of the APRM Secretariat, the establishment of a working platform for PAP and the APRM Secretariat and the taking into account of the specific characteristics of each country in their evaluation - PAP/RES 04(VI)/06; Recommendations [sic] on the new Partnership for Africa's Development and the African Peer Review Mechanism - PAP - Rec 002/04; New Partnership for Africa's Development (NEPAD), Recommendation PAP - Rec 003/2006; Recommendation on Peace and Security Issues in Africa, PAP/Recom.01(VI)/06, para 5 .

89 PAP-RES 001/05.

90 Economic Commission for Africa *The role of the Parliament in APRM: Information on how parliamentarians can participate in APRM* (2011) 10.

91 As above.

92 As above. M Hansungule 'Malawi and the African Peer Review Mechanism: A bold step towards good governance?' (2008) 2 *Malawi Law Journal* 14.

93 Art 11(7) PAP Protocol & Rule 5 PAP Rules of Procedure.

94 Para 25 APRM Base Document 2001.

95 Gruzid (n 85 above).

educating them on their role in the APRM process.⁹⁶ The report of the work of the PAP for the period January to June 2009, without any details, records that the Parliament has a 'good working relationship with NEPAD and the APRM'⁹⁷ and that the 'last NEPAD-PAP dialogue meeting held in April 2009 set the way forward for the two institutions to strengthen their collaboration mechanisms'.⁹⁸

The PAP occasionally receives reports on the status of the implementation of the assessment missions in the countries that have undergone an APRM review.⁹⁹ The PAP has, for example, received Malawi's APRM report.¹⁰⁰ In the case of Ghana, Rwanda and Kenya, it is indicated that 'the PAP, upon extensive deliberations, exhorted African leaders to accede to the APRM review and implement its findings'.¹⁰¹ It has been said that the reports 'were tabled without much preparation, analysis or debate'.¹⁰² The representative nature of the PAP gave rise to the expectation that the reports would be presented and thoroughly debated by the PAP MPs. Through such debates, the position of the Parliament on the issues contained in the reports would become known and should possibly be used in the future by the countries concerned to improve their systems. Also, such debates would enable the country representatives to make a valuable input when the reports are debated at the national level.¹⁰³

Improved participation of the PAP in the APRM process is therefore necessary. UNECA has indicated that the PAP can participate in the APRM process in four major ways, namely, by regularly engaging in debates surrounding the APRM process; by engaging in capacity building; by undertaking APRM missions; and by making the APRM a regular item in its agenda for debate during the plenary sessions.¹⁰⁴ It is suggested that the PAP should adopt a more focused strategy in its

96 The workshop which was held in Addis Ababa, Ethiopia from 12-14 May targeted parliamentarians from francophone and Portuguese-speaking countries and was titled Enhancing the role and effective participation of parliamentarians in the African Peer Review Mechanism (APRM) Process, Activity Report of the Pan-African Parliament for the period January to June 2010, Kampala, Uganda 7.

97 Report of the work of the Pan-African Parliament for the period January to June 2009, Sirte, Libya, June/July 2009, EX.CL/526(XV) Rev.1, 2.

98 As above.

99 Report of the work of the Pan-African Parliament for the period January to December 2007, Addis Ababba, Ethiopia, 28-29 January 2008, PAP/S/RPT/72/08, 9.

100 Hansungule (n 92 above) 14.

101 Report of the work of the Pan-African Parliament for the period January to December 2007, Addis Ababba, Ethiopia, 28-29 January 2008, PAP/S/RPT/72/08 9.

102 Hebert & Gruzd (n 82 above).

103 Eg, during the debate on the Report of the Pan-African Parliament by the Kenya National Assembly Member of Parliament Oparanya, head of the PAP delegation from Kenya, noted that during the PAP debates on the APRM, negatives about Kenya were highlighted and these included corruption and marginalisation of tribal minorities; Kenya National Assembly Official Report, 12 June 2007, Motion on the Adoption of Report on 6th session of Pan-African Parliament, 1705-1718.

104 Gruzd (n 85 above).

interaction with the PAP so as to ensure that its participation in the APRM process is relevant and useful.

4 Pan-African Parliament and civil society

Civil society has emerged as one of the most important actors on the human rights agenda.¹⁰⁵ The participation of NGOs and international non-governmental organisations (INGOs) in the promotion and protection of human rights in Africa has over the years become more and more impressive.

The importance of civil society in the human rights agenda is evidenced by their participation in the work of the African Commission, the African Human Rights Court and the African Children's Committee.¹⁰⁶ Civil society organisations have straddled the promotional and protective human rights mandate. They have managed to submit cases involving the violation of human rights by AU member states, and have shown tremendous commitment towards the promotion of the various human rights mechanisms in Africa. Their promotion of human rights has shaped them into one of the best vehicles to champion the human rights cause in Africa.

The ever-vigilant civil society is usually more informed about the actions of the government and, in turn, the government is also aware of their agenda.¹⁰⁷ The promotion and protection of human rights work done by civil society is usually carried out by experts or human rights experts. It is also worth noting that some members of civil society are donor-funded and can carry out human rights promotional activities. It does come as a surprise that the PAP Protocol and the PAP Rules of Procedure make no provision for the participation of civil society in its activities.¹⁰⁸ The Economic Community of West-African States (ECOWAS) Parliament,¹⁰⁹ the East African Legislative Assembly

105 AE Rice & C Ritchie 'Relationships between international non-governmental organisations and the United Nations' (1995) 47 *Transnational Associations* 254.

106 Viljoen (n 29 above) 405; BD Mezmur 'The African Committee of Experts on the Rights and Welfare of the Child: An update' (2006) 6 *African Human Rights Law Journal* 549; BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2010) 10 *African Human Rights Law Journal* 26; R Murray *The role of national human rights institutions at the international and regional levels: The experience of Africa* (2007).

107 SA Yeshanew 'Utilising the promotional mandate of the African Commission on Human and Peoples' Rights to promote human rights education in Africa' (2007) 7 *African Human Rights Law Journal* 202.

108 Southern Africa Trust 2007 - Establishing a civil society support mechanism with the Pan-African Parliament (PAP), the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM) 29, http://www.southernafricatrust.org/docs/CSO_Interface_Report_2007.pdf (accessed 18 August 2012).

109 Art 81 ECOWAS Treaty.

(EALA),¹¹⁰ the PACE¹¹¹ and the EP¹¹² are all mandated to co-operate with civil society in their respective jurisdictions by clear and unambiguous provisions in the founding treaties or their rules of procedure. The absence of a similar provision – specific to the co-operation of the PAP with civil society – has not prevented the Parliament from engaging civil society, though. The PAP Strategic Plan clearly earmarks co-operation with civil society and trade unions as one of the measures that will be adopted to ensure that ‘the peoples’ voices are represented, heard and listened to’.¹¹³ The PAP has also indicated that co-operation between civil society and the Parliament is undertaken within the larger framework of co-operation, as envisaged by the AU. It has cited provisions of the AU Constitutive Act¹¹⁴ and objectives of the Parliament in support of the collaboration between the Parliament and civil society.

The collaboration of the PAP and civil society is largely confined to workshops and conferences, most of which mainly benefit the PAP MPs. The workshops are usually preceded by presentations to the relevant committees for purposes of sharing with them the activities of a particular NGO. Most NGOs approach the PAP to indicate how they can assist and it is only then that they participate in the relevant committee sittings. In fact, it has been noted correctly that the PAP has largely collaborated ‘with research institutes and think tanks’¹¹⁵ and has not widened its network of civil society partners.

There are no clear efforts by the PAP to establish a permanent civil society forum as is the case with the African Commission. No interaction between the Parliament and civil society is visible when one visits the Parliament’s website. It must be pointed out that ‘thirty-five African and international civil society organisations working in over forty African countries participated in the first Consultative Dialogue with the Pan-African Parliament’.¹¹⁶ The impressive

110 EALA Strategic Plan 2010-2012 http://eala.org/oldsite041111/key-documents/doc_download/13-eala-strategic-plan-2010-2012.html (accessed 29 September 2012).

111 Art 44(5) Rules of Procedure of the PACE. See generally Parliamentary Assembly, Council of Europe Report, Political Affairs Committee on Co-operation between the Assembly and the Conference of INGO 7, <http://assembly.coe.int/Documents/WorkingDocs/Doc07/EDOC11441.pdf> (accessed 23 August 2012).

112 Rule 25 Rules of Procedure of the European Parliament; ANNEX XIX (to the European Parliament Rules of Procedure): Communicating Europe in partnership, para 7.

113 PAP Strategic Plan 12.

114 Art 17 AU Constitutive Act; African Civil Society Organisation and the Pan-African Parliament Consultative Dialogue *Report on building effective mechanisms for civil society engagement with the Pan-African and Regional Institutions*, 7-8 May 2007, Gallagher Estate, Midrand, South Africa 4, <http://www.southernafricatrust.org/docs/PAP%20Dialogue-dft5.pdf> (accessed 18 August 2012).

115 n 112 above, 5.

116 Submission from Civil Society Organisations to the Pan-African Parliament on the Proposal for Continental Government 14 May 2007, Gallagher Estate, Midrand, South Africa, http://www.afrimap.org/english/images/research_pdf/CSO_Submission_PAP_May2007.pdf (accessed 18 August 2012).

participation of civil society in this forum should have been the start of a robust relationship between the Parliament and civil society. However, on the contrary, an audit of the PAP Activity Reports from 2007 onwards indicates that the PAP and civil society have not fully implemented the recommendations that were adopted at the end of that consultative dialogue. It was recommended that the Parliament should invite more members of civil society to its sessions, publicise its activities, encourage civil society to participate in the work of the various permanent committees of the Parliament and have more joint activities.¹¹⁷

The PAP is yet to successfully secure greater participation of civil society in its activities. This buy-in is more than necessary and will most certainly improve the work of the Parliament. It will assist in taking the Parliament to the people. Such joint activities may include seminars, collaboration in elections and observer and fact-finding missions, participation in the petition procedure, presentations before the various Permanent Committees, as well as in monitoring the progress of member states on issues earmarked by the Parliament as necessitating the states' attention.

The Parliament should develop a normative framework within which it is to co-operate with civil society. This will in essence formalise the relationship between the two actors. The normative framework should be able to take into account the diversity of civil society, the parameters within which some members of civil society work as well as the varying expertise that civil society possesses. Further, the PAP should reach out and invite members of civil society to participate, to jointly co-ordinate activities and to publicise the work of the Parliament. It is imperative that the Parliament should move towards creating better synergies with members of civil society. The creation of a forum where the Parliament and civil society can consult each other consistently will certainly improve the promotion and protection of human rights in Africa. The West African Civil Society Forum and the African Commission NGO Forum¹¹⁸ may serve as possible models should the PAP establish such a forum. The former has participated actively in the activities of the ECOWAS Parliament, while the latter is well known for its contribution to the work of the African Commission.

117 Southern Africa Trust 2007 — Establishing a Civil Society Support Mechanism with the Pan-African Parliament (PAP), the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM) 12, http://www.southernafricatrust.org/docs/CSO_Interface_Report_2007.pdf (accessed 18 August 2012).

118 For more information, visit the African Commission NGO Forum at <http://www.ishr.ch/african-commission/ngo-forum> (accessed 20 August 2012).

5 Pan-African Parliament and national human rights institutions

The PAP has not made sufficient efforts to collaborate with national human rights institutions (NHRIs) in the promotion of human rights. Likewise, NHRIs have not made any effort to collaborate with the Parliament. This is perhaps due to the limited knowledge of the activities of the Parliament among NHRIs and the other way around. However, it is imperative that a stronger relationship between the two be established and nurtured.

A reflection on the Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights (Paris Principles) adopted by UN General Assembly Resolution of 20 December 1993 reveals an opportunity for co-operation between the PAP and NHRIs. The nature, duties and functions of NHRIs have been discussed in detail elsewhere.¹¹⁹ Here, reasons for the involvement of these institutions in the activities of the PAP are identified.

First, the Paris Principles envisage collaboration between NHRIs and a wide spectrum of actors at country level. The Paris Principles encourage NHRIs to consult other bodies with a similar mandate. Considering that NHRIs are now regarded as a bridge providing a practical link between the governing and the governed,¹²⁰ their relationship with the PAP is more than necessary. The role of NHRIs is no longer considered as only limited to the national arena. They have proven that their relevance to the regional and international levels can no longer be ignored.¹²¹

Second, the unique position of NHRIs at the national level makes them suitable partners to collaborate with the Parliament. They are neither state actors nor members of civil society. It is therefore easier for them to address issues of public concern without being accused of being biased. That is why the Belgrade Principles on the Relationship between NHRIs and Parliaments (Belgrade Principles), adopted in February 2012, provide a useful framework for co-operation between

119 OC Kafor & SC Agbakwa 'On legalism, popular agency and "voices of suffering": The Nigerian National Human Rights Commission in context' (2002) 24 *Human Rights Quarterly* 663; International Council on Human Rights Policy *Performance and legitimacy: National human rights institutions* (2004) 3; ESCR Committee General Comment 10, The role of NHRIs in the protection of economic, social and cultural rights (1998) Doc E/1999/22; LC Reif 'Building democratic institutions: The role of national human rights institutions in good governance and human rights protection' (2000) 13 *Spring Harvard Human Rights Journal* 2; S Cardenas 'Emerging global actors: The United Nations and national human rights institutions' (2003) 9 *Global Governance* 23.

120 A Smith 'The unique position of national human rights institutions: A mixed blessing?' (2006) 28 *Human Rights Quarterly* 904.

121 See generally Dinokopila (n 105 above) 33, making a case for the acceptance of NHRIs as regional and international actors.

the two.¹²² The Belgrade Principles provide for four main areas of co-operation between NHRIs and parliaments.¹²³ These are co-operation in relation to: legislation, international human rights mechanisms, the education, training and awareness raising of human rights as well as monitoring the executive's response to the judgments of judicial and quasi-judicial bodies.¹²⁴ Even though the Belgrade Principles do not make specific reference to international parliamentary institutions, they provide a useful framework for a closer and more nuanced relationship between the PAP and NHRIs. A closer reading of the Belgrade Principles also reveals that the areas of co-operation indicated therein mirror most of the activities of the Parliament. A normative framework for co-operation between the Parliament and NHRIs will thus be easy to craft.

6 Conclusion

The PAP has the potential to become an important actor in the promotion of human rights in Africa. This article concludes that despite the fact that the PAP can, within its present powers, effectively operate with the AU human rights system, it has not succeeded in doing so. The level of co-operation between the PAP and other continental institutions can best be described as negligible. Each institution acknowledges the existence of the other, without actually taking advantage of each other's strategic position. With respect to the promotion of human rights, it can be concluded that the current role played by the PAP is unsatisfactory. This is because the PAP has so far neither utilised any of the existing human rights mechanisms to promote human rights, nor has it moved to create strong partnerships with human rights institutions such as the African Commission. The Parliament's collaboration with other AU human rights actors has so far failed to successfully assist the PAP in becoming a champion of human rights. The ineffectiveness of the Parliament in the promotion of human rights is perhaps due to the poor co-ordination of its human rights activities. Other factors could come into play, such as the fact that most of members of civil society are unaware of the various mechanisms within the PAP. For the PAP to become a strong human rights actor within the AU it is necessary that it creates strong institutional partnerships with members of civil society, other human rights bodies within the AU, and NHRIs.

122 <http://www.theioi.org/news/serbia-belgrade-principles-on-the-relationship-between-nhris-and-parliaments> (accessed 1 February 2013).

123 As above.

124 As above.

Transitional justice in Kenya and the UN Special Rapporteur on Truth and Justice: Where to from here?

*Evelyne Asaala**

Lecturer, School of Law, University of Nairobi, Kenya

*Nicole Dicker***

PhD Candidate, University of Sydney, Australia

Summary

Transitional justice in Kenya responds predominantly to the two-month period of violence that devastated Kenya in the aftermath of disputed presidential elections in December 2007. Post-election violence left over 1 300 dead and hundreds of thousands displaced; many suffered abductions, illegal detentions, torture and ill-treatment, sexual violence and property rights violations. In this context, transitional justice endeavours to, among other objectives, bring accountability for human rights violations, promote victims' rights, and achieve national healing and reconciliation. The outcome of Kenya's 4 March 2013 general elections, with the election of Uhuru Muigai Kenyatta and William Samoei Ruto as Kenya's President and Deputy-President respectively, raised the stakes for transitional justice in Kenya. Both Kenyatta and Ruto have been indicted by the International Criminal Court, accused of crimes against humanity. While Ruto's trial began on 10 September 2013, as this article goes to print there is some consternation as to whether Kenyatta will cooperate with the ICC. His trial is scheduled to begin on 12 November 2013. Significantly, on 29 September 2011 the United Nations Human Rights Council, pursuant to Resolution 18/7, resolved to establish the mandate of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence. The Special Rapporteur is

* LLB (Hons) (Nairobi), LLM (Human Rights and Democratisation in Africa) (Pretoria); evelyneasaala@uonbi.ac.ke

** BA LLB (Hons) (Sydney), MAAPD (Australian National); nicole.dicker@sydney.edu.au

mandated to deal with situations in which there have been gross violations of human rights and serious violations of international humanitarian law; and to promote truth, justice, reparation and guarantees of non-recurrence in such contexts. This article considers the significance for Kenya of the Special Rapporteur's mandate, including the directive to, upon request, conduct country visits and provide technical assistance and advice on issues pertaining to the mandate. Given the hindrances to the effective implementation of transitional justice measures in Kenya, the article calls on the Special Rapporteur to issue a request to visit Kenya, in response to gross violations of human rights committed there.

1 Introduction

When you are riding in a train, and the train gets derailed, you are well advised to look backwards at the twisted rails to find out how you got to where you are, and then look ahead to find out how you now get to where you want to go. For Kenyans today, it is a question of doing just that: looking at the past to determine when and where the country got derailed. Once that is determined, you must fix and adjust the rails towards the direction of peace, justice and prosperity.¹

Transitional justice refers to the set of judicial and non-judicial measures implemented by different countries in order to respond to and remedy past human rights abuses.² The term has come to be widely embraced by scholarly and policy communities alike.³ Notably, the United Nations (UN) too has recently adopted the concept of transitional justice under its Special Procedures of the Human Rights Council mechanism.⁴ Specifically, on 29 September 2011 the Human Rights Council resolved to establish the mandate of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and

1 K Annan in GoDown Arts Centre *Kenya burning* (2009).

2 International Centre for Transitional Justice 'What is transitional justice?' <http://ictj.org/about/transitional-justice> (accessed 25 October 2013). See also AG Reiter *et al* 'Transitional justice and civil war: Exploring new pathways, challenging old guideposts' (2012) 1 *Transitional Justice Review* 137 138.

3 TD Olsen *et al* *Transitional justice in balance: Comparing processes, weighing efficacy* (2010) 2.

4 It is important to note that, while the inclusion of transitional justice by the UN Human Rights Council through its special procedures mechanism is new, the UN does have a significant history of engagement in the transitional justice sphere. Some examples of the other normative work conducted by the UN in the field of transitional justice include the UN-backed Khmer Rouge genocide tribunal in Cambodia (Extraordinary Chambers in the Courts of Cambodia); the Van Boven Principles, setting out the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; the UN-backed Commission for Historical Clarification in Guatemala; and the creation of the Commission for Reception, Truth, and Reconciliation (CAVR, for its acronym in Portuguese) under United Nations Transitional Administration for East Timor (UNTAET) and pursuant to a regulation of UNTAET.

Guarantees of Non-Recurrence, pursuant to Resolution 18/7.⁵ The Special Rapporteur is mandated to deal with situations in which there have been gross violations of human rights and serious violations of international humanitarian law; to promote truth, justice, reparation and guarantees of non-recurrence in such contexts. At the time of its adoption, the creation of the mandate was hailed as 'a highly important resolution and a significant contribution by the [Human Rights] Council to establish accountability for serious crimes and human rights violations'.⁶ While the title of the mandate does not explicitly include the term 'transitional justice', the four measures of the mandate (that is, truth, justice, reparation and guarantees of non-recurrence) parallel those measures most commonly associated with the field of transitional justice. Further, the term 'transitional justice' features in Resolution 18/7. It is also the terminology adopted by the Special Rapporteur in annual reports to the UN General Assembly and Human Rights Council for the years 2012 and 2013, submitted in accordance with Resolution 18/7.⁷ In these annual reports, the term 'transitional justice' is used as 'shorthand' to denote collectively the four measures comprising the mandate.⁸ As such, the term 'transitional justice' is used in this article.

Transitional justice in Kenya responds predominantly to the two-month period of violence that devastated Kenya in the aftermath of disputed presidential elections in December 2007. Post-election violence left over 1 300 dead and hundreds of thousands displaced; many suffered abductions, illegal detentions, torture and ill-treatment, sexual violence and property violations.⁹ In this context, transitional justice endeavours to, among other objectives, bring accountability for human rights violations, promote victims' rights, and achieve national healing and reconciliation. Some five years after the post-election violence period, the outcome of Kenya's 4 March 2013 general elections, with the election of Uhuru Muigai Kenyatta and William Samoei Ruto as Kenya's President and Deputy-President

5 UN Human Rights Council Resolution A/HRC/RES/18/7 of 29 September 2011.

6 D Tolbert 'ICTJ welcomes establishment of UN Special Rapporteur on Truth, Justice, Reparation and Guarantees of Non-Recurrence' (2011) <http://ictj.org/news/ictj-welcomes-establishment-un-special-rapporteur-truth-justice-reparation-and-guarantees-non> (accessed 20 October 2013).

7 P de Greiff 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' UN General Assembly 23 August 2013. See also P de Greiff 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, P de Greiff' Human Rights Council, 9 August 2012, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/158/58/PDF/G1215858.pdf?OpenElement> (accessed 2 February 2013).

8 De Greiff (n 7 above) 3.

9 CIPEV 'Report of the Commission of Inquiry into Post-Election Violence' (Commission of Inquiry into Post-Election Violence, 2008). See also Human Rights Watch *Turning pebbles: Evading accountability for post-election violence in Kenya* (2011) 3. See also Internal Displacement Monitoring Centre 'Speedy reforms needed to deal with past injustices and prevent future displacement' 10 June 2010 <http://www.internal-displacement.org/countries/kenya> (accessed 10 November 2012).

respectively, has added great complexity to Kenya's transitional justice project. Both Kenyatta and Ruto have been indicted by the International Criminal Court (ICC), accused of crimes against humanity. This has had the effect of bringing the African Union (AU) into direct confrontation with the ICC. While Ruto's trial began on 10 September 2013, as this article goes to print there is some consternation as to whether Kenyatta will co-operate with the ICC, his trial scheduled to begin on 12 November 2013. In particular, that the AU resolved on 12 October 2013 that Kenyatta and Ruto's trials should be suspended until they complete their terms of office, is concerning.¹⁰ It throws into question whether Kenyatta will attend those trial hearings which he has been ordered to attend, namely, all opening and closing statements, when victims testify, and any other hearing the judges deem necessary (including, if the case resulted in conviction, sentencing hearings and other post-conviction hearings).¹¹

This article considers transitional justice mechanisms implemented in and relating to Kenya within the framework of the (relatively) newly-created mandate of the Special Rapporteur.¹² The Special Rapporteur is mandated to report annually to the Human Rights Council and the General Assembly.¹³ The article functions as a response to the reports for the years 2012 and 2013, and contemplates the significance of the mandate. It applies the mandate of the Special Rapporteur as a framework for assessing the case of Kenya, including Kenya's progress towards achieving justice and accountability for past human rights violations. The article considers in detail the four measures of the mandate: truth, justice, reparation and guarantees of non-recurrence, tracking their implementation in Kenya to date. As the article will demonstrate, the mandate resonates with a range of ongoing judicial and non-judicial transitional justice measures implemented in Kenya. In light of significant challenges hindering the effective implementation of transitional justice measures in Kenya, the article calls on the Special Rapporteur to turn his attention to the case of Kenya, including issuing a request to conduct a country visit. The suggestion of a country visit by the Special Rapporteur has particular

10 Ext/Assembly/AU/Dec 1, Extraordinary Session of the Assembly of the African Union, Addis Ababa, Ethiopia; 12 October 2013 2-3, Decision on Africa's relationship with the International Criminal Court http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E_0.pdf (accessed 17 October 2013).

11 ICC-01/09-02/11-830, Trial Chamber V(B), Situation in the Republic of Kenya, *The Prosecutor v Uhuru Muigai Kenyatta* [ICC] *Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial* <http://www.icc-cpi.int/iccdocs/doc/doc1667182.pdf> (accessed 20 October 2013).

12 While the crux of the analysis of this article considers transitional justice measures implemented in Kenya, the article considers also the ICC, implemented not in Kenya but at the ICC headquarters in The Hague. As such, the indictment of Kenyatta and Ruto by the ICC is analysed as a transitional justice process relating to and not located in Kenya.

13 De Greiff (n 7 above).

relevance given the challenge facing Kenya of having two ICC suspects at the helm of government.¹⁴

The structure of the article is as follows: Following on from the introduction (part one), part two sets out a working definition of transitional justice for the article. Part three provides an overview of the Special Rapporteur's annual reports and activities, and offers reflections on the significance, particularly in terms of the contribution to the evolution of the field of transitional justice. Part four provides an analysis of the context of transition and transitional justice in Kenya. Part five then systematically considers each of the four measures, or thematic areas, of the mandate: truth, justice, reparation and guarantees of non-recurrence, and the effectiveness of their implementation in Kenya. Part six considers the extent to which the goals of transitional justice – recognition, trust, reconciliation and strengthening of the rule of law, as identified by the Special Rapporteur in the first annual report – have been achieved in Kenya. The analysis of Part six is anchored in the recognition that such goals of transitional justice are difficult to measure. It is also understood that goals of reconciliation and rule of law strengthening take many years to crystallise, beyond the five years subsequent to the post-election violence period. Finally, the article concludes with a summary of the key arguments of the article. This part also proposes and highlights the value and relevance of a visit by the Special Rapporteur to Kenya.

2 Defining 'transitional justice'

As set out in the introduction to the article, transitional justice denotes judicial and non-judicial measures geared to redress the legacies of massive human rights abuses.¹⁵ The term transitional justice does not have a universally-agreed upon definition,¹⁶ rather its meaning is 'contested territories with diverging bodies of (at least emerging) theory, policy, and practice'.¹⁷ Much of the ambiguity surrounding its precise meaning derives from the fact that the focus of transitional

14 This is not to presuppose Kenyatta or Ruto's guilt (or innocence), but rather recognises the seriousness of the crimes with which both are charged, the importance of their co-operation with the ICC, and the challenge of balancing responsibility for governing while simultaneously responding to international criminal charges.

15 ICTJ (n 2 above). See also Reiter *et al* (n 2 above) 138.

16 See P Gready 'Telling truth? The methodological challenges of truth commissions' in F Coomans *et al* (eds) *Methods of human rights research* (2009) 159. See also C Huggins 'Linking broad constellations of ideas: Transitional justice, land tenure reform, and development' in P de Greiff & R Duthie (eds) *Transitional justice and development: Making connections* (2009) 332. See also M Lenzen 'Roads less travelled? Conceptual pathways (and stumbling blocks) for development and transitional justice' in De Greiff & Duthie (above) 76; Olsen *et al* (n 3 above). See also R Sarkar *International development law: Rule of law, human rights and global finance* (2009).

17 Lenzen (n 16 above) 77.

justice has evolved and shifted somewhat since its inception. Originally, transitional justice was concerned with political transitions from authoritarian rule to democracy, its application being to address and furnish justice for past atrocities of authoritarian regimes.¹⁸ In light of the focus on achieving justice within the context of 'transitions to democracy', the field came to be termed 'transitional justice'.¹⁹ Over the past two decades, however, transitional justice measures have been appropriated to respond to contexts of conflict, political strife, as well as human rights atrocities more generally – expanding the gaze of transitional justice considerably.²⁰ Usefully, as Jeffery explains '[w]hat unites these different approaches to transitional justice ... is that each seeks to achieve accountability for human rights violations'.²¹ Of relevance also is the use of the terminology of transitional justice by the Special Rapporteur, suggesting the term's continued currency.

Helpfully, Olsen *et al* acknowledge that, increasingly, many scholars and practitioners alike are adopting a version of the definition elaborated by the International Centre for Transitional Justice (ICTJ), as follows:²²

Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for the victims and promotion of possibilities for peace, reconciliation, and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades.

This approach emerged in the late 1980s and early 1990s, mainly in response to political changes in Latin America and Eastern Europe – and to demands in these regions for justice. At the time, human rights activists and others wanted to address the systematic abuses by former regimes but without endangering the political transformations that were underway. Since these changes were popularly called 'transitions to democracy', people began calling this new multidisciplinary field 'transitional justice'.

This definition is useful for clarifying the meaning of the term as well as its overriding objectives. It underscores the historical origins of transitional justice and so functions to track the field's development.²³ The definition is also noteworthy as it features a clear statement recognising the experiences of victims of human rights violations, rather than focusing narrowly only on the perpetrators of human

18 Reiter *et al* (n 2 above). See also R Teitel 'Transitional justice genealogy' (2003) 16 *Harvard Human Rights Journal* 69. See also R Teitel *Transitional justice* (2000).

19 ICTJ (n 2 above).

20 Reiter *et al* (n 2 above).

21 R Jeffery 'Enduring tensions: Transitional justice in the Solomon Islands' (2013) 26 *The Pacific Review* 156.

22 ICTJ (n 2 above). See also Olsen *et al* (n 2 above).

23 Reiter *et al* (n 2 above).

rights atrocities. This aligns with the focus championed by the Special Rapporteur in the first annual report to the UN Human Rights Council on the mandate, advocating for a 'victim-centred' approach to transitional justice.²⁴

It is also worth noting that there is no consensus on the precise scope of transitional justice, that is, which mechanisms do and do not fall within the ambit of that which is generally considered to comprise transitional justice. One commonly-conveyed view, also put forward by the ICTJ, is that transitional justice mechanisms include criminal prosecutions, truth commissions, reparations programmes, and various kinds of institutional reforms (generally justice and security sector-focused).²⁵ Yet some scholars contemplate a broader array of measures as constitutive of transitional justice, such as amnesties,²⁶ apologies, commemorative practices, reconciliation initiatives, cultural and artistic works,²⁷ and education reforms, so as to incorporate learning of past atrocities into school curricula.²⁸ It is such lack of clarity and consensus surrounding the precise constitutive elements of transitional justice that contributes also to the ambiguity around its definition. This, then, is problematic methodologically for the field of transitional justice.

In order to frame the analysis, this article adopts the itemisation of transitional justice measures set out in the mandate of the Special Rapporteur. As set out both in Resolution 18/7 and the first annual report of the Special Rapporteur, thematically the mandate concentrates on measures intended to promote 'truth, justice, reparations and guarantees of non-recurrence'.²⁹ Specifically, Resolution 18/7 mentions 'individual prosecutions, reparations, truth seeking, institutional reform, and vetting of public employees and officials'. Each of these mechanisms will be considered according to their implementation in Kenya.³⁰ Importantly, Resolution 18/7 also tasks the Special Rapporteur to identify potential additional elements or mechanisms, with a view to recommending ways and means to improve and strengthen the promotion of the four elements of the mandate. This is significant because it suggests that the list of transitional justice mechanisms is not a closed list, thereby giving

24 De Greiff (n 7 above) 17.

25 E Harwell & P le Billon 'Natural connections: Linking transitional justice and development through a focus on natural resources' in De Greiff & Duthie (n 16 above) 282; ICTJ (n 2 above) 14.

26 Reiter *et al* (n 2 above).

27 P Gready 'Culture, testimony, and the toolbox of transitional justice' (2008) 20 *Peace Review* 41.

28 As above.

29 De Greiff (n 7 above).

30 Note that this article also considers the three cases pending before the ICC, to be heard external to Kenya, at the ICC headquarters in The Hague.

fluidity to the field of transitional justice as it develops and responds to new realities and challenges.

3 Significance of the Special Rapporteur's mandate for Kenya

Resolution 18/7 of the Human Rights Council establishes the mandate for the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. The creation of the mandate is significant as it demonstrates a commitment on the part of the Human Rights Council to justice and accountability for gross human rights violations and serious violations of international humanitarian law. Further, it functions to elevate transitional justice to the Special Procedures of the Human Rights Council, with the Special Rapporteur mandated to promote justice and accountability for human rights atrocities internationally. It is precisely this need for justice and accountability for egregious human rights abuses that exists in Kenya.

The annual reports of the Special Rapporteur to the UN General Assembly and Human Rights Council speak to the significance of the mandate. In particular, on 9 August 2012, the Special Rapporteur presented the first annual report to the Human Rights Council.³¹ The report provides an overview of key activities undertaken by the Special Rapporteur between 1 May (the initiation of the mandate) and 25 July 2012. As detailed in the report, key activities have included engagement in consultations with a number of experts, civil society organisations and UN bodies regarding priorities and strategies for fulfilling the mandate. The Special Rapporteur has continued to engage with an array of government and non-governmental actors and organisations as well as international bodies throughout 2013.

Further, demonstrative of the kinds of activities and approaches available under the mandate, in collaboration with the UN Special Rapporteur on Torture, De Greiff has addressed a letter to the government of Brazil, offering support and co-operation, including the provision of technical assistance or advisory services for Brazil's National Truth Commission. Additionally, the Special Rapporteur has received an invitation to visit Uruguay and has sent requests for country visits to Guatemala, Guinea, Nepal and Spain.³² Since the presentation of the first annual report, the Special Rapporteur has conducted an official visit to Uruguay in September/October 2013 to assess measures adopted by the authorities in relation to the serious human rights violations perpetrated during the dictatorship of the

31 De Greiff (n 7 above).

32 As above.

1970s and 1980s.³³ The Special Rapporteur has also conducted a country visit to Tunisia, and will visit Spain in January 2014. Requests for visits remain pending for Brazil, Côte d'Ivoire, Democratic Republic of the Congo, Guatemala, Guinea, Indonesia, Nepal and Rwanda. A visit to Kenya (additional to those visits pending) by the Special Rapporteur would be a powerful means of promoting truth, justice, reparation and guarantees of non-recurrence in that country. Access to technical assistance and advice, as well as the further elevation of crucial human rights issues at the international level, embody significant potential for positive justice outcomes.

The first annual report to the Human Rights Council sets out also the 'foundation of the mandate' (namely, Resolution 18/7, applicable international instruments,³⁴ the emergence and evolution of transitional justice measures across diverse contexts, and the normative conception of transitional justice)³⁵ – this is significant because it helps to clarify and correct misconceptions surrounding the mandate. This is important for its effective implementation going forward. In particular, the fact that the Special Rapporteur stresses that transitional justice mechanisms are 'neither meant to be a "soft form of justice" nor ... a means of pursuing the aim of reconciliation bypassing the implementation of the four measures under the mandate' is of great import.³⁶ Recognising that transitional justice is not a 'soft form of justice', nor that to achieve reconciliation, justice must be sacrificed, functions to reinforce approaches that target accountability for perpetrators of human rights violations. It also promotes the rigorous design and implementation of mechanisms that are geared towards this goal, as well as adequate justice and recognition for victims. This is relevant to the case of Kenya as it suggests that justice is a necessary precursor to peace (peace in the

33 UN transitional justice expert Pablo de Greiff in first official visit to Uruguay <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13777&LangID=E> (accessed 25 October 2013).

34 Applicable international instruments listed by the Special Rapporteur and detailed in Resolution 18/7 include the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1977; the International Convention for the Protection of All Persons From Enforced Disappearance; and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by the General Assembly in 2005.

35 As articulated in the Secretary-General's report on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), to which Resolution 18/7 refers. The Special Rapporteur explains that '[t]he 'main components of a transitional justice policy ... criminal justice, truth telling, reparations and vetting ... far from being isolated ... should be thought of as parts of a whole' (De Greiff (n 7 above) 6-7).

36 De Greiff (n 7 above) 6; ICTJ *UN Special Rapporteur delivers first annual report* 27 August 2012, International Centre for Transitional Justice <http://ictj.org/news/un-special-rapporteur-delivers-first-annual-report> (accessed 1 April 2013).

positive sense)³⁷ – that Kenya needs to come to terms with its past in order to move forward.

An additional noteworthy element is the emphasis in each of the Special Rapporteurs' reports for 2012 and 2013 on taking a comprehensive approach to transitional justice. The Special Rapporteur advocates for 'an approach that combines the elements of truth-seeking, justice initiatives, reparations and guarantees of non-recurrence in a complementary and mutually reinforcing manner'.³⁸ Building on this, the article argues that a 'comprehensive', or 'multi-dimensional',³⁹ approach to justice is vital for Kenya (necessarily in an appropriately-sequenced manner, and cognisant of contextual realities). It is only with such a comprehensive approach that the goals of transitional justice can be realised fully (such as those identified by the Special Rapporteur in the first annual report to the Human Rights Council: recognition, trust, reconciliation and strengthening the rule of law).⁴⁰ This perspective has been articulated effectively by the ICTJ: '[N]o single measure is as effective on its own as when combined with the others' and that '[t]he different elements of a transitional justice policy are not parts of a random list, but rather, are related to one another practically and conceptually'.⁴¹ In response, the article considers the implementation of the broad gamut of transitional justice measures in Kenya, informed by the perspective that an effective transitional justice project for Kenya necessarily demands full and effective implementation of an array of complementary transitional justice measures. Yet, as will be suggested, in the case of Kenya various transitional justice measures (though not a comprehensive set) have been implemented, to varying degrees of success and efficacy.

The Special Rapporteurs' annual reports are important also because they function to frame and further the conversation around transitional justice. That the reports are presented to the Human Rights Council and adopted by the UN General Assembly further elevates the conversation at the international and multilateral level (though noting that the UN has a significant history of engagement with transitional justice (see footnote 4)). The reports also serve to highlight key issues and developments currently playing out in the field of transitional justice, identifying priority areas where further work is required. In particular, the Special Rapporteur emphasises the importance of gender-sensitive and victim-centred approaches for transitional justice work.⁴² This emphasis aligns entirely with a growing call for transitional justice to better account for the gendered

37 J Galtung *Theories of peace: A synthetic approach to peace thinking* (1967).

38 De Greiff (n 7 above) 1.

39 JN Clark 'Peace, justice and the International Criminal Court: Limitations and possibilities' (2011) 9 *Journal of International Criminal Justice* 521.

40 De Greiff (n 7 above).

41 ICTJ (n 2 above).

42 De Greiff (n 7 above).

dimensions of human rights violations.⁴³ It also echoes important calls for justice for sexual and gender-based violence committed in contexts of conflict, such as those articulated in UN Security Council Resolutions 1325⁴⁴ and 1820.⁴⁵ Indeed, as Hellsten asserts: 'The [transitional justice] mechanisms that bring long-term gender justice while abolishing structural violence, bias and injustice still are not fully established.'⁴⁶ The Special Rapporteur's bringing this significant shortcoming into the gaze of dominant transitional justice discourses is crucial to its advancement and rectification. Further, the push for a victim-centred focus is also noteworthy. The Special Rapporteur asserts that, without the 'meaningful participation [of victims]', goals of transitional justice cannot be achieved.⁴⁷ Both the issue of victim-centred and gender-sensitive (justice) strategies will be revisited in this article.

Finally, of significance is that the Special Rapporteur specifically articulates the importance of 'drawing tighter connections with other types of policy interventions such as development and security policies'.⁴⁸ The Special Rapporteur's report to the Human Rights Council for 2013 takes forward the discussion on connections and complementarities between transitional justice and development, the report highlighting the relevance of justice and rights considerations to sustainable development.⁴⁹ This dearth in analysis of connections between development and security policies has previously been identified and explained, for example by the ICTJ.⁵⁰ Further, in 2008, the *International Journal of Transitional Justice* devoted an entire issue to the topic of transitional justice and development, 'in which a number of contributors argued for the 'expansion of the purview of transitional justice to include development issues'.⁵¹ And as it relates to connections between transitional justice and development, Lenzen has asserted that 'practical experience is more advanced than policy in this regard, although too little of it has been systematically

43 S Buckley-Zistel & R Stanley *Gender in transitional justice* (2011). See also SK Hellsten *Working Paper No 2012/06 Transitional justice and aid* (2012).

44 UN Security Council Resolution 1325 (2000) para 11 on women, peace and security '[e]mphasises the responsibility of all states to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity and war crimes, including those relating to sexual and other violence against women and girls'.

45 UN Security Council Resolution 1820 (2008) on Women and Peace and Security condemns sexual violence, and reaffirms the responsibility of states to end impunity for such crimes.

46 Hellsten (n 43 above) 16.

47 De Greiff (n 7 above) 17.

48 As above.

49 As above.

50 De Greiff & Duthie (n 16 above). The International Centre for Transitional Justice is also leading work in order to connect transitional justice and development actors as it relates to supporting 'positive complementarity'.

51 (2008) 2 *International Journal of Transitional Justice*.

captured',⁵² pointing out the need for continued research into such connections.⁵³ In the context of Kenya, questions of both development and security are pivotal: As it relates to development, Kenya is an important development hub, and a myriad of development actors are supporting and engaging in various transitional justice mechanisms. And yet, the election of Kenyatta and Ruto threw up new challenges for international development in Kenya, whereby key development partners, including the United States of America, the United Kingdom and the European Union, have indicated a reluctance to engage with the Kenyatta administration.⁵⁴ And as it relates to security, activities of militia groups, such as the Mombasa Republican Council (MRC), and Kenya's invasion of Somalia (and conflict with Al-Shabaab and ensuing terrorist attacks), pose significant challenges for Kenya's justice and security sectors.⁵⁵

The analysis in the subsequent pages describes the superficial and largely ineffectual manner in which Kenya has approached transitional justice to date. It points to a distinct lack of political will for transitional justice measures to be fully and effectively implemented in Kenya. Concomitantly, the Special Rapporteur suggests that the goals of transitional justice (such as providing recognition to victims, fostering trust, contributing to reconciliation and strengthening the rule of law) are most likely to be achieved where a *comprehensive* set of transitional justice mechanisms are *fully* implemented – the analysis below points to this shortcoming.⁵⁶ The article interrogates the transitional justice measures against the mandate of the Special Rapporteur, concluding with a call to the Special Rapporteur to issue a request for a country visit to Kenya.

4 Context of transition and transitional justice in Kenya

4.1 Human rights violations in post-independence Kenya

A historical narrative tracing Kenya's post-independence political regimes, and the commission of a myriad of human rights violations

52 Lenzen (n 16 above).

53 Dicker's PhD research considers transitional justice and development connections, focusing on three case study countries: Guatemala, Kenya and Solomon Islands. In particular, the research focuses on how international development actors engage with and support transitional justice, and that which constitutes effective development practice in this sphere.

54 J Gettleman 'Kenyatta is declared the victor in Kenya, but opponent plans to appeal' *The New York Times* (online) 9 March 2013, http://www.nytimes.com/2013/03/10/world/africa/kenyatta-wins-kenya-presidential-election.html?ref=global-home&_r=0 (accessed 19 October 2013).

55 CRJ 'Ethnicity dominant in Kenya's 2013 polls' *CRJ English* (online) 16 December 2012, <http://english.cri.cn/6966/2012/12/16/2361s738664.htm> (accessed 12 January 2013).

56 De Greiff (n 7 above).

by them (and various government elements, in particular excessive use of force by security agencies), underscores the need for transitional justice in Kenya. Successive post-independence Kenyan governments, under Presidents Kenyatta, Moi and Kibaki, have engaged in, condoned or overlooked the commission of gross human rights violations as well as other crimes, with impunity.⁵⁷ Such criminal acts have included political assassinations;⁵⁸ torture;⁵⁹ inter-ethnic violence sanctioned and allegedly incited by the state;⁶⁰ arbitrary arrests and detentions;⁶¹ extra-judicial police killings;⁶² banning of opposition parties; irregular allocation of land; and various other economic crimes.⁶³ Where such human rights violators have enjoyed impunity for their acts⁶⁴ – impunity then incentivising further violations – a strong argument may be made for the need for transitional justice mechanisms to be fully implemented in Kenya.⁶⁵ Indeed, the World Bank's World Development Report 2011, entitled *Conflict, Security and Development*, recognises a role for transitional justice in combating impunity as a means to ending cycles of conflict and violence.⁶⁶

While Kenya's ongoing project of transitional justice responds predominantly to the harrowing period of post-election violence (triggered by alleged irregularities in the 2007 Kenyan general election), Kenya's Truth, Justice and Reconciliation Commission, for example, spanned a temporally-broader timeframe, mandated to

57 E Asaala 'Exploring transitional justice as a vehicle for social and political transformation in Kenya' (2010) 10 *African Human Rights Law Journal* 377. See also TJRC Kenya 'Report of the Truth, Justice and Reconciliation Commission' (Truth, Justice and Reconciliation Commission, Kenya, 2013).

58 J Londale 'Moral and political argument in Kenya' in B Berman, D Eyoh & W Kymlicka (eds) *Ethnicity and democracy in Africa* (2004) 91.

59 R Ajulu 'Thinking through the crisis of democratisation in Kenya: A response to Adar and Murunga' (2000) 4 *African Sociological Review* 137 143.

60 Report by the National Christian Council of Kenya *The cursed arrow: Contemporary report on the politicised land clashes in Rift Valley, Nyanza and Western Provinces* (1992); Africa Watch *Divide and rule: State-sponsored ethnic violence in Kenya* (1993).

61 Ajulu (n 59 above).

62 KNCHR *Follow-up Report on Extra-Judicial Killings and Disappearances* August 2008.

63 TJRC Kenya (n 57 above). See also C Odhiambo-Mbai 'The rise and fall of the autocratic state in Kenya' in W Oyugi *et al* (eds) *The politics of transition in Kenya: From KANU TO NARC* (2003) 65; MK Mbondenyi 'Entrenching the right to participate in government in Kenya's constitutional order: Some viable lessons from the African Charter on Human and Peoples' Rights' (2011) 55 *Journal of African Law* 30. Mbai writes on the famous 'Goldenberg scandal', the 'Anglo leasing scandal' and the 'Grand regency scandal' involving the embezzlement of government funds.

64 G Muigai 'Ethnicity and the renewal of competitive politics in Kenya' in H Glickman (ed) *Ethnicity, conflict and democratisation* (1995) 171; Africa Watch *Divide and rule: State-sponsored ethnic violence in Kenya* (1993).

65 KNDRC *Agreement on agenda item three: How to resolve the political crisis* 14 February 2008 3 <http://www.dialoguekenya.org/index.php/agreements.html> (accessed 1 May 2012).

66 World Bank *Conflict, security, and development: World Development Report 2011* (2011).

investigate human rights violations committed between 1963 and 2008. As such, the broader context of Kenya's governance crisis and project of transitional justice was brought into focus. Focusing specifically on the post-election violence period, following a close presidential election in December 2007, 'with extensive allegations of fraud, including irregularities in the final tallying of the vote', Kenya was marred by two months of 'fratricidal violence'.⁶⁷ Over the course of the two-month period in the aftermath of the elections, 'which pitted ruling party supporters and the police against opposition-linked armed groups and civilians', an estimated 1 300 killings occurred, more than 500 000 people were displaced, and thousands of cases of sexual violence were reported.⁶⁸ Divisions were predominantly along ethno-regional lines⁶⁹ and, as Hayner explains, 'political differences quickly turn[ed] into ethnically targeted attacks'.⁷⁰

The alleged involvement and criminal responsibility of state actors is relevant to note,⁷¹ pertinent to the context of transitional justice and Kenya's 'transition', more generally. What is of particular significance is that the same kinds of state-sponsored human rights violations are alleged to have spanned each of the three post-independence political regimes (under Presidents Kenyatta, Moi and Kibaki) (and, similarly, without adequate investigations/prosecutions),⁷² calling into question the extent to which Kenya is undergoing any process of transition, if at all. Significantly, the Special Rapporteur, in the first annual report, explains that transitional justice mechanisms may well be implemented in contexts 'in which there has been no transition to speak of'⁷³ – perhaps an appropriate categorisation for transitional justice in Kenya. And, as Ambos suggests, 'the role of the (former) elite(s) in the process [of transition] affects the ... [success of transitional justice] in that the possibilities of transitional justice increase with the decreasing influence of the (former) elite(s)'.⁷⁴ In the case of Kenya, where there has been no real transition to speak of, Ambos's words have great resonance in explaining the shortcomings of Kenya's ongoing project of transitional justice.

67 S Brown & CL Sriram 'The big fish won't fry themselves: Criminal accountability for post-election violence in Kenya' (2012) 111 *African Affairs* 244.

68 CIPEV (n 9 above). See also Human Rights Watch (n 9 above) 3.

69 Brown & Sriram (n 67 above)

70 PB Hayner *Unspeakable truths: Transitional justice and the challenge of truth commissions* (2011) 73.

71 See Human Rights Watch (n 9 above).

72 Human Rights Watch (n 9 above) fn 57-63.

73 De Greiff (n 7 above).

74 K Ambos 'The legal framework of transitional justice: A systematic study with a special focus on the role of the ICC' in K Ambos *et al* (eds) *Building a future on peace and justice: Studies on transitional justice, peace and development* (2009) 106.

4.2 Inception of transitional justice in Kenya

As post-election violence escalated, emergency measures were necessary to quell the political stalemate and violence. Several regional attempts at bringing the then ruling party (Party of National Unity) and the then opposition party (Orange Democratic Movement) to a negotiating table were initiated. These efforts, however, were not successful initially. Then, in January 2008, the AU mandated a peace mediation process for Kenya, resulting in the establishment of the Kenya National Dialogue and Reconciliation Committee (KNDRC), under the leadership of former UN Secretary-General Kofi Annan. The KNDRC was tasked with mediating a halt in the violence and broader humanitarian and political crisis, as well as putting in place mechanisms geared at enabling Kenya's transition to a just, human rights-compliant future.⁷⁵

Recognising impunity as a significant stumbling block hindering Kenya's transition, the KNDRC forged an agreement as to the establishment of various transitional justice measures, including a truth commission and a comprehensive constitutional, legal and institutional reform process.⁷⁶ As Hansen asserts, this agreement 'seemed to provide a comprehensive framework for addressing the roots of political violence and other human rights abuses in the country', yet, to date these measures have 'remained detached from a fundamental transformation', 'captured' and 'manipulated' by elites. Associated shortcomings are discussed below.⁷⁷

Relating to criminal justice, as Brown and Sriram assert, one of the 'thorniest issues' for the KNDRC was how to impose criminal accountability for the post-election violence.⁷⁸ The negotiating teams agreed to the establishment of a Commission of Inquiry into the Post-Election Violence (CIPEV, also commonly known as the Waki Commission after its president, Justice Philip Waki).⁷⁹ CIPEV was subsequently established and implemented, mandated to, among other things, investigate the violence and make recommendations as to legal redress.⁸⁰ Significantly, in its final report of October 2008, CIPEV recommended the establishment of a special tribunal for the prosecution of those who bore the 'greatest responsibility' for crimes against humanity, arising from the post-election violence.⁸¹ CIPEV

75 KNDR 'Annotated agenda for the Kenya dialogue and reconciliation' KNDR Conference, 2008.

76 KNDRC 'Agreement on agenda item three: How to resolve the political crisis' 14 February 2008 3.

77 TO Hansen 'Kenya's power-sharing arrangement and its implications for transitional justice' (2013) 17 *The International Journal of Human Rights* 307.

78 Brown & Sriram (n 67 above)

79 KNDRC *Agreement: Commission of inquiry of post-election violence* (2008) 1.

80 *Kenya Gazette* Notice 4473, 23 May 2008. Note that CIPEV is highly regarded as having conducted its investigations and fulfilled its mandate effectively and in a credible manner.

81 CIPEV (n 9 above).

further recommended that, in the event that efforts towards establishing a special tribunal were frustrated, the names of the alleged perpetrators and accompanying evidence be referred to the prosecutor of the ICC. Brown and Sriram have since rightly described this self-enforcing mechanism as 'ingenious'.⁸² It is against this backdrop that the subsequent analysis in part five is set.

5 Analysis of the extent of implementation in Kenya of the four elements of the Special Rapporteur's mandate – truth, justice, reparations and guarantees of non-recurrence

This part systematically assesses the effectiveness of the implementation of the four measures of the Special Rapporteur's mandate in Kenya – truth, justice, reparations and guarantees of non-recurrence.

5.1 Truth

International law protects the right of victims and survivors to know about the circumstances of gross violations of their human rights, including who was responsible for the violations.⁸³ This right may be afforded through the effective implementation of various truth-seeking initiatives, including freedom of information legislation; declassification of archives; investigations into the missing and disappeared; and the establishment of non-judicial commissions of inquiry, including truth commissions.⁸⁴ The value of truth seeking rests in its contribution to the 'creation of a historical record' and, in so doing, preventing manipulation and the deliberate rewriting of history and a denial of atrocities by perpetrators.⁸⁵ Truth seeking is also esteemed for its perceived ability to 'help victims find closure by learning more about the events they suffered, such as the fate of disappeared individuals, or why certain people were targeted for abuse'.⁸⁶ Hayner also points to the value of truth seeking for confronting the legacy of past 'horrors', in order to lay a solid foundation on which to build a new society, warning against

82 Brown & Sriram (n 67 above).

83 The first judicial ruling articulating the existence of the right to the truth was by the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case of 1988. See also IACHR *Ellacuria v El Salvador* Case 10488 of 1999 (*Ellacuria* case). See further HRC *Elena Quinteros Almeida and Maria del Carmen Almeida de Quinteros v Uruguay*, Communication 107/1981 para 14.

84 ICTJ *Truth and memory* International Centre for Transitional Justice <http://www.ictj.org/our-work/transitional-justice-issues/truth-and-memory> (accessed 20 October 2013).

85 As above.

86 Human Rights Watch (n 9 above).

'bury[ing] ... sins, [as] they will reemerge later'.⁸⁷ And so, logically, the question arises: To what extent, if at all, has truth seeking contributed to achieving the above-mentioned objectives in Kenya; or has it been merely a case of burial of sins?

The task of truth seeking in Kenya has been broached through the mechanism of a truth commission – the Truth, Justice and Reconciliation Commission of Kenya (TJRC). Established pursuant to the TJRC Act, it came into operation on 17 March 2009.⁸⁸ Hayner's seminal work on truth commissions offers a useful starting point for framing critical thinking around truth commissions. Hayner defines a truth commission as a temporary body officially sanctioned by the state to investigate a pattern of abuses and to issue a report.⁸⁹ The definition adopted by Olsen *et al* which draws heavily on Hayner's definition, is also instructive: 'a newly-established, temporary body, officially sanctioned by the state or an international governmental organisation to investigate past human rights abuses'.⁹⁰ The explicit focus on 'human rights abuses'⁹¹ in Olsen *et al's* definition (and omitted by Hayner, who references only 'abuses'), is significant as it aligns with the articulation of the Special Rapporteur's mandate, which similarly is anchored within the language of human rights.⁹²

When the TJRC was agreed (in the context of the KNDRC process), it was seen to be a less controversial transitional justice measure than criminal prosecutions.⁹³ Unlike criminal prosecutions, there was perceived to be general agreement among the political class, civil society and the general public as to its utility and value for Kenyan society.⁹⁴ Unfortunately, however, allegations of corruption (including embezzlement of TJRC-designated funds),⁹⁵ serious allegations of human rights violations made against the TJRC Chairperson, Ambassador Bethuel Kiplagat,⁹⁶ and dubious political will for and commitment to the process, severely undermined the perceived legitimacy and overall effectiveness of the TJRC. The great majority of international development agencies and many civil society

87 Hayner (n 70 above).

88 The TJRC commissioners were sworn in on 3 August 2009.

89 PB Hayner 'Fifteen truth commissions – 1974 to 1994: A comparative study' (1994) 16 *Human Rights Quarterly* 597. See also Hayner (n 70 above).

90 Reiter *et al* (n 2 above).

91 Olsen *et al* (n 3 above) (our emphasis).

92 UN Human Rights Council (n 5 above).

93 Asaala (n 57 above).

94 As above.

95 A Kiprotich 'TJRC employees raise red flag over allegations of corruption' *Nation Media Group, Kenya*, 9 October 2011 <http://www.standardmedia.co.ke/?articleID=2000044411&pageNo=1> (accessed 21 October 2013). See also 'Corruption and the Corruption commissions: Who is investigating whom?' <http://www.kenyaforum.net/?p=773> (accessed 21 October 2013).

96 Serious allegations of human rights violations surround Ambassador Kiplagat's reputation. A commission was established to investigate these allegations; however, having made no concrete findings, Ambassador Kiplagat was controversially reinstated.

organisations operating in Kenya came to distance themselves from the TJRC process as it proceeded. This occurred in direct response to the above-mentioned shortcomings whereas, at the outset of the TJRC process, such actors committed funding and technical assistance, and demonstrated significant goodwill for the process. Indeed, initially there was significant support for and optimism surrounding the TJRC.⁹⁷ Yet, many scholars and practitioners (including national and international civil society and international development agency representatives) came to seriously question whether the TJRC would be able to achieve its intended objectives, specifically, to 'promote peace, justice, national unity, healing, and reconciliation among the people of Kenya'.⁹⁸ This was particularly in light of ever-diminishing public confidence in the TJRC mechanism.⁹⁹

Further, the considerable delays in completing and publishing the final report of the TJRC were widely denounced, as well as actively opposed by two Kenyan civil society umbrella organisations - Kenyans for Peace with Truth and Justice and the Kenya Transitional Justice Networks. These two civil society umbrella organisations labelled requests for extensions (and subsequent granting by cabinet) 'reprehensible', 'tantamount to a betrayal of the people's trust', and driven by 'personal interest' and 'self-preservation'.¹⁰⁰ These civil society groups labelled the delays also as 'reek[ing] of political mischief'.¹⁰¹ The TJRC's failing to publish its findings prior to the Kenyan general elections of 2013 has been aptly described as having 'undermined one of the main rationales of the Commission and denied the people of Kenya information to which they were entitled as they went to the polls'.¹⁰² The failure of the TJRC to release its report prior to the elections corresponds also with the analysis of the ICTJ that '[m]any international observers, civil society and victims

97 S Robins "'To live as other Kenyans do": A study of the reparative demands of Kenyan victims of human rights violations' International Centre for Transitional Justice (2011) <http://ictj.org/sites/default/files/ICTJ-Kenya-Reparations-Demands-2011-English.pdf> (accessed 21 October 2013); D Tolbert 'Kenya's truth commission must act now to salvage credibility' *Aljazeera* (online) 15 December 2012 <http://www.aljazeera.com/indepth/opinion/2012/12/20121213115429440429.html> (accessed 21 October 2013).

98 Sec 5 Truth, Justice and Reconciliation Act 6 of 2008. See, eg, ICTJ 'ICTJ Programme Report: Africa' (International Centre for Transitional Justice, 4 December 2012) <http://ictj.org/news/ictj-program-report-africa>; Tolbert (n 97 above). This assertion is concluded also on the basis of findings drawn from over 40 interviews conducted by Nicole Dicker in Kenya between August and September 2012.

99 See, eg, 'TJRC seeks six-month extension of tenure' *Nation TV Kenya* 31 July 2012.

100 KPTJ 'Civil society says No! to further extension of TJRC mandate' 5 August 2012 <http://www.africog.org/content/civil-society-says-no-further-extension-tjrcman-date> (accessed 25 October 2013).

101 As above.

102 ICTJ 'ICTJ welcomes Kenya's TJRC Report' (2013) http://ictj.org/news/ictj-welcomes-kenyas-tjrc-report?utm_source=International+Center+for+Transitional+Justice+Newsletter&utm_campaign=b7ba70f50f-World_Report_Issue_23_May_2013&utm_medium=email&utm_term=0_2d90950d4d-b7ba70f50f-245955113 (accessed 23 October 2013).

groups see this [delay] as a clear sign of the Commission's politicisation'.¹⁰³ Further, the alleged political pressure placed on the TJRC commissioners and staff by the office of the President to amend the land chapter of the final report of the TJRC is concerning.¹⁰⁴ Prior to its publication, the final draft of the land chapter implicated Kenya's first President (and father of Kenya's current president, President Uhuru Kenyatta), President Jomo Kenyatta, in irregular land dealings.¹⁰⁵ These paragraphs were then allegedly censored prior to the publication of the report. In protest, the three international commissioners, Judge Gertrude Chawatama, the late Ambassador Berhanu Dinka, and Professor Ronald C Slye, published a dissenting opinion that reproduced the original paragraphs of the land chapter.¹⁰⁶

It is, however, a credit both to the Kenyan government and to the institution of the TJRC and its commissioners, that the final report has now been released. This is an important means of accountability for past human rights violations, for recognising the suffering of victims and restoring dignity.¹⁰⁷ The report is also of value for identifying and recommending a means of addressing the root causes of historical injustices and post-election violence.¹⁰⁸ Significantly, strong political will is essential for the implementation of the TJRC's recommendations set out in its final report.¹⁰⁹ It remains to be seen how this will be

¹⁰³ Tolbert (n 97 above).

¹⁰⁴ Judge G Chawatama, Ambassador B Dinka & Professor RC Slye, Dissenting Opinion with Respect to Chapter 2 of Volume 2B of the Final Report of the Truth, Justice and Reconciliation Commission of Kenya. See also G Chawatama *et al* 'Kenya Truth Commission report doctored by state house' *Pambazuka (AllAfrica.com)* (online) 6 June 2013 <http://allafrica.com/stories/201306071639.html?viewall=1> (accessed 22 October 2013). See also K Migiro 'Kenyan President's office censored report on high-level land grabbing – Commissioners' *AllAfrica.com* 3 June 2013 <http://allafrica.com/stories/201306041093.html?viewall=1> (accessed 22 October 2013). See further N Musau 'Kenya: How TJRC land chapter was censored' *The Star (AllAfrica.com)* (online) 3 June 2013 <http://allafrica.com/stories/201306040965.html?viewall=1> (accessed 22 October 2013). See also Professor RC Slye, B Dinka & Judge G Chawatama 'Opinion: Kenya: Missing paragraphs in the TJRC report on the land question' *AllAfrica.com* 3 June 2013 <http://allafrica.com/stories/201306032385.html> (accessed 22 October 2013).

¹⁰⁵ In their dissenting opinion, the three international commissioners provide that they 'have no information with respect to whether the current President was aware of, or condoned, the actions of officials in the office of the President that we describe above. Needless to say, the same is true for the Deputy President.'

¹⁰⁶ Dissenting Opinion (n 104 above).

¹⁰⁷ LE Fletcher *et al* 'Context, timing and the dynamics of transitional justice: A historical perspective' (2009) 31 *Human Rights Quarterly* 163.

¹⁰⁸ J Gondi 'Bridging the impunity gap in Kenya requires a holistic approach to transitional justice' 19 July 2012 International Centre for Transitional Justice <http://www.ictj.org/news/bridging-impunity-gap-kenya-requires-holistic-approach-transitional-justice#.UAgjyuOS0HM.facebook> (accessed 20 October 2013). See also M Mwangi 'Kenya: TJRC is a waste of time, claim civil society groups' *Capital FM AllAfrica.com* 5 August 2012 <http://allafrica.com/stories/201208050561.html> (accessed 22 October 2013).

¹⁰⁹ Fletcher *et al* (n 107 above).

approached, though it is hoped that the recommendations will be wholly implemented without undue delay. There is a notable crescendo in the voices calling for the implementation of the report's recommendations, including by the Kenyan Diaspora Alliance (KDA), the conveners of which have said that this 'will help reconciliation and national healing' in Kenya.¹¹⁰ A number of national and international civil society actors have also called for the implementation of the recommendations, as has former Prime Minister Raila Odinga.¹¹¹

There are also some noteworthy elements of the TJRC which are important to highlight. It is worth acknowledging these elements for two reasons: First, it is not the intention of this article to dismiss the work of the TJRC. Rather, it is hoped that the voices calling for a credible and comprehensive implementation of the recommendations of its report bear fruit.¹¹² Second, some of the more innovative and impressive approaches of Kenya's TJRC may usefully serve as a model and guide of good practice for other countries considering implementing a truth commission. One of the key strengths of the TJRC is that its mandate extends to investigations of 'economic crimes'.¹¹³ This provision has been interpreted broadly by the TJRC as including violations of social, economic and cultural rights. This is a commendable approach, empowering the TJRC to address 'human rights violations more holistically, beyond classic violations of bodily integrity'.¹¹⁴ In fact, the Special Rapporteur touches on this strength in the 2013 report to the UN General Assembly.¹¹⁵ One further noteworthy strength is that the TJRC Act required gender equality to be accounted for in the appointment of commissioners.¹¹⁶ While it would be erroneous 'to assume that all female commissioners will bring expertise in addressing crimes against women – or that male

110 L Barasa 'Implement truth report, urge Kenyans in diaspora' *Africa Review* (online) 12 June 2013 <http://www.africareview.com/News/Implement-TJRC-report-say-Kenyans-in-diaspora/-/979180/1880234/-/521rs3/-/index.html> (accessed 21 October 2013).

111 Freedom House *Victims' voices heard in Kenyan Truth Commission Report* (2013) <http://www.freedomhouse.org/article/victims-voices-heard-kenyan-truth-commission-report> (accessed 20 October 2013). See also A Kisia & A Sum 'Raila Odinga calls for implementation of Truth, Justice and Reconciliation Commission report' *Standard Digital* (online) 26 May 2013 http://www.standardmedia.co.ke/?articleID=2000084568&story_title=raila-calls-for-implementation-of-tjrc-report (accessed 20 October 2013). See further Kenya Transitional Justice Network (KTJN) 'KTJN Press Release on the TJRC Report' 12 June 2013.

112 Office of the United Nations High Commissioner for Human Rights *Rule-of-law tools for post-conflict states: Truth commissions* (2006). See also CS Villalba 'Briefing paper: Transitional justice: Key concepts, processes and challenges' Institute for Democracy and Conflict Resolution (2011). In order for a truth commission process to be considered effective, a credible report must be released and its recommendations implemented.

113 Sec 6(g) Truth, Justice and Reconciliation Act of Kenya 6 of 2008.

114 Hayner (n 70 above) 74.

115 De Greiff (n 7 above).

116 Sec 10(3); First Schedule, sec 7 Truth, Justice and Reconciliation Act 2008.

commissioners will not', it is a step towards achieving gender justice through transitional justice.¹¹⁷

5.2 Justice

The Special Rapporteur emphasises the need to act on 'truths' disclosed through truth-seeking processes¹¹⁸ – the TJRC identified by name a total of 255 alleged perpetrators and recommended their prosecution or further investigation by the Office of the Director of Public Prosecutions (ODPP), or appropriate action to be undertaken by the relevant body (such as the National Land Commission) for investigation.¹¹⁹ As such, there is a clear need for criminal justice in Kenya in response to past human rights abuses. Teitel explains that '[t]rials are commonly thought to play the leading foundational role in the transformation to a more liberal political order. Only trials are thought to draw a bright line demarcating the normative shift from illegitimate to legitimate rule.'¹²⁰ Van Zyl asserts that 'prosecution can serve to deter future crimes, be a source of comfort to victims, reflect a new set of social norms and begin the process of reforming and rebuilding trust in government institutions'.¹²¹ Through these words, one sees the great importance of criminal justice in responding to human rights violations. In his report, the Special Rapporteur is emphatic regarding the fundamental role for prosecutorial mechanisms, though simultaneously quick to warn of the inadequacy of 'isolated and piecemeal prosecutorial initiatives' to quell claims for justice.¹²² This warning has great resonance for the case of Kenya, where the government 'has failed to ensure the prosecution of perpetrators in all but a handful' of post-election violence cases.¹²³

The CIPEV report highlights the instrumental role for criminal prosecutions in responding to the post-election violence, recommending the establishment of a special tribunal to eradicate cycles of impunity in Kenya.¹²⁴ Yet, there have been very few prosecutions, and even fewer convictions, and, at the domestic level, 'a near total lack of investigations of those who organised and financed the violence'.¹²⁵ Further, prosecution efforts have proven controversial, threatening to divide politically factions within the former Government of National Unity,¹²⁶ amidst reported attempts by one faction (the Party of National Unity) to 'own' and 'shape' the

117 Hayner (n 70 above) 89.

118 De Greiff (n 7 above) para 23.

119 See generally ch IV of Vol 4 of the TJRC Report.

120 Teitel (n 18 above) 40.

121 As above.

122 De Greiff (n 7 above) 8.

123 Human Rights Watch (n 9 above) 3.

124 CIPEV (n 9 above) 472.

125 Human Rights Watch (n 9 above) 3.

126 The Government of National Unity is the coalition government created by the National Accord and Reconciliation Act.

transitional process, particularly prosecutions.¹²⁷ Nevertheless, the fundamental role for criminal justice in Kenya's transitional process is crucial. Criminal prosecutions may abate the deep-rooted culture of impunity and ameliorate perceptions surrounding the legitimacy of the current government and state institutions.

As set out above in part three of this article, CIPEV recommended that the failure to establish a special tribunal should result in the referral of the names of the alleged perpetrators to the ICC.¹²⁸ Following failed attempts at legislating for the special tribunal (pursuant to the Special Tribunal for Kenya Bill 2009), on 9 July 2009 Kofi Annan referred a list of alleged perpetrators – those deemed most responsible for the post-election violence – to the then Chief Prosecutor of the ICC, Luis Moreno Ocampo.¹²⁹ The Kenyan population lauded this step,¹³⁰ reflective of frustrations surrounding an extant culture of impunity. This was coupled with a very real fear of political manipulation of any special tribunal to be established, given the apparent ethno-regional and political tensions. In this vein, Brown and Sriram assert that the fundamental reason for the government's failure to initiate prosecutions in Kenya is because 'those in charge of establishing these processes are ... those whom it would prosecute or their close allies'. This stance points to the appropriateness of international justice, through the ICC, for the case of Kenya.¹³¹

The ICC has subsequently charged three Kenyans of crimes against humanity – William Samoei Arap Ruto, Joshua Arap Sang and Uhuru Muigai Kenyatta.¹³² Significantly, two of those charged (Kenyatta and Ruto) were elected as Kenya's President and Deputy-President in the general elections of 4 March 2013 (running together as the Jubilee Coalition). This clearly creates a highly complex, high-risk, and politically-charged political transition in Kenya. The cases against Kenyatta and Ruto have brought the AU into direct confrontation with the ICC. As articulated in the introduction to this article, the AU's resolution of 12 October 2013 – that Kenyatta and Ruto's trials should be suspended until they complete their terms of office – is concerning.¹³³ The resolution also requires that Kenya should renew efforts to seek deferral of the cases against Kenyatta and Ruto, in

127 G Musila 'Options for transitional justice in Kenya: Autonomy and the challenge of external prescriptions' (2009) 3 *International Journal of Transitional Justice* 40.

128 CIPEV (n 9 above) 473.

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

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

131 Brown & Sriram (n 67 above).

132 *The Prosecutor v William Samoei Ruto and Joshua Arap Sang and Uhuru Muigai Kenyatta*. For further information, see http://www.icccpi.int/EN_Menu/ICC/Situations%20and%20Cases/Situations/Situation%20ICC%200109/Pages/situation%20index.aspx (accessed 17 October 2013).

133 Ext/Assembly/AU/Dec 1, extraordinary session of the Assembly of the African Union, Addis Ababa, Ethiopia 12 October 2013 2-3; Decision on Africa's relationship with the International Criminal Court http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E_0.pdf (accessed 17 October 2013).

conformity with article 16 of the Rome Statute of the ICC – these efforts would be endorsed by all African state parties.¹³⁴ This resolution therefore further complicates the process of achieving justice and accountability for post-election violence in Kenya.

Whether the deferral will be granted by the UN Security Council (UNSC) relies on a finding that the trial represents a threat to international peace and security as per chapter VII of the Charter of the United Nations. One view is that, in order to salvage the continental relevance of the ICC for Africa and ease tensions with the AU, the UNSC may grant the deferral, for fear of a threatened *en masse* continental withdrawal from the ICC. Alternatively, the UNSC may decline or ignore Kenya's request (as has previously been its approach), thereby risking its relationship with the AU and possibly compromising any future co-operation with the ICC. Yet, the recent majority decision by judges of the ICC to allow Kenyatta to be absent from some of the hearings of his trial (citing the attack on the Westgate shopping mall in Nairobi as one reason for the ruling), may assuage AU state parties, potentially fostering continued co-operation with the Court.¹³⁵

Moving to consider domestic criminal justice initiatives in Kenya, as stated above, domestic investigations and prosecutions have been limited. A Human Rights Watch report labels domestic prosecution efforts in Kenya as a 'half-hearted' effort at accountability. As such, 'hundreds of ... perpetrators of serious crimes continue to evade accountability'.¹³⁶ This deficiency can be attributed to a host of challenges, including inadequate investigations by police in terms of competencies and human and technical resources as well as a distinct lack of a political will in some cases.¹³⁷ Tensions surrounding ethnicity and inadequate witness protection programmes are significant challenges. As it relates to the state witness protection programme, there are significant concerns surrounding its credibility and independence. Indeed, as Ndubi suggests, 'those who are supposed to protect the witnesses are the ones the witnesses are likely to testify against'.¹³⁸

Significantly, signalling a potentially-positive development (assuming effective implementation) in December 2012, Kenya's Chief Justice Mutunga announced the creation of an International Crimes Division (ICD) within Kenya's High Court – a special division

134 n 133 above, art 10(vii).

135 *The Prosecutor v Uhuru Muigai Kenyatta* [ICC] *Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial*, <http://www.icc-cpi.int/iccdocs/doc/doc1667182.pdf> (accessed 17 October 2013).

136 Human Rights Watch (n 9 above) 4.

137 Human Rights Watch (n 9 above).

138 'Will witness protection law work?' *The Standard* 26 July 2009.

created to try cases of post-election violence, to be effective as of late 2013.¹³⁹

This special division would complement (and not replace) the ICC criminal prosecutions, and have jurisdiction to try, *inter alia*, international crimes.¹⁴⁰ Importantly, the success of this initiative depends on the 'political, financial and institutional commitment' of the Kenyan government, as emphasised by the Judicial Service Commission sub-committee tasked with overseeing the setting up of the ICD.¹⁴¹

5.3 Reparations

UN guidelines require states to provide effective remedies, including reparations, to victims for acts or omissions which can be attributed to the state and which constitute gross violations of human rights or serious violations of international humanitarian law – this must be 'adequate, effective and prompt'.¹⁴² Yet, to date, there has been no comprehensive reparations programme in Kenya for gross human rights violations suffered. Only some limited forms of assistance to victims have been afforded – this has not been accompanied by any measure of accountability. The Kenyan government has made some minimal payments to a minority of all people displaced during the post-election violence of KSh 10 000 and KSh 25 000 (approximately US \$117 and US \$293 respectively). These payments were to provide for basic needs and the reconstruction of homes.¹⁴³ Yet, these payments have not been framed (or conceived of) in terms of reparations *per se*; rather, they have functioned as mere emergency assistance, and are far from comprehensive.¹⁴⁴ Further, allegations of

139 R Obala 'Special court to complement ICC to be created' *The Standard* 17 December 2012 http://www.standardmedia.co.ke/?articleID=2000073088&story_title=Kenya-Special-court-to-complement-ICC-to-be-created (accessed 2 February 2013). See also P Seils & E Gonzalez 'ICTJ Forum: March 2013' http://ictj.org/news/ictj-forum-march-2013?utm_source=International+Center+for+Transitional+Justice+Newsletter&utm_campaign=90aebc6693-World_Report_Issue_21_March_2013&utm_medium=email (accessed 20 October 2013).

140 Obala (n 139 above) 127. The Chief Justice's articulation of the intended jurisdiction of the ICD includes, *inter alia*, crimes against humanity, post-election violence, piracy, money and cyber crimes.

141 F Oluoch 'International crimes to be tried locally' *The East African* (online) 1 December 2012 <http://www.theeastafrican.co.ke/news/International-crimes-to-be-tried-locally/-/2558/1634454/-/s6kt45/-/index.html> (accessed 20 October 2013). Note, however, that some civil society actors in Kenya have called for the creation of a hybrid tribunal in Kenya, external to the Kenyan High Court. The intention is that the hybrid tribunal would be comprised of both Kenyan and international judges, in an attempt to somewhat safeguard the independence of the tribunal.

142 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, adopted in 2005. Note that these guidelines stem from the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which are binding on states.

143 Robins (n 97 above).

144 Robins (n 97 above) 10-11.

'non-uniformity of the compensation, which both victims themselves and the organisations working with them see as favouring Kikuyu victims' have fuelled 'confusion and tension'.¹⁴⁵ Allegations of the insertion of ethnicity into the compensation programme are certainly extremely perilous and inflammatory. Notably, civil society organisations have called for transitional justice mechanisms in Kenya to better account for the needs and concerns of victims, in particular calling for the establishment of a comprehensive reparations programme.¹⁴⁶

At the international level, the ICC may grant reparations to those victims of post-election violence who have applied for reparations through the ICC process. However, this would in no way absolve the Kenyan state of responsibility to furnish reparations; reparations ordered through the ICC would not reach the great majority of those adversely impacted by the post-election violence.

5.4 Guarantees of non-recurrence

5.4.1 Constitutional reform

In August 2010, a new Constitution was promulgated for Kenya, the Constitution of Kenya, 2010, replacing the Constitution which had been negotiated at independence in 1963. Kenya's new Constitution is noteworthy for its incorporation of a robust bill of rights¹⁴⁷ and provisions for the creation of an independent electoral management body,¹⁴⁸ an independent judiciary,¹⁴⁹ executive¹⁵⁰ and parliament,¹⁵¹ a decentralised political system and a framework regulating a system of devolved government.¹⁵² The constitutional reform process has served to lay the ground for important institutional reforms of Kenya's justice and security apparatus and other governance institutions, geared to prevent the recurrence of human rights atrocities.

Further, the new Constitution is lauded for vastly diminishing the extensive executive powers enjoyed under the previous dispensation – this was one perceived causal factor of the post-election violence.¹⁵³ Such provisions relate to public appointments, lack of separation of powers, undue influence over the parliamentary calendar, weakened oversight bodies, and lack of adequate checks and balances. For

145 Human Rights Watch interview with IDP Network Chairperson Patrick Githinji, Nakuru, 24 October 2011 in Human Rights Watch (n 9 above) 79.

146 Robins (n 97 above).

147 Arts 19-51 Constitution of Kenya, 2010.

148 Art 88.

149 Art 160.

150 Arts 129-155.

151 Arts 93-105.

152 Arts 174-200.

153 C Moser & D Rodgers *Understanding the tipping point of urban conflict: Global policy report (draft)* (2012).

example, all public appointments under the new constitutional order require a robust process of recruitment, which is further subject to parliamentary approval.¹⁵⁴ Additionally, provisions aimed at eliminating political influence of the executive (that had perpetually marred judicial operations) have facilitated judicial independence. Another key strength of the Constitution is the creation of an ombudsman commission,¹⁵⁵ as well as other oversight bodies¹⁵⁶ important for the effective and accountable functioning of government.

The influence of the new Constitution has been felt in various transitional justice processes in Kenya, primarily in relation to criminal justice and institutional reform efforts. For example, shortly after the promulgation of the Constitution on 27 August 2010, the Kenyan government seemed to have found a legal basis to retreat from the ICC route. On various occasions, the government referred to the new Constitution as its new strength to try the ICC suspects.¹⁵⁷ In this regard, several avenues were exploited in an attempt to keep the ICC at bay. On 31 March 2011, the government of Kenya lodged an application before the ICC, challenging the admissibility of the Kenyan situation in accordance to article 19 of the Rome Statute.¹⁵⁸ Endeavouring to demonstrate capacity and willingness to prosecute alleged perpetrators, the government of Kenya urged the ICC to take into account the comprehensive constitutional and judicial reforms that had been adopted.¹⁵⁹ Although the pre-trial chamber dismissed the challenge, the fundamental role the new Constitution continues to play in Kenya's transitional justice project cannot be underestimated. The Constitution has not only informed several transitional justice measures in their substantive form, but also in the various procedural avenues that have been adopted. These will be captured in the debates on judicial and police reforms.

5.4.2 Judicial reform

At the time of the post-election violence, the Kenyan judiciary was in dire need of reform. The CIPEV report highlighted that the Kenyan

154 See, generally, ch 13 Constitution of Kenya 2010, on commissions and independent offices.

155 The Commission on Administrative Justice, created under the Commission on Administrative Justice Act, 2011 created pursuant to ch 15, Constitution of Kenya, 2010.

156 Art 248 of the Constitution of Kenya, 2010 establishes numerous oversight bodies.

157 'Mutula to Ocampo, quit Kenyan probe' *Sunday Nation* 19 September 2010 1. See also 'Why go to The Hague' *Sunday Nation* 19 September 2010 15. The then Minister for Justice and Constitutional Affairs called upon the ICC to quit the Kenyan probe and to allow Kenya a chance under the new Constitutional Court structures to deal with the cases.

158 ICC Pre-Trial Chamber *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article (19)(2)(b) of the Statute, 30 May 2011 ICC-01/09-02/11-96.

159 n 158 above 6.

judiciary had 'acquired the notoriety of losing the confidence and trust of those it must serve because of the perception that it is not independent as an institution'.¹⁶⁰ As such, the judiciary was not seen as a legitimate forum for the resolution of disputes, and therefore ineffective in limiting violence.¹⁶¹ The Task Force on Judicial Reforms (appointed by the government of Kenya in 2009) has since acknowledged the manifest corruption of the Kenyan judiciary.¹⁶² Significantly, in terms of achieving judicial reform, some noteworthy headway has been made (such that this is one of the *qualified* success stories of Kenya's transitional justice project): specifically, the adoption of a stringent method of appointing judicial officers and the vetting of current judicial officers. The Constitution of Kenya provides for the establishment of an independent Judicial Service Commission, imbued with the authority to make judicial appointments.¹⁶³ The Constitution also calls for the enactment of legislation for the vetting of judges and magistrates.¹⁶⁴ This constitutional provision has been implemented pursuant to the Vetting of Judges and Magistrates Act 2011 (Kenya). Under the Act, to date 69 High Court Appeal judges have been vetted, with 14 removed from office, and 351 magistrates vetted.¹⁶⁵

Significantly, the Kenyan Parliament enacted legislation that sought to insulate the decisions of the Judges and Magistrates Vetting Board.¹⁶⁶ Importantly, the law sought to suspend judges or magistrates who requested a review of the Board's decision until such reviews were fully determined.¹⁶⁷ This positive development responds to the dubious decision by the Kenyan High Court that sought to reinstate a suspended judge pending the determination of their appeals.¹⁶⁸ This was despite the effect of an exclusion clause in the Constitution that 'a removal, or the process leading to the removal of a judge from office by virtue of the operation of legislation ... shall not be subject to question in, or review by any court'.¹⁶⁹ Ambos suggests that one indicator of the success of transitional justice is the 'extent to which it contributes to ... the consolidation of ... the domestic judicial system'.¹⁷⁰ Applying this to Kenya's judicial reform efforts to date (in particular, a robust vetting process), coupled with the proposal for the

160 CIPEV (n 9 above) 460. See also MK Mbondenyei 'The place of the judiciary in democratic transitions in Africa: A comparison of post-apartheid South Africa and post-authoritarian Kenya' (2010) 9 *Judiciary Watch Report* 303.

161 Seils & Gonzalez (n 139 above).

162 Report of the Task Force on Judicial Reforms (2009) 74-77.

163 Art 20 Constitution of Kenya, 2010.

164 Art 23.

165 Seils & Gonzalez (n 139 above). However, note that there are mixed reports on how effective the process of vetting of magistrates has been.

166 The Vetting of Judges and Magistrates Act 43 of 2012.

167 Secs 21 & 22 The Vetting of Judges and Magistrates Act 43 of 2012.

168 *Hon Lady Justice Jean Gecheche v The Judges and Magistrates Vetting Board and the Judicial Service of Commission*, Judicial Review Application 295 of 2012.

169 Art 23(2), Sixth Schedule, Transitional and Consequential Provisions, Constitution of Kenya, 2010.

170 Ambos (n 74 above).

creation of the International Crimes Division within Kenya's High Court, there is some early indication of the transformative potential for transitional justice.

The perception of a reformed judiciary overwhelmingly enjoyed public trust in the judicial institution. This trust was, however, short-lived. Regarding a subsequent constitutional question as to whether the current President was fit to vie for presidency given the fact that he was an ICC indictee, the same High Court declared its lack of mandate to deal with a presidential election petition even when this was not an election petition *per se*, but a matter of constitutional interpretation based on the integrity requirements of public officers.¹⁷¹ Similarly, the Supreme Court of Kenya shied away from invalidating presidential elections despite their very own findings of irregularities.¹⁷² What is most saddening is the fact that this is the Kenyan judicial system that has apparently undergone drastic reforms. The traces of impunity, however, remain inherently ingrained and evident in their judicial decisions.

5.4.3 Police reform

Police reform in Kenya is vital: Allegations of an estimated 962 police shootings (405 fatal) and a myriad of cases of sexual assault perpetrated by the police in the context of post-election violence necessitates drastic reform.¹⁷³ Notably, no police officer in Kenya has been convicted of any such crimes, thereby 'demonstrat[ing] the extent of impunity for certain groups that appear to be protected'.¹⁷⁴ Further, a raft of constitutional and legislative provisions aimed at police reform remains to be implemented – the slow progress of police reform in Kenya has been disappointing. Of greatest concern is the failed attempt at vetting the leadership of the police force. As such, questions arise as to how other institutional reforms may be executed effectively where corresponding reforms have not occurred within the police. An effective justice chain relies on the proper functioning of each of its components – for example, in crude terms, prosecutions will not be successful where police have failed to collect appropriate evidence.

The National Task Force on Police Reforms (Ransley Task Force), established in 2009, has been central to informing the police reform agenda. The final report of the Ransley Task Force underscored the

171 *International Centre for Policy and Conflict & 5 Others v the AG & 4 Others* Constitutional and Human Rights Division Petition 552 of 2012 (2013) eKLR, http://kenyalaw.org/CaseSearch/view_preview1.php?link=11903065891756192934559 (accessed 17 May 2013).

172 See, generally, Supreme Court of Kenya Petitions 3, 4 & 5 of 2013; Reports on tally of 22 polling stations in Petition 5 of 2013 and Report of the scrutiny of 33 400 polling stations. These reports are as a result of the Supreme Court's own *suo moto* motion.

173 Human Rights Watch (n 9 above) 4.

174 As above.

need to establish an independent National Police Service Commission, responsible for the appointment, remunerations, disciplinary and general performance of the police – essential for the effective functioning of the police.¹⁷⁵ Indeed, the 2010 Constitution further bestows a constitutional mandate on the National Police Service Commission as the body in charge of the National Police Service in terms of appointments, disciplinary and any other functions conferred upon it by statute.¹⁷⁶ Additionally, Parliament further enacted a law that created yet another office within the security forces, the National Police Service headed by the Inspector-General.¹⁷⁷ The functions of the Inspector-General were generally to co-ordinate the functions of the police at the national level and to advise the government on policy matters.¹⁷⁸ Even then, the two offices – that of the Inspector-General and the National Police Service Commission – have been at loggerheads over who should exercise the key functions of discipline, recruitment and transfer of forces. These events have prompted the introduction of a bill to the National Assembly that seeks to amend the National Police Service Act by transferring the most crucial functions of the National Police Service Commission, recruitment, transfer and disciplinary of forces, to the Inspector-General.¹⁷⁹ Not only has this move been politicised, but also the Kenya National Commission on Human Rights has criticised the same as essentially ‘killing the National Police Service Commission’.¹⁸⁰

On a positive note, a Police Civilian Oversight Board was also established in 2009, in accordance with the recommendations of the Ransley Report.¹⁸¹ This board has been established to provide civilian oversight of the work of the police.¹⁸² While this community-policing model is promising, further efforts are required to ensure that the Kenyan public feels the positive impact of the Civilian Oversight Board.

175 The National Task Force on Police Reforms 2009 (commonly referred to as the Ransley Task Force) http://marsgroupkenya.org/pdfs/2012/11/Report%20of%20the%20National%20Task%20Force%20on%20Kenya%20Police%20Reforms%20-%2021st%20October%202009%20-%20The%20Ransley%20Report_.pdf (accessed 25 October 2013). See also the report by the UN Special Rapporteur on Extra-Judicial Executions 28 May 2009. This was later captured under the National Police Service Commission Act 30 of 2011.

176 Arts 243 & 246 Constitution of Kenya, 2010.

177 National Police Service Act 11A of 2011.

178 Sec 10 National Police Service Act.

179 National Police Service Commission (Amendment) Bill 2013.

180 S Omondi ‘Killing the National Police Service Commission’ KNCHR 7 August 2013 <http://www.knchr.org/SamsonOmondiKillingtheNPSC.aspx> (accessed 20 October 2013).

181 National Task Force on Police Reforms (2009) 82.

182 Established under Independent Policing Oversight Authority Act 35 of 2011.

6 Have the goals of transitional justice been achieved in Kenya?

As the Special Rapporteur sets out in the first annual report to the Human Rights Council, 'the four elements under the mandate serve to assist in the pursuit of two mediate goals, that is, providing recognition to victims and fostering trust, and two final goals, that is, contributing to reconciliation and to strengthening the rule of law'.¹⁸³ The Special Rapporteur explains also that these goals are most likely to be achieved where a *comprehensive* set of transitional justice mechanisms are *fully* implemented.¹⁸⁴ Kenya has fallen short of this. As Ambos suggests:¹⁸⁵

The role of the (former) elite(s) in the process [of transition] affects the ... [success of transitional justice] in that the possibilities of transitional justice increase with the decreasing influence of the (former) elite(s).

In the case of Kenya, where there has been no real transition to speak of, Ambos's words have great resonance in explaining the shortcomings of Kenya's ongoing project of transitional justice.

Certainly, the point should also be made that there is very little evidence-based understanding as to whether transitional justice mechanisms do actually achieve their stated objectives. Indeed, Brahm asserts that most strong ideological stances on the social impact of transitional justice processes are very much intuitively informed, based on some limited 'anecdotal evidence', but very little substantive empirical data.¹⁸⁶ This poses a further challenge to concluding with certainty what impact transitional justice has had (or indeed can have) in the process of political transition and reconstruction in Kenya. Further, the relatively short time frame (between the time of post-election violence, the KNDRC process and the implementation of various transitional justice measures in Kenya) is an important consideration, recognising that the fulfilment of goals such as recognition, trust and reconciliation is difficult to quantify and not capable of attainment instantaneously.

So, to what extent might it be said that these goals have been achieved in Kenya, acknowledging methodological measurement difficulties? It is argued that the recognition of harm suffered by victims in the Kenyan context is blemished with numerous failures and minimal successes. In terms of the successes, despite associated challenges, the ICC process has been agenda setting in achieving some recognition for victims as rights holders. The indictment by the

183 De Greiff (n 7 above).

184 As above.

185 Ambos (n 74 above) 22.

186 E Brahm 'Uncovering the truth: Examining truth commission success and impact' (2007) 8 *International Studies Perspectives* 16. This point is picked up also in Olsen *et al* (n 3 above).

ICC of alleged perpetrators of human rights atrocities was a powerful act of recognition; the completion of the trials would elevate this. The ICC process has also functioned to raise awareness of and pressure for criminal prosecutions domestically. Yet, the inadequacy of local truth-seeking and criminal justice efforts denies public acknowledgment of harm suffered by victims. The lack of a comprehensive reparations programme further functions to deprive victims of justice. In terms of fostering trust – that which the Special Rapporteur explains as trust ‘between individuals and trust of the individuals in state institutions’¹⁸⁷ – while arguably there is enhanced confidence in various state institutions (particularly the judiciary), this does not seem to have occurred between divided individuals and groups. For example, the Tana Delta clashes in August and September 2012, in which two ethnic communities turned against each other, killing hundreds, suggest a lack of trust, in particular along ethno-regional lines. (Of concern, various politicians have been accused of inciting this violence.)¹⁸⁸ These instances of ethnic violence also suggest that very little headway has been made in achieving reconciliation in Kenya.¹⁸⁹ Finally, with respect to the goal of strengthening the rule of law, despite some noteworthy reform efforts (namely of the Constitution and the Kenyan judiciary), the continued impunity of the ‘big fish’ suggests that the rule of law remains elusive in Kenya.¹⁹⁰

7 Conclusion

This article endeavours to respond to the creation of the mandate on the promotion of truth, justice, reparation and guarantees of non-recurrence, and corresponding first and second annual reports against the mandate. Each is of great significance and contributes to advancing the transitional justice discourse and evolution of the field. Indeed, the critical analysis in this article on the extent of implementation in Kenya of the four elements of the Special Rapporteur’s mandate – truth, justice, reparations and guarantees of non-recurrence – points to substantial shortcomings. It is submitted that the failure to fully and effectively implement each of these elements has meant that goals of recognition, trust, reconciliation and strengthening of the rule of law in Kenya remain unfulfilled. Accordingly, Seils’s diagnosis of the ‘panorama for transitional justice in Kenya’ as ‘uniformly bleak’ seems an accurate assessment.¹⁹¹

187 De Greiff (n 7 above) 11.

188 D Miriri & H Malalo ‘Second Kenyan minister charged with inciting violence’ *Reuters* (online) 27 September 2012.

189 Gondi (n 108 above).

190 As above. See also Brown & Sriram (n 67 above). See also Human Rights Watch (n 9 above).

191 Seils & Gonzalez (n 139 above).

The authors of this article therefore call on the Special Rapporteur to issue a request to the government of Kenya in order to conduct a country visit, pursuant to the Special Rapporteur's mandate. Such a focus on Kenya by the Special Rapporteur could have an important impact in ensuring that Kenya avoids further gross human rights violations. Access to quality technical assistance and advice, as well as the further elevation of crucial human rights issues to the international level, may have a powerful impact. In this context, the words and derisive tone of Kenyan poet, Phyllis Muthoni, have great resonance, and point to the urgent need for response (and yet are extremely haunting):¹⁹²

A slit throat, a bludgeoned head. Some bodies resembled porcupines ...
the smell of roasted flesh burning in church? ... We laugh at Somalia and
DRC.

As such, the effective implementation of transitional justice measures, geared towards avoiding a country spiralling into cycles of violence and gross violations of human rights, are pivotal.

192 P Muthoni *Lilac uprising: Poems for the city and other places* (2010) 92.

Female genital mutilation as a human rights issue: Examining the effectiveness of the law against female genital mutilation in Tanzania

*Camilla Yusuf**

Graduate Lecturing Assistant, Faculty of Law, University of the Western Cape, South Africa

*Yonatan Fessha***

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

Summary

In many African states, female genital mutilation (FGM) is a deeply-entrenched cultural practice. Tanzania is no exception. FGM persists despite the fact that the country has ratified a number of international and regional human rights instruments that protect women against the practice of FGM. The mere fact that the practice continues despite Tanzania's obligation under international and regional human rights treaties raises the question whether Tanzania has put in place adequate constitutional and legislative measures to protect women against FGM. It is this question that this article seeks to address. Against the backdrop of the emerging consensus that posits FGM as a human rights violation, the article examines the effectiveness of the constitutional and legal framework of Tanzania in protecting women against FGM.

* LLB, LLM (Western Cape); camillagulam@gmail.com

** LLB (Addis Ababa), LLM (Human Rights and Democratisation in Africa) (Pretoria), PhD (Western Cape); yfessha@uwc.ac.za

1 Introduction

Tanzania is one of 28 African countries in which female genital mutilation (FGM) is widely practised.¹ This is despite the fact that the country has ratified a number of international and regional human rights instruments that protect women against the practice of FGM.² The mere fact that the practice of FGM continues despite Tanzania's obligation under international and regional human rights treaties raises the question whether Tanzania has put in place adequate constitutional and legislative measures to protect women against FGM. It is this question that this article seeks to address

The article sets out to achieve its objective first by discussing the prevalence of FGM in Tanzania. This is followed by a discussion on the human rights implications of FGM, which traces the recognition of FGM as a human rights violation, indicates the different rights that are often implicated by the practice, and reiterates the legal duties that international and regional human rights instruments impose on states. The article then moves to its main business and examines the effectiveness of the constitutional and legal frameworks of Tanzania in protecting women against FGM. The article concludes the discussion by identifying some of the legal measures that need to be taken into account if Tanzania is to effectively protect women against FGM.

2 Practice of female genital mutilation in Tanzania

FGM is a deeply-entrenched cultural practice that is common among at least 20 of Tanzania's 120 ethnic groups.³ Although the practice is reported to be carried out by different ethnic groups across the country, it is most commonly practised among the Chagga, Pare, Maasaai, Iraque, Gogo, Nyaturu, Kurya, Ruri, Ikoma, Sweta and

1 According to the interagency statement of the United Nations, FGM involves 'the partial or total removal of the female external genitalia for cultural or non-therapeutic reasons'. WHO *Eliminating female genital mutilation: An interagency statement by OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO* (2008) http://whqlibdoc.who.int/publications/2008/9789241596442_eng.pdf (accessed 9 August 2011).

2 Although Tanzania is not a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it did ratify the Convention on the Elimination of All Forms of Discrimination Against Women in 1985; the Convention on the Rights of the Child in 1991; the African Charter on Human and Peoples' Rights in 1984; the African Women's Protocol in 2007; and the African Charter on the Rights and Welfare of the Child in 2003. This suggests that Tanzania has a legal obligation, derived from international and regional human rights instruments, to put in place measures to safeguard the rights of women against FGM.

3 *Female genital mutilation practice in Tanzania* <http://wgc.womensglobalconnection.org/conf06proceedings/Mwambalawa%20S.--Female%20Genital%20Mutilation.pdf> (accessed 12 June 2011).

Zanaki.⁴ In terms of geographic distribution, Arusha, Dodoma, Dar es Salaam, Kilimanjaro, Manyara, Mara, Morogoro and Singida are some of the regions that are famously known for the practice of FGM.⁵

All types of FGM are practised in Tanzania.⁶ Clitoridectomy, which involves the removal of the clitoris either partially or totally, is common mostly in the regions of Kilimanjaro, Arusha, Iringa, Mtwara, Kilosa and Tarime.⁷ Excision, involving the process where the clitoris is removed along with partial or total removal of the *labia minora*, is widely practised and amounts to almost 80 per cent of the reported cases of FGM in Tanzania. It is particularly common in Kilimanjaro, Arusha, Iringa and Mtwara. Infibulation, the most severe form of FGM, involving the 'removal of the external genitalia and stitching and/or narrowing of the vaginal opening', is common in Kilimanjaro and Arusha, and it is mostly practised by immigrants from Somalia and those with Nubian origins.⁸ Finally, the so-called 'unclassified' type, which encompasses all procedures that cut, alter and burn the female genitalia by using corrosive substances and herbs, which are inserted into the vagina for the purpose of tightening it, is also widely practised.⁹ One particular type of FGM that possibly falls under this category is the so-called *Kuvuta Matunya*.¹⁰

The name *Kuvuta Matunya* is a word derived from the Kiswahili language.¹¹ It involves the act of pulling the vagina banks to promote its elongation.¹² The process is usually initiated from an early age by the mother of the child and the child gradually adapts and learns to do it by herself.¹³ The practice is considered to enhance sexual pleasure for men and guards women against rape. This is commonly practised in Mtwara, and the Lake zone region. Another type of FGM that could also fall within this category is what is known as *ngoma za mbalamwezi*/moon dances or *singolyo*, as commonly referred to in the Kimasaai language.¹⁴ This particular type of FGM involves the '[u]se of ghee to lubricate and widen the vaginal orifice of girls' to facilitate

4 K Gamaya *The legal process, can it save girls from FGM?: A case of three Maasai girls in Morogoro* (2004) 2.

5 Gamaya (n 4 above) 2; Women's Legal Aid Centre *Annual report 2009* (2009) 10.

6 The United Republic of Tanzania combined 4th, 5th and 6th state report to the Committee on the Elimination of Discrimination against Women (2007) 23.

7 K Bisima *et al Reports on the findings of research into the practice of female genital mutilation (FGM) in Tanzania* (2005) 27.

8 Combined state report (n 6 above) 27 3.

9 Gamaya (n 4 above) 29.

10 As above; Legal Human Rights Centre *Female genital mutilation (FGM) 'A human rights abuse veiled in customs and tradition': A report on the findings of the research into the practice of FGM in Tanzania* (2005) 27.

11 Gamaya (n 4 above) 29; Legal Human Rights Centre (n 10 above) 27.

12 As above.

13 As above.

14 United Republic of Tanzania Ministry of Health and Ministry of Community Development, Gender and Children *The national plan of action to accelerate the elimination of female genital mutilation and other harmful practices in Tanzania 2001-2015* (2003) 7.

sexual penetration.¹⁵ The whole process can last for five to six hours during which a girl might also be sexually penetrated.¹⁶

The continued practice of FGM in Tanzania is attributed to various reasons that have and are still being used to justify its preservation. These reasons differ from one region to another, depending on the cultures and beliefs of the different ethnic communities. Despite some of the differences, many of the motivations are common and cut across the different regional and ethnic divisions of the country. These reasons range from those that attach cultural significance to the practice to those related to hygiene, myths and the desire to control women's sexuality.

Culture and, in particular, the desire to preserve one's cultural identity, are the most cited reasons for the continued practice of FGM in Tanzania.¹⁷ Most communities, the Chagga and Pare tribes in the Kilimanjaro region in particular, consider FGM an essential part of their culture and traditional beliefs.¹⁸ FGM is practised as a cultural ritual to please the ancestors in order to obtain their 'blessings'. The common belief is that these 'blessings' protect their families against any harm. It is because of this particular belief that FGM is largely supported by the elders but also by members of the younger generation, who do so to gain acceptance of the elders and their families.

For other communities, FGM is a practice that facilitates the transition of a young girl into adulthood.¹⁹ It is only after the practice is performed that a young girl acquires new rights, obligations, and specific teaching that are deemed necessary to prepare a young girl for marriage, bearing of children and expected responsibilities as an adult member of her community.²⁰ The Maasai, for example, consider FGM as one of the most important and respected cultural rituals.²¹ The practice is part and parcel of the initiation process where young Maasai girls are taught their culture and different traditional values held dear by the Maasai.²² It is only after this 'initiation process' that a young Maasai girl can be considered for marriage and earn respect and acceptance in her community as an adult.²³ The same is true among the Kurya tribe for whom FGM facilitates 'a passage to adulthood'.²⁴ The practice holds such a high cultural significance that

15 As above.

16 As above.

17 Legal Human Rights Centre (n 10 above) 27.

18 As above.

19 M Prazak 'Introducing alternative rites of passage' (2007) 53 *Africa Today* 26; Bisima *et al* (n 7 above) 26 28.

20 Bisima *et al* (n 7 above) 26 28.

21 Gamaya (n 4 above) 22.

22 Such values include their heritage and beliefs, traditional medicines and preparation for marriage.

23 Gamaya (n 4 above) 22.

24 Children's Dignity Forum *The voices of the child brides and mothers in Tanzania: A peer report on child marriage* (2010) 12.

anyone who refuses to submit herself to FGM is considered as outcast.²⁵ These examples show that cultural justifications remain to be one of the contributing factors for the continued practice of FGM in Tanzania. This is evident specifically in the regions of Kilimanjaro, Arusha, Dodoma, Singida, Tarime and Kilosa.²⁶

The practice of FGM is also closely linked to marriage. In fact, for a number of communities in Tanzania, FGM is a prerequisite for marriage. In Kilimanjaro, Arusha, Dodoma and Singida, it is only after FGM is performed that a woman can be considered an adult and, most importantly, be eligible for marriage.²⁷ It is only after that that men who are seeking wives would usually engage with the girls' families with the hope of securing marriage.²⁸ Similarly, in Tarime, it is believed that a woman who has not been subjected to FGM has a very limited chance of getting married. This is attributed to the common belief that 'a mutilated woman is better'.²⁹ Research conducted in the region indicates that women who have undergone FGM are usually married off immediately after completion of the practice or within two years after it was performed. If a woman has failed to secure a husband thereafter, she is considered to have 'bad luck'.³⁰ On the other hand, a woman who has not undergone FGM and has still managed to get married is considered only to have been done 'a favour' by the man who decides to marry her. Such women are prone to stigma in their communities and may not be accepted by their in-laws. They may further be prohibited from cooking. Members of the community may even refuse to associate with her in other activities which women who have undergone FGM would engage in. This is to ensure that she does not pass over any 'bad luck' that she may have acquired as a result of not being subjected to FGM.³¹

Myths also contribute to the continued practice of FGM in Tanzania. The myths that the practice suppresses women's sexual desire, prohibits promiscuity and ensures that a woman is faithful to her husband upon marriage are widely held among communities in Tanzania.³² This is the case, for example, with the Maasai. According to a myth held by the Maasai, FGM was used a long time ago as a 'cure' and punishment to Napei, a Maasai girl accused of having had sexual relations with a man who was considered an enemy of her family. She was subjected to FGM to suppress her sexual desires, which was considered to be the driving force behind her sexual relationships with the enemy. The practice of FGM has since been

25 As above.

26 Bisima *et al* (n 7 above) 29.

27 As above.

28 As above.

29 Children's Dignity Forum (n 24 above) 13.

30 As above.

31 Children's Dignity Forum (n 24 above) 13 14.

32 Gamaya (n 4 above) 30.

passed through generations among the Maasai and, according to them, it helps to maintain the honour of the girl and the family.³³

FGM is also regarded by many communities as a means to promote personal hygiene. This is attributed to the belief that the female genitalia are naturally dirty.³⁴ The practice is also considered to cure and prevent a genital disease, locally known as *lawalawa*, in Dodoma, Singida, Iringa and Mtwara.³⁵ This is, however, a myth. According to medical experts, the condition believed to be *lawalawa* is, in fact, a minor infection associated with poor hygiene referred to as thrush. The infection can be cured by improving one's hygiene and taking medication.³⁶

For a number of ethnic communities in Tanzania, the practice of FGM is also believed to help women embrace femininity and preserve gender identity. This myth is attributed to the misconception that a woman's external genitalia, specifically the clitoris, if not removed, will outgrow the male external genitalia. It is further believed that if it is not removed, it will cause harm to a man during sexual intercourse.³⁷ This belief is common among the Kurya tribe in the Tarime region. It is also believed that the clitoris, if not removed, may harm a new-born upon contact during child birth.³⁸ Moreover, it is believed that women who have undergone FGM are able to give birth easier because of the absence of the labia. This belief is widespread among the Gogo and Nyaturu in Dodoma and Singida.

FGM has no health benefits but rather it exposes women and girls to extreme pain and suffering, risks lives and imposes both long and short-term negative effects on victims. The negative effects of FGM on the health of women have triggered a wave of movements aimed at eradicating the practice.³⁹ It is to this point that the article now turns.

33 Equality Now *Protecting girls from undergoing female genital mutilation: The experience of working with the Maasai communities in Kenya and Tanzania* (2011) 12 http://www.equalitynow.org/sites/default/files/Protecting%20Girls_FGM_Kenya_Tanzania.pdf (accessed 29 November 2012).

34 Gamaya (n 4 above) 30.

35 S Mwita *FGM 'difficult to eliminate'* (2010) <http://www.dailynews.co.tz/feature/?n=14913&cat=feature> (accessed 28 August 2012).

36 As above.

37 Bisima *et al* (n 7 above) 28.

38 Gamaya (n 4 above) 30.

39 J Schott & A Henley *Culture, religion and child bearing in a multiracial society: A handbook for health professionals* (1996) 213; D Mekonnen 'The abolition of female circumcision in Eritrea: Inadequacies of the new legislation' (2007) 7 *African Human Rights law Journal* 393; AS Eldin 'Female genital mutilation' in P Chandra *et al* (eds) *Contemporary topics in women's mental health: Global perspective in a changing society* (2009) 486.

3 International human rights law and female genital mutilation

Documented campaigns against FGM date back towards the beginning of the twentieth century.⁴⁰ Based on the nature of the campaigns, the movements against FGM can be divided into two groups: those that followed the 'health frame' and those that campaign based on the 'rights frame'.⁴¹ The difference between the two approaches is that the former focuses on the negative effects of FGM on the health of women while the latter focuses on its adverse effects on the rights of women.

The initial campaigns against FGM predominately fell within the 'health frame'. The campaign was based on the assumption that the successful eradication of FGM is possible through the promotion of awareness of the negative effects of the practice on the health of women.⁴² Although the health frame approach contributed to the fight against the practice of FGM, it was not completely successful.⁴³ The major drawback of the approach is that it did not abolish the practice but rather opened up room for the medicalisation of FGM, a situation whereby FGM is performed by a health care provider of any level, regardless of the place where it is carried out. In this case, 'parents take their daughters to be cut by medical professionals or medically trained cutters working with sterile and cleaner instruments'.⁴⁴ Because it is performed by a health official, it is considered to be less harmful and, thus, creates 'legitimacy' despite its negative effects on the health of women. Medicalisation, thus, encouraged the practice, accelerated its growth and encouraged health officials to continue performing FGM for financial gain.⁴⁵ Eventually, the medicalisation of FGM was also prohibited.⁴⁶ It is against the backdrop of this rejection of the medicalisation of FGM

40 A Rahman & N Toubia *Female genital mutilation: A guide to laws and policies worldwide* (2000) 9.

41 C Bob *The international struggle for new human rights* (2009) 95.

42 As above.

43 Mgabako *et al* note that '[w]hile FGM has serious health implications, and although health education is and must be an important component of any anti-FGM campaign, focusing exclusively on its health consequences has not contributed significantly to the eradication of FGM, and has not properly addressed FGM as a violation of human rights'. C Mgabako *et al* 'Penetrating the silence in Sierra Leone: The blue print for the eradication of female genital mutilation' (2010) 23 *Harvard Human Rights Journal* 3.

44 As above.

45 World Health Organisation *Global strategy to stop health care providers performing female genital mutilation* (2010) http://whqlibdoc.who.int/hq/2010/WHO_RHR_10.9_eng.pdf (accessed 10 February 2012) 9.

46 In 1976, the WHO was the first institution to prohibit health care providers from performing FGM. This was followed by the United Nations Commission on Human Rights in 1982. From 1982 onwards, there has been increasing support from other international, non-governmental organisations and states for the prohibition of medicalisation of FGM. World Health Organisation (n 45 above) 2; Bob (n 41 above) 97.

that the rights frame approach towards the elimination of FGM started to emerge.⁴⁷

The rights frame approach was driven by women's rights activists that aimed at raising international awareness on the harmful effects of FGM on the rights of women.⁴⁸ They did so during the period of the 1980s and 1990s, an era where 'women's rights were beginning to be accepted as human rights', providing a good platform to address FGM as a human rights issue.⁴⁹ This brought a new dimension to the movement against FGM.⁵⁰ The practice was not only considered harmful to the health of women, but also one that violated their fundamental human rights. For them, FGM 'was a tool of patriarchy and a symbol of women's subordination'.⁵¹ The practice was renamed from female genital circumcision or cutting, which was considered a neutral term, to female genital mutilation.⁵² The rights frame approach contributed to the development of international consensus that FGM is a human rights violation. It must, however, be noted that the campaigns against the practice were not done in total isolation of the health frame approach. Although the latter approach had several shortcomings, it was still used to show the negative effects of FGM on the health of women. Therefore, what emerged was a fusion between the two approaches, creating a new dimension on the campaigns against FGM.⁵³

Although there are a number of international and regional human rights instruments whose provisions, as we shall see shortly, are interpreted to safeguard the rights of women against the practice, it is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) that has explicitly prohibited the practice of FGM. The Women's Protocol obliges states to ensure that legislative measures are in place prohibiting all forms of FGM and the medicalisation thereof. States are further required to impose sanctions against perpetrators, to promote awareness campaigns and to provide support to victims through health, legal and judicial services.

47 The failure of the health frame approach is partly attributed to the lack of co-operation from international organisations such as the WHO, that were reluctant to address FGM at the international level. They considered FGM a cultural issue that should be left to the domestic authorities. Bob (n 41 above) 98.

48 Bob (n 41 above) 98.

49 As above; Rahman & Toubia (n 40 above) 11.

50 Bob (n 41 above) 98.

51 Bob (n 41 above) 97.

52 Some scholars have argued that the change in terminology illustrates the intensity of the violation of the rights of women and, thus, enhanced national and international advocacy against the practice of FGM. See the discussion by S Windle *et al* 'Harmful traditional practices and women's health: Female genital mutilation' in J Ehti (ed) *Maternal and child health: Global challenges, programmes and policies* (2009) 168; Bob (n 41 above) 98.

53 Bob (n 41 above) 101.

In addition to the African Women's Protocol that explicitly prohibits FGM, the campaign against FGM has contributed towards the interpretation of international and regional human rights instruments to safeguard the rights of women against the practice. FGM is, for example, commonly linked to the rights to equality and to be free from all forms of discrimination.

Of course, whether FGM constitutes discrimination depends on our understanding of what constitutes discrimination. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was the first legal instrument to define discrimination against women. Discrimination against women is defined under article 1 of CEDAW as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

According to this definition, discrimination may come in the form of laws or practices that differentiate, exclude or restrict individuals based on sex. This, however, is not enough. The law or the practice in question must also have the effect of undermining the enjoyment of the rights of women. The act of discrimination can be carried out either by the state itself or even by private individuals. The same elements are also evident in article 1 of the African Women's Protocol, which defines discrimination against women as

any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

As a practice that exclusively targets women and girls, FGM is deemed to create a distinction on the basis of sex and subjects females to 'harsh consequences'.⁵⁴ After all, the practice, among other things, is done to control women's sexuality. It 'carries a strong message about the subordinate role of women and girls in society'.⁵⁵ It portrays the image that the role of women in society is only that of 'mother and spouse', further promoting the subordination of women in all spheres of life.⁵⁶ The effect of this is that the practice undermines the physical and mental integrity of women, hindering them from fully enjoying fundamental freedoms.⁵⁷

54 Mgabako *et al* (n 43 above) 17.

55 Rahman & Toubia (n 40 above) 21.

56 As above.

57 A Fasio & MI Morgan *Equity or equality for women? Understanding CEDAW equality principles* http://www.iwraw-ap.org/publications/doc/OPS14_Web.pdf (accessed 30 November 2012) 9; CEDAW General Comment 19.

The continued practice of FGM is also deemed to violate the right to be free from violence. The right to be free from violence is protected in a number of international and regional human rights instruments. Both the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Children's Charter) specifically protect the right of children to be free from all forms of psychological and physical violence under articles 19 and 16 respectively. Unfortunately, although CEDAW covers women's rights extensively, it does not expressly provide for the prohibition of violence against women. The CEDAW Committee, in General Comment 19, has, however, interpreted the prohibition against gender-based discrimination to include the protection of the rights of women against violence. Furthermore, the CEDAW Committee defines violence against women as⁵⁸

[v]iolence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.

The definition provided by the CEDAW Committee was later codified, albeit in the form of a declaration, in more or less a similar formulation in article 1 of the Declaration on the Elimination of Violence Against Women (DEVAW). The Declaration goes further than prohibiting violence against women. It, under article 2, includes a list of prohibited acts regarded as violence against women. This includes '[p]hysical, sexual and psychological violence occurring in the family'. More importantly, it explicitly declares FGM as a form of violence against women.

As alluded to earlier, FGM 'is a traumatising and painful surgical procedure, performed on young girls, without the aid of anaesthesia to temporarily dull the pain, or proper hygiene to prevent potential infection'.⁵⁹ This exposes women to severe pain and suffering, which has both physical and psychological effects. The practice inflicts physical, sexual and mental harm to women. Moreover, the violence does not end at the completion of the procedure. A woman who has undergone FGM will continue to live with the irreversible negative consequences of the practice for the rest of her life. There is, therefore, no doubt that FGM is a form of violence that is directed at a woman because she is a woman or that affects women disproportionately.

The right to life is also often implicated by the continued practice of FGM. Obviously, this right is violated when FGM results in death.⁶⁰

58 General Comment 19 (n 57 above).

59 J Wellerstein 'In the name of tradition: Eradicating the harmful traditional practice of female genital mutilation' (1999) 22 *Loyola of Los Angeles International and Comparative Law Review* 9.

60 Rahman & Toubia (n 40 above) 23. Death is likely to occur as a result of the after-effects of the practice on a woman's body. Most women die of loss of blood or

Others have, however, held the view that death must not necessarily occur for FGM to violate the right to life. For them, FGM violates the right to life 'from the perspective of reproduction'.⁶¹ This is because the practice involves the mutilation of a reproductive organ and this alone violates the right to life. Related to this is the argument that FGM violates a woman's right to health. The right to health is protected under the different international and regional human rights instruments. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) specifically provides that everyone has the 'right to the enjoyment of the highest attainable standard of physical and mental health'. At the regional level, article 16 of the African Charter on Human and Peoples' Rights (African Charter) provides for the 'best attainable state of physical and mental health'. With specific reference to women, CEDAW, under article 12, guarantees the protection of the right to health of all women. In addition, the African Women's Protocol not only provides for the right to health of all women, but also expressly provides for the promotion and respect of women's sexual and reproductive health. With specific reference to children, the same right is protected both in article 24 and article 14 of CRC and the African Children's Charter respectively. It is important to note that the right to the highest attainable standard of physical and mental health does not only extend to the right to be healthy, but also includes 'the right to control one's health and body'.

FGM, as indicated several times throughout this article, imposes both psychological and physical harm to the health of women. The risk of complications on the health of women is even greater due to the limited standards of medical care facilities in most countries where FGM prevails. Even in the absence of this, FGM still violates a woman's right to health because it involves the removal of healthy tissue for a non-medical purpose and this infringes the 'the highest attainable standard of physical and mental health'.⁶² The violation of the right to health by the continued practice of FGM consequently undermines 'the realisation of all the other fundamental human rights and freedoms'.⁶³

Many regard FGM as a harmful traditional practice that violates the rights of women and children. They, as a result, rely on international and regional instruments that prohibit harmful practices and argue that FGM must be outlawed. At the regional level, the right against harmful practices is protected by article 18 of the African Charter. Furthermore, according to article 21 of the African Children's Charter, all harmful social and cultural practices that are prejudicial to the

fatal infections that could be attributed to the unsanitary conditions under which FGM is usually performed.

61 A Slack 'Female circumcision: A critical appraisal' (1988) 10 *Human Rights Quarterly* 466.

62 Rahman & Toubia (n 40 above) 27; Wellerstein (n 59 above); Slack (n 61 above) 465.

63 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) 80.

'welfare, dignity, normal growth and development of the child' are prohibited. The provision goes a step further by expressly prohibiting practices and customs that negatively affect the health and life of children and those that are discriminatory on the basis of gender or any other ground. With reference to women, article 5 of CEDAW prohibits all social and cultural patterns that have the effect of enhancing gender inequality and the subordination of women in society. Similarly, article 5 of the African Women's Protocol, as mentioned earlier, prohibits all harmful traditional practices that undermine international human rights standards.

In order to benefit from the protections against harmful practices, one must first establish that FGM is a harmful practice. In relation to this, the point of departure would be the definition of harmful practices. Many international and regional instruments do not define harmful practices, with the exception of the African Women's Protocol. According to article 1 of the Women's Protocol, harmful practices are defined as 'all behaviours, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'. The African Women's Protocol elaborates the matter further by providing for an illustrative list of harmful practices. More importantly, it is important to note that the Women's Protocol explicitly regards FGM as a harmful practice.

In the absence of a clear statement that, like the African Women's Protocol, posits FGM as a harmful practice that undermines fundamental rights, the mere fact that FGM is a harmful practice cannot be helpful. This is largely attributed to the fact that not all harmful traditional practices are prohibited. Article 24(3) of CRC, for example, expressly prohibits only those traditional practices that negatively affect the health of women and children. It is, however, submitted that FGM is performed to preserve to enhance the patriarchy in most practising communities.⁶⁴ It is performed to control women's sexuality and this promotes their subordination in all spheres of life. Furthermore, it imposes both psychological and physical harm. This, obviously, undermines human rights, making FGM a prohibited harmful practice that negatively affects the rights and health of women and children. In fact, as mentioned earlier, the African Women's Protocol explicitly regards FGM as a harmful practice.⁶⁵ Similarly, the Women's Protocol prohibits all harmful traditional practices that undermine international human rights standards.⁶⁶

More controversial is the issue whether FGM violates the right against torture. A number of scholars argue that FGM amounts to

64 Fact Sheet 23, *Harmful traditional practices affecting the health of women and children*.

65 Art 5 African Women's Protocol.

66 As above.

torture. However, many are also quick to point out that the prerequisite of intention, as prescribed in the definition of torture, does not reflect the true mental state of practitioners of FGM or even parents that subject their children to FGM.⁶⁷ The rationale behind FGM is not to cause harm but rather to acquire 'acceptance in society or meeting culturally defined obligations'.⁶⁸ Based on this, it is often argued that FGM does not constitute an act of torture. It could rather be considered as cruel, inhumane or degrading treatment, the argument goes. This position finds support in observations of the United Nations Human Rights Committee which, in a number of concluding observations, stated that FGM constitutes cruel, inhumane or degrading treatment, thereby signalling that the practice violates the general prohibition against torture.⁶⁹

The position that the practice of FGM violates a number of rights has serious implications for state parties. One such important consequence is that it places a legal duty on the state to ensure that the rights of women are protected against FGM. This includes the legal obligation to put in place legislative measures to prohibit FGM. This duty requires states to provide constitutional protection for the rights of women, to enact legislation prohibiting the practice and to 'modify or abolish existing laws, regulations, customs and practices' such as FGM.⁷⁰ Furthermore, states are required to take other positive measures to ensure that the rights of women are protected against FGM. These include the duty to put in place administrative and regulatory measures to prohibit the practice and to raise awareness about the negative effects of FGM on the rights of women.⁷¹

Very recently, the rights-based approach against FGM gained a major boost with the UN's decision to adopt the 'first-ever draft resolution' that prohibits FGM. The objective of the resolution is to intensify global movements towards the eradication of FGM. The resolution seeks to promote awareness campaigns against FGM as one of the measures to prohibit the continued practice of FGM.⁷² These campaigns should be carried out through formal and informal education by engaging men and women and all the relevant stakeholders. In order to facilitate the general consensus towards the abandonment of FGM, these campaigns must also be used as a means

67 Rahman & Toubia (n 40 above) 26.

68 As above.

69 Concluding Observations on Sudan, (1997) UN Doc CCPR/C/76 ADD; Concluding Observation on Yemen (2002) UN Doc CCPR/CO/75/YEM.

70 Arts 2(a), (e) & (f) CEDAW; Arts 2(1), 5 & 6 African Women's Protocol; arts 1, 5(3) & 16 African Children's Charter; arts 2 & 6 CRC; General Comments 19 & 24 of CEDAW; General Comment 2 CAT; art 2 CAT.

71 General Comment 3, 14, & 24 CEDAW; arts 2, 4 & 5 African Women's Protocol; art 3 CEDAW; art 4(c) Declaration on the Elimination of Violence Against Women; arts 16, 5(3) & 21 African Children's Charter; arts 16 & 24 CRC.

72 United Nations News Centre 'UN Committee approves first-ever text calling for end to female genital mutilation' <http://www.un.org/apps/news/story.asp?NewsID=43625&Cr=&Cr1=#.ULiVQKyP3vp> (accessed 30 November 2012).

to compliment punitive measures against the practice. When undertaking such campaigns, states are advised to use a 'comprehensive, culturally sensitive, systematic approach that incorporates a social perspective and is based on human rights and gender-equality principles'.⁷³

Noting the discriminatory effects of FGM, the General Assembly urges states to promote the empowerment of women. States are further required to 'promote gender-sensitive' educational programmes that will equip women with the necessary knowledge on the different policies and programmes on gender-based violence and discrimination.⁷⁴ The resolution also calls upon states to put in place comprehensive and multidisciplinary national action plans and strategies that support the abandonment of FGM. These measures should be crafted in a manner in which its objectives are clearly set out and should also incorporate 'effective monitoring, impact assessment and co-ordination of programmes among all stakeholders'.⁷⁵

From the foregoing, it is clear that the change in the international perception towards the practice of FGM has contributed positively towards the protection of the rights of women against FGM. It has broadened the awareness about the harmful effects of the practice not only on the health of women, but also on their fundamental human rights and freedoms. FGM today is recognised as a practice that violates a number of international human rights laws. As a result, states that are parties to these international human rights instruments have a duty to fulfil, protect and promote the fundamental rights of women within their jurisdiction against the practice. It is against this background that the remaining part of the article seeks to analyse the legal measures that Tanzania has put in place against its human rights obligations to protect the rights of women against FGM.

4 The law and female genital mutilation in Tanzania

Incorporating international human rights treaties into the national legal system enhances the development of human rights.⁷⁶ This also ensures that international standards are enforceable within the national legal system.⁷⁷ The same is true for the protection of the rights of women against FGM. It is the domestic legal framework that plays an essential role in protecting the rights of women against FGM.

73 United Nations General Assembly *Intensifying global efforts for the elimination of female genital mutilation* (2012) adopted by the United Nations General Assembly on 16 November 2012.

74 United Nations General Assembly (n 73 above) 4.

75 As above.

76 Centre for Reproductive Health Rights *Female genital mutilation a matter of human rights: An advocate's guide to action* (2006) 11 http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/FGM_final.pdf (accessed 4 October 2012).

77 Centre for Reproductive Health Rights (n 76 above) 11.

As the following discussion reveals, Tanzania has put in place different legal measures to protect the rights of women against FGM. The measures include the Constitution of the United Republic of Tanzania of 1977 and other legislation complimenting the constitutional provisions protecting the rights of women against the practice.

4.1 Constitutional protection

The inclusion of constitutional provisions protecting the rights of women is, as mentioned earlier, one of the most effective measures that can enhance the legal framework to curb the violation of human rights by the continued practice of FGM. The constitutional provisions need to be drafted in manner that promotes gender equality, and prohibits harmful traditional practices, such as FGM, which are detrimental to the health of women. If the constitution does not specifically provide for these rights, then other general provisions can, of course, be interpreted to protect the rights of women against FGM.⁷⁸

The Tanzanian Constitution is founded on the principles of freedom, justice, fraternity and concord.⁷⁹ It strives to build a united society where every citizen has an opportunity to exercise human rights and enjoy freedom, justice, fraternity and concord. As the supreme law of the land, the Constitution is also referred to as the 'basic law', from which other laws are derived.⁸⁰ More specifically for our purpose, the Tanzanian Constitution protects the right to equality and non-discrimination,⁸¹ one of the rights implicated by the continued practice of FGM. The right to equality, as provided for in the Constitution, ensures that every individual is treated equally in the social, political or economic spheres of life.⁸² The right to non-discrimination, on the other hand, protects women from all forms of discrimination. Of course, the general prohibition against discrimination alone is not enough to protect women against FGM. The Constitution goes further by specifically providing for the prohibition of discrimination on the basis of sex. FGM, as established earlier, discriminates against women on the basis of sex as it is performed primarily to control women's sexuality. The recognition of these two corollary rights by the Constitution contributes to the protection of women against FGM.

In article 14, the Tanzanian Constitution protects the right to life, a right that, under certain circumstances, is threatened by the continued practice of FGM. The right to life encompasses the right to live and the right to have one's life protected in society by the law.⁸³

78 Centre for Reproductive Health Rights (n 76 above) 22.

79 Art 9 Tanzanian Constitution.

80 Preamble Tanzanian Constitution.

81 Arts 12 & 13(5) Tanzanian Constitution.

82 Legal Human Rights Centre *Tanzania human rights report* (2011) 65.

83 Art 14 Tanzanian Constitution.

FGM, as indicated earlier, violates the right to life in extreme cases when the practice results in death. The state has to ensure that this right is upheld by providing legal mechanisms to prohibit practices such as FGM that undermine this fundamental human right.⁸⁴ As established in the previous chapter, the practice of FGM also undermines the right against cruel, inhumane or degrading treatment. The Constitution of Tanzania protects the right of women to be free from cruel, inhumane or degrading treatment.⁸⁵

Unfortunately, the right to health, an important right that can be used to defend women against FGM, is not provided for in the Bill of Rights of Tanzania.⁸⁶ Despite the absence of explicit reference to the right to health by the Constitution, some scholars have held that article 11(1) of the Constitution can be interpreted to protect the right to health.⁸⁷ This interpretation is, however, debatable because the provision, if read carefully, does not actually provide for the right to health. It rather places a legal obligation on the state to put in place measures 'for securing the right to work, to education, and to public assistance in the case of old age, sickness and disablement, and in other cases of undeserved want'.⁸⁸ From this, it is clear that it is more of a welfare-related provision than the right to health. Even if it is regarded as the right to health, it does not help much in protecting women against FGM as it falls under the directive principles of state policy,⁸⁹ making it unenforceable against the state.⁹⁰ The failure of the government to incorporate this right in the Constitution goes against Tanzania's international and regional human rights obligations.

The Tanzanian Constitution also does not provide for the prohibition of harmful practices. As established earlier, FGM is a harmful practice that violates the fundamental rights of women. The absence of a constitutional provision against harmful practices is contrary to Tanzania's international and regional commitments in terms of human rights. The only way that this right is given effect to is through the Child Act that explicitly puts a prohibition against

84 As above.

85 Art 13(6) Tanzanian Constitution.

86 Legal Human Rights Centre (n 82 above) 83.

87 Art 11(1) Tanzanian Constitution: 'The state authority shall make appropriate provisions for the realisation of a person's right to work, to self-education and social welfare at times of old age, sickness or disability and in other cases of incapacity. Without prejudice to those rights, the state authority shall make provisions to ensure that every person earns his livelihood.'

88 IG Shivji *et al* (eds) *Constitutional and legal system of Tanzania: A civics sourcebook* (2004) 179.

89 As above.

90 As above. As a directive principle of state policy, the right to health is given effect through policies and legislation that are aimed at improving health care facilities. A good example is the National Health Policy of 2007 and Public Health Act of 2009. Legal Human Rights Centre (n 82 above) 83.

harmful cultural practices that adversely affect the physical and mental well-being of the child.⁹¹

From the foregoing, it is clear that the Constitution does provide protection to women against FGM. However, it has failed to include some key rights that could be used to protect women against FGM. In any case, the constitutional protection of the rights of women against FGM is not enough to ensure effective protection of women's rights against the continued practice of FGM. States should complement these measures with other legislation to ensure that women are adequately protected against FGM. That is the focus of the next section.

4.2 Legislative measures

Although an attempt to eradicate FGM in Tanzania through legislative measures is a recent development, this does not mean that there has not been any attempt to deal with the negative effects of the practice. In fact, efforts to eradicate the practice can be traced back to the colonial era when the British colonial government and Christian organisations worked together to prohibit the continued practice of FGM.⁹² With little success, these efforts made the British colonial government unpopular and were considered by local communities as a mechanism to suppress and abolish their culture.⁹³ The movement to prohibit FGM continued even after independence. This was mostly driven by NGOs who raised awareness on the negative effects of FGM on the health of women.⁹⁴ More importantly, NGOs played a crucial role in advocacy and lobbying for the enactment of legislation criminalising FGM.

The efforts to eradicate FGM gained impetus with the growing concern to put in place an adequate legal framework to curtail increasing violence against women. The alarming wave of violence against women in Tanzania raised valid concerns about the need to review the legal framework to protect the rights of women. These concerns were intensified by the increase of offences such as 'rape, defilement, incest', and also the manner in which these offences were regulated in terms of the law.⁹⁵ As a result of the increasing public outcry and the campaigns by several NGOs, the government, through

91 Art 13(1) Law of the Child Law Act 21 of 2009; UNICEF *Legislative reform to support the abandonment of female genital mutilation/cutting* (2010) http://www.unicef.org/policyanalysis/files/UNICEF_LRI_Legislative_Reform_to_support_the_Abandonment_of_FGMC_August_2010.pdf (accessed 20 October 2012) 10.

92 D Mukama 'Female genital mutilation in Tanzania: A legal appraisal of the Sexual Offences Special Provisions Act 1998' LLM thesis, University of Dar es Salaam, 2002 27.

93 Mukama (n 92 above) 27.

94 Mukama 29.

95 Mukama 77.

the Law Reform Commission of Tanzania, instituted an inquiry.⁹⁶ The study established that there were several shortcomings on the law and its enforcement measures.⁹⁷ It indicated that the law had failed to adequately protect the rights of women against sexual and domestic violence due to the problems associated with sentencing as well as evidentiary and procedural requirements relating to sexual offences.

For our purposes, it is important to note that the inquiry also contributed positively to the on-going campaigns to eradicate FGM as the latter, for the first time, received specific attention as one of the contributing factors to gender-based violence. Previously, FGM was not legally regulated under the Tanzanian legal framework.⁹⁸ The only way that the practice could be addressed was when it resulted in death or grievous bodily harm to the victim.⁹⁹ The perpetrators were dealt with in terms of the Penal Code.¹⁰⁰ The effect of this is that the rights of women against the practice of FGM were not adequately protected. Based on these findings, the Law Reform Commission of Tanzania proposed a way forward to improve the legal framework and recommended, among other things, new legislation. The new legislation, according to the Law Reform Commission, would criminalise FGM and ensure that victims are compensated and perpetrators are imprisoned for not less than 30 years.¹⁰¹

In 1998, Tanzania joined the 21 or so African countries that have outlawed FGM by imposing criminal sanctions.¹⁰² The practice of FGM was criminalised for the first time in the legal history of Tanzania by the Penal Code,¹⁰³ as amended by the Sexual Offences Special

96 Law Reform of Tanzania *Report on the criminal law as a vehicle for the protection of the right to personal integrity, dignity and liberty of women* (1998) 32-47; C Buccina *et al* 'Gender-based violence in Tanzania: An investigation on the effectiveness of the Sexual Offences Special Provision Act of 1998' (2009) *Virginia: Washington and Lee University School of Law* 12.

97 Law Reform of Tanzania (n 96 above) 32-47; Mukama (n 92 above) 12.

98 AOJ Kaniki 'An overview of the law on fighting against female genital mutilation in Tanzania' (on file with author) 22.

99 As above.

100 As above.

101 Some stress the point that the criminalisation of FGM in Tanzania was not an independent national strategy but rather an illustration of the international anti-FGM campaign. According to them, Tanzania relies extensively on financial aid from the West and the influence of international campaigns on the national system is reflected in the approach and language of the legislation criminalising FGM. See G Foss *et al* 'International discourse and local politics: Anti-female genital cutting laws in Egypt, Tanzania and the United States' (2001) 48 *Social Problems* 535; Law Reform of Tanzania (n 96 above) 66 67; Mukama (n 92 above) 77.

102 These states are Benin, Bukina Faso, Central African Republic, Chad, Côte d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Ghana, Guinea, Kenya, Mauritania, Niger, Nigeria, Senegal, Sudan, South Africa, Togo, Uganda and Kenya. Centre for Reproductive Health Rights (n 76 above) 7.

103 Penal Code ch 16 of the Laws of Tanzania, 2002.

Provision Act of 1998 in terms of section 169A.¹⁰⁴ The Penal Code criminalises FGM under a new offence of cruelty to children.¹⁰⁵ Section 169A(1) provides:¹⁰⁶

Any person who, having the custody, charge or care of any person under eighteen years of age, ill treats, neglects or abandons that person or causes female genital mutilation or carries or causes to be carried out female genital mutilation or procures that person to be assaulted, ill-treated, neglected or abandoned in a manner likely to cause him suffering or injury to health, including injury to, or loss of, sight or hearing, or limb or organ of the body or any mental derangement, commits the offence of cruelty to children.

The use of punitive measures is an important aspect of law that is designed to prohibit the practice of FGM.¹⁰⁷ In a system that has taken the punitive route, a state can impose criminal sanctions against FGM by incorporating provisions prohibiting the practice in its Penal Code.¹⁰⁸ The criminalisation of FGM attempts to achieve the abandonment of the practice through the use of threats of punitive measures against perpetrators.¹⁰⁹ States that have adopted this approach include Egypt, Ghana and Senegal. The manner in which legal measures and criminal sanctions can be utilised by states to prohibit FGM is not, however, limited to this particular approach. Kenya, for example, uses both the Penal Code and the Children's Act to prohibit FGM. In states that follow a federal form of government, a decision has to be made whether legislation against FGM should be left to the national or sub-national government. In Nigeria, for example, the matter is left to the states. Two states have adopted laws to prohibit FGM. A state can also choose to enact specific legislation prohibiting the practice. This has been done in Benin, Eritrea, Uganda, Sudan and Togo.¹¹⁰

Research indicates that when states have put in place comprehensive criminal sanctions against FGM, it contributes positively to the prohibition of the practice.¹¹¹ However, this must not be exaggerated. It must be conceded from the outset that the use of punitive measures to prohibit or regulate a particular behaviour or practice has its limitations. This is especially true of FGM, a practice that is often culturally engrained. As a result, states often are advised

104 The Act amended different laws dealing with sexual and other offences. It further changed the sentencing and evidentiary requirements in relation to sexual offences. Law Reform of Tanzania (n 96 above) 12.

105 Penal Code ch 16 of the Laws of Tanzania (n 103 above), sec 169(A)(1).

106 As above.

107 Mukama (n 92 above) 27.

108 Mukama (n 92 above) 28.

109 Mukama (n 92 above) 27.

110 For an in-depth discussion on the law against FGM in Uganda, see J Mujuzi 'Female genital mutilation in Uganda: A glimpse at the abolition process' (2011) 1 *Journal of African Law*, and on Eritrea see D Mekonnen 'The abolition of female circumcision in Eritrea: Inadequacies of the new legislation' (2007) 7 *African Human Rights Law Journal* 389.

111 UNICEF (n 91 above) 7-27; Mukama (n 92 above) 27.

to complement legislative measures with other supporting measures such as educational awareness programmes that promote social change. These measures are important in order to achieve public consensus to abandon FGM. With measures that promote social change in place, the punitive measures against FGM only feature as a 'positive force' towards the eradication of FGM. However, when a state fails to develop such measures, what usually happens is that criminalisation simply pushes 'the practice underground, lower[s] the age of cutting, trigger[s] cross-border migration and result[s] in public resentment'.¹¹² The net result is a less effective criminal sanction against FGM.

Notwithstanding the limitations of legal measures to deal with the practice of FGM, the amendment of the Penal Code in Tanzania represents a positive step towards ensuring that the legal framework protects the rights of women against the practice of FGM. It is also an important step towards fulfilling the country's international and regional human rights obligations. Notwithstanding this, the effectiveness of the Penal Code in protecting the rights of women against FGM is questionable. As the discussion in the next section reveals, several loopholes in the provisions criminalising FGM have limited the amendment from realising its objectives.

4.2.1 Absence of definition

When a state chooses to use criminal sanctions to prohibit FGM, several factors need to be considered to ensure that the desired objectives are achieved. To begin with, the law must provide for a clear definition of FGM and clearly outline the different types of FGM that are prohibited.¹¹³ The law in Uganda, for example, defines FGM as 'all procedures involving the partial or total removal of external female genitalia for non-therapeutic reasons'.¹¹⁴ The Kenyan approach goes further by not only defining the practice, but also listing the types of FGM that are prohibited.¹¹⁵

A more comprehensive approach comes from Eritrea. Article 2 of the Proclamation to Abolish Female Circumcision provides not only for a definition of FGM, but also lists and, more importantly, outlines, in reasonable detail, the different types of FGM and reiterates that all types of FGM are prohibited.

The Penal Code of Tanzania criminalises FGM without a clear definition. The Code does not also make reference to the different

112 UNICEF (n 91 above) 8.

113 UNICEF (n 91 above) 24; UN Women *A supplement to the handbook for legislation on violence against women: 'Harmful traditional practices' against women* (2010) <http://www.un.org/womenwatch/daw/handbook/Supplement-to-Handbook-English.pdf> (accessed 20 October 2012).

114 Sec 1 Prohibition of Female Genital Mutilation Act 5 of 2010; see Mujuzi (n 110 above) 9.

115 Prohibition of Female Genital Mutilation Act, 2011.

types of FGM that are prohibited. In fact, section 169A only makes reference to FGM in passing as one of the acts that, when performed to a person below the age of 18 years, constitutes the offence of cruelty to children. The absence of a clear definition of FGM creates legal uncertainty about the acts that constitute FGM. Furthermore, it potentially undermines the effectiveness of the objectives of the amendment of the Act in protecting the rights of women against FGM.

4.2.2 Issues around consent

The Penal Code criminalises FGM if it is performed on a person below the age of 18 years. Consent, albeit indirectly, seems to be an issue. The assumption behind the legislation seems to be that a person below the age of 18 years cannot give valid consent. The effect of this is that women who are above the age of 18 years fall outside the ambit of section 169A of the Penal Code.¹¹⁶ This obviously is based on the idea that a person above 18 can give valid consent and FGM practised on an adult person is not the business of the law.

The problem with the legislation, however, is that it seems to assume that anyone above the age of 18 years undergoes FGM voluntarily. This is, however, an assumption that is far from reality, especially for women who belong to communities where the practice is strongly supported. Many women are as vulnerable as children due to social pressure and may still be subjected to the practice without their valid consent.¹¹⁷ In some communities in Tanzania, for example, 'adult women are sometimes genitally mutilated forcefully during delivery'.¹¹⁸ Most women who may consent to FGM may not also necessarily be aware of the consequences of their decision to engage in the practice.¹¹⁹ They are often exposed to extreme social and economic pressure to undergo FGM. Furthermore, the practice is strongly supported in rural areas where the level of education for most women is still very low. As mentioned earlier, most of them consent to FGM as a result of myths as well as social and economic pressure. That is why, for example, the law that prohibits FGM in Uganda targets not only those who are involved in the act, but also members of the broader community that support or encourage the practice. It explicitly provides that¹²⁰

[a] person who discriminates against or stigmatizes a female who has not undergone female genital mutilation from engaging or participating in any

116 Kaniki (n 98 above) 24.

117 Women's Legal Aid Centre *United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Tanzania Non-Governmental Organisations' shadow report to CEDAW: The implementation of the Convention on the Elimination of All Forms of Discrimination Against Women 52* http://www.iwraw-ap.org/resources/pdf/41_shadow_reports/Tanzania%20_SR.pdf (accessed 27 November 2012).

118 Kaniki (n 98 above) 24.

119 Slack (n 61 above) 471 472.

120 Art 11 Prohibition of Female Genital Mutilation Act 5 of 2010.

economic, social, political or other activities in the community commits an offence and is liable on conviction to imprisonment not exceeding five years.

Furthermore, the failure of the Penal Code to outlaw FGM on a woman above the age of 18 has created a platform for the continuation of the practice. This is evident from the development of a 'new trend' in Tanzania where women voluntarily subject themselves to FGM for economic reasons. These women sell parts of their external genitals to miners who, in turn, use it for the purpose of witchcraft to enhance their chances of securing minerals.¹²¹ Obviously, this type of situation remains unregulated under section 169A as the legislation, it seems, does not have a problem with those who voluntarily subject themselves to FGM. This raises the question whether one's consent, even if it is valid and informed, is relevant for the purpose of criminal liability.

Some argue that an adult that willingly goes through FGM should not be criminally liable.¹²² On the other hand, the law criminalising FGM in Uganda, for example, has adopted a firm prohibition of FGM even in the presence of consent from the victim. In terms of the Act, consent does not constitute a valid defence against the prohibition of FGM.¹²³ Therefore, anyone who engages in FGM with or without consent will be criminally liable. The Act expressly provides that FGM is also criminalised even if it is performed on oneself.¹²⁴ Two states in Nigeria have adopted a similar position where the person giving consent can also be held criminally liable for FGM.¹²⁵ Consent, in this case, cannot be used as a justification to escape criminal liability for engaging in FGM.

In the case of Tanzania, the Law Reform Commission has proposed that the scope of the law should be widened to prohibit FGM on anyone regardless of age.¹²⁶ By reaffirming that consent does not constitute a valid justification for FGM, the legislation, it is submitted, can protect women against all the social and cultural pressure that may influence their ability to give valid consent to FGM.¹²⁷

4.2.3 Criminal liability

The law that seeks to prohibit FGM through criminal sanctions should expressly identify the persons that could potentially be held criminally liable.¹²⁸ It is believed that criminal sanctions should be attributed to

121 Legal Human Rights Centre *Tanzania human rights report 2008: Progress through human rights* (2009) 80.

122 Slack (n 61 above) 470.

123 Mukama (n 92 above) 10.

124 Sec 4 of the Prohibition of Female Genital Mutilation Act 5 of 2010; Mukama (n 92 above) 10.

125 Mukama (n 92 above) 28.

126 Slack (n 61 above) 3.

127 Centre for Reproductive Health Rights (n 76 above) 25.

128 Centre for Reproductive Health Rights (n 76 above) 24.

the primary offender and anyone else who assists the perpetrator as an accomplice.¹²⁹ In Eritrea and Uganda, the law attributes criminal liability to any person regardless of the relationship that the person shares with a child or a woman on whom FGM is performed.¹³⁰ This means that any person who is responsible for the act can be held criminally liable for the offence.

The law in Tanzania is structured in a manner that attributes criminal liability to only those who have guardianship or custody of a child and allows her to be subjected to FGM. This means a special relationship between the child and the perpetrator needs to exist for criminal liability to ensue under the Penal Code.¹³¹ Given that guardianship is the main criterium for liability, it also means that the child's parents could be potentially liable for criminal charges. This gives rise to the issue surrounding the problematic nature of prosecuting parents for causing FGM.¹³²

The main issue against prosecuting parents is that any separation between the parent and the child may cause undue hardship on the child.¹³³ Imposing criminal liability on parents may be detrimental to the child as a result of the hardship that may ensue from the child being separated from the parent. The prosecution of parents, it is often argued, should be done with caution. Measures that would require the removal of the child from the parents 'or suspending parental authority need to be weighed against the child's best interests'.¹³⁴ States are advised to consider alternative penalties whenever possible to limit any undue hardship on the child.¹³⁵ Such measures are encouraged as they protect the best interests of the child.¹³⁶ A good example comes from Bukina Faso.¹³⁷ The judiciary treats parents differently from other perpetrators of FGM by imposing either a lower or suspended sentence on parents.¹³⁸ The Tanzanian Penal Code, in this case, may have a 'reverse negative effect' on the child, undermining the interest it seeks to protect. Instead of protecting the child by promoting the child's best interests, the legislation might impose hardship on the child by sanctioning separation.

More problematically, the limitation of the application of the Penal Code to those with a special relationship with the child means that

129 Mukama (n 92 above) 27 28.

130 Art 4 Proclamation to Abolish Female Circumcision 158 of 2007; art 2 Children's Act 8 of 2001.

131 Kaniki (n 98 above) 23.

132 It is argued that even without an express provision on the legislation criminalising parents, they could still be held liable as accomplices. Mukama (n 92 above) 28.

133 Centre for Reproductive Health Rights (n 76 above) 24; Mukama (n 92 above) 28.

134 Mukama (n 92 above) 19.

135 Centre for Reproductive Health Rights (n 76 above) 24.

136 As above; Mukama (n 92 above) 18.

137 Mukama (n 92 above) 18 19.

138 Mukama (n 92 above) 19.

FGM practitioners, commonly referred to as *Ngariba*, and medical personnel, cannot be held criminally liable. This is because of the requirement of custody or guardianship for criminal liability. The effect of this is that parents and guardians try to circumvent criminal liability by avoiding direct engagement in subjecting children to FGM. This is evident in regions like Dodoma and Singida where parents attempt to avoid detection and prosecution by arranging that FGM be performed on new-borns.¹³⁹ In these regions, FGM is now done with the assistance of some health attendants such as midwives who 'poke their fingers, nails and incisive objects into an infant's clitoris as soon as they are born'.¹⁴⁰ The practice causes damage to the infant's bladder, promotes infections and can even cause death as a result of over-bleeding.¹⁴¹ Such incidents fall outside the ambit of section 169A and may only be regulated by other provisions of the Penal Code.¹⁴²

4.2.4 Punishment

One of the important elements of any law criminalising the practice of FGM are the measures incorporated to punish perpetrators of the crime.¹⁴³ The Penal Code, through article 169A(2), attributes punishment in the form of imprisonment. A perpetrator, if found guilty, can be imprisoned for a minimum of five years but not exceeding 13 years. The court, in addition, can impose a fine of a maximum of 300 000 Tanzania shillings.¹⁴⁴ The perpetrator can also be subjected to imprisonment and be required to pay a fine. In addition, the Penal Code mandates the perpetrator to compensate the victim for the harm caused.

It seems that the Penal Code provides for a 'fixed standard'. That means that, even in the event that the act results in death, the punishment remains the same, although this might be regulated under other relevant provisions of the Penal Code. This is problematic. In Uganda, for example, punishment is attributed to the perpetrators depending on the degree of harm caused. For example, a person that attempts to engage in FGM will be subjected to imprisonment of a

139 This new trend has also been reported to be carried out in the Karatu district in Arusha. Although in this region it has not yet been reported to be done with the assistance of health officials, it is done for the same purpose on infants to avoid prosecution. A Mwakyausa 'Karatu communities change strategy on FGM' *Daily News* 5 July 2012 9; Slack (n 61 above) 80.

140 Slack (n 61 above) 80.

141 As above.

142 It is, however, important to note that several measures have been instituted to guard against this practice. Such measures include a campaign by health officials where infants brought to the clinics are checked for any sign of FGM. The main objective behind this campaign is to hold the perpetrators accountable in line with sec 169A. 'Health workers now diagnose genitally-mutilated infants' *The Guardian* (Tanzania) 15 December 2008; Slack (n 61 above) 80.

143 Mukama (n 92 above) 27.

144 Penal Code ch 16 of the Laws of Tanzania (n 103 above) sec 169(A)(2).

maximum of five years. Furthermore, if the practice causes death or disability or infects the victim with HIV, the perpetrator could be subjected to life imprisonment.

The manner in which punishment is attributed may also vary depending on the person who committed the crime. If FGM is performed by a health official or by a person who shares a special relationship with a child, such as the guardian, such a person may be subjected to life imprisonment.¹⁴⁵ In some jurisdictions, like Burkina Faso, the government imposes strict punishment if the perpetrator is a health official. The person will not only be given the 'maximum punishment', but may also be suspended for five years from medical practice.¹⁴⁶ In Tanzania, the fact that the Penal Code applies the same form of punishment across the board, irrespective of the person responsible for the crime or the degree of the harm caused by the practice, is problematic.

4.2.5 Investigation and legal prosecution

FGM cases are predominantly criminal cases where the onus of proof is beyond reasonable doubt. This makes the investigation of FGM cases crucial in ensuring that the rights of women are protected against this practice. Research shows that one of the main challenges that law enforcers face in investigation and evidence gathering has to do with the nature of the FGM cases themselves. This particularly relates to the fact that FGM is usually performed in the privacy of family and community members. Another problem is accessibility to the areas where FGM is carried out. Added to this is the problem of determining whether a woman has already been subjected to the practice. It is often held that even in cases where it is obvious that FGM has been carried out, it is still difficult to investigate or gather evidence due to the support of FGM by most practising communities.

The situation in Tanzania around the investigation and prosecution of FGM cases is not different from most African countries where the practice still prevails, despite criminal sanctions against it. Research indicates that FGM is still supported in Tanzania, and is practised in the privacy of family and community members to avoid detection by law enforcers.¹⁴⁷ This creates a problem in investigating cases as law enforcers, who are considered as 'outsiders', are left unaware of whether the practice has been performed.¹⁴⁸ In order to ensure that the objectives of the legal measure are achieved, some states, such as Benin, have imposed a mandatory reporting duty on medical officials and all professionals who work with children and women to report

145 As above.

146 Mgabako *et al* (n 43 above)18.

147 H Kwasila 'FGM interventions: Achievements, challenges and prospects in the light of the National Plan of Action to accelerate the elimination of FGM and other harmful traditional practices' (2007) paper presented to the National Gender Group, REPOA Conference, 30 March 2007 15.

148 Mukama (n 92 above) 29.

FGM cases to law enforcers. The rationale behind this duty is to ensure that FGM cases are reported and to assist law enforcers in the investigation and collection of evidence. In Egypt, for example, the government has established a helpline to facilitate the reporting procedure where people can report cases of FGM. These cases are later on directed to the authorities where investigation and legal proceedings can be instituted against the perpetrators. In Burkina Faso, the government has established community patrols in the regions where FGM is supported. The police collaborate with health care officials and informants within these communities to report cases of FGM.

Sometimes, however, the problem could be the law enforcers themselves. The attitudes of the law enforcers and of the community is crucial in ensuring the effectiveness of the legal measures that are put in place to eradicate FGM. The experience in Tanzania has shown that the attitude of the community and the law enforcers towards the practice of FGM has a negative impact in the reporting of FGM cases. It has been established that the lack of co-operation from the law enforcers in the region has limited efforts to curb the practice.¹⁴⁹ The widely-reported case of a girl, who was subjected to FGM in Mnazi Moja in Morogoro, is a good indication of the attitude of the law enforcers. The matter was reported to the local police but no charges were brought against the perpetrators. The girl died later due to over-bleeding. In Tarime, specifically in Sirari Township, FGM ceremonies were held in 2010.¹⁵⁰ In 2010 alone, it was established that approximately 5 000 girls were in line to be subjected to FGM in Tarime. As one observer has put it, women who had just undergone FGM were¹⁵¹

paraded like merchandise after they had just been mutilated and crowds of people joyously dancing behind them. These girls were seated under the shade with fresh blood dripping down their legs. It was shocking to notice that there was a police station a few meters from where the actual FGM was taking place but the police went on working like nothing was happening.

Although the police are under a legal duty to protect women against FGM, most of them are reluctant to prohibit the practice in the region due to a fear of causing 'disarray between the police and FGM perpetrators'.¹⁵² In addition, most police stations lack proper documented records on FGM cases.¹⁵³ The consequence of this is

149 Gamaya (n 4 above) 34.

150 Legal Human Rights Centre *Fact-finding mission conducted at Tarime District November-December 2010* (2010) 4 7.

151 As above.

152 Legal Human Rights Centre (n 150 above) 12.

153 E Lema (ed) *20 years of Tanzania Media Women's Association (TAMWA): Moving the agenda for social transformation in Tanzania* (2008) 139; Legal Human Rights Centre (n 149 above) 12.

that the government initiatives to ensure that the rights of women are protected against FGM are significantly undermined.

One of the main contributing factors is the social pressure that victims of FGM experience either from the family, community, or both, when legal proceedings are instituted.¹⁵⁴ This makes prosecution of cases difficult as some victims would withdraw the cases due to social pressure and a lack of evidence. As a result, most cases are not prosecuted. Research undertaken in the District Registrar of Dodoma High Court has revealed that due to the 'family-oriented nature' of the cases of FGM, cases take a long time to be decided due to a lack of evidence.¹⁵⁵ This is because, most of the time, the perpetrator is a parent or a close relative of the child. Obtaining evidence from the victim or another relative has proven to be a challenge. For example, in *R v Fatuma Iddi* and *R v V Lucy Augustino*, the accused in both cases were acquitted due to a lack of evidence and family pressure.

5 Conclusion

The foregoing discussion has established that FGM violates fundamental human rights. It has further held that various legal obligations are imposed upon states to ensure that the rights of women are protected. Tanzania has a legal duty to protect women against the practice. In discharging this duty, Tanzania has amended the Penal Code to introduce the criminalisation of FGM. Upon close scrutiny of the legal measures, however, it became clear that despite the slight decrease in the prevalence rate of FGM, the law has not been effective in prohibiting the practice. This is attributed to various factors, including the lack of a comprehensive law to prohibit FGM.

The Penal Code has several shortcomings that limit the objectives of its amendment. This includes the lack of a precise definition of acts that constitute FGM, the limited scope of criminal liability, issues around punishment and the failure to criminalise FGM performed on women above the age of 18 years. Other contributing factors that hinder the effectiveness of the law against FGM include challenges related to the enforcement measures that are in place and societal views of the practice, as many still believe that the practice cures genital diseases. The inadequacy of the medical facilities in rural areas where FGM is most prominent, together with poverty, further enhances this misconception. The combination of all these factors continues to limit the effectiveness of the legal framework in protecting the rights of women against FGM in Tanzania.

¹⁵⁴ Mukama (n 92 above) 30.

¹⁵⁵ Mukama (n 92 above) 98.

Identities and citizenship in Sudan: Governing constitutional principles

*Nasredeen Abdulbari**

Lecturer, Department of International and Comparative Law, University of Khartoum, Sudan

Summary

*In several states across the globe, the relationship between the state and its cultural, religious, ethnic, and tribal components is still an issue of fierce constitutional and political debate, both at formal and informal levels. A nation's inability to properly deal with this sensitive question, through adherence to certain constitutional principles, makes it susceptible to instability and insecurity, and probably dichotomy and fragmentation. This article argues that the general recognition of diversity in a specific state is not, by itself, enough to guarantee peace and stability for that state. An impartial state which treats its diverse components equally is a *conditio sine qua non* for the stability and peace of heterogeneous societies. The idea that modern states are not nation states reflects the need to draw a clear line of distinction between identities and the state as an institution which should occupy itself with the interest of all its components, rather than the interests of one or some of its components only, and promote the peaceful co-existence of its diverse groups and elements, on the one hand, and lay down the rules that are essential to its advancement, on the other. The post-colonial history of Sudan unequivocally demonstrates that the country's successive national governments have failed to do so. If the post-9 July 2011 Sudan is to avoid wars, conflicts and further fragmentation, then it is necessary for the state to treat Sudan's different ethnic and religious groups equally and to reflect such equal treatment in its policies.*

* LLB LLM (Khartoum), LLM (Harvard); nabdulbari@llm08.law.harvard.edu. I would like to thank Tessa Khan, from the American Bar Association Rule of Law Initiative, and Margaret Zimmerman, from the Queen's University of Belfast School of Law, for their invaluable comments and suggestions. My thanks also go to Bronwen Manby, from the Africa Governance, Monitoring and Advocacy Project (AfriMAP) of the Open Society Foundations in Africa, for her comments and suggestions.

1 Introduction

Plurality and diversity have, since humans emerged in Africa two million years ago,¹ been two of the main characteristics of human societies and groups. The more societies develop and more individuals emigrate from one place to another, the more diverse they become. Societies display different types of diversity, including cultural diversity, ethnic diversity, religious diversity, gender diversity and political diversity. From the United States to Japan, it is rare to find states or societies that are a hundred per cent homogeneous. The same is true of nations such as China and Korea.² The United States is known as the melting pot of the world, comprised of an infinitesimal number of ethnicities and cultures.

The right to enjoy one's culture is considered a fundamental human right, enshrined in several international human rights instruments, including the United Nations Educational, Scientific and Cultural Organisation (UNESCO)'s Universal Declaration on Cultural Diversity³ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴

Although there is no accurate and reliable information on the demography of Sudan,⁵ the country, even after the secession of South Sudan, is an excellent example of a state that enjoys all types of diversity. Religiously, it consists of Muslims, Christians, and followers of local religions and belief systems. The Sudanese speak more than a hundred indigenous languages.⁶ Thus, there is no one society in Sudan, nor is there one culture, or one system of morals or belief that can or should govern the whole of Sudan.

1 This is the prevailing view among mainstream anthropologists. For further information, see http://anthropology.si.edu/humanorigins/faq/encarta/genus_homo.htm#origin (accessed 11 June 2011).

2 To read about ethnic diversity in Japan and China, see <http://people.cohums.ohio-state.edu/bender4/eall131/EAHReadings/module01/module01ethnicdiversity.html> (accessed 21 June 2012).

3 United Nations Educational, Scientific and Cultural Organisation (UNESCO) Universal Declaration on Cultural Diversity, 2 November 2001. The full electronic text of the Declaration is available at <http://www.unhcr.org/refworld/docid/435cbcd64.html> (accessed 28 July 2012). Adopted by the 31st session of the General Conference of UNESCO in Paris, 2 November 2001. Another example is the International Covenant on Economic, Social and Cultural Rights.

4 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations Treaty Series Vol 993 3. The electronic version of the Treaty is available at <http://www.unhcr.org/refworld/docid/3ae6b36c0.html> (accessed 29 November 2012).

5 For government-provided information on this, see the website of the Sudan Bureau of Statistics, <http://www.cbs.gov.sd/en/node/6> (accessed 21 June 2012). One should note that the government of Sudan refused any inclusion of a question about tribe and ethnicity in the 5th census that was conducted in 2008 in the aftermath of the Comprehensive Peace Agreement. The figures that came out in that census are disputable.

6 J Ryle 'Peoples and cultures of two Sudans' in J Ryle *et al* (eds) *The Sudan handbook* (2011) 70, http://www.sudanarchive.net/resources/file/RVI_Sudan_Handbook_Digital_Edition_2012.pdf (accessed 21 June 2012).

However, the history of the country, as shown in this article, demonstrates that diversity has not been recognised and properly managed by its successive governments since independence. It is because of this non-recognition that the issue is particularly significant, as government bodies and civil society organisations and groups are engaged in discussions over drafting a 'permanent' constitution in a country where constitutions are continuously changed without properly addressing the fundamental issue of identities and their connection to the state as an institution. The problem of having transient constitutions is, in fact, dialectically related to a failure to properly deal with the issue of diversity.

Issues related to the identity of a state or a community or an individual ('who are we/am I') are not new or particular to Sudan. For different reasons, it is an issue which almost arises in all societies and countries.

In developed and developing societies alike, people commonly ask themselves the question 'Who are we/am I?'. Anti-multi-culturalists and anti-diversity groups often raise this question. In my view, there are two reasons why they consistently raise the 'Who are we/am I?' question: first, their inability to appreciate the value, significance, and beauty of difference and diversity; and second, their belief that people in the communities where they live should all be the same and that cultures, religions, ethnicities and other components of identities are or should be static. They assume that their own communities are homogeneous or that they should be so. The so-called Just Peace Forum⁷ in Sudan, which claims to be the voice of 'the silent majority', is an obvious example of a group that insists on raising an unnecessary question in one of the most diverse countries in Africa. The group does not only raise that question, but also answers it incorrectly. It, along with other groups, falsely assumes that Sudan, after the secession of the predominantly Christian South Sudan, is an

7 The so-called 'Just Peace Forum' is a racist Sudanese political organisation whose members are mostly previous and current members of the National Congress Party. It was established in April 2004 before the final conclusion of the Comprehensive Peace Agreement (CPA) in Nairobi, Kenya. The group was established on the idea that the secession of South Sudan was the only solution to Sudan's political and economic problems. It also strongly opposed the CPA on the ground that it gave South Sudan too much, but welcomed it because it gave them the right to self-determination. It wanted the same self-determination right to be given to Northern Sudanese so that they could also vote. The group believed the agreement was not just, and this is where its name came from. They see themselves as defenders of what they call Sudan's Arabic and Islamic identity. Unaware of or unwilling to recognise North Sudan's diversity, the leaders and members of the group thought the secession of South Sudan would simply mean that Sudan is a homogeneous Arab-Islamic state. The group is well known of making racist and derogatory statements, particularly against Southern Sudanese and the Sudan People's Liberation Movement leaders, even after the birth of the Republic of South Sudan. They also target the rebel movements that fight the Sudanese government in Darfur, Blue Nile, and the Nuba Mountains.

Arab-Islamic nation,⁸ despite the existence of a diverse and heterogeneous the post-9 July 2011 Republic of Sudan. The Nuba in the Nuba Mountains (partially non-Arab Christians and followers of African indigenous religions), the Nubians in North Sudan (non-Arab Muslims), and the Coptics (non-Arab Christians), for instance, would not be able to see themselves in a Sudan that exists in the imagination of the so-called Just Peace Forum, leaders of the National Congress Party, and like-minded Sudanese from other organisations and parties.

The problem here is much clearer with regard to the definition of the word 'identity'. While the Just Peace Forum focuses on the identity of Sudan, others, who are Sudanese, too, raise the same issue, but for a quite different reason – they are striving for recognition as equal citizens, not only in the Constitution and the laws of the country, but also in their everyday lives. In stable, peaceful or democratic societies where the values of equality, justice, human rights and democracy prevail, individuals or groups rarely ask themselves about their ethnic or national identities.⁹ But when a nation goes through a difficult moment in its history, the question of national identity becomes unavoidable. However, the question of identity in this kind of situation is raised temporarily, that is, it persists only during the difficult moment or crisis that gave rise to its appearance in the first place.¹⁰ Wars, disenfranchisement, attacks and economic, social or political marginalisation are some of the reasons that cause individuals, groups and nations to ask themselves about their identities. The larger the crisis is, the stronger and more urgent the 'Who are we/am I?' question becomes. Similarly, the more diverse the nation is, the faster this question arises. Thus, in communities where equally ethnically-diverse groups embrace different religious or belief systems, the question about one's identity arises faster and stronger than, say, in communities where people are ethnically different but follow one religion. It should be noted that identity claims and questions are not uncommon in liberal democracies. The cases of Spain and Belgium illustrate this.

Since independence, in Sudan there has been an increasing awareness of regional and ethnic identities in the peripheries, mainly due to the exclusionary policies by the governments since the

8 After the secession of the South, the President of Sudan announced twice that Sudan would be an entirely Islamic state and that Arabic would be the official language of the country. For more information, see <http://sudanradio.org/al-bashir-reiterates-plan-make-sudan-and-entirely-islamic-state> (accessed 23 June 2012).

9 Eg, the right-wing political organisations across Europe, which claim to be defending the identity of Europe, which is defined without taking into consideration the demographical developments that Europe has witnessed as a result of migrations from all over the world.

10 In the case of extremist groups, the question is always raised - it is permanent. For extremists, defining the national identity of the nation is a matter of life or death, as it reflects ideological convictions.

departure of the British.¹¹ In addition, the relatively huge disparities in development between the periphery and the central parts of the country are partially responsible for this awareness. Many groups in Sudan have found themselves in crisis as the state has wittingly and, sometimes unwittingly, adopted a single national identity that does not reflect the social, ethnic, religious and cultural realities of the country. This has been expressed in the different internal and foreign policies of successive governments of Sudan and resulted in the secession of South Sudan and might lead to other secessions in the decades to come, if Sudan does not acknowledge and celebrate diversity. Groups threatened by the domination of an identity considered by the state to be the national identity are struggling to make the government respect their languages, religions and cultures and recognise their right to genuine participation in the administration of the public affairs of their country. If this state of exclusion continues, Sudan will face one of two probabilities: a continuation of the current situation of insecurity and instability; or the fragmentation of the remaining Sudanese nation. The process of drafting a new constitution for the country in the aftermath of South Sudan's historic independence is a good opportunity for the Sudanese people to rethink the way the country has been actually administered since 1956 to avoid the repeated mistakes of the past and craft a new path towards the future.

2 Demise of the nation state

Political scientists find it particularly attractive to describe the modern state as a nation state. The idea of a nation state originated in nineteenth century Europe and suggests cultural and ethnic homogeneity in a specific geographical area or territory. The modern state does not meet the elements of the nation state (and *vice versa*), as it does not suggest such homogeneity. In point of fact, cultural and ethnic heterogeneity is one of its main characteristics and people are connected or are eligible to be connected to it because they satisfy certain legal requirements.

Nation states were based on the assumption that there were nations that existed and had to exercise sovereignty on a certain territory, or that there was a state whose main purpose was to build, as a matter of policy, a nation to unify and modernise an already-existing state. In either case, the state is not an impartial entity as far as diversity is concerned. It exists either because there is an ethnically and culturally homogeneous population (a nation), or it exists to

11 Eg, many regional political organisations were established in the 1960s. Examples are the Darfur Development Front and the General Union of the Nuba Mountains (GUN), which were established in 1964. In South Sudan, a military and political organisation, Anya-nya, was born in 1955, one year before the formal independence of the country.

create that homogeneous population or nation. It is, therefore, inappropriate to describe modern states as nation states, since the former are diverse, while the latter are not. In this context, establishing a nation state is an illusory idea. It is a recipe for instability, as it always leads to conflicts and fragmentation as a direct result of marginalisation and exclusionary policies and practices. In nation states, an individual's enjoyment of rights depends on the extent to which they share the characteristics of that nation. It is their proximity to these characteristics that determines their rights. Post-colonial Africa is a clear example of the failure of nation states. Africa's wars and conflicts can only be understood if one considers the attempts by Africa's post-colonial ruling groups and organisations to unite their nations through the creation of the so-called nation states.

Modern states that accommodate differences and diversities are based on citizenship. The way in which a country is governed in terms of accommodating differences among its components determines whether their leaders would build or dismantle their nations. The Republic of Côte d'Ivoire is a good example. Immediately after independence, President Felix Houphouët-Boigny (1905-1993) adopted and followed an accommodative approach that included large numbers of immigrants who moved from neighbouring countries, especially Burkina Faso, for security, humanitarian or other reasons. In the aftermath of his death in December 1993, his opponents adopted different, exclusionary approaches and policies that made Côte d'Ivoire one of the most religiously, culturally and ethnically fragmented African nations.¹²

With the increasing spread of the idea of international human rights and multi-culturalism and the recognition of ethnic, religious and linguistic diversity, demise is the inevitable fate of nation states. The world is now moving away from nation states toward Habermas's idea of constitutional states, republicanism and citizenship, to establish nations that transcend cultural identities.¹³

3 Coerced nation building in Sudan

Discussions over the identity of the Sudanese nation are not new. For a variety of reasons, they started extensively in the early years of independence. The most well-known of such discussions in the political and social history of the country are the dialogues of Ali Abdullateef and Suleiman Kisha. Two groups reflecting political and intellectual immaturity emerged as a direct result of those discussions and dialogues: one that argued that Sudan is an Arab state and

12 R Joseph 'Nation state trajectories in Africa' (2003) 4 *Georgetown Journal of International Affairs* 16.

13 See J Habermas 'The European nation state - Its achievements and its limits' in G Balakrishnan *Mapping the nation* (1996) 281-294, cited in Joseph (n 12 above) 17.

another that argued that Sudan is an 'African' state. Later on, a school of 'compromisers' or realists, known as the 'forest and desert' school, argued that Sudan is an Afro-Arab state. However, in the wake of Sudan's independence, the apparatus of the state was dominated by Sudanese politicians who were tenacious defenders of the first school that argued for an Arab state, such as Mohamed Ahmed Almahgoub and Ismail Alazhri, both of whom played a crucial role in the national movement for independence. Their victory, however, was not a victory for the Sudanese as a nation, as it led to the establishment of a distorted, exclusionary state. The political crisis of the Sudanese nation is caused by those who led the state in the aftermath of its independence.

Several attempts have been made to find a solution. One that remains appealing to many Sudanese and relevant to the situation of Sudan, even after the secession of South Sudan, is the idea put forward by a Southern Sudanese revolutionary thinker, the founder of the Sudan People's Liberation Movement (SPLM), the late Dr John Garang de Mabior, whose vision is called 'New Sudan vision'. The objective of this vision, according to its architect, was to holistically address the central problem of Sudan, the classification of the state as an Arab-Islamic/Islamic-Arab state.¹⁴ He based the New Sudan vision on what he termed the 'historical diversity and contemporary plurality' notion which demonstrates that Sudan has throughout history been religiously, ethnically and culturally diverse. By contemporary plurality, he means the current ethnic, religious, cultural, political and other pluralisms that the present-day Sudan enjoys. With regard to historical diversity, Garang went back to the history of Sudan and Ancient Egypt (which is interconnected with Sudan) to find an anchor in history, because the past of a nation also plays a role in determining its future. In this context, he refers to the various 'peoples and kingdoms that thrived and disappeared in the geographical area that constitutes the present-day Sudan ...'¹⁵ In this sense, the vision has strong historical and contemporary foundations. The New Sudan vision aims at establishing a state on both the

14 A speech delivered by Dr John Garang de Mabior in Washington DC in the United States in 2004. The full speech is available at <http://www.youtube.com/watch?v=Tb1Esm5KK4k&feature=related> (accessed 25 October 2012).

15 He explains this as follows: 'Peoples and kingdoms have lived, thrived, and disappeared in the present day Sudan. Yet, and despite this wealth of historical evidence, the present and past rulers in Khartoum present a false picture of our country as if the Sudan started with them, and as if the history and reality of the Sudan consists only of specific parameters: Arabism and Islamism. We are much bigger than that ... the Sudan belongs to all the peoples that now inhabit the country, and its history, its diversity and richness are the common heritage of all the Sudanese people. It is important to establish this firm anchor in history and affirm that the Sudan and we, the Sudanese people, are indeed a historical people. So let nobody push you off the rails of history. If they want to push you out of history, you hold on and say no; I am here to stay and have rights like anybody else. I have called this 'historical diversity'.

historical diversity and the contemporary plurality of Sudan.¹⁶ In other words, it opposes the idea that the Sudanese are or should be of one identity. Nobody expresses this better than the designer of the vision:¹⁷

In His infinite wisdom, it is the same God that made the Arabs, that made the Nuba, that made the Fur, that made the Dinka, that made the Nubians, that made the Beja, that made the Shilluk, that made all the five hundred different ethnic groups in the Sudan ... and who is this to amend God's creation. The one who makes this amendment, I would say, is against God. If this case of mine is brought before God, I'll win it.

In his documented speeches both before and after the conclusion of the Comprehensive Peace Agreement in 2005, he repeatedly stated that, unless the Sudanese recognise that their nation has historically been plural and diverse, no solution for the problems of Sudan would ever be possible. In this regard, he discusses five possible state models: an 'African' state, which would exclude the Arabic component of the Sudanese nation; an Arab state, which would exclude the 'African' component of the Sudanese nation; an Islamic state, which would exclude the non-Islamic components of the nation; a Christian state, which would, like model three, exclude the non-Christian components of the Sudanese nation; and a new model, which is the New Sudan model, in which all Sudanese, regardless of their religion or origin, would be equal citizens.¹⁸ This last model which is, in fact, the embodiment of the New Sudan vision, is to a wide extent closer to the 'forest and desert' school that I referred to earlier: They both speak about 'Sudanism' as the only uniting bond. Each of the other four models is a recipe for conflicts and wars, as they are inherently exclusionary in a diverse society. Like the New Sudan vision and the 'forest and desert' school, constitutions of states should enshrine principles and contain provisions that unite the different religious, cultural and ethnic components of society. The engagement of intellectuals and lawmakers in the never-ending debate of 'Who are we/am I,' despite its intellectual legitimacy, would only lead to crises and distraction from focusing on the real problems of those components whose real interest is in establishing a state that accommodates them all. For this reason, this article does not speak to the issue of an identity crisis in Sudan. In fact, it is exactly this issue that the article tries to avoid, as it argues for a practical approach to deal with the question of identities and their relationship to the state.

Although the term 'identity' is often used in political, anthropological and legal circles and contexts, it remains ambiguous, and overlaps with the term 'citizenship'. Therefore, it is necessary to

16 As above. Also see 'The problem of the Sudan in its historical context', SPLM document defining the problem of Sudan, <http://www.splmtoday.com/index.php/about/historical-background> (accessed 25 October 2012).

17 De Mabior (n 14 above).

18 For further details and an explanation on this, see R Giba *John Garang and the vision of New Sudan* (2008).

analyse them both to ensure a clear idea about their meaning and how they differ from each other. Of course, when we speak about identity, we have to take into account that there are several types of identities. For example, one might speak about social identity or gender identity.

Identity and citizenship, although sometimes interrelated, are different concepts. The word 'identity' is derived from the Latin *identitas* and *idem*, which means 'the same'. Despite the fact that it is widely used, there is no clear or simple definition of the word 'identity'. Academics and politicians use the word without trying to define it. Writers on political science, anthropology and international relations have different definitions of 'identity', some of which will be mentioned briefly here.

Identity could refer to the way people define themselves or are defined by other individuals or groups. This is reflected by some authors who define the word as follows: Identity is 'people's concepts of who they are, of what sort of people they are, and how they relate to others';¹⁹ or 'identity is used ... to describe the way individuals and groups define themselves and are defined by others on the basis of race, ethnicity, religion, language, and culture';²⁰ or identity 'refers to the ways in which individuals and collectivities are distinguished in their relations with other individuals and collectivities'.²¹

However, national identity is different. National identity, as Blooms puts it, 'describes that condition in which a mass of people have made the same identification with national symbols'.²²

A broader definition, which is very similar to Bloom's concept of identity, is provided by Wendt, who speaks about identities in general, not just national identity. According to him, '[i]dentities are relatively stable, role-specific understandings and expectations about self'.²³

Wendt and some other authors provide definitions of social identity. According to Wendt,²⁴

[s]ocial identities are sets of meanings that an actor attributes to itself while taking the perspective of others, that is, as a social object ... [Social identities are] at once cognitive schemas that enable an actor to determine 'who I am/we are' in a situation and positions in a social role structure of shared understandings and expectations.

19 M Hogg & D Abrams *Social identifications: A social psychology of intergroup relations and group processes* (1988) 2.

20 FM Deng *War of visions: Conflict of identities in the Sudan* (1995) 1.

21 R Jenkins *Social identity* (1996) 18.

22 W Bloom *Personal identity, national identity and international relations* (1990) 52.

23 A Wendt 'Collective identity formation and the international state' (1994) 88 *American Political Science Review* 384.

24 Wendt (n 23 above) 385.

Another definition of social identity is offered by Herrigel. He states that²⁵

[b]y social identity, I mean the desire for group distinction, dignity and place within historically specific discourses (or frames of understanding) about the character, structure and boundaries of the polity and the economy.

Identity, according to yet other authors, is constructed and evolved in a shared manner by those who define and those who are defined. In this regard, '[t]he term [identity] (by convention) references mutually-constructed and evolving images of self and other'.²⁶

On the other hand, identities could be about political actors and their relations, *inter se*, as indicated by the definition which explains that '[i]dentities are ... prescriptive representations of political actors themselves and of their relationships to each other'.²⁷

An individual's identity determines, according to some authors, their values, obligations and positions. In Taylor's words:²⁸

My identity is defined by the commitments and identifications which provide the frame or horizon within which I can try to determine from case to case what is good, or valuable, or what ought to be done, or what I endorse or oppose.

Thinking differently, Clifford defines identity as a nexus of relations and transactions. As he wonders: 'Yet what if identity is conceived not as a boundary to be maintained but as a nexus of relations and transactions actively engaging a subject?'²⁹

Two other definitions that differ slightly from the above-mentioned are put forward by White and Berger and Luckmann, who define it as follows: '[I]dentify is any source of action not explicable from biophysical regularities, and to which observers can attribute meaning.'³⁰ 'Indeed, identity is objectively defined as location in a certain world and can be subjectively appropriated only along with that world. ... [A] coherent identity incorporates within itself all the various internalised roles and attitudes.'³¹

Finally, identity comes into existence over a long period of time. It is dynamic; it changes from time to time. In this context, Hall indicates that³²

25 G Herrigel 'Identity and institutions: The social construction of trade unions in the United States and Germany in the 19th century' (1993) *Studies in American Political Development* 371.

26 P Katzenstein (ed) *The culture of national security: Norms and identity in world politics* (1996) 59.

27 P Kowert & J Legro 'Norms, identity, and their limits' in Katzenstein (n 26 above) 451.

28 C Taylor *The sources of the self: The making of the modern identity* (1989) 27.

29 J Clifford *The predicament of culture* (1988) 344.

30 HC White *Identity and control: A structural theory of social action* (1992) 6.

31 PL Berger & T Luckmann *The social construction of reality* (1966) 132.

32 S Hall 'Ethnicity: Identity and difference' (1989) 23 *Radical America* 9.

[i]dentity emerges as a kind of unsettled space or an unresolved question in that space, between a number of intersecting discourses. ... [Until recently, we have incorrectly thought that identity is] a kind of fixed point of thought and being, a ground of action ... the logic of something like a 'true self' ... Identity is a process, identity is split. Identity is not a fixed point but an ambivalent point. Identity is also the relationship of the other to oneself.

There are, of course, many other definitions. The reason why there are so many is very obvious: The definition of any word, term or expression reflects the background or the purpose of the person who uses it. As Carroll puts it, '[w]hen I use a word, it means just what I choose it to mean, neither more nor less'.³³

Identity is used in academic and social circles with a sense that is different from the one used in the dictionaries. In this sense, the present concept of identity is relatively new. The *Oxford English dictionary*, for example, defines it as 'the sameness of a person or thing at all times or in all circumstances; the condition or fact that a person or thing is itself and not something else; individuality, personality'. This definition has shortcomings: It does not easily capture what we seem to mean when, for instance, speaking about 'national identity' or 'ethnic identity'. National identity does not necessarily mean the sameness of a nation in all times and places, nor does it mean that a nation is different from another nation or other nations. The present sense of 'identity' is derived from Erikson's concept of 'identity crisis', a concept which for its novelty made it into dictionaries with the following definition:³⁴

the condition of being uncertain of one's feelings about oneself, especially with regard to character, goals, and origins, occurring especially in adolescence as a result of growing up under disruptive, fast-changing conditions.

This definition implicitly defines the concept of identity as we use it today and it includes the concept of national, ethnic or tribal identity.

This article does not adopt any of the different definitions of the word 'identity'. Its aim is to establish that the apparatus of the state should be and should always remain impartial when it comes identities, regardless of their definitions.

Citizenship, unlike identity, is a legal and constitutional relationship between individuals and the state based on protection and loyalty. It defines and determines who belongs, and who does not. Through citizenship, which is alternatively referred to as nationality, people are able to interact with their states and define their social and cultural identities.³⁵ Its roots could be traced back to the days of Aristotle. In *Politics III*, Aristotle states that '[t]he politician and lawgiver is wholly

33 L Carroll *Through the looking glass* (1872) 205.

34 *Webster's new world dictionary* (1979) 696, cited in JD Fearson *What is identity (as we now use the word)?* (1999) 9.

35 SK Pokharel *Citizenship and identity in Nepal's transition to federalism* (2012) 1.

occupied with the city state, and the constitution is a certain way of organising those who inhabit the city state'.³⁶ He defines a citizen who is different from other inhabitants, such as aliens, children and minors, as a person who has the right to participate in deliberative or judicial office.³⁷ Thus, citizenship since Aristotle's era confers on its holders certain rights, and of course obligations, that non-citizens or aliens do not enjoy, nor are subject to. In addition, Aristotle does not relate citizenship to ethnicity, culture, religion or language.

Identity, be it social, cultural or national, should always be clearly distinguished from the concept of citizenship.³⁸ The former has to do with culture and the latter has to do with law. In McCrone and Kiely's words:³⁹

Nationality [identity] and citizenship actually belong to different spheres of meaning and activity. The former is in essence a cultural concept which binds people on the basis of shared identity – in Benedict Anderson's apt phrase as an 'imagined community' – while citizenship is a political concept deriving from people's relationship to the state. In other words, nation-ness and state-ness need not be, and increasingly are not, aligned.

McCrone and Kiely's definition of identity, derived from Anderson's 1991 book *Imagined communities: Reflections on the origin and spread of nationalism*, is one of the best for the purpose of precisely defining national identity.

States have different rules for acquiring citizenship. However, in the vast majority of their laws, citizenship or nationality is obtained by birth, marriage, adoption or legitimisation, naturalisation, or as a result of transfer of territory from one state to another.⁴⁰ Constitutions of states may contain provisions that constitutionalise citizenship and at the same time adopt a single identity. They may also constitutionally base citizenship on ethnicity. In either case, as we will see the following section of this article, the state only becomes a citizenship state in theory. In practice, it is an exclusionary state that divides its diverse components.

4 Past and current policies and the way forward

It is often mistakenly said that constitutions have a variety of objectives, the most prominent of which is to determine the identity of the nation. That is why we find that the inclusion of an article determining the national identity of a state is not something

36 See III 1274b36-38, cited in the *Stanford encyclopedia of philosophy, origins of citizenship*.

37 See 1275b18-21, cited in the *Stanford encyclopedia of philosophy, origins of citizenship*.

38 J Thomassen *European citizenship and identity* (2006) 469.

39 D McCrone & R Kiely *Nationalism and citizenship* (2000), cited in Thomassen (n 38 above) 469.

40 P Malanczuk *Akehurst's modern introduction to international law* (1997) 263.

uncommon in the constitutions of states, especially those of post-conflict states.⁴¹ Strongly related to determining the identity of the state is to provide for a national language in a country with multiple languages or to provide for an official or national religion in a country that has more than one religion. In addition, the sources of legislation in a constitution contribute to determining the identity of the state. Such provisions might be problematic in societies where there are minorities or majorities that speak other languages, embrace other religions, or embrace no religion or belief system at all.

In the modern political and constitutional history of Sudan, a number of constitutions clearly provided for an official language or a religious identity for Sudan, although the Self-Government Statute of 1953 and the 1956 and 1964 Constitutions did not contain any provisions that determined or indicated the identity of Sudan. The first constitution that clearly determined a national identity for the state was the 1968 Draft Constitution of Sudan, which provided for Arabic as the official language and Islam as the official religion of the state.⁴² Moreover, article 1 of the 1968 Draft Constitution also declared Sudan a 'democratic, socialist republic based on the guidance of Islam'. Under that Draft Constitution, Islam was the official religion of the state.⁴³ That Constitution, furthermore, provided that Shari'a was the main source of the laws of the country and that all laws that would be passed in contravention of Shari'a were null and void.⁴⁴

The 1973 Constitution also provided for Islam as the religion of the state and Christianity as a religion of a substantial number of citizens. The state was obligated under that Constitution to reflect the values of these two religions.⁴⁵ The 1985 Constitution provided that Shari'a, in addition to custom, was the main source of legislation and that family issues of non-Muslims were to be governed by their special laws.⁴⁶ Back in 1957 and 1968, Southern Sudanese members of the two Constitution Commissions that were tasked with the drafting of the Constitution objected to the provisions that determined Shari'a as the main source of legislation.⁴⁷ However, the two Draft Constitutions were never passed due to military *coups d'état*.

41 Eg, the Preamble of the Algerian Constitution provides that the state is 'an Arab land'. The Preamble of the Lebanese Constitution provides that Lebanon is 'Arab in its identity'. Art 1 of the Saudi Arabian Constitution provides that the state is a 'sovereign Arab Islamic state'. See also the Constitutions of Egypt, Libya and Syria which all describe their people as part of the Arab nation. See P William *et al Post-conflict constitution drafter's handbook* (2007) 9.

42 Art 2 Sudan Constitution 1968.

43 AS Fadlallah *Constitution making in the Sudan: Past experiences* (2011) 5, workshop paper, http://unmis.unmissions.org/Portals/UNMIS/Constitution-making%20Symposium/110524_Ali%20Suleiman_paper_dft2.pdf (accessed 22 June 2012).

44 See arts 113, 114 and 115 of the draft Constitution of 1968.

45 Art 16 1973 Constitution.

46 Art 4 1985 Constitution.

47 MI Khalil 'Religion and the state in the Sudanese Constitution' in MM Salih (ed) *Studies on the Constitution* (2012) 40.

The 1998 Constitution (repealed) continued in the footsteps of the 1968 Constitutions with regard to religion and language, but provided for the duty of the state to allow the development of other local and international languages.⁴⁸ The 1998 Constitution, in addition to determining an identity for the state, provided that 'supremacy in the Republic of Sudan is for God, the Creator of man'.⁴⁹ This is in contrast with the 2005 Constitution which provides that the supreme law of the country is the Constitution itself.⁵⁰ These two Constitutions, however, agree on one issue: that Shari'a is the source of legislation as far as North Sudan is concerned. Popular consensus and values and customs of the Sudanese people, which are the sources of legislation in South Sudan, are not sources of legislation in Northern Sudan.⁵¹ Depending on the logic of the 2005 Constitution, it is unclear why it does not exempt regions such as the Nuba Mountains and Blue Nile, where there are substantial followers of Christianity and African traditional religions, from the application of Islamic laws.

As discussions continue across the country over the content of the 'permanent' Constitution of Sudan, an old, outdated question comes up: What is the identity of Sudan? Another related question is: Should the upcoming Constitution provide for the identity of the state? Islamic extremist groups request that the identity of the country in the Constitution be Islamic, arguing that after the secession of South Sudan, the majority of the populations in Sudan are Muslims.⁵² Arab nationalists request that the identity of the country be Arabic, despite the fact that even after the secession of South Sudan, those who are classified as or consider themselves non-Arab are still a substantial part of Sudan's population, if not the majority.

All these questions, and indeed their answers, have little to do with the idea upon which modern constitutions are premised. The fundamental notion that the whole idea of modern constitutions is based on is citizenship, not identity. It seems that the drafters of the Constitution of the nascent Republic of South Sudan have well grasped this fundamental notion, as they do not declare in the current transitional Constitution that South Sudan has a specific identity.⁵³ In an article that I wrote and published in May 2011, I commented on

48 Art 3, which reads: 'Arabic is the official language in the Republic of the Sudan; and the state shall allow the development of other local and international languages.'

49 Art 4.

50 Art 3.

51 Arts 5(1) & (2).

52 Eg, on 28 February, an Islamist group (the Islamic Constitution Front) warned that it would unseat the President of Sudan if the government fails to adopt an Islamic constitution based on Shari'a law: <http://www.sudantribune.com/spip.php?article41745> (accessed 22 June 2012).

53 The Transitional Constitution of the Republic of South Sudan, 2011 (South Sudan), 9 July 2011, <http://www.unhcr.org/refworld/docid/4e269a3e2.html> (accessed 5 November 2012).

some articles relating to the draft of the Transitional Constitution of South Sudan with regard to this issue, where I stated:⁵⁴

Unlike some previous constitutions of Sudan, the draft of the Constitution [of South Sudan] does not make any mention of the identity of the new nation, and rightly so. The fundamental idea on which constitutions are based nowadays is citizenship, not ethnic, cultural or religious identities. Wisdom therefore dictates that nations, states and governments concentrate directly on how different identities could peacefully live together, and establish a strong nation, rather than sparking unnecessary debates over the identity of the state.

Indeed, citizenship could be provided for in a constitution side by side with a single identity for a specific state. In fact, a number of previous Sudanese Constitutions, such as the 2005 Interim Constitution of Sudan, provided for citizenship and a single identity for the state. However, such constitutionalisation of both citizenship and a single identity does not solve the problem of having an impartial state. It is a contradiction to say that the state is based on citizenship and yet have provisions that adopt or reflect one identity in a country with different identities. From Sudan's experience, citizenship becomes meaningless when the state sides with a single identity, rather than recognising all identities and treating them equally. It is because of this contradiction that many Sudanese, whose identities are not practically recognised by the state, feel that the state does not represent them. This is true not only of those who live on the peripheries in marginalised areas, but also of those who live in Khartoum but do not identify with the dominant 'official' identity. In interviews conducted in Khartoum in 2012 with individuals who identified themselves as non-Arab, it was obvious that when the state adopts a single identity, citizenship does not guarantee people their fundamental rights - it is their identity that does so. In one of those interviews, a man from Darfur interviewed in Khartoum on 30 June 2012 said:⁵⁵

I am a university graduate in economic and political science. But we feel no value for education because of the ethnic and racial problems in our country Sudan, as well as the lack of equality in political power.

Another man from South Kordofan interviewed on 17 June 2012 expressed how citizenship becomes useless when a single identity is favored by the state even if they are both constitutionalised: 'I am a Sudanese citizen and have my identity card. But I don't feel I have the same rights as others.'⁵⁶

Besides this fundamental idea, there is another reason why it is imperative for constitutions of diverse nations (and all of them are

54 N Abdulbari 'South Sudan needs to recognise citizenship' *The Start Newspaper* 9 May 2011 and the *Sudan Tribune* 13 May 2011, <http://www.sudantribune.com/South-Sudan-needs-to-recognise,38884>, (accessed 22 June 2012).

55 See 'The disappearance of Sudan? Life in Khartoum for citizens without rights' International Refugee Rights Initiative (IRRI), *Citizenship and Displacement in the Great Lakes Region Working Paper* 9, May 2013 8.

56 n 55 above, 11.

diverse today) not to provide for a single national identity. Adoption of a single national identity could make a state susceptible to economic and political exploitation. Each and every identity has a centre. If the centre of an identity is an exploitative one or led by an opportunistic government, then states that are on the periphery of that identity could be used for the achievement of economic and political objectives that have nothing to do with the real interests of the populations. Identities can, therefore, distract states from upholding external policies that prioritise the higher economic and political interests of their nations. Sudan has suffered a lot from the insistence of its leaders on imagining that it is a nation that has a specific national identity. The upcoming Constitution should be a salvific document that should, once and for all, liberate them from this illusion.

In addition, the adoption of a specific national identity might be an instrument to strengthen or increase the influence of the group or groups whose identity is adopted by the state. Adoption of a national identity in such a case creates divisions within the population of the state. In Sudan, for instance, the call for an Islamic constitution and establishing an Islamic state has not been out of religious piety. The objective behind such a call is to affirm the alleged Arabic identity of the state, which would in turn increase the influence and power of certain ethnic and political groups in Sudan. This connection between these two identities explains the unusual coalition between the Islamic groups and Arab nationalists in Sudan. In countries such as Libya, Egypt, Syria and Iraq, for instance, the relationship between the two groups has always been tense, and sometimes violent.⁵⁷

It should be noted here that having a constitution without a religious identity in a diverse society is not without a foundation in the political history of Islam. In 622 CE, Prophet Mohammed called the document that governed relations between Muslims, Christians, Jews and pagans in Medina 'the Medina Charter', not the Islamic Charter or the Islamic Constitution.⁵⁸

A flimsy argument is often made that the state should reflect the aspirations and identities of the majority. This argument has two problems: It does not address situations where there is more than one group that could be considered as a majority, and it ignores the fact that the state is not for the majority – the state is for the majority and the minority. In open and tolerant societies, every single citizen counts and minorities are as important as majorities. The essence of

57 Oral conversation with Dr Musa Adam Abdul-Jaleel, Head of the Anthropology Department, University of Khartoum, Faculty of Economics, Khartoum, Sudan. The conversation was on 11 August 2012.

58 The Medina Charter was an agreement between the tribes and groups of Medina. The full electronic version of the document is available at http://www.constitution.org/cons/medina/con_medina.htm (accessed 25 October 2012).

democracy is to rule the state by the majority without ignoring the aspirations and concerns of the minority.

Governing one of the, if not the most, diverse nations on earth, the Constitution of the United States of America does not provide for an identity for the United States. Nor does it provide for an official language, although English is the *de facto* national and official language, as it is spoken by 82,1 per cent of US citizens.⁵⁹ Each state in the United States is entitled to adopt its official language or languages. The state of Hawaii, for example, according to its 1978 Constitution, has two official languages: English and Hawaiian.⁶⁰ Because of Sudan's diversity, it is certainly important not to adopt a national or a single official language for the state in the future Constitution. States should be entitled to do the same. In this regard, the provisions of the 2005 Interim Constitution of Sudan on multi-culturalism and languages should be reflected in the new Constitution of Sudan. All religious rights that are enshrined therein should also be guaranteed for all religious groups.⁶¹ The 2005 Constitution assures multi-culturalism and recognises the indigenous languages of the country as equally national. They must be respected, developed and promoted by the state.⁶² It contains an article that should be repeated *verbatim* in the new Constitution. That article, *inter alia*, states:⁶³

The Republic of the Sudan is an independent, sovereign state. It is a democratic, decentralised, multi-cultural, multi-lingual, multi-racial, multi-ethnic, and multi-religious country where such diversities co-exist.

Furthermore, Sudan's future Constitution should adopt no national identity or give preference to a single language as a national language. There is no plausible reason why the Constitution should not adopt all the major Sudanese languages as official languages. It should with respect to languages at least provide for the provisions of the Interim Constitution, which state that 'Arabic is a widely-spoken

59 CIA *World fact book* (2009) <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (accessed 22 June 2012).

60 See sec 4 of the Constitution of the State of Hawaii, <http://hawaii.gov/lrb/con/conart15.html> (accessed 30 August 2012).

61 The interim Constitution details religious rights in art 6, which provides: 'The state shall respect the religious rights to (a) worship or assemble in connection with any religion or belief and to establish and maintain places for these purposes; (b) establish and maintain appropriate charitable or humanitarian institutions; (c) acquire and possess movable and immovable property and make, acquire and use the necessary articles and materials related to the rites or customs of a religion or belief; (d) write, issue and disseminate religious publications; (e) teach religion or belief in places suitable for these purposes; (f) solicit and receive voluntary financial and other contributions from individuals, private and public institutions; (g) train, appoint, elect or designate by succession appropriate religious leaders called for by the requirements and standards of any religion or belief; (h) observe days of rest, celebrate holidays and ceremonies in accordance with the precepts of religious beliefs; (i) communicate with individuals and communities in matters of religion and belief at national and international levels.'

62 Art 8(1) interim National Constitution.

63 Art 1.

national language in the Sudan' and that 'Arabic, as a major language at the national level *and* English shall be the official working languages of the national government and the languages of instruction for higher education'.⁶⁴ There are many laws that were supposed to be amended so that they could be consistent with the provisions of this article. An example is section 12(h) of the Higher Education and Scientific Research Institutions Regulation Act 1990 (amended 1995), which clearly indicates that one of the main objectives of higher education institutions is to ensure that Arabic is *the* language of instruction in all academic fields. It, in addition, provides that expanding teaching Arabic is one of the responsibilities of those institutions.

There are two obvious reasons why the future Constitution of Sudan should adopt or maintain English, as well as Arabic, as the official working language of the national government and the language of instruction for higher education: One is the recognition of the right of individuals and groups that would prefer to use English for learning and communicating with others; the other is that English would help the Sudanese better communicate with the outside world, including the Arab world which is increasingly concentrating on English in education and official governmental transactions. In addition, English would contribute positively to the quality of education that the Sudanese students and researchers would have access to. In turn, this would increase the opportunities of Sudanese university graduates to, for example, further enhance their career paths through further study or working abroad. In the past, Sudanese were able to compete in the job market of the Gulf countries, in large part due to a mastery of English and indeed Arabic. Sudanese applicants were often the first choice in careers located in oil-rich Arab countries. However, at present, because of the continuous deterioration in English language skills in younger generations of Sudanese university graduates, as a direct result of the Arabisation policies in higher education, Sudanese are no longer the top candidates. It is probably worth noting that anti-English language policies have ironically led to a deterioration in the level of Arabic language proficiency of the Sudanese, as well. Learning new languages makes individuals compare them to their mother tongues or native or previously-learned languages, and therefore they more deeply understand the latter.

With regard to indigenous and other languages, guidance could be found in the South African Constitution, which recognises 11 languages as official languages of South Africa.⁶⁵ In recognition of the historically-diminished use and status of the indigenous South African

64 Arts 2 & 3 (my emphasis).

65 See the South African Constitution of 1996, art 6(1), which reads: 'The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.'

languages, the South African Constitution obliges the state to take practical steps and positive measures to elevate the status and advance the use of those official languages.⁶⁶ The Constitution, in addition, puts an obligation on the state to promote and ensure respect for all languages commonly used by communities in South Africa, such as German, Greek, Hindi, Tamil, Portuguese, Arabic, Hebrew and Urdu.⁶⁷

Language is not, as many people mistakenly argue, simply a means of communication and so is its adoption. In point of fact, the adoption of a language or several languages as official languages reflects the recognition of the adopting state of the ethnic groups that speak those languages. It practically expresses the support of the state of such languages and at the same time guarantees their passing on, together with their associated traditions and conventions, to the next generations. The adoption of a single official language that is the mother tongue of a group is apparently inconsistent with the state's necessary impartiality in diverse societies. Of course, the state could adopt a culturally-neutral language, as is the case in many African nations. The adoption of several languages in linguistically-diverse communities is, therefore, particularly necessitated by the fact that in some societies the option of a culturally-neutral language might not be available.⁶⁸ In some parts of the world, the declaration of a single official language fuelled civil wars. One example can be found in the war that broke out in 1956 in Sri Lanka between the Tamil minority and the Sinhalese majority as a result of passing a law (the Official Language Act) that made Sinhalese the official language of the state.⁶⁹ That civil war proves the destructive consequences of having a state that is biased towards a specific language, culture or ethnic group.

Experiences of many countries that enjoy linguistic diversity demonstrate that recognising vernacular schools at the elementary level contributes to both maintaining indigenous languages and improving education, as children always understand better in their mother tongues or native languages. In addition, vernacular schools give schools a chance to introduce children to languages that they could use at secondary and university levels. In fact, the recognition by the state of vernaculars as a medium of instruction at the elementary level reflects its respect for them and shows its commitment to elevating their status, advancing their use, and promoting cultural diversity. Since the beginning of the 1980s, successive Sudanese governments have been implementing strict policies that aim at diminishing the role of the indigenous Sudanese languages in public spheres. Before then, public servants were paid an

66 Art 6(2) South African Constitution.

67 Art 6(5) South African Constitution.

68 YT Fessha *Ethnic diversity and federalism: Constitution making in South Africa and Ethiopia* (2010) 18.

69 Fessha (n 68 above) 19.

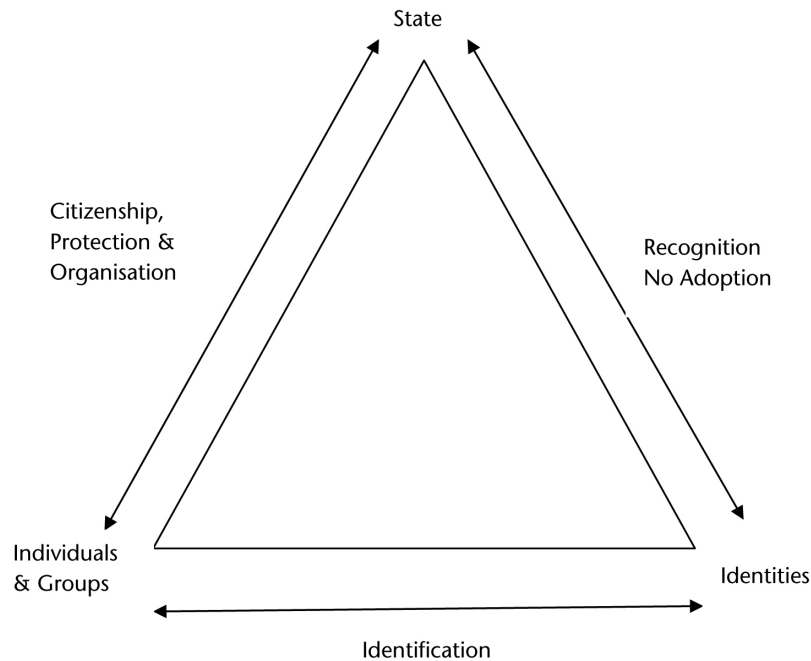
allowance for learning an indigenous language. Malaysia's experience in this context is fascinating. Nobody is prohibited or prevented from using, teaching or learning non-Malay languages. The country, which fastidiously weaved a rich cultural mosaic, has vernacular schools that are strongly supported by the non-Malay ethnic groups in the Western part of the Malaysian peninsula. Features indicate that 94 per cent of Chinese attend vernacular schools. Approximately 75 per cent of Indians attend a Tamil vernacular school.⁷⁰ English is used as a medium of instruction, in addition to Malay, Mandarin and Tamil at the national level for primary, secondary and tertiary education. Private schools use Arabic in addition to the aforesaid languages.⁷¹

In short, the future Constitution of Sudan should unambiguously recognise all the identities and cultures of the Sudanese peoples and enhance their promotion and protection. Its relationship with individuals must be based on international principles of citizenship or nationality, as they will be mentioned in detail in a following part of this article. Regarding its cultural, ethnic, religious and political groups, its role should focus on organising and protecting them. This position of the state with regard to ethnic, religious and cultural identities should under no circumstance prevent individuals or groups from identifying themselves with these identities, provided that they do not harm any individual or group. In other words, the right of individuals and groups to identify themselves with identities should end where other individuals' or groups' rights begin. In fact, allowing them to do so is part and parcel of maintaining the impartiality of the state and accenting its organisational, promotional and protectional role. It would also be a reflection of its respect for one of the underlying constitutional principles, which are necessary for the stability of the state; that is, the international principles of human rights, as detailed in the various international human rights conventions.

These relationships could be illustrated by this triangle that I would like to call the 'state, individual and groups, and identities triangle':

70 CS Farugi *Nation building in a divided society: The experience of Malaysia* (unpublished) (2012) 9. See also art 152(a) of the Malaysian Constitution, which reads: 'No person shall be prohibited or prevented from using (other than for official purposes), or from teaching or learning, any other language.' "Official purposes" here means any purpose of the government, whether federal or state, and includes any purpose of a public authority.'

71 A Puteh 'The language medium policy in Malaysia: A plural society model?' (2010) 2 *Review of European Studies* 192.



State, Individuals & Groups, and Identities Triangle

In addition to the impartiality of the new Constitution and, as far as the issue of national identity is concerned, the Constitution should contain and enshrine the following principles to organise and govern identity, diversity and plurality issues:

4.1 Human rights

It goes without saying that international human rights are one of the main instruments of achieving justice and equality among and between the diverse components of any society. All citizens should have the right to equally enjoy internationally-recognised human rights and freedoms, regardless of their ethnic, religious, political, cultural or geographic background.⁷² The protection of group and individual cultural, social, religious and linguistic rights is one of the central functions of national and international human rights systems. It is because of this significant role of human rights that philosopher

⁷² See eg art 2(1) of the International Covenant on Civil and Political Rights, which reads: 'Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Immanuel Kant eloquently argues that it is the 'principles of human rights that allow states to protect each other against external aggression, while at the same time refraining from interfering with each other's internal disagreements'.⁷³ The same is so true of relations between individuals and groups within one state.

One of the revolutionary aspects of the 2005 interim National Constitution is that it directly incorporates universal human rights into the domestic law of Sudan.⁷⁴ However, two problems should be dealt with in the upcoming Constitution of Sudan as far as human rights are concerned. The first is the lack of political commitment to human rights, which is demonstrated by the unwillingness of the government to amend laws that are inconsistent with the 2005 Constitution. Although Sudan is not a party to many significant international human rights conventions, the provisions of the conventions to which Sudan is a party, if respected and implemented, can change the human rights record of the country. However, the new Constitution should oblige the state to join the other international human rights treaties if individuals and groups are to fully benefit from those treaties and conventions according to that direct incorporation. The second problem relates to the establishment and functioning of the institutions and bodies that promote and protect the rights and freedom enshrined in the Constitution. Many bodies and commissions that should have been established under the Interim Constitution have not been established and those that have been established remain inactive. The upcoming Constitution of Sudan should, therefore, concentrate not only on the theoretical, constitutional framework of fundamental rights and freedoms, but also on the mechanisms for implementing and protecting them through domestic and international mechanisms.

One of the striking characteristics of the 2005 Constitution is that it provides in its first article that Sudan is a diverse or multi-cultural state.⁷⁵ This recognition of diversity should be reflected in the institutions and policies of the state. Such recognition and reflection are significant constitutional and human rights principles that should clearly be included in Sudan's 'permanent' Constitution.

4.2 Prohibition of discrimination

The prohibition of discrimination is a global human rights norm that the new Constitution should clearly provide for. Discrimination is a

73 G Cavallar 'Kantian perspective on democratic peace: Alternatives to Doyle' (2001) 27 *Review of International Studies* 229-48, cited in SO Akoth *Challenges of nationhood: Identities, citizenship, and belonging under Kenya's new Constitution* (2011) 17, Constitution Working Paper Series 10.

74 Art 27(3) interim National Constitution.

75 See art 1(1), which provides: 'The Republic of the Sudan is an independent, sovereign state. It is a democratic, decentralised, multi-cultural, multilingual, multi-racial, multi-ethnic, and multi-religious country where such diversities co-exist.'

chronic problem of modern societies, because of their ethnic, cultural and religious diversity. It is a problem that is prevalent across the globe. Constitutions in many countries contain provisions to deal with it and equally protect individuals and groups. The 2005 Interim Constitution dedicates article 31 to equality before the law and equal protection of the law. It provides that '[a]ll persons are equal before the law and are entitled without discrimination, as to race, color, sex, language, religious creed, political opinion or ethnic origin, to the equal protection of the law'. General UN human rights conventions also prohibit discrimination. Examples are articles 1 and 2 of the Universal Declaration of Human Rights (Universal Declaration);⁷⁶ articles 2, 3 and 26 of the International Covenant on Civil and Political Rights (ICCPR);⁷⁷ and article 2 of ICESCR.⁷⁸ In addition, the UN adopted a number of issue-specific conventions which aim at combating discrimination on the basis of race, gender, disability and religion. The adoption of these issue-specific conventions indicates the particular significance of protecting the human rights of all individuals, but in particular of certain groups, regardless of their racial, gender or religious background.⁷⁹ The future Constitution of Sudan should pay particular attention to protecting and ensuring the well-being of the groups for whose rights these issue-specific conventions were adopted by the UN, such as women, ethnic and cultural groups and people with disabilities.

At the regional level, the African Charter on Human and Peoples' Rights (African Charter),⁸⁰ which was drafted taking into consideration the immense diversity of Africa, prohibits discrimination

76 Art 1 reads: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' Art 2 is more detailed on the issue: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.'

77 Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with art 49. The full text of the Convention is accessible at <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 28 June 2012).

78 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with art 27, <http://www2.ohchr.org/english/law/cescr.htm> (accessed 28 June 2012).

79 Examples are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979); and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981).

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

in articles 2 and 3. These two articles provide that '[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status' and that '[e]very individual shall be equal before the law'; and adds that '[e]very individual shall be entitled to equal protection of the law'.

In the Constitution of the United States of America, the prohibition of discrimination is an underlying principle. It was introduced in 1868 (Fourteenth Amendment) which states that '[n]o state shall ... deny to any person within its jurisdiction the equal protection of the law'. In fact, the Fourteen Amendment does nothing more than repeating and accentuating an already-existing principle. The American Declaration of Independence contains that principle of equality in, to my mind, one of the best-crafted sentences in the history of the English language:⁸¹

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among those are Life, Liberty, and the pursuit of Happiness.

The only internationally, constitutionally-acceptable exception to the principle of non-discrimination is affirmative action, which is sometimes alternatively inappropriately known or referred to as 'positive discrimination'. Affirmative action is justified on the basis that it aims at addressing historical discrimination and inequalities. In this context, affirmative action is implemented to eradicate substantive inequalities. It therefore aims at achieving substantive equality. Unlike formal equality, which means identical treatment regardless of the concrete circumstances, substantive equality acknowledges the need for formally differential treatment to obtain substantively equal treatment.⁸² Conventional anti-discrimination policies aim at achieving formal equality, not substantive equality. In this sense, affirmative action is explicitly provided for in the interim Constitution of Sudan to promote women's rights.⁸³ The future Constitution should contain affirmative action provisions to deal with the various types of substantive inequalities that are prevalent across Sudan.

4.3 Right to citizenship

Since the Constitution and the state are based on citizenship, the most significant right becomes the right to obtain citizenship or nationality according to internationally-recognised principles. States might adopt different rules for obtaining citizenship, despite the fact

81 See the American Declaration of Independence, <http://www.ushistory.org/declaration/document/> (accessed 21 August 2012).

82 K Henrard *Equality of individuals* (2011) 1.

83 Art 32(2) interim National Constitution, which provides: 'The state shall promote women's rights through affirmative action.'

that these laws have some common features, as I have mentioned earlier in this article. International law and constitutional law have developed principles that are now international, thanks to customary law and conventions adopted by states.

Article 7 of the interim Constitution contains a number of well-established principles that protect the right to a nationality, although it does not provide for the *jus soli* (right of soil) principles, one of the common ways of acquiring citizenship today. The 2010 Constitution of the Republic of Kenya properly addresses this issue by conspicuously providing for almost all the principles of the acquisition of citizenship. It is my view that the new Constitution of Sudan should contain them as well. Modelled on the 2010 Kenya Constitution, the article or articles that deal with citizenship or nationality should be drafted and included in the new constitution of Sudan as follows:

- Citizenship shall be the basis for equal rights and duties for all Sudanese.⁸⁴
- A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Sudan, either the mother or father of the person is a citizen.⁸⁵
- A person who has been married to a Sudanese citizen for a period of at least five years is entitled on application to be a Sudanese citizen.⁸⁶
- A person born outside Sudan is a citizen, provided that either the father or the mother of the person is or was a citizen (although this can be limited by law to prevent citizenship from passing from generation to generation through people who have no active connection with Sudan).⁸⁷
- A citizen who becomes or has become a citizen of another country is entitled to be a citizen of Sudan.⁸⁸
- A child adopted by a non-Muslim Sudanese is entitled on application to become a Sudanese citizen.⁸⁹
- A person first found as a deserted infant shall, until the contrary is proven, be deemed to be Sudanese by birth.⁹⁰

Constitutional provisions that provide for dual citizenship would in the long run end the dominant notion that being a Sudanese national necessarily means being a member of a specific tribe or ethnic group. By doing so, the upcoming Constitution will adhere to the fundamental idea that Sudan is a citizenship state, not a state that

84 Art 7(1) Sudan interim National Constitution.

85 Art 14(1) Kenyan Constitution.

86 Art 15(1) Kenyan Constitution.

87 Art 7(2) Sudan interim National Constitution.

88 Arts 14(5), 15(4) & 16.

89 The Kenya Constitution gives this right to all Kenyans. In Sudan, this right could be restricted to non-Muslims, as Islam strictly prohibits adoption as practised today in the world in a clear-cut Quranic verse. In fact, the 1974 Sudan Nationality Act was amended, among other reasons, to remove provisions that gave this right to Sudanese citizens. As Sudan has Christian and non-religious populations, it is consistent with human rights and constitutional practices in many countries to provide for such a provision in the new Constitution.

90 Art 14(4) of the Kenya Constitution in this regard is less generous. It provides that 'a child who is in Kenya and who seems to be less than 8 years old, but whose parents are unknown, will be assumed to be Kenyan'.

assumes homogeneity or adopts and implements policies to create a homogeneous nation. This adherence will in turn greatly contribute to building a modern state. In Kenya, the above-mentioned constitutional provisions on citizenship helped the Republic of Kenya deal with what once was a strong aboriginal movement.⁹¹

4.4 Recognition of differences

Recognition and protection of human rights of individuals and groups pave the way towards establishing a political community, a pluralistic community that accommodates differences and diversities. In this context, differences or pluralisms could be classified into two distinct types or groups: horizontal pluralisms and vertical pluralisms. Horizontal pluralism refers to a situation in which people are different by choice or primordially. Examples include religious beliefs and, as a function of innate differences in skin pigmentation, language or culture, respectively. Differences that arise as an implication of social distinctions in access to socially valuable or even livelihood material resources are classified as vertical pluralisms.⁹²

The recognition by the new Constitution of Sudan of pluralisms should lend weight towards the aim of protecting or eliminating them, depending on the type of pluralism. Horizontal differences should be recognised so that through the Constitution and implementation mechanisms, the state is able to protect them. On the other hand, vertical pluralisms should be recognised first, so that the state has the opportunity to eliminate or reverse them. The economic and political inequalities throughout Sudan demonstrate the existence of vertical differences. The conflicts and wars that Sudan has been witnessing are a direct result of those vertical differences that have not been addressed properly and sometimes not recognised by successive governments of Sudan.

It is worth noting that the 1998 Constitution was the first in the constitutional history of Sudan to directly recognise diversity. The Interim Constitution of 2005 unambiguously recognises the horizontal differences of the country, but no clear reference is made to vertical differences, although the provisions of the Constitution of 2005 have been drafted to deal with them. They were mentioned and recognised in the 2005 Comprehensive Peace Agreement which was part and parcel of the Constitution. Here again it is important that the Constitution focuses on the necessary mechanisms of effectuating its provisions. Direct and unambiguous recognition of vertical differences in the Constitution will certainly create a better atmosphere for their reversal and elimination.

The recognition of horizontal differences as detailed above inherently springs from the existence of several distinct groups in

91 Akoth (n 73 above) 21.

92 MG Smith 'Institutional and political constitutions of pluralism' in L Kuper & MG Smith (eds) *Pluralism in Africa* (1969), cited in Akoth (n 73 above).

Sudan. Unlike the policy of assimilation, recognition here aims at acknowledging the plurality of the state. It puts an obligation on it to recognise the right of ethnic groups with regard to maintaining their distinctions and managing their affairs.⁹³

The liberal non-recognition-of-ethnic-groups approach is untenable in societies where ethnic groups are regionally or geographically centred. In such societies, individual civil and political rights would not help states and governments deal with a variety of problems and questions that arise in relation to ethnic and national groups. An example in this regard is the question of which language should be recognised in parliament. As Fessha puts it, '[i]f the state is going to effectively address these questions and thus accommodate cultural diversity, it needs to supplement individual rights with institutional measures that represent an acknowledgment of its multi-ethnic reality'.⁹⁴

4.5 Federalism

Federalism is accepted in many countries in the world as one of the most effective forms of governance for vast and diverse nations. It is an effective means when it comes to organising relationships between identities. As defined by Watts, federalism is 'a normative term [that] refers to the advocacy of multi-tiered government combining elements of shared rule and regional self-rule. It is based on the presumed value and validity of combining unity and diversity and of accommodating, preserving and promoting distinct identities within larger political union.'⁹⁵ The future constitution of Sudan should, therefore, adopt federalism as a tool for dealing with the country's diversity and vastness, as federalism is the only option that the Sudanese have to deal with their diversity, if they are to keep the country in security and peace, and in the long run create a strong state. In other words, the incentives for creating a federal state, in Sudan's particular situation, are centrifugal in the short run and centripetal in the long run.

As federations greatly differ, depending on the particular circumstances and history of every state, the details of the exact federal system that the future Constitution of Sudan should adopt must be worked out by the technical body that should draft the Constitution in light of the discussions and deliberations that should be organised throughout the country. That body should, in particular, consider an asymmetric federalist system which is recommended by the 2004 United Nations Development Programme (UNDP) report for

93 Fessha (n 68 above) 19.

94 Fessha (n 68 above) 14-19.

95 R Watts *Comparing federal systems* (1999) 9, cited in F Boucher 'Deep diversity and multinational federalism in Canada' 5, IFF Summer University Paper for Week 2.

certain multi-cultural states.⁹⁶ Nevertheless, whatever type of federation the Sudanese choose, it must be an authentic, democratic one. To do so would require a foundation of a strong rule of law paradigm. This leads to a greater likelihood of success due to the constitutional divisions of power and respect for minority rights within such federations. Historically, most failed federations were not in fact authentic democratic ones – rather they were sham or pseudo-federations.⁹⁷

In this context, federalism should be distinguished from constitutionally-decentralised unions. Federalism is based on an agreement between the units of the federal state, while constitutionally-decentralised units are created by the will of the central government. In other words, in constitutionally-decentralised unions, the states or the regions derive their powers and authority from the central government, which means that these powers could be unilaterally retaken by the central government if it so decides. This fundamental difference between federal states and constitutionally-decentralised units reflects one of the fundamentals of federalism, that is, keeping the balance between self-rule and shared-rule or having unity in diversity.

Neither decentralisation nor federalism is new to Sudan's political history. The roots of decentralisation in Sudan date back to the era of the Nubian Christian kingdoms in Northern Sudan, the Fung State in Central Sudan, and the Fur Sultanate in Darfur in Western Sudan, where tribal chiefs were in full charge of ruling the regions of their tribes. Aware of regional diversity and the necessity of accommodating such diversity coupled with a willingness to respect the right of all to participate in administering their affairs, the leaders of the old Sudanese kingdoms were wise enough to rule in a way that today is called decentralisation or federalism.

With regard to centralisation, one should refer to the Turko-Egyptian rule (1821-1885), which divided Sudan into three provinces whose rulers were directly responsible to the Turko-Egyptian administration in Cairo. In the aftermath of the collapse of the Turko-Egyptian rule in Sudan and the triumph of the Mahdist revolution, Sudan witnessed a centralised system of government from 1885 until 1898. The military nature of the Mahdist movement and revolution dictated the establishment of a highly-centralised state.

The British rule of Sudan (1898-1955) very early on adopted a centralised system of government, where British officers ruled the British-created provinces under the administration of the Governor-General. In 1921, the British started to apply an indirect rule system. Milner, a British expert who wrote a report on the government system

96 Human Development Report, United Nations Development Programme, (2004) <http://www.hdr.undp.org/2004/> (accessed 27 July 2012).

97 J McGarry 'Can federalism help to manage ethnic and national diversity' (2005) 5 *Forum of Federations* 15.

in Sudan, recommended that an indirect rule system be applied. With the increase of the political movements that called for independence, the British authority issued several laws that increased and sometimes decreased centralisation of powers. In fact, this has been the case during the periods that followed the British era, beginning in 1956 with Sudan's independence.

Discussions over the significance of federalism started before independence and continued thereafter. In the 1947 famous Juba Conference, the 1953 Southern Sudanese Political Parties Conference and the 1956 Roundtable Conference, Southern Sudanese demanded a federal form of government. Decentralisation was formally adopted in 1989 and implemented in two stages: The first was through the 1991 Fourth Constitutional Decree, which was issued to put into practice one of the recommendations of the National Conference for Dialogue on Peace Issues; and the second through the 1998 Constitution.

The 2005 interim Constitution, based on the Comprehensive Peace Agreement and the 1998 Constitution, declares in article 1 that Sudan is a decentralised state. In chapter 4, article 24, the Constitution adopts a decentralised system of governance with four levels of government: national, Southern Sudan, state and local. However, it does not mention the word 'federal' or 'federalism'.⁹⁸

The experience of the past years indicates that neither decentralisation nor federalism has been properly applied in Sudan, basically due to a lack of commitment. The states consistently report the intervention by central authorities in some affairs that do not fall within their constitutionally-determined powers. In addition, federalism of powers is never accompanied with fiscal federalism. For instance, state governments complain that they are given powers or, to be more precise, responsibilities without the necessary resources to meet them. All significant revenue resources are made national by the central or federal government, while revenue resources that put the states in a direct confrontation with citizens are left to the states. Financial transfers to the states are not made on time or are not made through the legally-determined channels.⁹⁹ As a rule, federal states' fiscal decentralisation is generally measured by the difference between

98 Art 24, titled 'Decentralised system of governance', provides: 'The Sudan is a decentralised state, with the following levels of government: (a) the national level of government, which shall exercise authority with a view to protecting the national sovereignty and territorial integrity of the Sudan and promoting the welfare of its people; (b) the Southern Sudan level of government, which shall exercise authority in respect of the people and states in Southern Sudan; (c) the state level of government, which shall exercise authority at the state level throughout the Sudan and render public services through the level closest to the people; (d) local level of government, which shall be throughout the Sudan.'

99 Eg, a previous governor of South Darfur, Abdulhameed Musa Kasha, resigned from his position because of channelling money by the Sudan Ministry of Finance directly to the Commissioner of Riheed Ekbirdi. The money should have been channelled to the Commissioner through the legally-designated South Darfur

the revenues and expenditure of the central government and those of the state governments.¹⁰⁰ Applying this rule, there has been no proper application of fiscal decentralisation or federalism in Sudan. Therefore, the future Constitution of Sudan should contain detailed provisions on the application of fiscal federalism and responsibilities. Moreover, in this context, it should deal with all the problems that accompanied the previous attempts of their application.

Additionally, the ruling elites in Khartoum have, because of their political myopia, been unjustifiably concerned that federalism would eventually lead to the fragmentation of Sudan. Ignorant of history, some governmental circles strongly argue today for further centralisation after the secession of South Sudan. They wrongly believe that the more centralised the government is, the more united the state becomes. In fact, the history of Sudan tells that this fear is deeply rooted. Prior to independence, Benjamin Luki, from Yei in South Sudan, speaking on behalf of Southern Sudanese parliamentary representatives, demanded on 12 December 1955 that a congress of all political parties be formed to ensure that the Declaration of Independence contains a statement that Sudan would be a federal state that would bring the North and the South together under a united state, but his suggestion was rejected by both the then ruling and opposition parties. Those political parties agreed that a paragraph be added to the Declaration that South Sudan's demand of federalism be taken into consideration in the new Constitution of Sudan. However, this promise – which was accepted by Southern Sudanese – for the sake of securing Sudan's independence – was later broken by the political parties.¹⁰¹ Later, calling for federalism became a crime: Stansalous Biasama, a parliament member from South Sudan, was deprived of parliamentary immunity and tried, and Satirino Ohuru, also from South Sudan, was assassinated by Sudanese security forces on the Sudan-Uganda border.¹⁰²

In 1957, for example, one of the suggestions made by the Constitution Commission established by the Constituent Assembly was that federalism be the system of governance in Sudan. The same suggestion was made in 1968 by the Southern Sudanese members of the Constituent Assembly. None of the two draft constitutions contained a single article on federalism. Instead, article 2 of the 1968 Draft Constitution provided that Sudan was a united state.

Finally, there is an argument made against federalism that it is a costly system of governance and that it is inappropriate for states with limited budgets. This argument is indeed correct, but if we weigh it

State authorities. Another example is the resignation of Gadarif state governor, Karamallah Abbas, for not receiving financial transfers from the federal government.

100 M Mushtaq 'Managing ethnic diversity and federalism in Pakistan' (2009) 33 *European Journal of Scientific Research* 288.

101 M Khalid *Takathur Az-za'azi wa Tanagas Alawtad* (2010) 10.

102 Khalid (n 101 above) 20.

against the deleterious repercussions of centralisation in diverse and vast countries, we would certainly opt for federalism. Sudan, for instance, had spent billions of dollars to deal with the war that continued for decades in South Sudan because of centralisation, and it is today doing the same to contain wars and conflicts in Darfur, Blue Nile, and the Nuba Mountains. These financial costs of war are, of course, in addition to the loss of lives and the lack of development caused by instability or insecurity.

In short, to deal with Sudan's vastness and diversity, the future Constitution of Sudan must, first of all, clearly recognise and adopt federalism as a system of governance and, secondly, avoid the theoretical and practical shortcomings of the country's previous experiences with federalism, particularly as far as fiscal federalism is concerned.

5 Concluding remarks

States are fundamentally created and structured to promote and protect the interests of their populations; *all* their populations. They are broader and larger institutions that are able to comprehensively and accurately reflect the interests of their components. It is indisputable that nations today are so diverse that they could only be stable if the state is impartial and unbiased towards various and different groups. Constitutional principles such as human rights, citizenship, the prohibition of discrimination, and recognition of differences or diversities, in addition to federalism, are effective instruments that help nations achieve peace, stability and unity.

While it is legitimate to speak about the identities of people or identify oneself with them, the question of ethnic, cultural, and national identities have nothing to do with the basic principles of modern constitutions that are based on the concept of citizenship. Constitutions should concentrate on organising, promoting and protecting these identities but should not adopt any to the exclusion of the other identities.

Political power might be used by a group of individuals, at a certain historical moment, to impose their own identity on others, but that has always been a recipe for conflict and instability. This is why principles that secure recognition of diversity must be included in the future Constitution of Sudan, as our own history tells us about the deleterious consequences of exclusionary policies that have led us to wars, destruction and fragmentation.

Sudan's beauty is in its diversity. Efforts should therefore be exerted to constitutionally strengthen, promote and protect pluralism and diversity. In this context, the new Constitution of Sudan should particularly concentrate on the implementation of the constitutional principles that aim at recognising the different types of differences and pluralisms. This, of course, needs something more than having

strong implementation mechanisms and institutions. That is, it requires a strong commitment to constitutionalism.

In essence, the state as an institution should remain impartial and indifferent. It should in practice equally treat its populations and citizens, recognise their differences and occupy itself with their higher, common interests. It should, in other words, be an accommodating state. It is this characteristic of accommodation that will secure permanent peace, stability and unity for Sudan and make it a tolerant, modern and inclusive state.

The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective

*Nicholas Wasonga Orago**

Doctoral Researcher, Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, South Africa

Summary

The prominent use of international human rights law in a state's domestic legal system depends on the hierarchical place occupied by international law in general, and international human rights law in particular, among the sources of law in that particular legal system. Two systems of receipt of international law in the domestic legal systems have been used by different states: monism, which looks to directly incorporate ratified international law treaties in a state's domestic legal system; and dualism, which entails the transformation of international law into the domestic legal system through the domestication of ratified international law treaties by means of the enactment of parliamentary legislation. Kenya, as a Commonwealth country, has always primarily followed a dualist approach which requires that domesticating legislation be enacted by parliament for ratified international law treaties to have application in the domestic legal system. However, with the promulgation of the new Constitution in August 2010, international law has been given a more prominent role in the domestic legal system through the inclusion in the Constitution of a provision directly incorporating ratified treaty law into the Kenyan legal system as a legitimate source of law. This article is primarily focused on analysing the hierarchical place of international law, specifically international human rights treaty law, in the Kenyan domestic

* LLB (Hons) (Nairobi), LLM (Human Rights and Democratisation in Africa) (Pretoria), LLD (Western Cape); nicholasorago@gmail.com. The kind financial support of the University of the Western Cape Research Department is acknowledged.

legal system in the context of the new constitutional dispensation. It recommends that in order for international human rights law to have a prominent place in the governance of the country, article 2(6) of the Constitution should be interpreted progressively so as to give international human rights law norms an infra-constitutional but a supra-legal status in the domestic legal system. In this way, international human rights law will act as a bulwark against recession to totalitarian rule, as well as safeguard the democratic and fundamental rights protection gains that were won in the struggle for constitutional change.

1 Introduction

International law, specifically international human rights law, has had an unenviable history in the Kenyan domestic legal system.¹ The 1963 Independence Constitution did not provide for its direct application in the Kenyan legal system, with Kenya, similarly to other common law countries, adopting a dualist approach to international law.² With the adoption of the dualist approach, Kenya espoused the doctrine of transformation, which envisioned that international law could only be applicable in the domestic legal system if it had been domesticated by parliamentary legislation.³ The doctrine of transformation meant that, hierarchically speaking, ratified international treaties, once

1 This article is primarily focused on international human rights law because of its *sui generis* nature of aiming to afford practical and effective protection to individuals and groups who are not parties to the relevant international instruments. The import of this article is, therefore, to make recommendations for the purposive interpretation of art 2(6) of the 2010 Kenyan Constitution so as to achieve the practical and effective protection of individuals and groups, the purpose and objective of international human rights law.

2 F Viljoen *International human rights law in Africa* (2012) 522; M Killander & H Adjohoun 'Introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 3 11. Dualism envisages the complete separation of national and international legal systems, and that for rules of international law to apply in the national legal system, they must be transformed, through domestication, and thus apply as part of domestic national law and not as international law. Monism, on the other hand, envisages international law and national law as part of one legal system, and that international law is directly incorporated into the national legal system without any difficulty in its application as international law within the domestic legal system. For a more elaborate analysis of monism and dualism, see TM Frank & AR Thiruvengadam 'International law and constitution making' (2003) 2 *Chinese Journal of International Law* 470; WM Gibson 'International law and Colombian constitutionalism: A note on monism' (1942) 36 *The American Journal of International Law* 614; G Slyz 'International law in national courts' (1995-1996) *New York Journal of International Law and Politics* 65 67.

3 See JO Ambani 'Navigating past the "dualist doctrine": The case for progressive jurisprudence on the application of international human rights norms in Kenya' in Killander (n 2 above) 26. The doctrine of transformation was aptly captured by Justice Atkin in the case of *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271, 295 where he stated: 'International law as such can offer no right cognisable in the municipal courts. It is only in so far as the rules of international law are recognised as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations.'

domesticated, only had application in the domestic legal system at the same level as other domestic legislation, and they could be amended by a simple legislative majority.⁴ This indifferent treatment of international law was replicated in the Kenyan Judicature Act which, in enumerating Kenya's sources of law, did not earmark it as a source of law in Kenya's domestic legal system.⁵ The situation had been exacerbated by the poor domestication practice of the Kenyan legislature, with most of the ratified treaties having had no force of law in Kenya due to the absence of domesticating legislation.

Due to this *lacuna*, the Kenyan courts had developed an inconsistent practice in relation to international law, with the courts generally shying away from directly applying international law.⁶ The prevailing judicial position on the applicability of international law in the Kenyan domestic legal system prior to the enactment of the 2010 Constitution was established in the case of *Rono v Rono & Another* by the Court of Appeal, then the highest court in the country.⁷ In this case, the Court affirmed that as a member of the international community, Kenya subscribed to international customary law and ratified international treaties.⁸ It acknowledged the long-standing debate on the applicability of international law in the Kenyan domestic legal system, and affirmed that 'Kenya subscribes to the common law view that international law is only part of domestic law

4 See Frank & Thiruvengadam (n 2 above) 477 483 485, who affirm this equal hierarchal status of ratified and domesticated treaties *vis-à-vis* domestic legislation in a dualist system in their discussion of the prevailing situation in Italy, the United Kingdom and India respectively. See also Ambani (n 3 above) 30, who is of the opinion that prior to the enactment of the 2010 Kenyan Constitution, international law was hierarchically lower in rank than both the Constitution and domestic legislation in the Kenyan domestic legal system. This, however, could not have been the case with domesticated treaties, as the domesticating legislation had equal hierarchical status to any other parliamentary legislation and could only be overridden by subsequent legislation.

5 The Judicature Act of Kenya, Cap 8 (Revised Edition 2007 (2003)) <http://www.kenyalaw.org/Downloads/GreyBook/3.%20Judicature%20Act.pdf> (accessed 22 April 2013), which in sec 3 enumerates sources of law in Kenya as the Constitution, Acts of Parliament, the common law, doctrines of equity, the statutes of general application, and African customary law so long as it is not repugnant to justice and morality or inconsistent with any written law.

6 This judicial attitude is exemplified by the case of *Okunda v Republic* [1970] EA 512, where the High Court held that since international law was not included in the Judicature Act as a source of law in Kenya, it did not have any legal force in the domestic legal system. In the High Court case of *Pattni & Another v Republic* [2001] KLR 262, the Court similarly held that even though international law norms could have persuasive value and that the courts could take account of relevant international law values in adjudication, they were not binding sources of law in the Kenyan domestic jurisdiction unless they were transformed into Kenyan law by the Constitution or other written law.

7 *Mary Rono v Jane and William Rono*, Court of Appeal at Eldoret, Civil Appeal 66 of 2002, 29 April 2005 (*Rono v Rono*).

8 Paras 19-20 *Rono v Rono* (n 7 above).

where it has been specifically incorporated'.⁹ Despite this dualist position, the Court went on to hold as follows:¹⁰

However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation.

In reaching its decision, the Court foreshadowed the impending change in the situation of international law in the Kenyan domestic legal system through the adoption of a new constitutional dispensation by pointing to the then Draft Constitution of Kenya which clearly provided for international customary and treaty law to form part of the laws of Kenya.¹¹ The Court then proceeded to make its finding by relying on both national law and relevant ratified international human rights law, especially the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), even when it had not been domesticated by Kenya.¹²

However, with the promulgation of the 2010 Constitution, with a provision envisaging the direct application of international law as contained in ratified treaties, the place of international law in the Kenyan domestic legal system has shifted significantly. The challenge facing Kenyan courts at the moment, and which is the main focus of this article, is how this constitutional provision directly incorporating international law norms in ratified treaties in the Kenyan domestic legal system should be interpreted, especially in relation to ratified international human rights treaties, and the hierarchical status that should be given to international human rights norms contained in ratified treaties in Kenya. After this brief introduction, the article in part 2 undertakes an analysis of the prevailing treatment of international human rights law in the Kenyan domestic legal system after the promulgation of the 2010 Kenyan Constitution. Parts 3 and 4 of the article delve into a comparative analysis of the interpretation of constitutional provisions directly incorporating international law into domestic law in two jurisdictions: the United States of America and Colombia respectively. These two jurisdictions are chosen because, even though both have constitutional provisions directly

9 Para 21 *Rono v Rono*.

10 As above. In its decision, the Court relied on Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms which states as follows: 'It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.'

11 Para 23 *Rono v Rono*.

12 Para 24 *Rono v Rono*. See also Viljoen (n 2 above) 525. The position in *Rono v Rono* has been affirmed and followed by the Kenyan Courts in subsequent cases such as *Re The Estate of Lerionka Ole Ntutu (Deceased)* (2008) eKLR and *Rose Moraa & Another v The Attorney-General* (2006) eKLR.

incorporating international law into their domestic legal systems, they have adopted differing approaches to the interpretation of these constitutional provisions, with the result that the hierarchical place of international law in the two comparative systems are also different. The United States has, over the years, restricted the direct incorporation and use of international human rights law in its domestic jurisdiction using the self- and non-self-executing doctrine, while Colombia has continued a practice of direct incorporation of international human rights law and the reliance on international human rights standards to enhance the national protection of human rights and fundamental freedoms. The comparative study of these two jurisdictions is thus intended to indicate the two alternative approaches that can be adopted in the interpretation of article 2(6) of the 2010 Kenyan Constitution, and the effects that a choice of any of the alternative interpretations will have on the hierarchical place of international human rights law in the Kenyan domestic legal system and, consequently, the protective value of international human rights norms in Kenya. Part 5 entails a proposal regarding the hierarchical status that international human rights law should be accorded in the Kenyan domestic legal system, if the objective of the drafters of the Constitution that international human rights law should play a prominent role in governance in Kenya, is to be realised. Part 6 contains a short conclusion.

2 Place of international human rights treaty law in Kenya's domestic legal system after the promulgation of the 2010 Constitution

The promulgation in August 2010 of the new Kenyan Constitution has radically changed the position of international human rights law in the Kenyan domestic legal system, as discussed above. With the promulgation, international human rights law in ratified treaties have been directly incorporated into the Kenyan domestic legal system through article 2(6)¹³ of the Constitution.¹⁴ The entrenchment of the

13 Art 2(6) provides that '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'. This provision has similarities with art 144 of the 1990 Namibian Constitution which provides that '[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia'. For an interpretation of art 144 of the 1990 Namibian Constitution, see O Tshosha 'The status of international law in Namibian national law: A critical appraisal of the constitutional strategy' (2010) 2 *Namibia Law Journal* 11. Tshosha contends that the inclusion of the clause directly incorporating international law in the Namibian domestic jurisdiction effectively accords international law a constitutional status in Namibia.

14 The practice of directly incorporating international law into the domestic legal system in art 2(6) of the Kenyan Constitution is comparatively similar to the 1991 Colombian Constitution, art 93, which provides that international human rights treaties ratified by Colombia take precedence over domestic law. See M Sepulveda

primacy of international human rights law into the Kenyan legal system, a system that has been plagued by almost four decades of totalitarian rule, is not a strangely Kenyan phenomenon, but has been witnessed worldwide, and is based on the importance of a commitment to international human rights protective values at the highest level possible with the hope of non-regression to totalitarian rule.¹⁵

The change in the reception of international law in the Kenyan legal system from transformation to incorporation was confirmed by Justice Martha Koome in the High Court case of *Re The Matter of Zipporah Wambui Mathara*,¹⁶ concerning article 11 of the International Covenant on Civil and Political Rights (ICCPR). She held that article 2(6) imported the provisions of international treaties and conventions that Kenya has ratified into Kenyan law as part of the sources of Kenyan law.¹⁷ This was similarly affirmed in the High Court case of *Beatrice Wanjiku & Another v The Attorney-General & Another*,¹⁸ where the Court stated as follows:

Before the promulgation of the Constitution, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular articles 2(5) and 2(6) gave new colour to the relationship between international law and international instruments and national law.

'The Constitutional Court's role in addressing social injustice' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 145-146. Similarly, art 15(4) of the the Russian Constitution of 12 December 1993, article 15(4) incorporates international law into the Russian legal system by providing that '[t]he commonly recognised principles and norms of international law and international treaties of the Russian Federation shall be a competent part of its legal system. If an international treaty ... stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply'. Similar provisions are also included in the new East European states' Constitutions, such as Estonia, Azerbaijan, Armenia, Kazakhstan, Tadjikistan, Turkmenistan, Moldova and Belarus. See VS Vereshtin 'New constitutions and the old problem of the relationship between international law and national law' (1996) 7 *European Journal of International Law* 34; A Peters 'Supremacy lost: International law meets domestic constitutional law' (2009) 3 *International Constitutional Law Journal* 171; GM Danilenko 'Implementation of international law in CIS states: Theory and practice' (1999) 10 *European Journal of International Law* 52-53.

15 Vereshtin (n 14 above) 29-30; GL Neuman 'The use of international law in constitutional interpretation' (2004) 98 *American Journal of International Law* 85.

16 *David Ndungo Maina v Zipporah Wambui Mathara*, Bankruptcy Cause 19 of 2010, http://kenyalaw.org/Downloads_FreeCases/77605.pdf (accessed 8 October 2011).

17 n 16 above 4. See also *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others*, High Court of Kenya at Nairobi, Petition 15 of 2011 6-7; and *Ibrahim Songor Osman v Attorney General & 3 Others*, High Court Constitutional Petition 2 of 2011 8-10, where the High Court affirmed that, since Kenya has ratified ICESCR, it has become part of Kenyan law by dint of art 2(6) of the Constitution.

18 High Court of Kenya at Nairobi, Petition 190 of 2011 para 17.

Further affirmation of the changed situation in relation to the applicability of international law in Kenya after the promulgation of the 2010 Constitution was provided by the Kenyan Court of Appeal in the case of *David Njoroge Macharia v Republic*,¹⁹ and by the Supreme Court of Kenya in the dissenting opinion of Chief Justice Willy Mutunga in the One-Third Gender Representation Advisory Opinion as follows:²⁰

From article 27, and from CEDAW, it is clear that disenfranchisement of the Kenyan women in the political arena is a form of discrimination. CEDAW applies through the operation of Article 2(6) of the Constitution of Kenya, having been acceded to by Kenya on 9th March 1984. These provisions collectively call for the immediate removal of this discrimination through the empowerment of women representation in political office, with CEDAW calling for stop-gap measures to be put in place to reverse the negative effects on our society through the operation of this systemic discrimination.

This direct incorporation of international human rights law into the domestic legal system, as per the 2010 Constitution, is in line with the prevailing jurisprudence of international treaty bodies such as the Committee on Economic, Social and Cultural Rights (CESCR Committee) which, in General Comment 9, has recommended to member states the immediate and direct application of binding international human rights instruments in the domestic legal systems of states so as to enhance the ability of individuals to seek effective, accessible, affordable and timely enforcement of their rights in domestic courts and tribunals.²¹

However, progressive as it may seem, the change in the system of applicability of international law from a system of transformation to a system of incorporation portends great challenges in the implementation of the 2010 Constitution. The lack of clear constitutional safeguards in relation to the interpretation and operationalisation of article 2(6), coupled with the lack of a clear constitutionally-entrenched role for parliament in the treaty-adoption process,²² raises concerns about the limitation of Kenya's sovereignty

19 Criminal Appeal 497 of 2007 15, http://kenyalaw.org/Downloads_FreeCases/81236.pdf (accessed 23 June 2013). See also CEDAW Committee Concluding Observation to Kenya's 7th Periodic Report, 5 April 2011 para 4, where the Committee contends that the promulgation of the 2010 Constitution ensured the immediate domestication of the Convention.

20 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Supreme Court of Kenya, Advisory Opinion Application 2 of 2012 Dissenting Advisory Opinion of Chief Justice Willy Mutunga, para 11.1. The opinion of the Chief Justice is in line with the arguments made by the parties in the case, especially the Centre for Multi-Party Democracy, Kenya Human Rights Commission and Federation of Women Lawyers-Kenya, that by dint of art 2(6) of the Constitution, CEDAW has constitutional force in Kenya; paras 5.7-5.8.

21 CESCR General Comment 9: The domestic application of the Covenant, 3 December 1998, E/C 12/1998/24 para 4, <http://www.unhcr.org/refworld/docid/47a7079d6.html> (accessed 2 June 2013).

22 The 2010 Kenyan Constitution, in art 94(1), vests the legislative authority of the state in parliament, and further provides in sub-art 5 that no person or body has

vis-à-vis international law.²³ These concerns are, however, too broad to be adequately and comprehensively discussed in this article. The main concern of this article is the hierarchy or place of international human rights law in ratified international treaties in relation to other sources of law in the Kenyan domestic legal system. To respond to this main concern, a brief analysis of a few of the jurisdictions with provisions incorporating international law into their domestic legal system is imperative.

3 International law in the United States domestic legal system

The supremacy of international law in the domestic legal system of the United States (US) was affirmed as early as 1804 when the then Chief Justice Marshall, in his interpretation of article VI of the US Constitution,²⁴ held that '[a]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains'.²⁵ This was affirmed by the US Supreme Court in 1895 and 1900 when it held that '[i]nternational law is part of our law, and must be ascertained and administered by the courts of

the power to make law in Kenya, except under authority conferred by the Constitution or legislation. The Kenyan Constitution and the prevailing practice, unlike in the United States and in Colombia, does not require the approval of parliament as a condition precedent before the executive ratifies a treaty, and thus direct application of treaties as law in the Kenyan domestic jurisdiction will be tantamount to legislation by the executive. However, a new law, The Treaty-Making and Ratification Act 45 of 2012, has been developed with a view to plugging this gap, as is discussed more elaborately in sec 5 below.

- 23 Gibson (n 2 above) 614; Slyz (n 2 above) 67, who argues that in monist states, legislatures are circumscribed by international law requirements when making decisions, the executive is obliged to ensure that international law obligations are faithfully realised, and the courts must take into account and give effect to international law in their decisions. A further argument against direct incorporation of international law principles (customary international law) is that such incorporation interferes with democratic governance as no democratically-elected institution evaluates their desirability and acts affirmatively to adopt them. See PR Dubinsky 'International law in the legal system of the United States' (2010) 58 *American Journal of Comparative Law* 464. This cautious approach towards the incorporation of recent international law customs, especially modern international human rights law, was affirmed in 2004 by the US Supreme Court in *Sosa v Alvarez Machain* 542 US 692 (2004).
- 24 Art VI of the US Constitution provides that '[a]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding'. See the Constitution of the United States, <http://constitutioncenter.org/633876696043236250.pdf> (accessed 5 April 2013).
- 25 *Murray v The Schooner Charming Betsy* 6 US (2 Cranch) 64 118 (1804), quoted in H Hongju-Koh 'International law as part of our law' (2004) 98 *American Journal of International Law* 44.

justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination'.²⁶

However, international law jurisprudence in US courts has progressively shifted towards a nationalist leaning.²⁷ Three reasons have been given for this nationalist shift: first, the perceived different nature of international law from, and its potentially pervasive effects on, domestic law; second, the perception that fundamental tenets of the domestic legal order, as enshrined in the Constitution, cannot be altered by a body of law which does not exclusively emanate from a national societal body;²⁸ and, third, an understanding of constitutions as emerging from, espousing and responding to a nation's particular history and traditions.²⁹ This shift has led to the development of the doctrine of self-executing and non-self-executing treaties. The doctrine commenced with the decision of Chief Justice Marshall in the case of *Forser & Elam v Neilson*,³⁰ where he held as follows:

Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the Legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the Judicial Department, and the Legislature must execute the contract before it can become a rule for the Court.

Following on this holding of Chief Justice Marshall, the US courts proceeded to develop criteria for the determination of the self-executing nature of a treaty, which included the following: the purpose of the treaty and the objective of its creators; the circumstances surrounding its execution; the nature of obligations imposed by the agreement; the existence of domestic procedures and institutions appropriate for direct implementation; the availability and feasibility of alternative enforcement methods; and the immediate and

26 See *Hilton v Guyot* 159 US 113 (1895); *The Paquete Habana* 175 US 677 (1900) 700, quoted in Hongju-Koh (n 25 above) 43. See also XF Torrijo 'International and domestic law: Definitely an odd couple' (2008) 77 *Revista Juridica Universidad de Puerto Rico* 485, who affirms that the supremacy clause in the US Constitution allows for the direct incorporation of ratified treaties, making them applicable, in principle, by national courts.

27 A Bianchi 'International law and US courts: The myth of Lohengrin revisited' (2004) 15 *European Journal of International Law* 754; Frank & Thiruvengadam (n 2 above) 471.

28 As above.

29 S Choudhry 'Globalisation in search of justification: Towards a theory of comparative constitutional interpretation' (1999) 74 *Indiana Law Journal* 822, who expounds on the doctrine of 'legal particularism' and 'legal hegemony' as some of the interpretive attitudes militating against the use of international law in the interpretation of constitutional provisions in the US, 830-832.

30 27 US (2 Pet) 253 (1829) 314. For a discussion of the development of this doctrine, see Slyz (n 2 above) 78-80; D Sloss 'Non-self-executing treaties: Exposing a constitutional fallacy' (2002) 36 *University of California Davis Law Review* 1.

long-term implications of self- or non-self-execution.³¹ These criteria were reaffirmed in the Third Restatement of the Foreign Relations Law of the US, which provided the following three conditions, any of which makes a treaty non-self-executing: if it manifests an intention not to be an effective domestic law without implementing legislation; if Congress or the Senate requires implementing legislation; or if the Constitution requires implementing legislation.³²

The development of the doctrine of self-executing treaties signified that for non-self-executing treaty provisions to provide concrete litigable rights to individuals, the US Congress must pass implementing legislation.³³ The US Supreme Court, faced with the question of the status of article 94 of the UN Charter and as a consequence the status of the International Court of Justice (ICJ)'s decision in the *Avena* case,³⁴ decided in *Medellin v Texas* (2008)³⁵ that the *Avena* decision was not self-executing within the US legal system. The Court, in a six-to-three decision, held as follows:³⁶

An ICJ judgment creates legal obligations for the United States under public international law and should be accorded 'respectful consideration' within the US domestic legal system, but is not to be accorded the status of binding law to be applied by US courts in the absence of either implementing legislation or an intent, clearly expressed in the treaty text, for the provision at issue to be incorporated into US law without action by Congress.

Slyz contends that this is a prudent way of avoiding the question of the supremacy of one system of law over the other, as they do not share a common field of application.³⁷ Bianchi, however, disagrees, contending that it detracts from, and waters down, the intended protection envisaged by international human rights and humanitarian law, as was exemplified by the lack of international law protection given to Guantanamo Bay detainees in the context of the so-called war on terror.³⁸

31 See *People of Saipan v United States Department of the Interior* 502 F2d 90 (9th Cir 1974); and *Frolova v USSR* 761 F2d 370 (7th Cir 1985).

32 For a more elaborate discussion of the criteria for the determination of the self-executing or non-self-executing nature of a treaty in the US, see Slyz (n 2 above) 78-80; Frank & Thiruvengadam (n 2 above) 472-474.

33 Slyz (n 2 above) 67-68 78. He gives the example of the US Genocide Convention Implementation Act of 1987 secs 1091-1093, which proscribe the statute from creating any substantive or procedural right enforceable by law by any party in any proceedings; 68 fn 15.

34 *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)*, <http://www.icj-cij.org/docket/files/128/8190.pdf> (accessed 12 April 2013).

35 552 US 491 (2008).

36 Dubinsky (n 23 above) 461.

37 Slyz (n 2 above) 68.

38 Bianchi (n 27 above) 758. He cites the case of *Hamdi v Rumsfeld*, where the 4th Circuit Court held that the Geneva Convention III on Prisoners of War was non-self-executing and could not create enforceable private rights of action in US domestic courts, 764.

On the place of international law in relation to the Constitution and domestic legislation, the US Constitution is the supreme law of the land, and envisages that human rights treaty law provisions inconsistent with the Constitution will not have the force of law in the US.³⁹ On the relationship between federal statutes and international law, the US courts, on the basis of the supremacy of the Constitution, have held that federal statutes and self-executing treaty provisions have equal status as sources of domestic law.⁴⁰ Therefore, in case of a conflict between them, the courts have used the 'last-in-time' doctrine to hold the validity of the subsequent instrument, be it the treaty or the statute.⁴¹ The similarity in hierarchy between self-executing treaties and domestic statutes in the US was aptly captured in the case of *Whitney v Robertson*,⁴² where the Supreme Court held as follows:

By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavour to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing.

A reading of article 2(6) to infuse this type of interpretation in the Kenyan jurisdiction is possible, taking into account article 21(4) of the 2010 Constitution which calls on the state – that is parliament and the executive respectively – to enact and to implement legislation aimed at fulfilling its international human rights obligations.

An interpretation placing international human rights norms in ratified international human rights treaties at the same hierarchical level as national legislation was adopted in the Kenyan High Court case of *Diamond Trust Kenya Ltd v Daniel Mwema Mulwa*,⁴³ a case

39 Bianchi (n 27 above) 780. This position was espoused as early as 1957 in *Reid v Covert* 354 US 1 16-17 (1957), where the Supreme Court stated as follows: '[N]o agreement with a foreign nation can confer power on congress, or any other branch of government, which is free from the restraints of the Constitution ... The prohibitions of the Constitution were designed to apply to all branches of the national government and they cannot be nullified by the executive or the executive and the senate combined.'

40 Slyz (n 2 above) 84; Dubinsky (n 23 above) 458.

41 DL Sloss *et al* (eds) *International law in the US Supreme Court: Continuity and change* (2011) 58. However, to minimise congressional abuse of the 'last-in-time doctrine', US courts have purposed to construe statutes so as not to conflict with international law and have strived to reconcile subsequent statutes with international law (the *Charming Betsy* rule of statutory construction). Thus, in *United States v Palestinian Liberation Organisation* 695 F Supp 1456 (SDNY 1988), the Court held that 'in order for a subsequent statute to supersede a treaty, the explicit purpose of the statute must be to supersede the treaty' (1459). See also Bianchi (n 27 above) 761-763.

42 124 US 190 (1887).

43 (2010) eKLR, quoted in *Beatrice Wanjiku & Another v The Attorney-General* (n 18 above) para 16.

which concerned the constitutionality of a provision of the Civil Procedure Act of Kenya which permitted the comital of a judgment debtor to civil jail contrary to article 11 of ICCPR, which was incorporated into Kenyan law through article 2(6) of the Constitution. In dealing with the issue of the hierarchy of international human rights norms in ratified international human rights instruments *vis-à-vis* national legislation, the Court held as follows:

We have in this country a three tier hierarchy of the law. At the apex is the Constitution of Kenya, which is the supreme law of the land, to which all other laws are subservient. Next in rank are Acts of Parliament, followed by subsidiary legislation at the bottom of the pile. The Civil Procedure Act is an Act of Parliament which provides for procedure in Civil Courts. Section 40 thereof makes provision for the arrest and detention of judgment debtors ... To the extent that this Section provides for the arrest and detention of a judgment-debtor, it is clearly in conflict with Article 11 of the [ICCPR]. The two are contradictory. This raises several issues. Can the two provisions co-exist? If so, how can they operate side by side? And if any cannot co-exist, which of them should take precedence over the other? In my view, article 11 of the [ICCPR] cannot rank *pari passu* with the Constitution. The highest rank it can possibly enjoy is that of an Act of Parliament. And even if it ranks in parity with an Act of Parliament, it cannot oust the application of section 40 of the Civil Procedure Act. Nor for that matter, can it render section 40 unconstitutional. For that reason for as long as section 40 remains in the statute book, it is not unconstitutional for a judgment-debtor to be committed to a civil jail upon his failure to pay his debts. Since, however, section 40 is at variance with the provisions of an International Convention which is part of the law of Kenya, it follows that we now have two conflicting laws, none of which is superior to the other.

Despite the Court holding that international human rights norms were in parity with national legislation, it failed to adopt the last-in-time doctrine, as has been adopted in the United States, a doctrine which would have ensured that the international human rights norms contained in ICCPR override the provisions of the Civil Procedure Act due to the fact that ICCPR was incorporated into the Kenyan domestic legal system at a later date via article 2(6) of the Constitution. An adoption of the last-in-time doctrine also would have ensured that the Court does not abdicate its responsibility as the protector of the fundamental rights in the Constitution by contending as follows:⁴⁴

In the spirit of the new constitutional order, it is more likely than not that Kenyans would prefer a system in which there is no threat of civil jails. Until a decision is taken at a proper forum, section 40 of the Civil Procedure Act will continue to haunt the liberal freedoms enshrined in the Constitution until it is repealed or found to be unconstitutional at a proper forum.

The viability of the continued application of this approach in the interpretation of article 2(6) of the Kenyan Constitution is discussed more elaborately in part 5 below.

44 As above. This holding by the Court begs the question of which other forum is better placed to declare the unconstitutionality of legislative provisions that violate the fundamental rights of individuals and groups than the court itself.

4 International law in the Colombian domestic legal system

Colombia, a country with a similar constitutional provision incorporating international law directly into the domestic legal system, provides a different practice to the US in relation to the applicability of international law in the domestic legal system. Monism has been entrenched in the Colombian constitutional jurisprudence as far back as 1914, with the Supreme Court of Colombia insisting that in instances of conflict between treaty provisions and provisions of municipal law, treaty provisions prevailed.⁴⁵ The import of this decision was affirmed by Nagle who, in his analysis of the decision, contended that once ratified, international law in treaties were superior to domestic law and that in instances of conflict, domestic law had to yield to international law.⁴⁶ He contended that the import of the 1914 decision was that 'the domestic law of Colombia, including the Constitution, was subject to the terms and conditions of international treaties'. This is still the prevailing situation after the adoption of the 1991 Constitution, which in article 93 provides as follows:

International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically.

The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia.

An interpretation of article 93 affirming the supremacy of international human rights law in the Colombian domestic jurisdiction was delivered in 2010 by the Constitutional Court of Colombia (CCC).⁴⁷ In its commentary on *Decision C-376/10*, the International Network for Economic, Social and Cultural Rights (ESCR-Net) contends that the decision is significant as it (the decision) 'restates that human rights treaties and comments by [human rights treaty] bodies regarding

45 Challenge to the Constitutionality of Law 14 of 1914, decision of 6 July 1914, 23 *Gaceta Judicial* (1915), analysed in Gibson (n 2 above) 614-615.

46 LE Nagle 'The rule of law or the rule of fear: Some thoughts on Colombian extradition' (1991) 13 *Loyola of Los Angeles International and Comparative Law Journal* 862-863

47 *Decision C-376/10* (in Spanish) http://www.escr-net.org/usr_doc/C-376_10_in_spanish.pdf (accessed 6 April 2013). In arriving at its decision, the Court used a plethora of international legal instruments such as the Universal Declaration, art 26; ICESCR, art 13; the Protocol of San Salvador, art 13; and ESCR Committee General Comments 11 & 13; see ESCR Committee Justice, Monthly Case Law Update 'Colombian Constitutional Court issues a landmark decision on the right to education' (November 2010) <http://www.agirpourlesdesc.org/english/esc-rights-caselaw/article/colombian-constitutional-court> (accessed 6 April 2013).

[SERs] are part of the Colombian legal system and, within it, have a superior standing compared with the remaining regulations'.⁴⁸

A further elaboration of this expansive use of international law in Colombia is exemplified by Decision C-355/2006 of the CCC which dealt with women's rights to reproductive health and especially the right to abortion. In her analysis of this case, Ordolis chronicles the broad use of international human rights law, and an affirmation by the Court that since women's sexual and reproductive rights had been recognised as human rights under international law, they as such became part of Colombian constitutional rights.⁴⁹ She argues that the Court's reliance not only on international human rights law instruments,⁵⁰ but other soft law instruments,⁵¹ enabled it to espouse a progressive approach to reproductive rights. These instruments formed the basis for the recognition and protection of women's reproductive health rights by the Court.⁵²

Olaya, in analysing the health rights jurisprudence of the CCC, furthermore contends that the Court has developed the notion of 'constitutional blocks' which entails the incorporation of norms, standards and principles espoused in ratified international human rights instruments, and even interpretive documents issued by international human rights-monitoring bodies, when reviewing the constitutionality of laws or when interpreting fundamental rights.⁵³ This has been affirmed by Chowdhury, who submits that international human rights treaties ratified by Colombia are at the same level as the Colombian Constitution with regard to the hierarchy of sources of law, and that the provisions of ICESCR must be used when interpreting the relevant articles of the Constitution.⁵⁴

Taking into account the plain reading of article 2(6) of the 2010 Kenyan Constitution, an interpretation that harmonises national and international human rights law is possible in the Kenyan context. The

48 ESR-Net 'Decision C-376/10 of the Colombian Constitutional Court' http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=1407210 (accessed 6 April 2013).

49 E Ordolis 'Lessons from Colombia: Abortion, equality and constitutional choices' (2008) 20 *Canadian Journal of Women and the Law* 267.

50 Instruments relied on include the Universal Declaration; ICCPR; ICESCR; CEDAW; the American Convention on Human Rights; and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention Belem do Para). See Ordolis (n 49 above) 267.

51 The Court used the definition of reproductive health adopted in the 1994 UN International Conference on Population and Development (ICPD). See Ordolis (n 49 above) 268.

52 Ordolis 68.

53 MA Olaya 'The right to health as a fundamental and judicially-enforceable right in Colombia' (2009) 10 *ESR Review* 16-17, http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/esr_review (accessed 2 April 2013).

54 J Chowdhury 'Judicial adherence to a minimum core approach to socio-economic rights – A comparative perspective' (2009) *Cornell Law School Inter-University Graduate Student Conference Papers*, Paper 27 8, http://scholarship.law.cornell.edu/lps_clacp/27 (accessed 2 April 2013).

next part of this article thus proposes an interpretation that should be given to article 2(6) taking into account the two differing practices of the US and the Colombian domestic systems.

5 Proposed hierarchy of international law in the Kenyan legal system

As indicated by the comparative analysis of the US and Colombia above, countries with constitutional provisions directly incorporating international human rights law into their domestic legal systems have adopted varying interpretations of those provisions; with the result that international human rights law is accorded a different hierarchical status *vis-à-vis* domestic law, depending on the interpretation adopted. As we saw in part 3 above, the US, due to its nationalist leaning, has progressively given more prominence to its domestic law at the expense of international human rights law with the adoption of the self-executing and non-self-executing doctrine to the direct application of treaties, and has further placed treaties at hierarchically the same level as domestic legislation. This has led to the application of the last-in-time doctrine, with the result that the subsequent instrument supersedes the previous one, be it a self-executing treaty or domestic legislation. This 'American exceptionalism' in relation to international human rights law norms and standards has generally detracted from the comprehensive human rights protection and accountability standards that have been set at the international level, with the result that the rights of individuals are more easily violated, as was the case with the rights of the war-on-terror detainees in Guantanamo Bay.⁵⁵ It is submitted that, if the international human rights norms and standards contained in ratified international human rights treaties are to enhance the protection of the rights and fundamental freedoms of the Kenyan people, this restricted application of international human rights law norms should not be adopted in the Kenyan domestic legal system.

Colombia, on the other hand, as shown in part 4 above, has chosen to give prominence to international human rights law in its domestic legal jurisdiction, with some commentators contending that international human rights law is at the same level as the Colombian Constitution and that the interpretation of the Constitution must thus take into account the norms and principles of international human rights law.⁵⁶ As a result, the Colombian courts have been more willing

55 The ability of the US approach to erode the protection of rights and fundamental freedoms is seen in the US's practice of entering reservations and declarations during its ratification of ICCPR, the Convention on the Prevention and Punishment of Genocide, the Convention against Torture and the Convention on Racial Discrimination, to the effect that these important international human rights instruments were non-self-executing in US domestic law. See Franck & Thiruvengadam (n 2 above) 473.

56 See Chowdhury (n 54 above) 8; Nagle (n 46 above) 863.

to accept international human rights law as a prominent source of legal obligations, especially in the adjudication of human rights violations, providing a proper accountability mechanism to ensure that the political institutions of the state fulfil Colombia's internal and external obligations emanating from binding international human rights law. It is this prominent application of international human rights law in the domestic legal system that Kenya should aspire to, and it should thus adopt a progressive interpretation of the constitutional provisions directly incorporating international law in Kenya's domestic legal system in such a manner that international human rights law can enhance government accountability regarding the respect, protection, promotion and fulfilment of human rights and fundamental freedoms at the domestic level.

There are several possibilities of how article 2(6) of the 2010 Constitution can be interpreted so as to accord a prominent status to international human rights law in the Kenyan domestic jurisdiction.⁵⁷ Due to time and space constraints, only three of the interpretive possibilities will be considered in this article: first, an interpretation that gives international human rights law norms a constitutional hierarchy; secondly, an interpretation that gives international human rights law norms an infra-constitutional and infra-legal hierarchy; and thirdly, an interpretation that gives international human rights law norms an infra-constitutional but supra-legal hierarchy.

The first possibility is the interpretation that gives international human rights law a constitutional hierarchy, that is, an interpretation placing international human rights law at the same level as the other constitutional provisions.⁵⁸ This first possibility is supported by Peters, who provides two arguments as to why international human rights law must be placed at the same hierarchical level as the provisions of

57 Even though only these two positions are considered as viable in the Kenyan context, international law can also have a higher status than all national legislative Acts, including the Constitution, or it may have an equal hierarchical status to national legislative Acts, or even have a lower status than both the Constitution and national legislative Acts. For a discussion of these possibilities, see Viljoen (n 2 above) 525-527.

58 For a comparative argument in support of this proposal, see Danilenko (n 14 above) 64, who submits, taking into account the debate on the interpretation of art 17 of the Russian Constitution, that international law has the same status as constitutional provisions in Russia. This is the position in Argentina, whose Constitution in art 75 also provides clearly that some ratified international treaties (especially most of the international human rights law treaties) are at the same level as the Constitution and should be considered as complementary to the rights in the Constitution. Commenting on art 75 of the Argentinian Constitution, the UN Housing Rights Programme Report emphasises the importance of giving international law a prominent role at the national level, especially in the interpretation, implementation as well as enforcement of fundamental human rights, and encourages the inclusion of such clauses into the constitutional frameworks of other countries. See UN Housing Rights Programme Report 1, *Housing rights legislation: Review of international and national legal instruments* (2002) 39-40, <http://www.ohchr.org/Documents/Publications/HousingRightsen.pdf> (accessed 19 April 2013). See also Franck & Thiruvengadam (n 2 above) 513-514; Torrijo (n 26 above) 491.

national constitutions. First, she argues for the abandoning of a formal hierarchy between constitutional provisions and international human rights law provisions by stating that, due to the increasing permeability and convergence of state constitutions (constitutional cross-pollination) resulting in vertical and horizontal harmonisation (that is, with international law and with other state constitutions respectively), it matters little whether a court applies a domestic fundamental right or an international human rights provision, because both sets of norms tend to acquire the same content and scope.⁵⁹ She thus calls for the adoption of a 'substance-oriented perspective' where norms are ranked in accordance with their substantive weight and significance, with less significant state constitutional provisions giving way to important international human rights norms in instances of conflict.⁶⁰ Second, she argues that '[i]n a strictly legal positivist and schematic perspective, a hierarchically inferior norm cannot have an impact on the reading of a higher norm'.⁶¹ She contends that in accordance with this understanding, the idea of the supremacy of domestic constitutional law over international law is irreconcilable with the requirement that national constitutions must be interpreted in conformity with international human rights law.⁶² Therefore, for international human rights law to have the desired effect and impact on the development of national constitutional and domestic law, it must of necessity be ranked at the same level as constitutional provisions.

An argument adopting this first approach was advanced by a petitioner and adopted by the High Court of Kenya in *Re – The Matter*

59 Peters (n 14 above) 197. This is the doctrine espoused by the universalist model of constitutional interpretation through the use of comparative international and foreign law sources, which provides that constitutional guarantees are cut from a universal cloth and constitutional interpretation is an engagement in the identification, construction and application of the same set of principles. See Choudhry (n 29 above) 833; DM Beatty 'Law and politics' (1996) 44 *American Journal of Comparative Law* 131; RF Oppong 'Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa' (2007) 30 *Fordham International Law Journal* 299, who argues that with the convergence of interests protected by both national and international law, that is, the securing of the well-being of individuals, it is practically inappropriate to isolate national and international law; and C L'Heureux-Dube 'The importance of dialogue: Globalisation and the international impact of the Rehnquist Court' (1998-1999) 34 *Tulsa Law Journal* 24, who avers that since human rights law, national and international, is cut from the same cloth and is drawn from similar earlier documents, it makes sense for judges to engage with the expertise, experience and reasoning of interpreters of similar documents from other jurisdictions.

60 Peters (n 14 above) 197.

61 Peters (n 14 above) 181.

62 Peters 177-178. She gives the examples of the 1976 Portuguese Constitution, art 16(2); the 1978 Spanish Constitution, art 10(2); and the 1991 Romanian Constitution, art 20(1), as those constitutions which require that their provisions are interpreted in conformity with international law. See also K Young *Constituting economic and social rights* (2012) 23, who similarly contends that domestic constitutional rights must be interpreted compatibly with international human rights law.

of *Zipporah Wambui Mathara*.⁶³ The petitioners argued that article 2, of which article 2(6) is a part, not only provides for the supremacy of the Constitution, but also provides for the hierarchy and sources of law in Kenya, thus incorporating international treaties ratified by Kenya into the Kenyan domestic system as sources of law.⁶⁴ The petitioners went on to argue that, due to the hierarchy of laws created under article 2, the Constitution with its incorporation of ratified international law treaties as sources of law in Kenya was supreme, and that the provisions of the Civil Procedure Act, which permitted the committal of civil debtors to jail, were against the spirit of the Constitution and of international human rights law as contained in article 11 of ICCPR.⁶⁵ In deciding the case, the Court held as follows:⁶⁶

Principally I agree with counsel for the Debtor that by virtue of the provisions of Section 2(6) of the Constitution of Kenya 2010, International Treaties and Conventions that Kenya has ratified are imported as part of the sources of the Kenyan Law. Thus the provision of Article 11 of the [ICCPR] which Kenya ratified on 1st May 1972 is part of the Kenyan law. This covenant makes provision for the promotion and protection of human rights and recognises that individuals are entitled to basic freedoms to seek ways and means of bettering themselves. It obviously goes without saying that a party who is deprived of their basic freedom by way of enforcement of a civil debt through imprisonment, their ability to move and even seek ways and means of repaying the debt is curtailed ... An order of imprisonment in civil jail is meant to punish, humiliate and subject the debtor to shame and indignity due to failure to pay a civil debt. That goes against the [ICCPR] that guarantee parties basic freedoms of movement and of pursuing economic social and cultural development.

In this case, the Court gave constitutional force to international human rights law norms contained in ratified international human rights treaties as per article 2(6) of the Constitution, a reading of the *Mathara* case that was affirmed by the High Court in the case of *Beatrice Wanjiku & Another v The Attorney-General & Another* as follows.⁶⁷

Justice Koome seemed to suggest that the provisions of the Civil Procedure Act and Rules were subject to ICCPR and that they could be invalidated on that basis that they were inconsistent with its provisions.

A similar argument on the constitutional hierarchy of ratified international human rights law norms was also made by the Centre for Multi-Party Democracy (CMD) and other interested parties in the Supreme Court of Kenya in relation to the interpretation of the one-third gender rule entrenched in articles 27(6) and 27(8) of the 2010 Kenyan Constitution.⁶⁸ Although the Supreme Court went ahead to rely on international human rights law norms in both the majority

63 *Mathara* (n 16 above).

64 *Mathara* para 3.

65 *Mathara* para 4.

66 *Mathara* paras 9-10.

67 *Beatrice Wanjiku & Another v The Attorney-General* (n 18 above) para 15.

opinion and the dissenting opinion of the Chief Justice, they did not make any pronouncement with regard to the hierarchical place of international human rights law in the Kenyan domestic legal system.

Despite the illuminating arguments by Peters, the High Court pronouncement in the Mathara case and the proposition by CMD that international human rights law norms have constitutional force in Kenya due to their constitutional entrenchment in article 2(6), the interpretation placing international human rights law at the same hierarchical status as the constitutional provisions may not be very viable in the Kenyan domestic legal system due to the supremacy clause of the Constitution, as is shown more elaborately in the discussion of the third possibility of interpretation below.

The second possible interpretation is that of placing international human rights law norms at an infra-constitutional and infra-legal hierarchical position, that is, human rights norms in ratified international treaties being below both constitutional norms and national legislation. This is the approach that was adopted in the Kenyan High Court case of *Beatrice Wanjiku & Another v The Attorney-General & Another* as follows:⁶⁹

I take the position that the use of the phrase 'under this Constitution' as used in Article 2(6) means that the international conventions and treaties are 'subordinate' to and ought to be in compliance with the Constitution. Although it is generally expected that the government through its executive ratifies international instruments in good faith on the behalf of and in the best interests of the citizens, I do not think the framers of the Constitution would have intended that international conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives under the provisions of Article 94. Article 1 places a premium on the sovereignty of the people to be exercised through democratically elected representatives and a contrary interpretation would put the executive in a position where it directly usurps legislative authority through treaties thereby undermining the doctrine of separation of powers which is part of our Constitutional set up.

The view adopted by the judge in the *Wanjiku* case above is *per incuriam* as it is not supported by the judge's engagement with any comparative national or international judicial jurisprudence or based on the writings of any national or international commentator on the hierarchy of international human rights law in national jurisdictions. Reliance on the sovereignty of the people argument in article 1 of the Constitution has also been overtaken by events and cannot stand due to the adoption of the Treaty-Making and Ratification Act, 2012, which provides a clear role for parliament as well as the people generally, though the requirement of public participation in the treaty

68 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*, Supreme Court of Kenya, Advisory Opinion Application 2 of 2012, para 42; Dissenting Opinion of the Chief Justice Willy Mutunga (n 20 above) paras 5.7-5.8.

69 *Beatrice Wanjiku & Another v The Attorney-General* (n 18 above) para 20.

ratification process, to oversee the ratification of treaties, as is discussed more elaborately below.

It is submitted here that the adoption of this approach does not change the position and the function of international human rights law norms as was envisaged by the drafters of the 2010 Constitution.⁷⁰ In fact, it provides for retrogressive application of international human rights law in the Kenyan domestic legal system as, prior to the adoption of the 2010 Constitution, ratified and domesticated international human rights treaties shared a similar hierarchical status to national legislation, and not a lower status as is envisaged by the Court's infra-legislative interpretation in the *Wanjiku* case.⁷¹ The protection of human rights and fundamental freedoms enshrined in international human rights norms is the basic minimum protection that should be accorded to human beings if they are to live as human beings. International human rights law envisages and does not prohibit higher standards of human rights protection that are adopted at national levels for the protection of human rights and fundamental freedoms of individuals and groups. What it prohibits is the adoption of national legislative and other measures that detract from the basic protection that should be accorded to individuals and groups at the national level. States are thus not limited by international human rights standards if they want to adopt more progressive protective national measures for the realisation of human rights. In adopting an interpretation that places international human rights norms contained in ratified international human rights treaties at a hierarchically-lower position than national legislation, the judge in the *Wanjiku* case permits the legislative adoption of retrogressive national measures that go below the basic level of human rights protection espoused in international human rights law. This standard, which is lower than the restrictive standard adopted in the US, a state which places international human rights law at the same level as national legislation, should not be adopted in Kenya as it has the potential to lower the standard of protection of human rights and fundamental freedoms envisaged in the 2010 Constitution.

The third possibility, and which is the favoured interpretive choice in this article, is an interpretation that gives international law a hierarchical status slightly lower than the constitutional provisions, but

70 For arguments on the importance of international human rights law in the Kenyan domestic legal system, see the arguments in the texts accompanying nn 87-91 below.

71 See D Shelton 'Introduction' in D Shelton (ed) *International law and domestic legal systems: Incorporation, transformation and persuasion* (2011) 5, who affirms that most dualist common law states, as Kenya was prior to the enactment of the 2010 Constitution, generally rank ratified treaties as equivalent to domestic legislation. See also Franck & Thiruvengadam (n 2 above) 476 477-478, who affirm, in relation to Germany, that since incorporation of international treaties in Germany takes place through federal legislation, treaties in German law are equivalent in rank to federal statutes. They further note that despite this equality of rank, the courts in Germany and Italy have in practice purposed to uphold treaties even in instances of contradictory subsequent federal legislation.

superior to domestic legislation (infra-constitutional but supra-legal hierarchy) in the new constitutional dispensation.⁷² This is due to the supremacy clause in the 2010 Constitution which not only provides in article 2(1) that it is the supreme law of the land binding on all persons and all state organs, but also provides that its validity is not subject to any challenge, and that any other law, custom, act or omission inconsistent with the Constitution is void to the extent of the inconsistency, as per articles 2(3) and (4).⁷³ It is submitted that, taking into account a holistic reading of article 2 of the Constitution, in incorporating international law as part of Kenyan law in article 2(6) within the supremacy clause, the drafters intended that international law, as long as it is consistent with the purport, spirit and the provisions of the Constitution,⁷⁴ should have a prominent place in the Kenyan domestic legal system.

The requirement that international law contained in treaties must be compatible with the Constitution if they are to have direct application in the Kenyan domestic legal system can be drawn from article 2(6) itself, which provides that treaties form part of the laws of Kenya 'under this Constitution'. The phrase 'under this Constitution' can be interpreted as a requirement that a proper constitutional analysis be undertaken before the ratification of a treaty to ensure that it is in compliance with the Constitution and that the processes leading to the ratification of a treaty must be accomplished in accordance with the Constitution.⁷⁵ This interpretation is supported by the arguments of Korenika and Doli who, writing in the context of

72 See T Kabau & C Njoroge 'The application of international law in Kenya under the 2010 Constitution: Critical issues in the harmonisation of the legal system' (2011) 44 *Comparative and International Law Journal of Southern Africa* 302-303. Some of the comparative jurisdictions that have an infraconstitutional but supralegal hierarchy of international law *vis-à-vis* domestic legislation include France (as well as the francophone African countries who have directly replicated art 55 of the 1958 French Constitution), Japan, China, Albania and Cape Verde. The jurisdictions in which international law and domestic legislation have equal status include the US, Germany, Italy and India. For an elaborate discussion of these jurisdictions, see Frank & Thiruvengadam (n 2 above) 471-489; Viljoen (n 2 above) 518-522; Killander & Adjolahoun (n 2 above) 5-7; Oppong (n 59 above) 322-323; and F Korenika & D Doli 'The relationship between international treaties and domestic law: A view from Albanian constitutional law and practice' (2012) 24 *Pace International Law Review* 103.

73 Kabau & Njoroge (n 72 above) 294 298-300.

74 See eg JH Jackson 'Status of treaties in domestic legal systems: A policy analysis' (1992) 86 *American Journal of International Law* 317, who contends that there is a possibility that a treaty binding under international law may be invalid under the constitution of a state if it conflicts with the provisions of the domestic constitution. In such instances, the treaty cannot have a direct application and will be invalid to the extent of its inconsistency with the domestic constitution. He further argues that for the issue of the hierarchy of norms to surface in relation to treaty law, it must first be determined that the treaty is valid both internationally and domestically (not inconsistent with the constitution), must be directly applicable (reliance on the treaty provisions by the courts and other government institutions as a source of law) as well as invocable by parties in litigation (318).

75 See *Beatrice Wanjiku & Another v The Attorney-General* (n 18 above) para 20, where the Court held that 'the phrase "under this Constitution" as used in article 2(6)

the Albanian Constitution, contend that for treaties to have direct application, they must be constitutional, and that an *a priori* process of analysis of the constitutionality of the treaty is undertaken by the Albanian Constitutional Court before the ratification of the treaty in question.⁷⁶ Although the 2010 Kenyan Constitution has no express provision requiring *a priori* review of treaties for constitutionality, a similar procedure has been developed through the adoption of the Treaty-Making and Ratification Act 45 of 2012, an Act of Parliament adopted to give effect to article 2(6) of the Constitution in relation to the procedure for the making and ratification of treaties.⁷⁷ The Act entrusts the general responsibility for the initiation, negotiation and ratification of treaties on the executive arm of government.⁷⁸ The Act in Part III envisions the *a priori* approval by both the cabinet and parliament before a treaty is ratified, requiring the drafting of a memorandum to the cabinet, and subsequently to parliament after the approval of the cabinet, on the objectives and the subject matter of the treaty.⁷⁹ The memorandum submitted to the cabinet and subsequently to parliament must contain a detailed explanation of the following important requirements:⁸⁰

- (a) the objects and subject matter of the treaty;
- (b) any constitutional implications including -
 - (i) any proposed amendment to the Constitution; and
 - (ii) that the treaty is consistent with the Constitution and promotes constitutional values and objectives;
- (c) the national interests which may be affected by the ratification of the treaty;
- (d) obligations imposed on Kenya by the treaty;
- (e) requirements for implementation of the treaty;
- (f) policy and legislative considerations;
- (g) financial implications;
- (h) ministerial responsibility;
- (i) implications on matters relating to counties;
- (j) the summary of the process leading to the adoption of the treaty;
- (k) the date of signature;
- (l) the number of states that are party to the treaty;
- (m) the views of the public on the ratification of the treaty;
- (n) whether the treaty sought to be ratified permits reservations and any recommendations on reservations and declarations;
- (o) the proposed text of any reservations that should be entered when ratifying the treaty in order to protect or advance national interests or ensure conformity with the Constitution; and
- (p) whether expenditure of public funds will be incurred in implementing the treaty and an estimate, where possible, of the expenditure.

The Act further requires public participation in the ratification of treaties, demanding that the relevant parliamentary committees

means that the international conventions and treaties are "subordinate" to and ought to be in compliance with the Constitution'.

76 Korenika & Doli (n 72 above) 110-117.

77 <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads> (accessed 5 October 2013).

78 The Treaty Making and Ratification Act, Part II, secs 4-6.

79 The Treaty Making and Ratification Act, secs 7-9.

80 The Treaty Making and Ratification Act, sec 7.

involve the public in the ratification process in accordance with the laid-down parliamentary procedures.⁸¹ It requires parliament not to approve the ratification of any treaty which is contrary to the Constitution or any reservations to a treaty which negate any of the provisions of the Constitution.⁸² The Act also places these safeguards when the state is seeking to denounce or withdraw from a treaty.⁸³ The practice of *a priori* review of the constitutionality of a treaty by the legislature has taken root in many of the countries with constitutional provisions requiring the direct incorporation of ratified treaties into the domestic legal system, such as in Namibia,⁸⁴ the US, Germany, Italy, Japan, France, China⁸⁵ and Colombia.⁸⁶

The direct application of international human rights law in the Kenyan domestic legal system, together with the proposal that international human rights law norms should have a supra-legal status in Kenya, are aimed at ensuring that important democratic governance standards as well as human rights and fundamental freedoms contained in international law are sufficiently entrenched in the Kenyan domestic legal system, and are not left to the whims of the ruling majority of the day to change at their own convenience through legislative amendments.⁸⁷ This reasoning is supported by the 2010 Constitution in articles 255 to 257, which pinpoint the supremacy clause as one of the clauses that can only be changed through a referendum, and not by a simple majority in parliament. In this way, the drafters of the Constitution intended to safeguard the democratic and fundamental rights protection gains that were won in the struggle for constitutional change and to preclude a relapse to totalitarian rule.⁸⁸ Slaughter and Burke-White outline some of the ways in which international human rights law can enhance democratic governance and improve the respect for as well as the

81 The Treaty Making and Ratification Act, sec 8(3).

82 Sec 8(9).

83 Sec 17.

84 The 1990 Namibian Constitution, art 63(2)(e), which provides that '[t]he National Assembly of Namibia shall agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of article 32(3)(e) hereof'. This article has been interpreted as requiring that for international law contained in treaties to be binding on Namibia externally and internally, it must be approved by parliament. See Tshosha (n 13 above) 19-21.

85 See Frank & Thiruvengadam (n 2 above) 471-489.

86 See Nagle (n 46 above) 859-861.

87 The importance of a strong incorporation of international law in the domestic legal system is also affirmed in the context of Russia, where it is argued that it is a part of a general policy of enhancing the rule of law, democracy and the respect for human rights and fundamental freedoms. See Franck & Thiruvengadam (n 2 above) 506-507.

88 Torrijo (n 26 above) 491, who avers that '[d]omestic legislation should not be allowed to untie what has been tied through the incorporation of international law into domestic law', and that to achieve this, international law should be placed beyond the reach of domestic law; Jackson (n 74 above) 322-323 331. He contends that '[i]f citizens of a nation have a higher degree of trust in the international institutions and treaties than they do in their own governmental structures, they will prefer [directly applicable international norms with higher

protection of human rights, which include the following:⁸⁹ First, it helps in the strengthening of domestic institutions through the formalisation and inclusion of 'government networks' as mechanisms of global governance so as to enhance accountability and effectiveness at the national level; secondly, it provides a mechanism for the backstopping of national governments in instances of their unwillingness or failure to act through international law rules and principles such as the international criminal law duty to prosecute or extradite (*aut dedere aut judicare*), the complementarity principle enshrined in the Rome Statute establishing the International Criminal Court, as well as the requirement that national remedies be available and effective for the principle of the exhaustion of local remedies to be applicable in filing individual communications in international treaty-monitoring bodies;⁹⁰ and, thirdly, it can serve as a mechanism for the compelling of national governments to act to address new transnational threats through the enactment of national legislation domestically criminalising certain transnational acts such as terrorism, money laundering and piracy.⁹¹

Therefore Kenya, in its effort to respect, protect, promote and fulfil the fundamental human rights and freedoms of the people, must not only take into account its constitutional human rights obligations, but must also enforce its international human rights obligations as entrenched in ratified international legal instruments. Kenyan courts are thus under an obligation to take judicial notice of international human rights norms in ratified treaties as legitimate and prominent sources of law in the Kenyan domestic jurisdiction. As Kenya already has an extensive constitutionally-entrenched catalogue of human rights based on generally-recognised international human rights standards, the practice should be that in litigation for the vindication of human rights violations, the litigants should primarily premise their

status than national legislative norms] as a conscious or implicit check on their government. Thus, it is entirely understandable that some persons in recently autocratic countries might favour an international regime to protect human rights' (332). This adequately summarises the Kenyan situation and supports the constitutionalisation as well as the prominent status given to international law in the 2010 Constitution. See also D Shelton (n 71 above) 2, who affirms that due to the post-war emphasis on human rights and democratic governance, international law has been given a prominent status in domestic legal jurisdictions as a form of 'international safety net'.

89 AM Slaughter & W Burke-White 'The future of international law is domestic (or the European way of law)' (2006) 47 *Harvard International Law Journal* 333-346.

90 The importance of the backstopping role is twofold: first, to provide a second line of defence when national institutions fail and, secondly, the ability of the international process to catalyse action at the national level. See Slaughter & Burke-White (n 89 above) 341-342.

91 A case in point is the United Nations Security Council Resolution 1373; the International Convention for the Suppression of the Financing of Terrorism; and the International Convention for the Suppression of Terrorist Bombing, which, in an effort to combat global terrorism, require states to enact legislation criminalising the financing of terrorism, the freezing of terrorists' assets by national authorities and the use of domestic courts to bring to justice individuals involved in terrorist acts. See Slaughter & Burke-White (n 89 above) 344-345.

case on the constitutional provisions relevant to their case, and should only use international human rights law to support their arguments based on the violation of their constitutional rights. In adjudicating on such cases, courts must take into account the relevant international human rights law provisions as well as the relevant interpretive devices that have been developed in relation to the relevant international human rights law norms, such as the general comments of the relevant treaty bodies, international guidelines dealing with the issue at hand, and other soft law materials from the relevant international treaty bodies.⁹² This will ensure that there is a harmonised development of the entrenched constitutional rights in line with international human rights law, as well as an enhanced fulfilment of both the constitutional and the international human rights obligations of the state. However, in instances of a real gap in the domestic constitutional provisions, international human rights law norms should be applied directly to cover the deficit.

In the interpretation of domestic legislative Acts, taking into account the superior hierarchical status of international human rights law *vis-à-vis* domestic legislation as proposed above, the courts must interpret domestic legislation to ensure their conformity with international human rights law. As such, in instances of a conflict between national domestic legislation and international human rights law norms, the courts should resort to the use of the *Charming Betsy* doctrine of constitutional interpretation, discussed in part 3 note 42 above, and interpret the domestic legislation, as far as possible, to conform to international human rights standards, failing which international human rights law norms should triumph.⁹³

6 Conclusion

Prior to the promulgation of the 2010 Kenyan Constitution, the use of international law in the Kenyan domestic legal jurisdiction was limited as Kenya followed the dualist system of transformation of treaties into the domestic legal system through the enactment of domesticating

92 See Kabau & Njoroge (n 72 above) 300-301; Danilenko (n 14 above) 62.

93 The Kenyan courts can also benefit from the experience of the Russian Constitutional Court in its use of international law in the interpretation of constitutional and other domestic laws, such as *Case Concerning Certain Normative Acts of the City of Moscow and Some Other Regions*, VKS 1996 2 42, where the Court held that art 17 of the 1993 Russian Constitution recognises and guarantees human rights in accordance with the general principles and norms of international law, and emphasised that the right to freedom of movement is not only guaranteed by the Constitution, but also by ICCPR, art 12, and other international human rights instruments, including art 2 of Protocol 4 to the European Convention on Human Rights. For more such Russian cases, see Danilenko (n 14 above) 57-59 68; GM Danilenko 'The new Russian Constitution and international law' (1994) 88 *American Journal of International Law* 451; J Henderson 'Reference to international law in decided cases of the first Russian Constitutional Court' in R Mullerson *et al* (eds) *Constitutional reforms and international law in Central and Eastern Europe* (1998) 59.

legislation. However, with the promulgation of the Constitution, the system of transformation has been replaced by a system of direct incorporation, where international human rights law norms in ratified treaties are expected to form an integral part of sources of law in Kenya as per article 2(6) of the Constitution.

This article has proposed that, in order to give international human rights law a prominent place in the Kenyan legal system and to ensure domestic accountability for the realisation of Kenya's international human rights obligations, article 2(6) of the Constitution must be interpreted in a progressive manner to give international human rights law a higher status hierarchically as compared to domestic legislative Acts. To achieve this, it has been proposed that Kenya adopts an interpretation that accords international human rights law norms an infra-constitutional but supra-legal hierarchical status in the Kenyan domestic system. This will mean that, for international human rights law to be applicable directly in the Kenyan domestic jurisdiction, it must be compatible with the Constitution, which is the supreme law of the land. In relation to the interpretation of national legislative Acts, the proposal that international human rights law norms be accorded a supra-legal status means that international human rights law will be superior to these national legislative Acts, and that should there be any irreconcilable conflict between them, international human rights law norms would prevail. In this way, the human rights and fundamental freedoms as well as the democratic and good governance standards enshrined in international human rights law will be safeguarded from the whims of the prevailing parliamentary majorities, with a strong international human rights law buffer to guard against relapse to totalitarian rule.⁹⁴ This approach is envisaged by the 2010 Kenyan Constitution, especially article 20(2), which provides for the enjoyment of rights in the Constitution to the greatest extent consistent with the nature of the rights. It is further buttressed by article 20(3)(b), which calls for the adoption of an interpretation that most favours the enforcement of rights.⁹⁵

94 Hongju-Koh (n 25 above) 53; E Benvenisti 'Reclaiming democracy: The strategic use of foreign and international law by national courts' (2008) 102 *American Journal of International Law* 242; Peters (n 14 above) 173-174. She argues that the reception of international standards, such as human rights protection, good governance and democracy, into national constitutions leads to the vertical convergence of constitutional and international law; that is 'the globalisation of state constitutions and the constitutionalisation of international law'.

95 See also the 2010 Kenyan Constitution, art 259(1), which calls for the construction of the provisions of the Constitution in a manner that promotes its purposes, values and principles; advances the rule of law and the fundamental rights in the Bill of Rights; permits the development of law; and contributes to good governance.

The application of traditional justice mechanisms to the atrocities committed by child soldiers in Uganda: A practical restorative justice approach

*Hope Among**

Consultant, African Child Policy Forum, Addis Ababa, Ethiopia

Summary

Some communities affected by the conflict in Uganda have selectively adopted traditional cleansing rituals to reintegrate former child soldiers. Furthermore, there appears to be support amongst communities for the holistic adoption of traditional justice mechanisms for the atrocities committed by child soldiers. However, these processes need to be modified prior to their adoption in order to address various practicality dilemmas such as the nature and extent of atrocities committed, the proportionality of punishments to the crimes committed, and the identification of parties. This article therefore proposes that such modifications should primarily be drawn from practical restorative approaches embodied within the criminal justice system, and relevant examples from selected countries. This could enhance the application of traditional justice mechanisms to the crimes committed by child soldiers. The article is timely considering that Uganda is currently developing a comprehensive national policy on transitional justice, which will entail a policy on traditional justice mechanisms.

1 Introduction

The child justice system in Uganda recognises the application of traditional justice processes to child offenders. For instance, section 92 of the Children's Act and section 6 of the Executive Committees (Judicial Powers) Act give village courts original jurisdiction over civil

* LLB (Makerere), LLM (Stellenbosch), LLD (University of Pretoria); hope.chodry@gmail.com

matters and criminal offences,¹ and award them the discretion to make informal orders of reconciliation, compensation, restitution, apology and caution, notwithstanding the penalties prescribed in the Penal Code Act 1950 (chapter 120) regarding criminal offences.²

It is important to note that these provisions are silent as to whether such processes can be used for crimes under international law, committed by child soldiers. Nonetheless, the current discourse on Uganda's draft national transitional policy indicates a widespread acknowledgment for the holistic adoption of traditional justice processes for the atrocities committed by child soldiers.³ This is in the midst of uncertainties as to the possible prosecution of some crimes committed by former child soldiers, within Uganda's International Crimes Division.⁴

The adoption of traditional justice mechanisms for atrocities committed by child soldiers is reinforced in paragraph 3.1 of the Agreement on Accountability and Reconciliation (Agreement) between the government of Uganda and the Lord's Resistance Army (LRA).⁵ Such processes include *cula kwor* (practised among Acholi and Langi for homicide);⁶ *kayo cuk* (among the Langi); and *mato oput*

1 Such as actual bodily harm and malicious damage to property. Sec 92 Children's Act; sec 6 Executive Committees (Judicial Powers) Act; sec 2 Executive Committees (Judicial Powers) Act Cap 8, 1964. Village courts are the lowest ranking, followed by Parish courts, the sub-county courts.

2 Secs 6 & 28 Executive Committees (Judicial Powers) Act. See also sec 92(4) of the Children's Act.

3 Justice, Law and Order Sector *Key note address to stakeholder consensus on building workshop on the Draft National Transitional Justice Policy* (2013); Chief Justice of Uganda, Steven BK Kavuma, 21 May 2013, Imperial Royale Hotel, Kampala, Uganda, <http://www.jlos.go.ug/index.php/component/k2/item/288-transitional-justice-policy-reviewed> (accessed 3 June 2013).

4 Sec 19(1)(a)(v) of the International Criminal Court Act 2010 limits its jurisdiction to crimes committed by perpetrators aged 18 and above. For more discussion on the possible prosecution of some crimes committed by child soldiers, see H Among 'Challenges in prosecuting former child soldiers in Uganda's International Crimes Division' (2012) 18 *East African Journal of Peace and Human Rights* 336. On amnesty, see Amnesty Act 2000 and sec 2 of the Amnesty Act (Extension of Expiry Period) Instrument 2010, 21. See also K Agger & S Lezhnev 'Policy alert: Uganda reinstates key tool to boost defections from the Lord's Resistance Army' 5 June 2013 <http://www.enoughproject.org/blogs/policy-alert-uganda-reinstates-key-tool-boost-defections-lords-resistance-army> (accessed 29 June 2013).

5 Para 3.1 Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan (Agreement on Accountability and Reconciliation) http://www.beyondjuba.org/BJP1/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf (accessed 27 March 2012). This agreement was never signed by the LRA but is highly recognised and persuasive in Uganda's transitional justice framework. High Court Division 'Establishment of International Crimes Division of the High Court in Uganda' http://www.judicature.go.ug/index.php?option=com_content&task=view&id=117&Itemid=154 (accessed 22 March 2013).

6 Concerned Parents Association & Lango Cultural Foundation *Lango traditional mechanisms and its application to the current war situation* (2008) 1.

(among the Acholi).⁷ Moreover, paragraph 12(IV) of the Agreement provides that children shall be exempted from criminal justice processes, but may participate as appropriate in reconciliation processes.⁸ The majority of affected communities also maintain that traditional justice processes should be modified and adopted for the crimes committed by child soldiers.⁹ This position is informed by the peculiar experiences of these children, such as forced recruitment at a young age and indoctrination, which significantly influenced their participation in the commission of atrocities.¹⁰

The discourse on traditional justice processes indicates that the processes used among communities in Uganda entail some variations in content, but they embody comparable restorative processes that aim at realising justice through compensation and reconciliation.¹¹ While these restorative processes have the potential to contribute towards accountability for atrocities committed by child soldiers, the actual application of traditional justice processes in their entirety will be limited by factors such as the nature and scale of atrocities committed, and the devastated economic structures, as discussed later.

Uganda is currently drafting a national transitional justice policy which will entail a policy on traditional justice processes within Uganda.¹² This creates an opportunity for this article to propose practical restorative approaches that have the potential to advance the application of traditional justice processes to the crimes committed by child soldiers. These restorative approaches are drawn from selected restorative processes incorporated within criminal justice systems, such as those in the United States of America and Canada, and transitional justice mechanisms in countries like Sierra Leone, Rwanda and South Africa.

The term 'traditional justice mechanisms' in this article refers to customary law processes used to resolve disputes. This term encompasses processes that were used prior to the conflict, and those that have been modified to deal with atrocities committed during the conflict. The words 'mechanisms' and 'processes' are used interchangeably.

7 Mato Oput Project *Community perspectives on the Mato Oput process: A research study by the Mato Oput Project* (2009) 10; See Beyond Juba Project *Conflict justice and reconciliation in Teso* (2008) 7.

8 The Agreement on Accountability and Reconciliation (n 5 above).

9 P Pham *et al* *When the war ends: A population-based survey on attitudes about peace, justice, and social reconstruction in Northern Uganda* (2007) 43.

10 See Among (n 4 above).

11 Mato Oput Project (n 7 above) 7.

12 Justice, Law and Order Sector 'Opening remarks by Hon Eng Hillary Onek, Minister for Internal Affairs at a stakeholder consensus building workshop on the Draft National Transitional Justice Policy' 21 May 2013, Kampala, Uganda.

2 Restorative justice within the criminal justice system and transitional justice

Restorative justice is an umbrella term referring to processes that bring together all the parties affected by a crime to actively participate in the resolution of matters arising from this crime.¹³ This term is not restricted to already-existing processes, but also embraces future processes that might develop.¹⁴ Restorative justice processes focus on repairing the harm rather than punishment and attend to the needs of victims, which range from emotional, financial, material and social. These processes also aim to avert recurrence by reintegrating offenders, to provide opportunities for active responsibility, and to foster a community environment that supports victims and promotes the rehabilitation of offenders.¹⁵

2.1 Criminal justice system

The use of restorative justice within the criminal justice system has been recognised through resolutions and principles within the international legal framework.¹⁶ For instance, the Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice recommends the adoption of mediation and restorative justice measures for minor disputes.¹⁷ Moreover, the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters¹⁸ emphasises the development and incorporation of restorative justice mechanisms in all stages of the criminal justice process.¹⁹ Participation in such processes and their outcomes or agreements should be voluntary,²⁰ and states should formulate guidelines and procedural safeguards for restorative processes. The

13 Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Res 2000/14, UN Doc E/2000/INF/2/Add.2 35 (2000); H Zehr *The little book of restorative justice* (2002) 32.

14 D van Ness 'Proposed basic principles on the use of restorative justice: Recognising the aims and limits of restorative justice' in A van Hirsh *et al* (eds) *Restorative justice and criminal justice: Competing or reconcilable paradigms?* (2003) 166.

15 T Marshall *Restorative justice* (1999) 6.

16 The recognition of restorative processes and remedies was informed by a number of factors such as the inadequate recognition of victims' rights to a remedy within the justice system. C Nils 'Conflict as property' (1977) 17 *British Journal of Criminology* 1.

17 Principles 2 & 5 Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice 1999/26, adopted by the Economic and Social Council on 28 July 1999.

18 Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

19 Principle 6 Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

20 Principle 7 Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

Declaration also recognises that judicial discharges arising out of restorative agreements are binding, just like judicial decisions.²¹

Restorative justice processes have been comprehensively developed and used within the criminal justice process or as a diversion option, especially within the child justice system in Africa and on other continents.²² Some of the most common restorative justice processes within criminal justice systems are victim-offender mediation, family group conferencing and sentencing/peace-making circles. These processes are briefly explained below.

Victim-Offender Mediation (VOM) involves face-to-face or indirect discussions between victims and offenders, facilitated by trained mediators in secure settings.²³ VOM aims to foster healing and reconciliation, to enable face-to-face interaction, to give offenders an opportunity to take responsibility, and to give victims closure.²⁴ During this process, the needs of both parties are identified and outcomes are tailored to suit such needs.²⁵ This process has been used successfully²⁶ mainly to complement the criminal justice process and not as a substitute.²⁷ The application of VOM in the transitional context of Uganda will be limited, considering that parties to the atrocities can rarely identify each other,²⁸ and the face-to-face interactions may be traumatic for former child soldiers and victims of atrocities as well. This process could, however, be used for the

-
- 21 Principles 11-12 Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.
- 22 In South Africa, restorative justice processes of victim offender mediation and family group conferencing have been incorporated in secs 61, 62 and 73 of the Child Justice Act 75 of 2008. For a detailed discussion of restorative programmes in South Africa, see A Skelton & M Batley *Mapping progress, charting the future: Restorative justice in South Africa* (2006). Restorative processes have been used in schools and workplaces. B Morrison 'Restorative justice in schools' in C Hoyle (ed) *Restorative justice: Critical concepts in criminology* (2010) 416. For a summary of restorative justice developments worldwide, see D van Ness & HK Strong *Restoring justice: An introduction to restorative justice* (2010) 33.
- 23 G Bazemore & M Umbreit 'A comparison of four restorative conferencing models' (2001) *Juvenile Justice Bulletin* 2; K Edgar & T Newell *Restorative justice in prisons: A guide to making it happen* (2006) 11; Legal systems in Europe have developed practices of indirect mediation where professional mediators act as go-betweens for the parties. I Aertsen 'Restorative justice through networking: A report from Europe' in E van der Spuy *et al* (eds) *Restorative justice: Politics, policies and prospects* (2007) 95.
- 24 Bazemore & Umbreit. (n 23 above) 2-3.
- 25 Marshall (n 15 above) 11.
- 26 Research shows that VOM has successfully been used in countries like the United States of America, Canada and New Zealand. See W Nugent *et al* (eds) 'Participation in victim-offender mediation and re-offence: Successful replications' (2001) 11 *Research on Social Work Practice* 5; D Miers 'An international review of restorative justice' (2001) *Crime Reduction Research Series Paper* 10. However, there are concerns regarding the unregulated power of mediators which consequently diminishes parties' ownership of the process and outcomes. R Declan *Accountability in restorative justice* (2004) 36.
- 27 Marshall (n 15 above) 8-9 21.
- 28 Perpetrators committed atrocities in numerous villages. Mato Oput Project (n 7 above) 18.

resolution of subsequent civil and criminal disputes. This argument is later elaborated upon.

Family group conferencing (FGC) was drawn from the traditional *whanau* conference process of dispute resolution among the Maori in New Zealand,²⁹ primarily to address the high rates at which courts transferred young persons from Maori families into state facilities.³⁰ The FGC embodies face-to-face meetings, the offenders' active responsibility for their actions, the identification of needs, and mutual outcomes.³¹ VOM and FGC are strikingly similar, but the major difference is that FGC encourages the attendance of the victims' and offenders' support systems such as family, relatives, psychologists, probation officers and social workers.³²

In the transitional context, FGC could be used in redressing atrocities committed by child soldiers, and any other offences or disputes subsequent to their return into communities. However, the application of FGC will be limited by the face-to-face meetings which may traumatise former child soldiers and victims of atrocities. Therefore, FGC should be modified to suit the peculiar needs of child soldiers and their communities, taking into consideration that the conflict diminished social cohesion and devastated cultural structures which were the bedrock of traditional justice processes.³³ This could therefore necessitate an adjustment towards a holistic approach of community conferencing or discussions.

Sentencing circles have been used for serious crimes such as robbery and criminal negligence causing death, with a primary focus on responsibility, reparation, rehabilitation, empathy, healing, dialogue and transformation.³⁴ These circles have been used in the

29 C Love 'Family group conferencing: Cultural origins, sharing and appropriation: A Maori reflection' in G Burford & J Hudson (eds) *Family group conferencing: New directions in community-centred child and family practice* (2000) 15; Van Ness & Strong (n 22 above) 28-68. The FGC was first created by the Children, Young Persons and Their Families Act 1989 24 (as at 23 July 2011), Public Act, to deal with young offenders in New Zealand.

30 This process later involved adult offenders; Van Ness & Strong (n 22 above) 28-29. This was later developed in the United States, Canada, England and Australia to address issues of family violence. For the development of restorative justice process from 1970 to 2004, see P McCold 'The recent history of restorative justice: Mediation, circles and conferencing' in Hoyle (n 22 above) 137-142.

31 Outcomes ranged from financial support to counselling. Offenders may need employment and moral support. Van Ness & Strong (n 22 above) 99.

32 Edgar & Newell (n 23 above) 12.

33 L Hovil & J Quinn 'Peace first, justice later: Traditional justice in Northern Uganda' Working Paper 17 (2005) 3-8-9. See also C Blattman & J Annan 'Child combatants in Northern Uganda: Reintegration myths and realities' in R Muggah (ed) *Security and post-conflict reconstruction: Dealing with fighters in the aftermath of war* (2008) 103.

34 B Huculak *et al* 'Restorative justice innovations in Canada' (2002) 20 *Behavioral Sciences and the Law* 363. These circles were developed by judges in Yukon, Canada between the 1980s and early 1990s to solve the high incarceration rates within communities. J Rudin 'Aboriginal justice and restorative justice' in E Elliott & RM Gordon (eds) *New directions in restorative justice: Issues, practice, evaluation* (2005) 97-99.

pre-charge and post-charge stage as a diversion for youth straight into community circles.³⁵ Circles have also been used during the pre-sentencing stage to attain detailed information from the offender, the victim and their families, which could inform an alternative sentence to incarceration.³⁶ The participation in these circles is completely voluntary.³⁷ In the context of atrocities committed by child soldiers, it is more appropriate to adopt community or healing circles than sentencing circles, considering that child soldiers have been excluded from prosecution, as earlier discussed. Nonetheless, these circles could be developed within the child justice system and used for offences under penal law.

Last but not least, peace-making circles, which already form part of traditional justice mechanisms among native communities in Europe, Asia, and Africa,³⁸ have been developed to deal with offences within the criminal justice system. One good example is the Navajo nation³⁹ which has successfully developed peace-making circles as a diversion from the criminal justice system.⁴⁰ The Navajo Peace-Making Division combines substantive and procedural rules of Navajo common law with Anglo-American methods.⁴¹ Peace-making circles complement the formal justice system, but are mainly conducted in an informal manner with the participation of all parties and the entire community. These circles focus on communal rather than individual healing, and are guided by peace-makers who draw knowledge from traditional narratives, customs and norms.⁴²

35 Huculak *et al* (n 34 above) 367.

36 Rudin (n 34 above) 97.

37 Huculak *et al* (n 34 above) 367.

38 K Pranis 'Peace-making circles: Restorative justice in practice allows victims and offenders to begin repairing the harm' (1997) 59 *Corrections Today* 73.

39 The Navajo nation is considered a sovereign Indian state. H Brown 'The Navajo nation's peacemaker division: An integrated, community-based dispute resolution forum' (1999-2000) 24 *American Indian Law Review* 297-298. This nation covers North Eastern Arizona, South Eastern Utah and North Western New Mexico. RD Austin *Navajo courts and Navajo common law: A tradition of tribal self-governance* (2009) 1-2.

40 For the development of peace-making circles, see J Zion & R Yazzie 'Navajo peace-making: Original dispute resolution and a life way' in D Sullivan & L Tifft (eds) *Handbook of restorative justice: A global perspective* (2006) 157; see also R Yazzie *History of the courts of the Navajo nation* (2003), prepared for the Orientation of the Judiciary Committee of the Navajo Nation 11 February 2003 Navajo Nation Museum, Library and Visitor Centre <http://www.navajocourts.org/history.htm> (accessed 10 February 2012). Circles have also been used in work places, child welfare cases, schools, and families. B Stuart & K Pranis 'Peace-making circles: Reflections on principal features and primary outcome' in Sullivan & Tifft (n 40 above) 125-126.

41 Rule 90. J Zion 'The Navajo Peace-Maker Court: Deference to the old and accommodation to the new' (1983) 11 *American Indian Law Review* 89. This Division was developed by James Zion and Phil Bluehouse in partnership with the criminal justice system. EK Gross *Evaluation/assessment of Navajo peace-making 2001* NCJRS Document 187675 US Department of Justice Research Report <https://www.ncjrs.gov/pdffiles1/nij/grants/187675.pdf> (accessed 24 September 2012) 4-5.

42 Gross (n 41 above) 5.

It is significant that peace-making circles may generally entail healing circles for victims and circles with offenders to appreciate the causes of their criminal behaviour.⁴³ A typical circle is guided by key values such as respectful listening; voluntary and objective participation,⁴⁴ regardless of one's qualifications and expertise; honesty when sharing one's experience; the focus on the community rather than individuals; and mutual outcomes.⁴⁵ Peace-making circles share similar values and goals but may be conducted differently based on the nature of the case, traditions or religion and the needs of participants.⁴⁶

Peace-making circles have remarkably similar attributes to some traditional justice processes within communities in Uganda. Such attributes include the emphasis on communal healing, the application of traditional norms and customs, and the use of traditional leaders or elders to conduct the process. Such similarities could make it easier for child soldiers and communities to embrace attributes of peace-making circles which could enhance the practicability of traditional justice mechanisms in dealing with the atrocities committed by child soldiers.

The restorative justice processes of VOM, FGC, sentencing circles and peace-making circles have been successfully used within the criminal justice system, especially for child offenders.⁴⁷ I will now consider restorative justice processes within a transitional justice framework.

2.2 Transitional justice framework

Restorative justice is not a new concept within transitional justice and has been associated primarily with truth and reconciliation commissions which embody restorative aspects of truth telling, and the bringing together of victims and perpetrators.⁴⁸ Although truth commissions are primarily created to complement rather than substitute prosecution,⁴⁹ their work generally has been commended

43 Stuart & Pranis (n 40 above) 125.

44 M Umbreit *et al* 'Restorative justice circles: An exploratory study' (2003) 6 *Contemporary Justice Review* 268.

45 Umbreit *et al* (n 44 above) 268.

46 J Zion 'The dynamics of Navajo peace-making' (1998) 14 *Journal of Contemporary Criminal Justice* 58.

47 For an evaluation as to the effectiveness of peace-making circles, see Gross (n 41 above) 32; Judicial Branch of the Navajo Nation *Fiscal Year 2010 Fourth Quarter Report* (1 July 2010-30 September 2010) released 15 October 2010, <http://www.navajocourts.org/Reports/FY2010%204th%20Qtr%20Report.pdf> (accessed 30 November 2011) 38-56.

48 Detailed discussion of truth commissions established between 1974 and 2010, Amnesty International *Commissioning justice: Truth commissions and criminal justice* (2010).

49 C Stahn 'Accommodating individual criminal responsibility and national reconciliation: The UN Truth Commission for East Timor' (2001) 95 *American Journal of International Law* 652 954.

to realise far-reaching closure and accountability for atrocities committed.⁵⁰ The truth commissions in Sierra Leone⁵¹ and Liberia⁵² are commended for the innovative participation of children, especially former child soldiers, within their processes.⁵³ With the assistance of child protection agencies,⁵⁴ these commissions put in place special child-friendly procedures to ensure the participation and protection of children from re-victimisation. These include statement taking *in camera*; prior consent from parents or guardians; confidentiality concerning the names of children, their relatives and particular locations; and participation based on the maturity of the child.⁵⁵

On the contrary, these commissions are generally criticised for providing limited avenues that specifically advance the active participation of all parties, an appreciation of the needs of parties, and mutual outcomes that are designed to suit such needs. Moreover, the 'tell-it-all' approach of the commissions undermines some traditional practices that require the parties to forgive each other and never to reminisce about the past.⁵⁶ Nonetheless, the restorative justice aspects and the child-friendly participation measures in these commissions could be instructive to the provisions on the creation of a truth commission, and the application of traditional justice processes, which are intended to form part of the national transitional justice policy in Uganda.

Besides truth commissions, aspects of restorative justice have also been used among civil society groups to deal with human rights

-
- 50 R Teitel 'From dictatorship to democracy: The role of transitional justice' in H Koh & R Slye (eds) *Deliberative democracy and human rights* (1999) 278. For the different commissions, see PB Hayner 'Fifteen truth commissions - 1974 to 1994: A comparative study' (1994) 16 *Human Rights Quarterly* 611.
- 51 Secs 2-6 Truth and Reconciliation Commission Act 2000, Supplement to the Sierra Leone Gazette CXXXI (9), 10 February 2000 <http://www.unhcr.org/refworld/pdfid/3fbcee4d4.pdf> (accessed 3 October 2012). See also T Ekiyor 'Reflecting on the Sierra Leone Truth and Reconciliation Commission: A peace-building perspective' in CL Sriram & P Suren (eds) *Peace versus justice? The dilemma of transitional justice in Africa* (2009) 157.
- 52 See art 3 of the Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia of 12 May 2005 <http://www.trcofliberia.org/about/trc-mandate> (accessed 14 January 2012).
- 53 The participation of children within the South African Truth and Reconciliation Commission was instructive to the Commission in Sierra Leone and Liberia. UNICEF Innocenti Research Centre and the International Centre for Transitional Justice *Children and truth commissions* (2010) 41. On participatory rights of children, see art 12 of the Convention of the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989; G Lansdown 'Children's participation: A decade of change' in I Byrne & L MacMillan (eds) *Participation: The forgotten 'P' in the Convention on the Rights of the Child* (2003) 48-51.
- 54 These agencies provided guidance and psychological support for children and statement takers. P Cook & C Heykoop 'Child participation in the Sierra Leonean Truth and Reconciliation Commission' in S Parmar *et al* (eds) *Children and transitional justice: Truth-telling, accountability and reconciliation* (2010) 171.
- 55 Cook & Heykoop (n 54 above) 158.
- 56 R Shaw *Rethinking truth and reconciliation commissions: Lessons from Sierra Leone* (2005) 9.

violations. For instance, the Community Restorative Justice Ireland and Northern Ireland Alternatives were created as part of the wider peace-making plan in Northern Ireland to convince the Republican and Loyalist paramilitaries against the use of violent punishments such as shooting and beatings. These groups, especially the Irish Republican Army (IRA) and Ulster Volunteer Force (UVF), adopted community-based systems of restorative justice.⁵⁷ In South Africa, the Ex-Combatants Reintegration and Restorative Justice Project was created to facilitate restorative justice dialogue or mediation between ex-combatants and survivors. This project was developed to include victim/victim discourses, ex-combatant discourses, and dialogues involving intergenerational conflicts and disappearance cases.⁵⁸

2.3 Restorative justice and child soldiers

There is an emerging interest in the adoption of restorative justice processes for the atrocities committed by child soldiers. For example, the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups recommend that the crimes committed by child soldiers should 'be treated in accordance with international law in a framework of restorative justice and social rehabilitation.'⁵⁹ This proposition is supported by several scholars, like Masila, who recommend that restorative justice elements must be emphasised in any accountability approach adopted for child soldiers.⁶⁰ Stovel and Valiñas also propose restorative justice as the most appropriate approach to realise the healing needs and reintegration measures of former child soldiers with the support of community and family members. However, the study cautions against drawing conclusions from restorative justice as used for youth in peace time and translating them to contexts of war. This is because of the peculiar circumstances faced by child soldiers, such as differences in the social construction of childhood and complexities of atrocities.⁶¹

The adoption of restorative justice processes for atrocities committed by child soldiers was to a limited extent observed in some modifications to the *Gacaca* courts which were adopted to end

57 K McEvoy & A Eriksson 'Restorative justice in transition: Ownership, leadership and "bottom-up" human rights' in D Sullivan & L Tiftt (eds) *Handbook of restorative justice: A global perspective* (2006) 321-332.

58 These dialogues have contributed towards peace building and reconciliation. B Greenbaum *Evaluation of the 2005 Ex-Combatants' Dialogues* (2006) 3.

59 Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups 3.6.

60 GM Masila 'Challenges in establishing the accountability of child soldiers for human rights violations: Restorative justice as an option' (2005) 5 *African Human Rights Law Journal* 321.

61 L Stovel & M Valiñas *Restorative justice after mass violence: Opportunities and risks for children and youth* (2010).

impunity in Rwanda after the 1994 genocide.⁶² The *Gacaca* courts passed orders of community service which were intended to provide perpetrators with opportunities to take active responsibility for the crimes they committed.⁶³ Unfortunately, it was overshadowed by concerns about proportionality of punishments to the crimes committed, and fears of reprisal.⁶⁴ Moreover, the *Gacaca* courts were primarily modified with punitive measures and punishments, the application of which was limited by arbitrary arrests, the rejection of evidence or witnesses for the accused, partiality of judges towards victims, and false testimonies, among others.⁶⁵ The *Gacaca* model presents an example as to how traditional justice processes could be modified with punitive measures, and the limitations of such modifications in establishing accountability.

So far, Sierra Leone is the first documented transitional society to primarily modify traditional justice processes with restorative justice measures in order to deal with the atrocities committed by both adult and child soldiers. Communities in Sierra Leone are currently using the community-based traditional justice mechanism of *Fambul Tok* (family talk) process. Previously, the communities in Sierra Leone primarily relied on the Truth and Reconciliation Commission to establish accountability for atrocities committed by child soldiers.⁶⁶ Notwithstanding the success of these processes,⁶⁷ some communities still struggled to come to terms with the atrocities committed against them.⁶⁸ Many victims and offenders had not participated in these processes.⁶⁹ Even after participation, the offenders were still resented by some community members, and victims expressed fear for and hatred towards their aggressors.⁷⁰ This informed the adoption of *Fambul Tok*.

62 Organic Law 40/2000 of 26 January 2001 setting up *Gacaca* Jurisdictions and Organising Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed between 1 October 1990 and 31 December 1994; L Waldorf 'Rwanda's failing experiment in restorative justice' in Sullivan & Tift (n 57 above) 422-425.

63 See art 14 of Organic Law 10/2007 of 1 March 2007, which complemented Organic Law 16/2004 of 19 June 2004. By May 2010, more than 106 918 had been sentenced to community service. Penal Reform International *Eight years on: A record of Gacaca monitoring in Rwanda* (2010) 47.

64 Penal Reform International (n 63 above) 13.

65 Rwandan League for the Promotion and Defence of Human Rights *Situation of human rights in Rwanda: 2007-2008* (2010) 2.1.1.12.

66 A Tejan-Cole 'Sierra Leone's "not-so" Special Court' in CL Sriram & P Suren (eds) *Peace versus justice? The dilemma of transitional justice in Africa* (2009); Child soldiers were exempted from prosecution. Special Court for Sierra Leone Public Affairs Office 'Special Court prosecutor says he will not prosecute children' Press Release 2 November 2002 1.

67 UNICEF *Truth and Reconciliation Commission: Report for the children of Sierra Leone* (2004) 30-32.

68 E Hoffman 'Reconciliation in Sierra Leone' (2008) 32 *The Fletcher Forum of World Affairs* 131.

69 Hoffman (n 68 above).

70 L Fofana 'Sierra Leone: No easy road to reconciliation' *Inter Press Service News* 25 March 2010 1.

The *Fambul Tok* process was modified with inclusive restorative justice attributes that bring together all parties to deal with the effects of the crimes, to focus on repairing the harm, and to provide perpetrators with opportunities for active responsibility. These attributes also aim at identifying and addressing the needs of the parties, realising mutual outcomes, supporting victims, and fostering rehabilitation and reintegration.⁷¹ During *Fambul Tok*, the participants sit in a circle around a bonfire and openly share their experiences with the entire community. The circle reinforces equal participation, provides a platform for dialogue, understanding and mutual outcomes that address their needs. This process is usually guided by positive traditional values and rituals,⁷² and is being used for both minor and brutal atrocities with a focus on accountability, reconciliation and reintegration.⁷³

The modifications to the *Fambul Tok* process could provide practical insights into the application of traditional justice processes in Uganda, considering the striking similarities between transitional communities in these countries. For example, both communities experienced intra-communal conflicts,⁷⁴ which were notorious for recruiting and using child soldiers who notably participated in the commission of atrocities.⁷⁵ Moreover, some community members selectively used traditional cleansing rituals to welcome and heal perpetrators, and overlooked other important aspects of traditional justice processes such as confession from the perpetrators to the victims, individual responsibility, remorse, forgiveness from the victim, and compensation were excluded.⁷⁶

It is evident from the above discussion that restorative justice processes have been developed and used within the criminal justice system, and in some transitional justice approaches adopted by communities in dealing with atrocities committed by child soldiers. The next part of this article therefore proposes the modification of traditional justice processes with primarily restorative attributes or processes embodied within the criminal justice system and various transitional justice processes earlier discussed. This broad approach provides far-reaching recommendations that could enhance the

71 Fambul Tok International *Community healing in Sierra Leone: Our second year* (2010) 26.

72 Fambul Tok International (n 71 above) 17.

73 Fambul Tok International (n 71 above) 5.

74 Intra-communal conflicts are conducted among groups within a community. Stovel & Valiñas (n 61 above) 27.

75 Coalition to Stop the Use of Child Soldiers *Child soldiers: Global report 2008* (2008) 341-350.

76 Such as *nyono tong gweno* which are primarily considered preconditions for the commencement and conclusion of justice processes like *mato oput*. Lui Institute for Global Issues & Gulu District NGO Forum *Roco Wat I Acoli: Restoring relationships in Acholi-Land: Traditional approaches to justice and reintegration* (2005) 27; ASJ Park 'Community-based restorative transitional justice in Sierra Leone' (2010) 13 *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice* 95.

practicability of traditional justice processes to the atrocities committed by child soldiers.

These proposals are discussed based on the restorative justice attributes of repairing the harm caused; participation; truth telling; ownership; catering for the needs of all stakeholders; active responsibility; reparations or compensation; and follow-up. The article also proposes the harmonisation of traditional justice processes with fundamental human rights.

3 Proposals based on restorative justice processes

3.1 Repairing the harm caused

It is important for the modifications to traditional justice processes to focus on the harm suffered rather than the punitive distinction of offenders based on the nature of the offence, and criminal responsibility which is typically found in the formal justice system. This distinction was adopted within the *Gacaca* courts to determine the jurisdiction of courts and the penalties.⁷⁷ Whereas this fostered the systematic prosecution of perpetrators, the focus on punitive consequences resulted in serious fair trial violations such as delayed trials, arbitrary arrests, disregard for evidence or witnesses led in favour of the accused, and partiality of judges towards victims.⁷⁸ Although the adoption of some restorative justice processes like victim offender mediation necessitates the identification of victims and offenders,⁷⁹ any modifications to traditional justice processes should focus primarily on repairing the harm suffered and the reintegration of child soldiers.

The focus on the dichotomy of parties could be a major setback. The identification of parties is complicated by the blurred distinction by the overlap of victim and perpetrator, considering that child soldiers were recruited at a young age, manipulated, and forced to commit atrocities against their own communities.⁸⁰ This was witnessed in the case of Odong, a former child soldier whose failure to identify his victims and their clans hindered the commencement of *mato oput* in Uganda.⁸¹ This dichotomy could undermine the

77 Organic Law 40/2000 of 26 January 2001.

78 Rwandan League for the Promotion and Defence of Human Rights (n 65 above) 2.1.1.12.

79 Bazemore & Umbreit (n 23 above) 2-3.

80 Refugee Law Project (n 7 above) 32.

81 Odong's case was dismissed by the elders of the Acholi Cultural Authority in 2010. Odong justified his inability to identify his victims: 'When I am abducting you, do I know your place?' 'If I kill you in the road, I cannot know where you come from.' The elders also believed that the Acholi community was not prepared for detailed accountability of the conflict. Integrated Regional Information Networks 'Uganda: Former LRA combatants struggle for forgiveness' *Humanitarian News and Analysis* (2010) <http://www.irinnews.org/InDepthMain.aspx?indepthid=87&reportid=91019> (accessed 28 March 2013) 1.

recognition of the harm suffered by the majority of affected individuals who cannot identify their victims or perpetrators.⁸² Besides, the restorative justice processes, as mentioned earlier, primarily focus on the recognition of the harm suffered and the way forward in attaining reconciliation and reintegration rather than the distinction of victim from perpetrator.

Therefore, the traditional justice provisions within a national policy could adopt the term 'stake holders' rather than 'victims and perpetrators' in order to reinforce the restorative nature of traditional justice processes. Stake holders could entail victims, perpetrators, and the affected community. This term could extend to civil society and other interested persons or organisations. The policy could also adopt the term 'harm' rather than 'offences or crimes or atrocities', since traditional justice processes should focus on the harm suffered and not individual criminal responsibility which may jeopardise the attainment of accountability, as was witnessed in Rwanda.

The above recommendation is feasible considering the fact that most of the atrocities were allegedly committed by LRA soldiers who mainly comprised of children. Some of these children were as young as six years at the time of abduction into the LRA, subjected to inhumane rituals, manipulated, and forced to commit atrocities.⁸³ Such activities transformed children into ruthless killers, which was mainly motivated by the need to survive.⁸⁴ Therefore, the focus on the harm suffered rather than individual responsibility advances a restorative mindset among all stake holders, which creates a better appreciation of any restorative outcomes. This could also minimise the re-traumatisation of former child soldiers and victims of atrocities committed.

3.2 Participation

Active participation is a fundamental precept of restorative justice processes where all stake holders to the crime committed come together to discuss the effects of the crime and ways to repair the harm caused. There are misconceptions among communities and former child soldiers in Uganda regarding the relevance of the International Crimes Division and amnesty towards accountability.⁸⁵

82 Mato Oput Project (n 28 above) 18.

83 C Bellamy *The state of the world's children: Childhood under threat* (2005) 44.

84 P Krijn & P Richards 'Fighting with open eyes: Youth combatants talking about the war in Sierra Leone' in PJ Bracken & C Petty (eds) *Rethinking the trauma of war* (1998) 76.

85 Justice and Reconciliation Project *Who forgives whom? Northern Uganda's grassroots views on the Amnesty Act* (2012) 1-8. Such mixed reactions were also raised prior to the lapse of the grant of amnesty. See Justice and Reconciliation Project *Situational analysis: To pardon or to punish* (2011) 1-3. See also the case of Thomas Kwoyelo, an allegedly former child soldier who was denied amnesty. Sudan Human Security Baseline Assessment *The Lord's Resistance Army* (2011) 5-6.

Such inconsistencies could jeopardise the extent of participation in traditional justice processes.

The national transitional policy could therefore emphasise that amnesty was primarily aimed at attaining peace, which is fundamental to the commencement of transitional justice processes that advance accountability and reconciliation. Therefore, all stake holders, including children and adults who were granted amnesty, should participate in traditional justice processes and other transitional justice processes. Besides, a clear distinction of restorative and punitive measures should be emphasised in order to wade off speculations of punitive measures which might jeopardise the already fragile peace⁸⁶ which was attained through amnesty.

The article proposes that the modifications to traditional justice processes should also ensure the participation of former LRA child soldiers. Some of these children, especially youth, have continuously been subjected to stigmatisation and rejection by their communities, including family members. Some children have been verbally called 'rebels', 'killers', and publically accused of abducting other children and participating in the attacks among communities.⁸⁷ Some girls are referred to as rebel wives, and their children as 'rebel's children'. This forced some of these children to relocate to towns away from home.⁸⁸ Such stigmatisation could discourage these children from participating in these processes due to fear of traumatisation, and the use of their testimonies to implicate them.

In order to ensure the participation of children in traditional justice processes, the policy should recognise the need to strengthen efforts that foster the comprehensive revitalisation of the social and cultural structures that were devastated during the conflict.⁸⁹ These structures formed the bedrock of traditional justice processes, and were used as channels for the cultural socialisation of the younger generation.⁹⁰ Education efforts, especially for children and youth, should be emphasised. The need for such efforts was reflected in a study by Annan *et al* on female youth where the majority of participants did not appreciate the relevance of traditional leaders and the justice process. Some participants used the words 'useless', 'wasteful' and 'outdated' to articulate the insignificance of these processes.⁹¹

86 The LRA is still active in neighbouring Central African Republic, the Democratic Republic of Congo, South Sudan; Sudan Invisible Children, and Resolve *LRA crisis tracker: Mid-year security brief [January-June 2012]* (2012) 1-14.

87 B Verhey *Child soldiers: Preventing, demobilising and reintegrating* (2001) 16.

88 G Akello *et al* 'Reintegration of former child soldiers in Northern Uganda: Coming to terms with children's agency and accountability' (2006) 4 *Intervention* 229.

89 J Annan *et al* *The state of female youth in Northern Uganda: Findings from the survey of war affected youth, Phase II* (2008) 45. For details of the armed conflict, see United Nations Children Fund *A report on the situation of children and women in the Republic of Uganda* (2005).

90 Hovil & Quinn (n 33 above) 8 9.

91 Annan *et al* (n 89 above) 45.

However, the policy could recognise the current efforts among communities towards the progressive revitalisation of these structures. These efforts have been spearheaded by traditional institutes like the Acholi Cultural Institute and other organisations, which are training community reconciliation promoters, providing financial support for communal cleansing ceremonies and the construction of memorials, and mediating land disputes within communities.⁹² The policy could further emphasise the creation of child-friendly platforms for discussions on how best they can participate in these processes, and what should be done in the furtherance of reconciliation and reintegration. Such participation should also take into consideration the maturity of children.

3.3 Truth telling

Affected communities have prioritised the process of truth telling as an important component of any forthcoming transitional justice mechanism in order to ensure closure and acknowledgment of the harm suffered.⁹³ While most communities acknowledge the significance of truth telling, they are of the view that the sole use of this process is inadequate for the realisation of reconciliation. Therefore, such a process should be accompanied by traditional justice processes.⁹⁴

Truth telling is one of the precepts of restorative justice processes, truth commissions and traditional justice processes. Restorative justice processes within the criminal justice system engage all parties in the establishment of truth and foster understanding regarding the offence.⁹⁵ In the transitional context, truth commissions are mandated to establish the truth through testimonies and confessions from participants.⁹⁶ The concept of truth telling has also been incorporated in conditional amnesties like in South Africa.⁹⁷ Within the traditional justice processes in Uganda, the offender was required to make an honest confession of any acts or omissions that subsequently informed the relevant process to be adopted. Truth telling was also evident during meetings between the parties or clans

92 Other organisations include the War-Affected Children's Association (WACA); Gulu Theatre Artists (GTA); War-Affected Youth Association (WAYA) and Acholi Religious Leaders Peace Initiative (ARLI). DM Okot *A successful Mato Oput* (2011) <http://www.arlpi.org/archieve-of-arlpi-articles/a-successful-mato-oput> (accessed 28 June 2013) 1.

93 Justice and Reconciliation Project *The cooling of hearts: Community truth-telling in Acholi-Land* (2007) 6. See also R Cecily 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth telling and reparations' (2008) 28 *Boston College Third World Law Journal* 360-361.

94 Justice and Reconciliation Project (n 93 above) 9.

95 H Zehr *Changing lenses: A new focus for crime and justice* (2005) 186.

96 Hayner (n 50 above) 604.

97 Sec 4(c) Promotion of National Unity and Reconciliation Act 1995; see Truth and Reconciliation Commission of South Africa *Report 2003* (6) <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> (accessed 30 March 2011) 22-32.

to discuss the crime, its effects, and the compensation to be paid to the victim's family or clan.⁹⁸

In the context of the present atrocities, the application of the truth-telling process as used within traditional justice processes could be limited by complexities in identifying individual stakeholders to the harm caused by the atrocities. This was fundamental to the commencement of traditional justice processes and the payment of compensation.⁹⁹ During the armed conflict, some child soldiers randomly and repeatedly committed atrocities in numerous villages, thus making it virtually impossible to identify the stakeholders to these atrocities.¹⁰⁰ The truth-telling processes could also be limited by uncertainties as to the effects of amnesty, and possible prosecution by the International Crimes Division. Moreover, there is distrust among community members due to the presence of ex-combatants and alleged LRA spies within the community.¹⁰¹ These shortcomings were witnessed during the *Gacaca* trials in Rwanda where the parties gave false testimonies, concealed the truth and admitted to lesser offences. This undermined the effectiveness of the *Gacaca* courts in ending impunity.¹⁰²

Therefore, the national policy should first and foremost emphasise the mandate of the truth-telling process, which could include closure as to the causes and extent of the crimes committed and reparation or compensation, among others. In order to overcome the limitation regarding identification of individual stakeholders to the crimes committed, the policy should primarily emphasise communal rather than individual approaches of truth telling.

The national policy should also put emphasis on the participation of children in truth telling since they are the most vulnerable group affected by the conflict.¹⁰³ Such participation in traditional justice processes could be informed by the child-friendly measures adopted within the commissions in South Africa, Sierra Leone and Liberia. For instance, children shared their experiences *in camera* within a child-friendly environment, and child care officers were involved in the entire process to ensure that such participation complied with international standards.¹⁰⁴

98 SA Lamony *Approaching national reconciliation in Uganda: Perspectives on applicable justice systems Ugandan* (2007) 11; Concerned Parents Association & Lango Cultural Foundation (n 6 above) 11-15.

99 Hovil & Quinn (n 33 above) 15.

100 Mato Oput Project (n 28 above) 18.

101 Hovil & Quinn (n 33 above) 8.

102 Rwandan League for the Promotion and Defence of Human Rights (n 65 above) 2.1.1.13.

103 T Dagne *Uganda: Current conditions and the crisis in North Uganda* (2011) Congress Congressional Research Service, <http://www.fas.org/sgp/crs/row/RL33701.pdf> (accessed 20 May 2012) 7.

104 Cook & Heykoop (n 54 above) 173.

Therefore, the national policy could recommend the modification of traditional justice processes with child-friendly participation measures. Such participation should be monitored by child rights-centred organisations like World Vision and Save the Children, among others. The policy could further emphasise the voluntary nature of such participation taking into consideration the maturity of the child, and the process must be guided by child-friendly questions. The element of voluntary participation within restorative processes is premised on the argument that crime primarily affects people and relationships.¹⁰⁵ Therefore, the policy could reinforce voluntary participation through the education of child soldiers and communities on the various aspects of traditional justice processes as earlier highlighted, and emphasise the aspect of ownership which is later presented. These measures could be coupled with psychological counselling to prepare the children and community for such participation. This is a more appropriate approach than the use of law enforcement bodies to compel participation as was done in Rwanda.¹⁰⁶

The truth-telling process could foster healing which in the context of restorative justice has been equated to providing victims with a certain degree of closure and a feeling of safety and control rather than forgetting the wrong.¹⁰⁷

3.4 Ownership

The ownership of the process is an important aspect of restorative justice processes, which may be attained through consultations to ensure that the process adopted suits the needs of the parties involved, thus fostering participation.¹⁰⁸ This approach was used in Sierra Leone prior to the adoption of the *Fambul Tok*. Through grassroots and nationwide consultations, most communities in Sierra Leone expressed an urgency for processes that promote accountability and reconciliation. This resulted in the nationwide endorsement of *Fambul Tok*.¹⁰⁹

In Uganda, there is wide support for the adoption of traditional justice processes for the atrocities committed by child soldiers. In order to promote a sense of ownership, the policy provisions on these processes could recommend regular consultations among the affected communities as to the modifications to traditional justice processes that suit their needs. This information can be attained through

105 Declan (n 26 above) 30.

106 The local paramilitary forces compelled people to attend the pilot stage of the *Gacaca* trials. Those who were absent were fined and threatened. Penal Reform International *Research on Gacaca (Report V)* (2003b).

107 Zehr (n 95 above) 186.

108 Bazemore & Umbreit (n 23 above) 3.

109 *Fambul Tok International* (n 73 above) 10-13; LS Graybill 'Traditional practices and reconciliation in Sierra Leone: The effectiveness of *Fambul Tok*' (2010) 3 *Conflict Trends* 44.

grassroots and nationwide consultation as was done in Sierra Leone. The consultation process could be conducted through interviews, group discussions and debates among community members. These consultations should involve all stake holders, and should be representative of all groups regardless of age, sex and disability.

Ownership and participation in traditional justice processes can also be reinforced by maintaining the authority of community members or elders to preside over these processes. This approach is maintained in the peace-making circles among the Navajo which are led by traditional leaders or respected persons within the community.¹¹⁰ In the transitional context, the modified *Gacaca* courts were presided over by *inyangamugayo*, comprising of Rwandese who were trained in the pilot stage.¹¹¹ In Uganda, traditional justice processes are presided over by traditional leaders, mediators, elders and spiritual leaders.¹¹² It is therefore of paramount importance to maintain the role of traditional leaders, elders, and respected community members in order to enhance participation in these processes.

Since the conflict resulted in the distrust, the death, and the displacement of most traditional or community leaders,¹¹³ there is a need to educate other respected community members who will assist in guiding the traditional justice processes in the various communities. Ownership may be compromised by imposing trained professionals. Nonetheless, the policy could emphasise that any modifications to these processes should accommodate the presence of trained child welfare officials and independent observers who will reinforce child-friendly participation and outcomes in compliance with international instruments and national laws. The knowledge and skills of traditional institutions like Acholi Cultural Institute (Ker Kwaro Acholi), and Lango Cultural Foundation could be employed during the entire process. These modifications should also engage the expertise of other organisations such as the War-Affected Children's Association (WACA), the War-Affected Youth Association (WAYA) and the Acholi Religious Leaders Peace Initiative (ARLI), among others.¹¹⁴ Such modifications could also accommodate independent observers to ensure compliance with fundamental human rights.

Last but not least, ownership could be reinforced through the advancement of already-existing positive justice practices that aim at

110 *Naat'aanii* (meaning teacher, leader and healer) maintained order, and ensured the participation of all parties. The *Naat'aanii* applied the Navajo common law and traditions. D Sullivan 'Navajo peace-making history, development, and possibilities for adjudication-based systems of justice: An interview with Zion' (2002) 5 *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice* 167-188.

111 H Scanlon & N Motlafi 'indigenous justice or political instrument? The modern *Gacaca* courts of Rwanda' in CL Sriram & S Pillay (eds) *Peace versus justice? The dilemma of transitional justice in Africa* (2010) 302.

112 Concerned Parents Association & Lango Cultural Foundation (n 6 above) 10.

113 Lui Institute for Global Issues & Gulu District NGO Forum (n 76 above) 20-22.

114 Ch 5.

repairing the harm caused, truth telling and reintegration. This will foster a sense of ownership since communities are familiar with such practices.

3.5 Catering for the needs of all stake holders

The policy could also underline the importance of tailoring traditional justice processes to suit the needs of the different parties, taking into consideration the existing traditions and customs within those communities. This restorative attribute is maintained within the peace-making circles used among the Navajo which are designed on a case-by-case basis depending on the nature of the crime committed and the needs of the parties. These processes may vary in content but maintain uniformity through the emphasis on repairing the harm caused, the voluntary participation of all parties, active responsibility, and restorative outcomes such as reparation to the victim and reintegration of the offender.¹¹⁵ Within the *Fambul Tok* in Sierra Leone, uniformity is maintained through the emphasis on the active participation of all persons in attendance, the use of bonfires, voluntary confessions, the incorporation of traditional practices, and the adoption of restorative outcomes that promote reconciliation and rebuild trust among community members.¹¹⁶

In Uganda, the traditional justice processes among affected communities vary in content and procedure.¹¹⁷ However, provisions on traditional justice processes within the national policy could provide a framework of comparable restorative practices and values that should be maintained. Some of these practices include truth telling, reparations through compensation, reconciliation, deterrence, the reintegration of offenders, and the use of traditional leaders or community members. These practices could cater for the needs of the parties and reinforce consistency.

3.6 Active responsibility

Active responsibility is a fundamental precept of restorative justice processes which provides opportunities for all stakeholders to repair the harm caused by the offence. Some restorative outcomes may entail obligations that range from direct or indirect assistance to the victim.¹¹⁸ Within traditional justice processes, the payment of compensation was intended to ensure the active responsibility of the offender towards the reparation of the victim(s). The application of this kind of responsibility to the present atrocities is limited by the

115 KE Gross *Evaluation/assessment of Navajo peace-making* (2001) NCJRS Document 187675 US Department of Justice Research Report <https://www.ncjrs.gov/pdffiles1/nij/grants/187675.pdf> (accessed 24 September 2011) 5. Traditional leaders were well versed with the Navajo history; Creation Scriptures and Journey Narratives, Austin (2009). *Navajo courts and Navajo common law* 9-10.

116 Graybill (n 109 above); *Fambul Tok International* (n 71 above) 11-31.

117 Lui Institute for Global Issues & Gulu District NGO Forum (n 76 above) 26.

118 Van Ness & Strong (n 22 above) 48-49.

devastated economic structures or livelihoods, and the decline in social cohesion during the conflict.¹¹⁹

In the transitional context, the *Gacaca* courts in Rwanda embraced active responsibility through community service, as already discussed. In Sierra Leone, the outcomes of the *Fambul Tok* process entailed communal activities intended to provide perpetrators with the opportunity to make amends as well as to reinforce communal values and unity. Such activities include the communal construction of buildings such as health care centres and community centres, and communal farms.¹²⁰

The policy provisions on traditional justice could emphasise the restorative aspect of active responsibility. This could be drawn from the processes developed within the *Gacaca* courts in Rwanda and the *Fambul Tok* process in Sierra Leone. This approach has the potential to rebuild trust and unity and to promote reconciliation.

3.7 Reparation or compensation

Community members affected by the conflict in Uganda have emphasised the need for compensation rather than punishment such as imprisonment.¹²¹ This is attributed to the traditional justice concept where punishment is equated to compensation.¹²² Compensation within traditional justice processes in Uganda was mainly in the form of livestock and girls, and the amount depended on the nature of the crime committed.¹²³ The use of girls is later criticised in this article as a violation of fundamental human rights.

In the context of armed conflict, the nature of the atrocities raises concerns as to the proportionality of compensation to these atrocities.¹²⁴ It would be difficult to determine the appropriate compensation for victims of abduction, rape, mutilations, and orphaned children.¹²⁵ The determination of proportional compensation and who to compensate would also be problematic in incidents where the perpetrators committed multiple atrocities.¹²⁶ Moreover, the individual compensation of victims using livestock is impractical considering the presence of multiple or unknown victims, the difficulty in identification of specific parties or clans to the

119 Hovil & Quinn (n 33 above) 13.

120 Fambul Tok International (n 71 above) 13-18.

121 Justice and Reconciliation Project *Victims' voices: JRP Community Dialogues 2008* (2008) 9-11.

122 Lui Institute for Global Issues & Gulu District NGO Forum (n 76 above) 15.

123 A specified number of livestock was paid if a clan mate was murdered. The victim from another clan was compensated with a girl who would give birth to a child to replace the life of the deceased. Lamony (n 98 above) 17.

124 Lui Institute for Global Issues & Gulu District NGO Forum (n 76 above) 4.

125 These crimes are alien to traditional justice processes. Lui Institute for Global Issues & Gulu District NGO Forum (n 76 above) 4.

126 Hovil & Quinn (n 33 above) 14.

atrocities committed, and the devastated economic structures.¹²⁷ Last but not least, the commission of atrocities by perpetrators from different regions and clans complicates the determination of the justice processes to be adopted, the amount of compensation to be paid, and who should pay the compensation. Moreover, these communities have different gods, sacred sites, cultural leaders and traditional justice practices.¹²⁸

Rather than individual compensation, the policy could recommend communal compensation in the form of subsidised health services and counselling, vocational training, agricultural tools, livestock, medicine and household goods. Although this may not be proportionate to the harm suffered, it will provide some form of reparation to stakeholders. Symbolic reparations could be in the form of community monuments that acknowledge the harm suffered, advance apologies from government and LRA soldiers, reinforce unity, and positive community values.

3.8 Follow-up

Within some restorative justice processes like peace-making circles, follow-up processes are usually organised in order to ensure that the parties complied with the outcomes of those processes, and to reinforce the restorative values that were discussed during the peace-making circle.¹²⁹ The *Fambul Tok* process in Sierra Leone also adopted follow-up communal activities such as feasts, dances, friendly games and communal farming, which are intended to reinforce positive community values and trust.¹³⁰

Therefore, it is vital for the policy on traditional justice processes to emphasise the relevance of follow-up processes which reinforce the fulfilment of outcomes reached by the different communities. These processes may differ from one community to another depending on the needs of a particular community. Follow-up processes will further reconciliation which is considered a gradual process. With regard to former child soldiers, follow-up processes will assist the progressive and successful reintegration of such children into communities. Follow-up activities like friendly games, communal feasts and dances, as was done in Sierra Leone, could also be conducted in order to reinforce unity and restorative values.

127 The burden of compensation was borne by all clan members. Hovil & Quinn (n 33 above) 13. The communities experience extreme levels of poverty emanating from a severe reduction of livestock and land ownership. M Bøås & HA Fafo *Northern Uganda internally-displaced persons study profiling* (2005) 7 24.

128 Lamony (n 98 above) 18.

129 Umbreit *et al* (n 44 above) 269-270.

130 *Fambul Tok International* (n 71 above) 8.

3.9 Harmonisation with fundamental human rights

The national policy should recommend the harmonisation of traditional justice practice with fundamental human rights enshrined in the Constitution and international instruments.¹³¹ Traditional justice processes embody harmful practices such as corporal punishments which were used especially for children, and the use of girls as compensation for the offence of murder.¹³² Moreover, the traditional patriarchal system reinforced discrimination against women, girls and children, which constrained their participation in traditional justice processes.¹³³ Such practices should be proscribed in order to eliminate any participation or outcomes that violate fundamental human rights.

4 Conclusion

The practical adoption of traditional justice processes for atrocities committed by child soldiers necessitates restorative justice modifications that advance an inclusive approach to address the needs of all affected parties. Although restorative justice processes and outcomes may not guarantee absolute justice and restitution for the atrocities committed by child soldiers, in the context of restorative justice processes justice means encouraging offenders to appreciate and acknowledge the harm caused, and providing them with opportunities to make amends. Moreover, this goes hand-in-hand with the participation of victims during the entire process, especially in determining their needs and how they should be addressed.¹³⁴ Thus, traditional justice processes should be modified with restorative justice processes within the criminal justice system and transitional justice approaches, in order to enhance their practical application to the atrocities committed by child soldiers.

131 Inhumane treatment is prohibited under art 24 of the Constitution of the Republic of Uganda, 1995. Art 31(1) of the 1995 Ugandan Constitution sets the minimum age for marriage at 18 years. The right to marry with free and full consent which is enshrined in art 16(1)(b) Convention on the Elimination of All Forms of Discrimination Against Women.

132 Lamony (n 98 above) 21.

133 Lamony (n 98 above) 32.

134 Zehr (n 95 above) 194.

Recent developments

So sweet, so sour: A commentary on the Nigerian High Court's decision in *Georgina Ahamefule v Imperial Hospital & Another* relating to the rights of persons living with HIV

*Ebenezer Durojaye**

Senior Researcher, Community Law Centre, University of the Western Cape,
South Africa

Summary

The purpose of this article is to assess the decision of the Nigerian High Court in the Ahamefule case. While the case would seem to be a victory for people living with HIV in the country, it left some important questions unanswered. First, the article gives the facts of the case and the Court's decision. It then questions the reasoning of the Court in this case. The article argues that the decision merely gives people living with HIV false hope in realising their rights. It argues further that, apart from the fact that the decision lacks in-depth analysis, it also misses a great opportunity to address an important issue relating to the right to non-discrimination of people living with HIV. The article concludes by arguing that the supposed 'sweet victory' in the Ahamefule case has left 'a sour taste' in our mouths, since it does not in the true sense advance the rights of people living with HIV in the country.

* LLB (Lagos), LLM LLD (Free State); ebenezerdurojaye@gmail.com

1 Introduction

In September 2012, a Lagos High Court, after more than a decade since the case was first instituted, handed down judgment in the case of *Georgina Ahamefule v Imperial Hospital & Another*.¹ The case summarises the nature of the challenges people living with HIV encounter in Nigeria. Since 1986, when the first reported case of HIV/AIDS was made public in Nigeria, the HIV pandemic has continued to pose serious health and development challenges for the country. The HIV epidemic in Nigeria would seem to have stabilised from a peak of a 5,8 per cent prevalence in 2001 to 4,4 per cent in 2005 and 4,6 per cent in 2008.² Currently, it is estimated that 4,1 per cent of the population is infected with HIV, translating to about 3,1 million people living with HIV,³ thus making the country home to the second-largest number of people living with HIV in sub-Saharan Africa (South Africa has the largest number) and the largest in West Africa. The major mode of HIV transmission in Nigeria is through unsafe heterosexual sexual intercourse. Of late, however, there seems to have been an increase in the infection rate through homosexual activities.⁴ Other modes of transmission include blood transfusions, unsafe injections and mother-to-child transmission. It is estimated that AIDS has claimed 2 million lives in the country since 1986.⁵ Also, annually an estimated 215 000 HIV-related deaths and 281 000 new infections occur in the country.⁶

More importantly, people living with HIV have continued to experience different forms of human rights violations. These range from mandatory testing before employment, marriage or uptake of health care services; eviction from accommodation; denial of employment or other benefits; and rejection or ostracism by family or community members based on one's HIV status. It should be noted that the Nigerian government has taken various steps, including the establishment of a multi-sectoral body, the National Agency for the Control of AIDS (NACA), to co-ordinate government's response to the epidemic. This includes developing strategies and programmes to address the epidemic. It would seem that these efforts are beginning to yield fruits as the HIV prevalence in the country is stabilising. Moreover, access to life-saving medication has improved considerably

1 Unreported suit ID/1627/2000, judgment delivered by the Lagos High Court on 27 September 2012.

2 National Agency for the Control of AIDS (NACA) *Update on HIV/AIDS epidemic and response in Nigeria* (2011).

3 Federal Ministry of Health *Report of the National HIV/Syphilis Sentinel Sero prevalence survey* (Abuja: FMOH 2010).

4 VA Owuliri & OM Jolayemi 'Reaching vulnerable and high risk groups in Nigeria' in O Adeyi *et al* (eds) *AIDS in Nigeria: A nation in threshold* (2006) 310.

5 NACA (n 2 above).

6 As above.

and the number of treatment centres across the country has increased greatly.

Despite the various efforts by the government to tame the epidemic, HIV-related stigma and discrimination remain serious barriers to government's commitment to achieving zero HIV infection. Studies have shown that people living with HIV in the country encounter human rights violations on a daily basis in relation to housing, employment, health care services and other services.⁷ In most cases, these violations occur without redress as many people living with HIV either lack knowledge about their rights or cannot afford litigation. In addition, institutional and structural factors, including an undue delay in resolving cases, often act as barriers to access to justice for people living with HIV and other vulnerable groups. These challenges came to the fore in the *Ahamefule* case.⁸ This case has had a chequered history and at one point one of the trial judges handling the case had ruled that, unless expert evidence was provided that the courtroom would not be contaminated with HIV, the plaintiff would not be allowed to testify in her case. More than ten years after the case was first instituted, the Court finally delivered judgment in September 2012 in favour of the plaintiff. The Court found that the termination of the plaintiff's employment was unlawful and actuated by malice. Understandably, the decision has elicited joyous celebration among civil society groups and people living with HIV in the country. In his elated reaction to the decision, Morka, the Executive Director of the Social Economic Rights Action Centre, remarked:⁹

We believe that this epochal decision will go a long way in correcting the wrongs suffered by people living with HIV as many of them have been discriminated against and have lost their jobs due to discrimination, just like Georgina.

The purpose of this article is to assess the decision of the Court in the *Ahamefule* case. While the case would seem to be a victory for people living with HIV in the country, it has left some important questions unanswered. First, the article gives the facts of the case and the Court's decision. It then questions the reasoning of the Court. The article argues that the decision merely gives people living with HIV false hope to realise their rights. It argues further that, apart from the fact that the decision lacks an in-depth analysis, it also misses an opportunity to address an important issue relating to the right to non-discrimination of people living with HIV. The article concludes by arguing that the supposed 'sweet victory' in the *Ahamefule* case has

7 Centre for the Right to Health *HIV/AIDS and human rights: Experiences of people living with HIV in Nigeria* (2001).

8 *Ahamefule* (n 1 above).

9 P Ogbo 'Nurse wins landmark case in Nigeria over dismissal for testing positive to HIV' <http://www.theeagleonline.com.ng/news/nurse-wins-landmark-case-in-nigeria-over-dismissal-for-testing-positive-to-hiv/> (accessed 28 May 2013).

left 'a sour taste' in our mouths since it does not in any real sense advance the rights of people living with HIV in Nigeria.

2 Facts of the case

The plaintiff, an auxiliary nurse, was an employee of the first defendant hospital, having been employed at the hospital since 1989. Some time in 1995, she developed a boil on her skin during her pregnancy and decided to seek medical attention at the first defendant hospital. During her medical examination, a series of tests were conducted on her by the second defendant without her informed consent or any knowledge of the nature or outcome of such tests. Rather, the second defendant merely informed her to take leave for two weeks through a letter dated 12 October 1995. Furthermore, with a sealed note the second defendant referred the plaintiff to the Lagos University Teaching Hospital (LUTH) to see one Dr Okany for a further medical examination. Upon arriving at LUTH, the plaintiff was asked to return with her husband and their blood samples were taken. On her next visit to the hospital, the plaintiff was shocked when Dr Okany informed her that she had tested positive for HIV, while her husband had tested negative. The plaintiff claimed that during the entire process, at no point was her consent formally sought before she was tested for HIV, neither was she offered pre- or post-test counselling. Furthermore, the plaintiff claimed that she was traumatised and psychologically destabilised by the news of her HIV-positive status. On her return to the first defendant hospital to confront the second defendant as to why he had not informed her about the HIV test and results, she was shocked about the hostile attitude of the second defendant, who ordered her out of his office. To further add insult to the plaintiff's injury, the second defendant abruptly terminated her employment through a letter dated 23 October 1995.

The plaintiff alleged that due to the shock of learning her HIV results and the subsequent termination of her employment, she could not cope emotionally and hence lost her pregnancy. In addition, she claimed that she experienced rejection and humiliation at the hands of the defendants, when the hospital refused to carry out the recommended cleaning exercise after her miscarriage due to her HIV status. The plaintiff therefore claimed that the purported termination of her employment due to her HIV status was unlawful and illegal, actuated by malice or bad faith, and that it constituted unfair discrimination contrary to the provisions of the African Charter on Human and Peoples' Rights (African Charter).¹⁰ More importantly, she claimed that subjecting her to HIV testing without her informed consent amounted to unlawful battery and that the failure to provide

¹⁰ African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev 5, adopted by the OAU, 27 June 1981, entered into force 21 October 1986.

pre- and post-test counselling services constituted unlawful neglect of professional duty. The plaintiff further claimed that the denial of treatment by the defendants due to her HIV status constituted a flagrant violation of her right to health, as guaranteed under the African Charter and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹

In agreeing with the plaintiff's claims, the Court held that the termination of her employment was unlawful and illegal and actuated by malice and extreme bad faith. The Court further held that subjecting the plaintiff to HIV testing without informed consent constituted unlawful battery and that the failure to provide pre- and post-test HIV counselling services amounted to unlawful neglect of professional duty. The Court also held that the failure to provide treatment for the plaintiff based on her HIV status was a violation of the provisions of the African Charter and ICESCR. The plaintiff was awarded damages amounting to N 7 million. This matter is currently on appeal to the Court of Appeal.

3 Analysis of the case

The discussion that follows is an analysis of the High Court's decision based on these issues: testing without consent, including the non-provision of counselling and care services; the termination of employment based on the plaintiff's HIV status; and denial of treatment based on her HIV status. It will be argued that, although the decision was in favour of the plaintiff, it does not serve as a good precedent in advancing the rights of people living with HIV in the country.

3.1 HIV testing without consent

One of the most important ethical and legal challenges the HIV pandemic has raised in many societies relates to the issue of testing without informed consent. This is one of the issues the Court was asked to consider in the *Ahamefule* case. At the onset of the epidemic in Nigeria, misconceptions about the epidemic were rife and being HIV positive was equated with a 'death sentence'. Worse still, there was no cure for the epidemic and access to treatment was almost non-existent.¹² This caused panic and confusion in the country and led to a situation where health care providers resorted to conducting HIV tests without their patients' informed consent. Several studies have documented the negative experiences of women, especially pregnant women, who were subjected to HIV testing without their

11 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 (entered into force 3 January 1976).

12 See eg E Durojaye & O Ayankogbe 'A rights-based approach to access to HIV treatment in Nigeria' (2005) 5 *African Human Rights Law Journal* 187.

informed consent while attending antenatal care services.¹³ Incidences were reported where prospective employees were made to undergo HIV testing before employment.¹⁴

In *Ahamefule*, the Court reasoned that conducting HIV testing without the informed consent of the plaintiff was not only unlawful and illegal, but also amounted to battery. In addition, the Court held that a failure to provide pre- and post-test counselling was a breach of professional conduct. In a way, this pronouncement is a victory for people living with HIV. It is the first time in Nigeria that a court has found that conducting HIV testing without informed consent is unlawful. However, the limitation of this pronouncement is that the issue is approached from a tortious liability perspective and not from a human rights perspective. The Court did not refer to any human rights instruments, case law or even the provisions of the Nigerian Constitution in declaring the act unlawful. Merely declaring HIV testing without informed consent as unlawful without engaging in any legal analysis in support of this finding has tended to weaken the importance of this pronouncement.

There is no doubt that HIV testing without informed consent is a serious human rights violation. It is an undue interference with an individual's privacy and encroaches on the right to bodily integrity. Article 9 of the Universal Declaration on Human Rights (Universal Declaration)¹⁵ and article 17 of the International Covenant on Civil and Political Rights (ICCPR)¹⁶ guarantee an individual's right to privacy. This would seem to prohibit the unlawful interference with the correspondence, family, home and body of an individual. The Committee on Economic, Social and Cultural Rights (ESCR Committee) in General Comment 14 has explained that the right to health contains both freedoms and entitlements.¹⁷ According to the Committee, the term 'freedoms' implies that no individual should be subjected to non-consensual medical treatment.¹⁸ Also, the international Guidelines on HIV/AIDS and Human Rights provide that HIV testing must only be conducted with the informed consent of the individual.¹⁹ The Nigerian Federation of Gynaecology and Obstetrics (FIGO) has defined informed consent as 'consent obtained freely, without threats or improper inducements, after appropriate disclosure

13 See eg Centre for the Right to Health (n 7 above).

14 As above.

15 Universal Declaration of Human Rights, GA Res 217 A (III), UN Doc A/810 (10 December 1948).

16 International Covenant on Civil and Political Rights GA Res 2200A (XXI), UN GAOR, 21st session, UN Doc A/6316 (1966),

17 The Right to the Highest Attainable Standard of Health; ESCR Committee, General Comment 14, UN Doc E/C/12/2000/4.

18 As above.

19 Adopted at the 3rd International Consultation on HIV/AIDS and Human Rights (Geneva 25 July 2002), organised by the Human Rights Office of the United Nations High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS.

to the patient of adequate and understandable information in a form and language understood by the patient'.²⁰

Under the Nigerian Constitution (as amended), section 34 guarantees the right to dignity, while section 37 protects the right to privacy.²¹ These provisions impose obligations on the government and individuals not to interfere with a person's dignity and privacy. Because HIV testing without consent may lead to adverse consequences, such as rejection and isolation, the right to dignity of an individual is infringed. In *R v Dymont*,²² the Canadian Supreme Court, while commenting on the legal implications of testing without consent, noted as follows:

The use of a person's body without his consent to obtain information about him invades an area of personal privacy essential to the maintenance of his human dignity ... [T]he protection of the Charter extends to prevent a police officer, an agent of the state, from taking a substance as intimately personal as a person's blood from a person who holds it subject to a duty to respect the dignity and privacy of that person.

It should be noted that the National Policy on HIV/AIDS of 2009 prohibits any form of HIV testing without informed consent. However, given the devastating effect of the HIV epidemic in the worst-affected regions such as sub-Saharan Africa, some commentators have argued that the need for informed consent before testing may hinder an effective response to the epidemic.²³ This position is reinforced by the fact that treatment, hitherto unavailable to millions of people in need, is now largely available to people living with HIV. It is thus suggested that, since many people tend to avoid knowing their status, in some situations HIV testing should be made compulsory.²⁴ This has led to a shift in testing policy at the international level. For instance, recent guidelines by the World Health Organisation (WHO) and UNAIDS tend to favour provider-initiated testing as opposed to patient-initiated testing, especially with regard to pregnant women attending antenatal care.²⁵ While there seems to be some merit in scaling up HIV testing so that people can ascertain their status and commence treatment immediately, thereby preventing the further spread of HIV, this should never be done at the expense of the individual's

20 FIGO Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health *Ethical Issues in obstetrics and gynaecology* (2006).

21 Under the 1979 Constitution, which is applicable to this case, the right to dignity is guaranteed in sec 31, while under the present Constitution, the right to dignity is guaranteed in sec 34.

22 [1988] 2 SCR 417.

23 KM de Cock *et al* 'A serostatus-based approach to HIV/AIDS prevention and care in Africa' (2003) 362 *The Lancet* 1848; see also U Schuklenk & A Kleinsmidt 'Rethinking mandatory HIV testing during pregnancy in areas with high HIV prevalence rates: Ethical and policy issues' (2007) 97 *American Journal of Public Health* 1179.

24 F Venter 'Make HIV testing compulsory for South Africans' *Sunday Times Africa* 3 June 2007.

25 UNAIDS/WHO *Guidance on provider-initiated HIV testing and counselling in health care facilities* (2007) 5.

fundamental rights. Gruskin *et al* have argued that, while it is important to scale up HIV testing and for individuals to ascertain their HIV status, this should be done properly and ethically, paying respect to the individual's right to privacy and confidentiality.²⁶ In a nutshell, any approach to scale up HIV testing and prevention programmes must be consistent with a respect for human rights.

Obligations under human rights instruments and national constitutions are imposed specifically on the state. However, there is nothing to suggest that an individual or a private entity cannot be held accountable for human rights violations.²⁷ Therefore, it is immaterial that in this case the plaintiff's action is against a private hospital and its proprietor. An individual or private entity can still be held liable or accountable, almost in similar fashion as the government, for human rights violations.²⁸ Declaring HIV testing without consent a human rights violation would have had a greater effect than merely describing it as battery. This is because the Court will be able to invoke the applicable constitutional provisions and human rights instruments, thereby sending a strong warning to individuals, corporate bodies and the state that often indulge in such practices. Moreover, such a declaration will require the Nigerian government to take appropriate measures to prevent such practices, under the principle of due diligence.²⁹ More importantly, declaring coercive HIV testing as a violation of rights has the potential of soothing the bruised ego and dignity of the plaintiff. As noted above, testing without consent often undermines the dignity of an individual.

3.2 Failure of the Court to address the remedy for non-discrimination

The crux of the *Ahamefule* case was the unlawful termination of employment based on HIV status. This has remained a great challenge for people living with HIV. It is a common practice for people seeking employment to be subjected to HIV testing and even to be denied employment based on their HIV status. Experience has shown that

26 S Gruskin *et al* 'Beyond numbers: Using a human rights-based perspective to enhance anti-retroviral treatment scale up' (2007) *AIDS* 17. See also E Durojaye 'The impact of routine HIV testing on HIV-related stigma and discrimination in Africa' (2011) *International Journal of Discrimination and the Law* 187-200; J Csete & R Elliott 'Scaling up HIV testing: Human rights and hidden costs' (2006) 11 *HIV/AIDS Policy and Law Review* 5-10.

27 For a detailed discussion on this issue, see D Chirwa 'The horizontal application of constitutional rights in a comparative perspective' (2006) 10 *Law, Democracy and Development* 21-48.

28 See Supreme Court decision in *Alhaji Dahiru Saude v Alhaji Halliru Abdullahi* (1989) 4 NWLR pt 116 387.

29 Under the principle of due diligence, a state can be held accountable for violations arising from the activities of a third party. See the African Commission on Human and Peoples' Rights' decision in *SERAC & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), where the African Commission found the Nigerian government liable for human rights violations perpetrated by multi-national oil companies in the Niger Delta area.

discriminatory practices against HIV-positive persons in the country are rife. Recounting personal experience, Olamide lamented that she had been dismissed from her employment when her employer discovered that she was HIV positive. Her employer had said that this was necessary so that she would not 'spread the fruit of her waywardness to other members of staff and clients'.³⁰ She further explained that her employer had gone ahead and informed her sister about this fact, as a result of which she was evicted from the place where she was living. This is just one of the many negative experiences HIV-positive persons are subjected to in the country. Out of ignorance and fear, employers tend to assume that being HIV positive implies that an employee cannot perform as expected or poses a threat to the health of others. This misconception is fuelled by socio-cultural beliefs that an HIV-positive status is the consequence of a loose or immoral lifestyle. This pushes HIV-positive people to the margins of society as they are unable to secure a source of livelihood, to afford the cost of treatment or to adhere to a treatment regime. The denial of employment opportunities based on real or perceived HIV status amounts to unfair discrimination and erodes the right to dignity of the person.

In *Ahamefule*, the defendants argued that their relationship with the plaintiff is that of master/servant under common law and, as such, they are entitled to terminate the employment contract. It is trite at common law that, in a contract of employment, the employer may terminate that contract for no reason at all. The plaintiff countered by arguing that, even in a contract of employment, if the letter terminating the contract specifically gives reasons for doing so, then it becomes necessary for the court to ascertain the correctness or otherwise of such reasons. More importantly, the plaintiff argued that the fact that the letter terminating her employment clearly referred to her HIV status as the reason, amounted to discrimination contrary to section 42 of the 1999 Nigerian Constitution (as amended) and the provisions of the African Charter. In response, the defendants argued that, since the case was instituted in 1995 before the promulgation of the 1999 Constitution, the plaintiff cannot rely on section 42 of the 1999 Constitution.

For some inexplicable reason, the Court failed to engage with the very substance of the case by not determining whether the termination of the plaintiff's employment based on her HIV status amounted to discrimination. This is a serious omission that diminishes the impact of the case in addressing the HIV-related stigma and advancing the rights of people living with HIV in Nigeria. As noted above, people living with HIV have continued to encounter serious challenges and human rights violations in every facet of their lives, particularly the workplace. More than 30 years into the HIV epidemic, stigma and discrimination remain barriers to HIV-prevention

30 E Udom 'PLWHA in Nigeria: A story of the neglected' *New Age* 17 June 2004.

programmes in many parts of Africa, including Nigeria. HIV-related stigma and discrimination not only fuel misconception about the epidemic, but may also aid the spread of the epidemic. Indeed, fear, ignorance and discrimination in the context of HIV have continued to lead to profound human cost, such as violence and abusive treatment.³¹ It is noted that '[n]egative attitudes and beliefs within communities can also increase internalised self-stigma, including guilt, shame and alienation felt by people living with HIV'.³² A stigma index survey conducted in Nigeria shows that people living with HIV still encounter violence, a denial of access to services and human rights violations contrary to the Nigerian Constitution and other human rights instruments.³³

For several years, activists and groups of people living with HIV have clamoured for laws to address discriminatory practices against people living with HIV. This call has been buoyed by the United Nations (UN) General Assembly's Declaration of Commitment, which calls on member states of the UN to enact anti-discriminatory legislation to address HIV-related stigma in their countries by 2004.³⁴ This call was reiterated in 2011 at the UN General Assembly's Political Declaration on HIV/AIDS, where states resolved to take decisive steps with a view to eliminating stigma and discrimination against people living with HIV by promoting laws and policies that would ensure the full realisation of all human rights and freedoms.³⁵ Nigeria is yet to fulfil its commitment as regards this call. However, the National HIV Strategic Framework places an emphasis on the need to respect the human rights of all, including people living with HIV, and to eliminate stigma and discrimination in the context of HIV in the country.³⁶ In addition, an Anti-Discrimination Bill is pending before the national legislature. Moreover, a National Policy on HIV/AIDS and the Workplace exists which prohibits discrimination against HIV-positive persons in the workplace.³⁷ A major challenge of this policy and other policies relates to its non-binding nature.

In 1995, at the time the *Ahamefule* case was filed, the applicable Constitution was the 1979 Constitution. Section 37 of that Constitution, which is *in pari materia* with section 42 of the 1999 Constitution (as amended), prohibits discrimination against any citizen of Nigeria on various grounds, including race, birth, religious grouping, sex or political affinity. Even if the plaintiff had relied on the

31 UNAIDS *Global AIDS epidemic report* (2012) 74.

32 As above.

33 As above.

34 UN General Assembly Special Session on HIV/AIDS Resolution A/S-26/L2 June 2001.

35 UN General Assembly Resolution on Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS A/RES/65/277.

36 National Agency for the Control of AIDS (NACA) *National HIV/AIDS Strategic Framework 2010-2015* (2010).

37 Ministry of Labour and Productivity *National workplace policy on HIV/AIDS* (2005) 14.

incorrect law (section 42 of the 1999 Constitution), this should not have been fatal to her case. There is no reason why the Court should not have invoked the provisions of the 1979 Constitution to protect the rights of the plaintiff. This is even more so when one considers that the Court is expected to be a refuge of justice and the last hope of the oppressed. On several occasions, the Nigerian Supreme Court has emphasised that justice should never be sacrificed at the altar of technicalities.³⁸

By failing to consider whether the termination of the plaintiff's employment amounted to discrimination under the Constitution, the Court would seem to have fallen into the same pit as the earlier judgment in *Odaife & Others v Attorney-General & Others*.³⁹ In that case, the applicants – four HIV-positive prisoners – had alleged that the denial of treatment based on their HIV status was discriminatory and in violation of section 42 of the Nigerian Constitution (as amended) and article 2 of the African Charter. The Court had ruled that section 42 of the Nigerian Constitution did not prohibit discrimination on the basis of one's health or HIV status, and that therefore the applicants' claim failed. This decision has been criticised for its narrow interpretation of the Constitution and for failing to consider articles 2 and 3 of the African Charter.⁴⁰

It should be noted that Nigeria is one of a few countries in Africa that has domesticated the African Charter.⁴¹ Article 2 of the African Charter prohibits discrimination on various grounds, including 'other status'. The phrase has consistently been interpreted to include health or HIV status.⁴² Although the African Commission on Human and Peoples' Rights (African Commission) has not had the opportunity to interpret articles 2 and 3 in the context of HIV/AIDS, it has explained the importance of these provisions in several cases. For instance, in *Legal Resources Foundation v Zambia*, the African Commission explains that articles 2 and 3 are fundamental provisions of the Charter that are not subject to derogation.⁴³ In addition, the Commission in one of its Resolutions has explained that any measures adopted to curb the spread of HIV must be grounded in a respect for human rights.⁴⁴ This should have been the approach of the Court in *Ahamefule*. More

38 See eg *Falobi v Falobi* (1976) 1 NMLR 169.

39 (2004) AHRLR 205 (NgHC 2004).

40 See E Durojaye 'Discrimination based on HIV/AIDS status: A comparative analysis of the decision of the Nigerian High Court's decision in *Festus Odaife & Another v Attorney-General of the Federation & Others* with other Commonwealth countries' (2007) 11 *Law, Democracy and Development* 137.

41 See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria (LFN) 2004.

42 See eg ESCR Committee General Comment 20 on non-discrimination in economic, social and cultural rights (art 2 para 2 of ICESCR).

43 (2001) AHRLP 84 (ACHPR 2001) para 63.

44 See Resolution on the HIV/AIDS Pandemic Threat Against Human Rights and Humanity adopted at the 29th ordinary session of the African Commission held in Tripoli, Libya, ACHPR Res 53/(XXIX)01.

recently, the African Commission, in its first ever General Comment on articles 14(1)(d) and (e) of the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol), has noted that women are more likely than men to suffer the consequences of HIV-related stigma and discrimination.⁴⁵ The Commission further noted that 'the societal context based on gender inequalities, power imbalances and male dominance' can further compound HIV-related stigma and discrimination for women and deny them their fundamental rights.⁴⁶

Also, the South African Constitutional Court in *Hoffmann v South African Airways*⁴⁷ has held that the denial of employment to a prospective employee based on his HIV status is a clear violation of the equality clause in section 9 of the South African Constitution.⁴⁸ The Court further noted that when HIV-positive people are denied employment, they are deprived of the opportunity to earn a living and their worth as human beings is devalued, thus leading to the violation of their right to dignity. The Court in *Ahamefule* should have adopted a purposive interpretation of section 32 of the 1979 Constitution, holding that the termination of the plaintiff's employment undermined not only her right to equality and non-discrimination, but also her right to dignity. Moreover, given the serious human rights violations HIV-positive women often encounter in Nigeria, as exemplified by the plaintiff's experience in *Ahamefule*, the Court could have shown greater sensitivity to the gender dimension raised by this case. Failure of the Court to consider the applicable constitutional provisions and the dimension of gender in this case has deprived the plaintiff of the justice she deserves. This is contrary to the maxim in law *ubi jus ibi remedium* (where there is a right there is always a remedy).

3.3 Denial of treatment as a violation of the right to health

An important reasoning of the Court in *Ahamefule* is that the failure to provide medical treatment to the plaintiff solely based on her HIV status constitutes a violation of the right to health under article 16 of the African Charter and article 12 of ICESCR, as at the time this case was instituted, access to HIV treatment was almost unavailable for the majority of people in need. The Nigerian government commenced its treatment programme in 2002. It was estimated that only 12 000

45 African Commission on Human and Peoples' Rights General Comments on Articles 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted at the 53rd ordinary session of the African Commission, October 2012.

46 n 45 above, para 3.

47 2000 11 BCLR 1235 (CC).

48 Sec 9(3) of the South Africa Constitution provides that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

persons out of the total number of people in need of treatment were receiving it as of 2005.⁴⁹ In 2006, the Nigerian government commenced its ambitious free anti-retroviral therapy programme, making it one of the biggest in the region. Consequently, the number of sites providing anti-retroviral treatment has increased from a low 20 to about 450 sites across the country.⁵⁰

Recent statistics have shown a tremendous improvement in the number of people receiving treatment. By the end of 2010 it was estimated that 400 000 people in need of treatment in the country were receiving it.⁵¹ While progress has been made in relation to the number of adults receiving treatment in the country, access to the prevention of mother-to-child transmission remains a great challenge. Nigeria lags behind in realising universal access to prevent mother-to-child transmission of HIV, accounting for about a 30 per cent gap in realising such treatment.⁵² Many factors account for poor access to HIV treatment in Nigeria. These include a weak or poor infrastructure; lack of political will; high cost of medicines; non-respect for human rights; and stigma and discrimination. A study has documented the human rights challenges that people living with HIV encounter in the health care setting in the country, showing that people living with HIV are often maltreated by health care providers and are sometimes denied access to health care services.⁵³

After reviewing the facts, the Court was of the view that the failure to provide treatment to the plaintiff solely based on her HIV status constituted a violation of article 16 of the African Charter. While this seems to be a positive and progressive approach by the Court, there was no legal analysis in support of this reasoning. The Court failed to make reference to international human rights law or the jurisprudence of other jurisdictions in arriving at its decision. For instance, the Court could have relied on General Comment 14 of the ESCR Committee in emphasising the importance of access to treatment for vulnerable and marginalised groups such as people living with HIV.⁵⁴ The ESCR Committee noted that ensuring access to treatment on a non-discriminatory basis to all, particularly vulnerable and marginalised groups, constitutes a minimum core obligation of the right to health. While the Committee notes that the obligations contained in the Covenant are imposed on states, it nonetheless reasons that non-state actors have a duty to ensure that the right to health is not violated.⁵⁵ Also, the Revised International Guidelines on HIV and Human Rights has emphasised the need to ensure access to treatment for HIV-

49 Durojaye & Ayankogbe (n 12 above).

50 NACA (n 2 above).

51 Federal Ministry of Health *Fact sheet: Universal access: The journey so far* (2011) 2.

52 UNAIDS Report 2011.

53 C Reis *et al* 'Discriminatory attitudes and practices by health care workers towards patients with HIV/AIDS in Nigeria' (2005) 2 *PLoS Medicine* 246.

54 General Comment 14 (n 17 above).

55 As above.

positive persons as a human right imperative.⁵⁶ More recently, the African Commission in General Comment on articles 14(1)(d) and (e) of the African Women's Protocol, emphasised the importance of realising access to treatment for women in the context of HIV.⁵⁷ The Commission noted that the denial of access to comprehensive sexual and reproductive health care services for women may further predispose them to HIV infection.⁵⁸

In addition, the Nigerian Court could have drawn inspiration from the decisions of other Commonwealth courts on similar issues. A good example is the decision of the South African Constitutional Court in the *Treatment Action Campaign* case.⁵⁹ This decision established that the denial of access to treatment to HIV-positive persons undermined their right to health and sexual and reproductive health. This case has remained a point of reference in articulating the right of HIV-positive persons to treatment. While the decisions of other courts are not binding on Nigerian courts, they no doubt serve as persuasive authority which can be relied on in the absence of any jurisprudence at the national level addressing similar issues.

As stated earlier, Nigeria is one of a few countries in Africa that has incorporated the African Charter into its domestic law. This provides ample opportunity for Nigerian courts to invoke the provisions of the Charter to advance human rights in the country. Indeed, in a number of cases Nigerian courts have applied the provisions of the African Charter to provide relief for the victims of human rights violations.⁶⁰ However, most of these cases have dealt with civil and political rights and few cases relate to the violation of socio-economic rights. Therefore, this has raised the question of whether Nigerian courts can invoke the socio-economic rights provisions of the African Charter in cases before them. This is more so when one considers that section 6(6)(c) of the Constitution provides that the provisions of chapter II of the Constitution, which essentially deals with socio-economic rights, are not justiciable.⁶¹ This clearly raises the possibility of a clash between the Constitution and the African Charter. In *Abacha v Fawehinmi*,⁶² the Supreme Court noted that by virtue of incorporation, the African Charter Enforcement and Ratification Act

56 Adopted at the 3rd International Consultation on HIV/AIDS and Human Rights, Geneva, Switzerland, 25 July 2002, organised by the Human Rights Office of the United Nations High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS.

57 General Comment on art 14(1)(d) and (e) (n 45 above).

58 n 57 above, para 5.

59 *Minister of Health v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC).

60 See eg cases such as *Ogugu v The State* (1994) NWLR (Part 366) 1; see also *Peter Nemi v State* [1994] 1 LRC 376 (SC); *Agbakova v Director State Security Service* [1994] 6 NWLR 475.

61 See sec 6(6)(c) of the Nigerian Constitution 1999, which provides that all rights, including the right to health, listed in ch 2 of the Constitution, shall not be made justiciable. A similar provision is contained in sec 6(6)(c) of the 1979 Constitution.

62 [2000] 6 NWLR (Part 660) 228.

has become part and parcel of Nigerian law and must be treated like any other statute. To this extent, in the event of a conflict between the African Charter and any other Nigerian statute, the former will take precedence. However, where there is a conflict between the African Charter and the Constitution, the latter takes precedence. Implicit in this decision is that the socio-economic rights provisions of the Charter might not be invoked to apply to cases before Nigerian courts.

Some commentators have argued that the decision in *Abacha* constitutes a narrow interpretation of the law and would further erode the rights of vulnerable and marginalised groups to seek justice in redressing socio-economic rights violations in the country.⁶³ Thus, in *Odafe*, the Court held that the denial of treatment to four HIV-positive prisoners constituted a violation of their right to health guaranteed under article 16 of the African Charter. This position would seem to coincide with that of the Court in *Ahamefule*. As radical as this would seem, it fails to consider the conflict which this may raise, given that socio-economic rights are not enforceable in Nigeria. Moreover, it fails to consider the Supreme Court's decision in *Abacha*. Given that the doctrine of judicial precedent is an entrenched part of the Nigerian legal system, the question may be asked whether a High Court can overrule or ignore the decision of the highest court in the land. Perhaps one may also ask: Does the pronouncement in *Ahamefule* raise any conflict with the Nigerian Constitution? It would seem so. The remedy being sought relates to the violation of the right to health, which falls under chapter II of the Constitution that has been declared unenforceable.⁶⁴ If at all there is any reason for the Court to deviate from the decision in *Abacha*, the Court should have provided a sound reasoning to this effect. Sadly, however, the Court in *Ahamefule* merely invoked article 16 of the African Charter and article 12 of ICESCR without laying the legal foundation for this.

4 Conclusion

This article has shown that the decision of the Nigerian High Court in *Ahamefule* is a welcome development as it can potentially advance the rights of people living with HIV in Nigeria. However, the major gaps in this decision relate to the failure of the Court to clearly articulate the human rights of people living with HIV in line with international human rights principles and standards. For instance, while the Court found that conducting HIV testing without informed consent amounts to unlawful battery, it failed to examine the implications of this from a

63 See eg C Onyemelukwe 'Access to anti-retroviral drugs as a component of the right to health in international law: Examining the application of the right in Nigerian jurisprudence' (2007) 7 *African Human Rights Law Journal* 446 469.

64 See cases such as *Archbishop Okogie & Others v The Attorney-General of Lagos State* (1981) 2 NCLR 350.

human rights perspective. More disappointedly, the Court ignored or failed to engage on whether the termination of the plaintiff's employment based on her HIV status constituted an act of discrimination contrary to the Nigerian Constitution and the African Charter. This was a missed opportunity for the Court to deal with a very pertinent issue that has continued to deter HIV-positive persons from living a dignified and meaningful life. For many years, HIV-related stigma and discrimination have continued to fuel human rights violations and to hinder efforts aimed at curbing the spread of the epidemic.

There is no doubt that the Court acted boldly by holding that a denial of treatment to a person based on her HIV status constitutes a violation of article 16 of the African Charter and article 12 of ICESCR. This can potentially advance the human rights of people living with HIV in the country. It has been argued that giving effect to the rights of vulnerable and marginalised groups can serve as a tool for achieving social justice in society.⁶⁵ This is based on the idea that progressive court decisions or pronouncements are able to improve the lives of vulnerable and marginalised groups in society. However, the Court should have formulated a well-reasoned argument for side-stepping the decision of the Supreme Court in *Abacha*. This lack of finesse on the part of the Court in *Ahamefule* has potentially pitted its decision with that of the Supreme Court in *Abacha*. It has been argued that since the doctrine of judicial precedent is well recognised under Nigerian law, it would seem that the decision of the Supreme Court in *Abacha* remains the law and is binding on a lower court.⁶⁶ Egede has lent his support to the decision of the Supreme Court in *Abacha* in coming to the conclusion that the African Charter is not superior to the Constitution. He notes that this position represents the correct interpretation of the law and that to hold otherwise would have been absurd, considering the provisions of sections 1(1) and (3) of the Constitution.⁶⁷

In summary, the fact that over 10 years passed before justice was finally done is merely a reminder of the deficiencies in the Nigerian legal system. It is a known fact that access to justice for the poor and disadvantaged in the country is often hindered by the high cost of litigation and the undue delay in the administration of justice. This

65 See M Pieterse 'The potential of socio-economic rights litigation for the achievement of social justice: Considering the example of access to medical care in South African prisons' (2006) 50 *Journal of African Law* 118.

66 E Durojaye 'Litigating the right to health in Nigeria: Challenges and prospects' in M Killander (ed) *International human rights law and domestic human rights litigation in Africa* (2010) 149-172.

67 See E Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria' (2007) 51 *Journal of African Law* 254. The combined reading of these provisions (similar to the 1979 Constitution) is to the effect that the Constitution is the supreme law of the land and that if any law is inconsistent with the Constitution, the Constitution shall prevail and such law shall be declared null and void to the extent of its inconsistency.

tends to erode the confidence of vulnerable and marginalised groups in the justice system. For many vulnerable groups, including people living with HIV, the justice system has suddenly become a nightmare - unreliable and incapable of providing adequate relief for human rights violations. Given the fears, misconceptions and stigmas associated with HIV, having to wait for over a decade to secure justice for the unlawful termination of employment is nothing short of a miscarriage of justice. The common saying that 'justice delayed is justice denied' is apt in this situation.

Recent Publications

Ernest Ojukwu *et al* Handbook on Prison Pre-trial Detainee Law Clinic

Network of University Legal Aid Institutions (2012) 225 pages

Stanley Ibe

Associate Legal Officer, Africa Programme, Open Society Justice Initiative, Abuja, Nigeria

1 Introduction

The clinical legal education movement in Nigeria owes its formal origins to an exchange visit sponsored by the British Council to understudy clinical legal education in South Africa. Professor Ernest Ojukwu, then deputy director-general of the Nigerian Law School, led a team of academics on that exchange visit. The seed sowed on that trip grew and took on a life of its own by June 2003 when an expanded team of academics attended the first All-Africa Clinical Legal Education Colloquium in Durban, South Africa. On their return, Professor Ojukwu and his colleagues co-founded the Network of University Legal Aid Institutions (NULAI Nigeria), modelled after the Association of University Legal Aid Institutions (AULAI).

Since its registration in October 2003, NULAI Nigeria has led the clinical movement in Nigeria and, over the last three years, in West Africa. It has supported the establishment of new clinics, trained faculties, facilitated exchange visits, organised client-counselling competitions and provided peer learning for other law clinics and law clinic associations around the world.

NULAI's pioneer clinics were generalist in orientation. This is understandable given the resources – financial and other – required for establishing specialist law clinics, particularly for a nascent clinical movement. In the last five years, however, law clinics have begun the move towards specialisation so that today there are law clinics specialising in women's human rights, criminal justice and mediation, amongst other areas.

With specialisation comes the need for resources to guide students and their teachers. Although NULAI has a standard curriculum for learning in all its affiliate clinics, it had yet to venture into publishing for its specialist clinics. Its new *Handbook on Prison Pre-trial Detainee Law Clinic (Handbook)* is therefore a welcome addition to the literature on law clinics and clearly a first on specialist law clinics in Nigeria.

This review takes a critical look at the *Handbook* – identifying good points, revealing missing fundamentals and offering ideas on how to improve output.

2 Overview of the *Handbook*

The handbook brings together ten chapters, an index and a page about the authors. It opens with a two-page chapter which sets out the objectives and scope of the Prison Pre-Trial Law Clinic. This extremely short chapter misses an opportunity to introduce the subject to a new reader in a compelling manner. It neither describes what clinical legal education is nor what role law clinics play in this relatively new form of legal education. Pre-trial law clinics suffer the same fate.

In addition, the *Handbook* appears to use 'prison pre-trial detainee law clinic' and 'prison pre-trial law clinic' interchangeably. It is not clear if this is the intention of the authors. The lack of clarity about the authors' choice of words also extends to the title of the *Handbook* where 'prison pre-trial detainee law clinic' is used. Perhaps an explanation in the opening chapter or a glossary of terms at the end of the text could have dealt with this. I can only surmise that the authors may have determined to focus on pre-trial detainees held in prisons. This is crucial because police and other detention facilities hold pre-trial detainees.

The preface responds to the question of *what* the text is about but not *why* it is necessary or why focus on pre-trial detention. There is no attempt to review any literature or say that none on the subject matter exists. The 'how to use' this *Handbook* is seemingly implicit in the suggestion that 'teachers and students will find this handbook (as well as the *Manual on Prison Pre-trial Law Clinic*¹ that supports it) very useful'. I can surmise that the *Manual* and *Handbook* will be used together.

Chapter two usefully discusses the criminal justice system to provide a fitting background to the subject of pre-trial detention. It opens with a set of three 'outcomes'² *Handbook* users should expect,

1 E Ojukwu & O Lagi *Manual on Pre-trial Detainee Law Clinic* (2012).

2 The outcomes read like questions at the end of the chapter, eg, discuss and explain the nature, scope and concept of the Nigerian criminal justice system. E Ojukwu *et al Handbook on Prison Pre-trial Detainee Law Clinic* (2012) 3.

but does not follow the format of chapter one in that it fails to address objectives.³

The first of the outcomes, which relates to the nature, scope and concept of Nigeria's criminal justice system, forms the basis of discussion under 2.2. Curiously, only the last of eight paragraphs⁴ actually attempts to describe criminal justice in the context of Nigeria. The prior seven paragraphs engage conceptual clarifications of terms such as 'system', 'justice sector' and 'criminal justice'.

The second outcome addresses institutions involved in the criminal justice system. Section 2.3 identifies the police and other law enforcement agencies, the judiciary and the prisons service. For some unexplained reason, it fails to include prosecutions, which is often a shared function between the police in lower magistrate courts and the Department of Public Prosecutions – a department of the Attorney-General's office in Abuja and the 36 states of Nigeria.⁵

Chapter three is a fairly elaborate 56-page section, introducing the procedure for instituting criminal proceedings. The length of this chapter is indicative of the complexity of the subject given the different competing legal traditions in Nigeria.⁶

The chapter impressively identifies and discusses the stages involved in prosecuting a crime in Nigeria, taking care to distinguish what is required in Northern Nigeria from what is required in Southern Nigeria. There is, however, a controversial statement on page 61 suggesting that '[g]one are the days when a magistrate acting upon an application for remand by the police merely orders a remand'. In the context of Lagos state, those days are certainly gone,⁷ but this is not exactly the case with the other 35 states and the federal capital territory, Abuja.⁸

Chapter four provides an overview of the human rights of prisoners/pre-trial detainees in Nigeria. It is rather superfluous to include 'human' in a topic on rights relating to prisoners. Prisoners are clearly human.

3 There is a general lack of uniformity in the structure of the *Handbook*. Eg, chapters three and four end with a 'conclusion'; others do not.

4 6.

5 Interestingly, sec 2.3.14 titled 'Ministry of justice, attorney-general and director of public prosecutions' describes the ministry of justice as 'an organ of the government established to prosecute and defend matters on behalf of the government'. See 19.

6 Eg, there is a federal Criminal Procedure Act and states Criminal Procedure Laws applicable to Southern Nigeria. The Criminal Procedure Code applies to Northern Nigeria as well as the Federal Capital Territory, Abuja. While states like Lagos have Administration of Criminal Justice Law in addition.

7 The Administration of Criminal Justice Law of Lagos State, 2007 provides a maximum of 60 days for detainees to be returned to court for trial.

8 There are no concurrent laws in the other states. Rather, most states still maintain remand laws that ostensibly allow magistrates without trial jurisdiction to remand criminal suspects, often indefinitely.

The chapter provides a set of definitions for terms such as 'prisoner' and 'pre-trial detainee'. This is remarkable given that these terms have been used throughout the *Handbook* with concrete descriptions. The choice of Black's *Law dictionary*⁹ as a source for the definition of 'pre-trial detainee' is rather unfortunate in that it is not context specific.¹⁰

Under section 4.5, dealing with the entitlement of prisoners/pre-trial detainees to human rights, there is a reference to the right of 'everyone to take part in the government of his or her country directly or through freely-chosen representatives'.¹¹ The authors do not express an opinion as to whether this right exists in practice or is restricted in Nigeria. The correct position is that there is no law restricting prisoners from voting during elections although they have never enjoyed this right.¹²

Chapter five opens with a rather discriminatory description of the term 'access to justice', namely, 'the substantive and procedural mechanisms designed to ensure that the *citizens* have opportunity of seeking redress for the violation of their legal rights'.¹³ I am unable to agree with the idea that access to justice is restricted to citizens. It ought to be available to everyone within the jurisdiction of Nigeria. Beyond this, the chapter acquits itself well on this interesting topic by identifying challenges to access to justice and discussing the operation of legal aid. The chapter also makes concrete proposals for enhancing access to justice.

Chapter six makes a useful contribution in that it addresses a question that should have been addressed earlier in this *Handbook*, namely, what is the role of law clinics in prisons. It chooses a two-pronged approach to this – the problem(s) clinics are designed to solve and the objectives for which they exist. The authors rightly suggest that law clinics are designed to supplement existing legal aid and assistance programmes, amongst other objectives. However, they also conclude that interventions made by existing legal aid and assistance programmes 'have made no impact at all'.¹⁴ This is rather unfortunate given that it is not supported by any empirical evidence. Nonetheless, it raises interesting questions about not just existing legal aid interventions but also access to legal aid.

9 89.

10 Blacks defines a pre-trial detainee as a 'defendant who is held before trial on criminal charges either because the established bail could not be posted or because the release was denied'. In Nigeria, there are other circumstances in which a suspect can await uncertain trial, eg where a court of competent jurisdiction has yet to determine the charge against the suspect.

11 91.

12 Dr Chidi Odinkalu, Chairperson of the National Human Rights Commission, recently canvassed this position arguing, as I do, that there is no legal restriction on the right of prisoners to vote. See I Chiedozie 'NHRC advocates voting rights for prisoners' *Punch* <http://www.punchng.com/news/nhrc-advocates-voting-rights-for-prisoners/> (accessed 9 August 2013).

13 121.

14 157.

I think that access to legal aid is less than optimal. This is clearly due to more structural problems, namely, the low lawyer-to-population ratio,¹⁵ coupled with the penchant for the legal profession to be uncomfortable with paralegal services provision, particularly if non-lawyers offer this service. The chapter does not provide a balanced debate on this subject, but it does say something about the activities of pre-trial detention clinics.¹⁶

Chapter seven offers an interesting diet on professional responsibility and ethics. It raises and adequately responds to an interesting question about the applicability of the Rules of Professional Conduct¹⁷ to law students. On the subject of ethical issues relating to prison work, the authors seem to suggest that there are seven principles from which the code of ethics are derived,¹⁸ but list and discuss only six.¹⁹

Chapters eight and nine discuss interrelated subjects of interviewing and counselling as well as report and opinion writing. The former extracts useful tips from a highly-regarded handbook for professional legal training²⁰ on the functions and golden rules for interviews, while the latter presents concise but rich guidelines for writing a report and an opinion.

The concluding chapter of this *Handbook* focuses on file management from the perspective of a law office or clinic.

3 Critique of the *Handbook*

The authors appear to assume that the audience is knowledgeable about the topic and therefore make little or no effort to provide a background or explain certain concepts. For example, there is a reference to the Criminal Procedure Act and Criminal Procedure (Northern States) Act in the context of power of arrest²¹ without an effort, even if by footnote, to explain why there are two legislations on the same subject in the same country. In the same passage, there are references to 'indictable' and 'non-indictable' offences as well as 'arrest with warrant' and 'arrest without warrant'. To find answers to

15 Nigeria currently has nearly 100 000 lawyers to a population of 150 million – a ratio of 1:1 500.

16 157-169.

17 *Rules of professional conduct for legal practitioners* (2007) http://www.afrilegstud.com/calsreview/PDF/professional_conduct.pdf (accessed 23 August 2013).

18 181.

19 Dignity/integrity at work, confidentiality, legal requirements, conflict of interest, dilemmas, and competence/diligence. See 181 for the list and 182-192 for the discussion.

20 *Professional legal training handbook* of the Faculty of Law Clinic, University of Durban-Westville, South Africa, referenced on 200. University of Durban-Westville is now a campus of the University of KwaZulu-Natal.

21 8.

the first two terms, the reader has to move to pages 46²² and 48.²³ There is, however, no answer provided in the text for circumstances under which one may be arrested with a warrant as distinct from an arrest without a warrant. Perhaps the authors expect that readers would have gone through a course of instruction in criminal law or procedure by the time they use this *Handbook*.

Similarly, the concept of 'holding charge' is first mentioned in the context of what happens when a defendant is before a magistrate's court for an offence over which the court has no jurisdiction. The reader is left to wonder what 'holding charge' means until page 54.²⁴

The authors also use a number of legalese, including *de facto*,²⁵ *inter alia*,²⁶ *locus standi*,²⁷ *de novo*,²⁸ *cause list*²⁹ and *pre-action notice*³⁰ without explaining what these words or phrases mean. Again, this may have been informed by the assumption that the reader ought to know. These terms would have been usefully explained in a glossary of terms.

There is an attempt to extract usually long commentary from reported cases. While this may have been an exercise in allowing the judges to speak for themselves, it could have been better managed. Clearly, the decision to devote almost two full pages to reporting *verbatim* the decision in *Munir v Federal Republic of Nigeria*³¹ merits further scrutiny. The main points of that decision could have been highlighted and, where necessary, the judge's statements could have been quoted with minimal distraction. This is not an isolated case. There are similar extensive quotations with respect to the cases of *Timothy v Federal Republic of Nigeria*,³² *Jimoh v Commissioner of Police*,³³ *Lufadeju v Bayo Johnson*³⁴ and *Uwazurike & 6 Others v Attorney-General of the Federation*.³⁵

22 n 34 cites sec 2 of the Criminal Procedure Act which defines 'indictable offence' as 'any offence which on conviction may be punished by a term of imprisonment exceeding two years or by imposition of a fine exceeding four hundred naira'.

23 n 38 describes 'non-indictable' offence as one 'which upon conviction may be punished by a term of imprisonment not exceeding two years or by imposition of a fine below four hundred naira'.

24 Sec 3.4.7 is devoted to explaining the subject of 'holding charge'. For more on the subject, see O Agbakoba & S Ibe *Travesty of justice: An advocacy manual against the holding charge* (2004).

25 139.

26 63.

27 135.

28 133.

29 134.

30 136.

31 69-71.

32 40-41.

33 56-57.

34 58-59.

35 67-68.

The information in the book is generally accurate up to the date of publication. There is one notable exception, however, where the authors say that '[t]he Ministry of Internal Affairs supervises the Police Service Commission and the Police'.³⁶ The Presidency supervises the Police Service Commission,³⁷ while the Ministry of Police Affairs supervises the Nigerian Police Force.³⁸

For readers interested in further exploring the subject of this *Handbook*, they may have to literally extract the resources used as there is no bibliography. The absence of this tool is a profound missed opportunity.

The absence of a section or chapter on funding law clinics is another omission. Funding is one of the more significant challenges law clinics in Africa face, and therefore an undertaking such as the one under review ought to devote some attention to addressing the question of how to fundraise for law clinics.

4 Conclusion

The *Handbook* is a useful tool for navigating the relatively new idea of pre-trial law clinics in Nigeria. It presents the most relevant information in a reader-friendly fashion. Although there are a number of missing fundamentals, it is still a veritable resource material for those seeking to understand how pre-trial law clinics work in Nigeria.

36 10.

37 The Police Service Commission is established as an executive body of the Federal Republic of Nigeria under sec 153 of the 1999 Constitution and the Police Service Commission (Establishment) Act of 2001. See the website of the Commission, <http://www.psc.gov.ng/node/47> (accessed 9 August 2013).

38 The core mandate of the Ministry is to 'administer the NPF (Nigeria Police Force) in such a manner that it operates at the highest level of professionalism, dedication and discipline to ensure public safety and internal security of the country'. See the website of the Ministry, <http://www.policeaffairs.gov.ng/> (accessed 9 August 2013).

AFRICAN HUMAN RIGHTS LAW JOURNAL
GUIDE FOR CONTRIBUTORS

Contributions should preferably be e-mailed to
isabeau.demeyer@up.ac.za

but may also be posted to:

The Editors
African Human Rights Law Journal
Centre for Human Rights
Faculty of Law
University of Pretoria
Pretoria 0002
South Africa

All correspondence, books for review and other communications should be sent to the same address.

The editors will consider only material that complies with the following requirements:

- The submission must be original.
- The submission should not already have been published or submitted elsewhere.
- Articles that do not conform to the *African Human Rights Law Journal's* style guidelines will be rejected out of hand.
- The *African Human Rights Law Journal* utilises plagiarism detection software. Please ensure that submissions do not infringe other persons' intellectual property rights.
- Papers should average between 5 000 and 10 000 words (including footnotes) in length.
- If the manuscript is not sent by e-mail, it should be submitted as hard copy and in electronic format (MS Word).
- The manuscript should be typed in Arial, 12 point (footnotes 10 point), 1½spacing.
- Authors of contributions are to supply their university degrees, academic qualifications (with institutions where obtained) and professional or academic status.
- Authors should supply a summary of their contributions of not more than 300words.
- Footnotes must be numbered consecutively. Footnote numbers should be in superscript without any surrounding brackets. The manuscript will be submitted to a referee for evaluation. The editors reserve the right to change manuscripts to make them in conformity with the house style, to improve accuracy, to eliminate mistakes and ambiguity, and to bring the manuscript in line with the tenets of plain legal language.
- The following general style pointers should be followed:

- First reference to books: eg UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 21.
- First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.
- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34 above) 243.
- Use UK English.
- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN)
- Words such as 'article' and 'section' are written out in full in the text.
- Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; secs. No full stops should be used. Words in a foreign language should be italicised. Numbering should be done as follows:
 - 1
 - 2
 - 3.1
 - 3.2.1
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than 30 words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes): 28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms 'constitution', but when a specific country's constitution is referred to, capitals are used 'Constitution'.
- Official titles are capitalised: eg 'the President of the Constitutional Court'.
- Refer to the Journal or <http://www.chr.up.ac.za/index.php/ahrlj-contributors-guide.html> for additional aspects of house style.

**THE CENTRE FOR HUMAN RIGHTS
UNIVERSITY OF PRETORIA**

The Centre for Human Rights, founded in 1986, is part of the Faculty of Law of the University of Pretoria. The main focus of the Centre is human rights law in Africa.

For full information on the Centre, see www.chr.up.ac.za or contact

The Director
Centre for Human Rights
Faculty of Law, University of Pretoria
PRETORIA 0002
Tel: (012) 420-3810/3034
Fax: (012) 362-5125
chr@up.ac.za

Staff

Adem Abebe

Post-Doctoral Research Fellow

Romola Adeola

Alumni Co-ordinator; Doctoral candidate

Kweku Antwi

Project Manager: Advanced Human Rights Courses

Melhik Bekele

Tutor: LLM (Human Rights and Democratisation in Africa);
Doctoral candidate

Yolanda Booyzen

Senior Internet Administrator

Danie Brand

Managing Editor: Pretoria University Law Press

Sukoluhle Joy Chilongo

Administrative Assistant: Advanced Human Rights Courses

Elize Delport

Consultant: Gender Unit; Extraordinary Lecturer

Isabeau de Meyer

Publication Manager: *African Human Rights Law Journal*;
Administrator: LLM (Human Rights and Democratisation in Africa)

Michelo Hansungule

Professor of Human Rights Law; Academic Co-ordinator: LLM
(Multidisciplinary Human Rights)

Lizette Hermann

Manager: Pretoria University Law Press

Ademola Jegede

Tutor: LLM (Human Rights and Democratisation in Africa);
Doctoral candidate

Magnus Killander

Senior Lecturer and Head of Research

Dan Kuwali

Post-doctoral Fellow

Emily Laubscher

Assistant Financial Manager

Josua Loots

Project Manager: Business and Human Rights

Eric Lwanga

Programme Co-ordinator: LLM (Human Rights and
Democratisation in Africa)

Harold Meintjes

Financial Manager

Remember Miamingi

Tutor: LLM (Human Rights and Democratisation in Africa);
Doctoral candidate

Jehoshaphat Njau

Project Co-ordinator: Disability Rights Scholarships

Bright Nkrumah

Research assistant

Martin Nsibirwa

Programme Manager: LLM (Human Rights and Democratisation in
Africa)

Azubike Onuora-Oguno

Tutor: LLM (Human Rights and Democratisation in Africa);
Doctoral candidate

Sarita Pienaar-Erasmus

Assistant Financial Manager

Ally Possi

Tutor: LLM (Human Rights and Democratisation in Africa);
Doctoral candidate

Ololade Shyllon

Project Administrator; Doctoral candidate

Olufemi Soyaju

Programme Co-ordinator: LLM (International Trade and Investment Law in Africa); Doctoral candidate

Norman Taku

Assistant Director

Armand Tanoh

Project Manager: African Human Rights Moot Court Competition;
Doctoral candidate

Carole Viljoen

Operations Manager

Frans Viljoen

Director

Extraordinary/Honorary professors

Jean Allain

Professor of Public International Law, Queen's University of Belfast,
Northern Ireland

Cecile Aptel

Office of the High Commissioner for Human Rights, Geneva,
Switzerland

Danny Bradlow

Head: International Economic Relations and Policy Department,
South African Reserve Bank

Jakkie Cilliers

Director, Institute for Security Studies

Mustaqeem de Gama

Acting Director of International Trade and Economic
Development, Department of Trade and Industry

John Dugard

Member, International Law Commission

Johann Kriegler

Retired Justice of the Constitutional Court of South Africa

Edward Kwakwa

Legal Counsel, World Intellectual Property Organisation, Geneva,
Switzerland

Cephas Lumina

Independent Expert of the United Nations Human Rights Council

Richard Maiman

University of Southern Maine, USA

David Padilla

Formerly Assistant Executive Secretary, Inter-American Commission on Human Rights

Mary Robinson

President, Mary Robinson Foundation – Climate Justice, Northern Ireland

Johann van der Westhuizen

Justice of the Constitutional Court of South Africa

Extraordinary lecturers

Elize Delpont

Consultant

Oagile Dingake

Justice of the Botswana High Court

Solomon Ebobrah

Co-ordinator and Senior Lecturer, Department of Jurisprudence and Public Law, Niger Delta University, Nigeria

Nicole Fritz

Executive Director, Southern Africa Litigation Centre

Asha Ramgobin

Executive Director, Human Rights Development Initiative

Sarah Knuckey

Director, Project on Extrajudicial Executions, New York University School of Law, USA

Advisory board

André Boraine

Dean, Faculty of Law, University of Pretoria

Edouard Jacot Guillarmod

Consultant

Johann Kriegler

Retired Justice of the Constitutional Court of South Africa

Bess Nkabinde

Justice of the Constitutional Court of South Africa

David Padilla

Formerly Assistant Executive Secretary, Inter-American Commission on Human Rights

Sylvia Tamale

Makerere University, Kampala, Uganda

Johann van der Westhuizen

Justice of the Constitutional Court of South Africa

Projects and programmes

- African Human Rights Moot Court Competition
- Master's Programme (LLM/MPhil) in Human Rights and Democratisation in Africa
- Master's Programme (LLM) in International Trade and Investment Law in Africa
- Master's Programme (LLM/MPhil) in Multidisciplinary Human Rights
- Gender Unit
- HIV/AIDS and Human Rights (with the Centre for the Study of AIDS)
- Advanced Human Rights Courses
- Indigenous Peoples' Rights in Africa
- Disability Rights

Regular publications

- African Human Rights Law Journal
- *African Human Rights Law Reports* (English and French)
- *Constitutional Law of South Africa*

CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 July 2013

Compiled by: I de Meyer

Source: <http://www.africa-union.org> (accessed 31 October 2013)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	Ratified/Acceeded	Ratified/Acceeded	Ratified/Acceeded	Ratified/Acceeded	Ratified/Acceeded	Ratified/Acceeded
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	28/06/12
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		13/09/12	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	14/12/11	
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	02/12/12
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		16/04/12	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	11/10/12
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
South Sudan						
Sudan	18/02/86	24/12/72	30/07/05			19/06/13
Swaziland	15/09/95	16/01/89	05/10/12		05/10/12	
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	21/10/05	24/01/12
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	54	45	47	26	36	20

* Additional declaration under article 34(6)
Ratifications after 31 December 2012 are indicated in bold