

Human Rights in Africa

Legal Perspectives on their Protection and Promotion

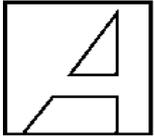
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Foreword

Freedom, justice and peace in the world are founded on the recognition of the inherent dignity of all members of the human family, and of their equal and inalienable rights. This pronouncement in the Preamble of the 1948 Universal Declaration of Human Rights means that human rights serve to protect and promote the dignity of human beings worldwide. Human rights can be seen as a legal codification of the concept of human dignity. Despite different regional perceptions and arguments relating to cultural relativism, the concept of *human rights* and their universality are generally accepted, although these always have to be seen in their specific contexts.

Human rights as a legal concept and codification of human dignity was late to arrive in Africa. Its evolution on this continent is to be seen against the background of the dynamic development of human rights within the United Nations system and that of international law, although the impetus of this evolution is owed to the struggles within African states in the colonial and post-independence eras.

The role of the Organisation of African Unity (OAU) and its successor, the African Union (AU), must also be acknowledged here. Since the OAU's inception in 1963, several organisations, instruments and mechanisms have come to the fore, aiming at promoting and protecting human rights in Africa. The adoption of the African Charter on Human and Peoples' Rights in 1981 is considered a milestone in this regard, as are the establishment of the African Commission on Human and Peoples' Rights and the associated African Court of Human and Peoples' Rights. In addition, regional economic communities have set up their own organisations and instruments aiming at promoting human rights in their respective regions. These regional and continental provisions should not blur the fact that any state in the world is considered a prime agent in promoting and protecting human rights: the benchmark of any civilised society is taken as its state's commitment to protect the dignity of its citizens.

Despite the consensus in, amongst other forums, academic literature that African human rights systems are weak and ineffective, the fact that a protection and promotion system is in place needs to be acknowledged. However, such systems have to be filled with life and blood, with serious commitment and professional efficiency.

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A publication on human rights in Africa will, therefore, enhance the understanding of this crucial paradigm, its system and its legal perspectives. The various articles presented here attempt to expose and analyse Africa's numerous achievements and challenges in this regard.

May this publication nobly serve the purpose of deepening the understanding of human rights, strengthening the rule of law, and protecting and promoting the dignity of the people of Africa.

A handwritten signature in black ink, appearing to read 'Desmond Mpilo Tutu', followed by several horizontal strokes that suggest a flourish or the end of a signature.

Desmond Mpilo Tutu
Archbishop Emeritus of Cape Town
South Africa

Introduction

Anton Bösl and Joseph Diescho

To protect the inviolability of human dignity worldwide is the ultimate objective of the concept of human rights. Human rights are considered and officially accepted as universal – regardless of their genesis or cultural manifestation. History and experience show, however, that respect for the dignity and rights of human beings cannot be taken for granted: they must be constantly nurtured and vigorously guarded.

It is against this background that this publication evolved. Its contents stem from the conviction that, amongst several means, legal instruments and institutions can contribute to the advancement of human rights.

Human rights as a legal concept arrived in Africa relatively late. The United Nations (UN) System, international law and the African Union have certainly all contributed to the establishment of a human rights system in Africa, which has positively and indispensably impacted on the advancement of human rights and of justice. Yet some of the promises made about such rights being guaranteed under global, continental, regional and national legal instruments have remained unfulfilled.

Therefore, this publication on human rights on the continent tries to capture the current status of the African human rights protection system and the various legal instruments, institutions and mechanisms at its disposal. It summarises, from a legal perspective, the achievements gained and challenges faced when it comes to respecting human rights in Africa.

SECTION I, entitled “**The paradigm of human rights and its relevance for Africa**”, is discussed from a general perspective. In his article, “Human rights between universalism and cultural relativism?”, **Manfred Hinz** pleads for the need for anthropological jurisprudence in the globalising world. Despite the universality of human rights and their principles, different cultural norms place universal human rights in relation to their cultural context, hence leading to ‘soft’ universalism or ‘soft’ relativism. This concept is elaborated on in the article from a jurisprudential perspective informed by anthropology.

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The article by **Charles Villa-Vicencio** entitled “Transitional justice and human rights in Africa” discusses the dichotomy of traditional African mechanisms of reconciliation and Western notions of conflict resolution. It identifies the limitations of prosecutorial justice as witnessed in the dominant transitional justice debate, and ponders the origins and parameters of the transitional justice debate in Africa.

In his article, “Human rights education in Africa”, **Nico Horn** argues for the importance and necessity of human rights education in implementing and advancing human rights effectively in Africa. He refers especially to the UN declaration of a Decade of Human Rights Education (1995–2004), to which African states gave scant attention. This Decade was followed by another declared by the UN, namely the World Programme for Human Rights Education (2005–ongoing). Horn proposes that human rights institutions, treaty bodies and civil society need to collaborate more effectively in human rights education in Africa.

SECTION II is dedicated to the theme “**The international justice system and human rights in Africa**”. In his article entitled “The United Nations and the advancement of human rights in Africa”, **Wilfred Nderitu** focuses on the issue of poverty as a violation of human rights, elaborates on definitions of *poverty* in various international human rights documents, and describes various UN efforts in this regard as human-rights-related regimes or initiatives. Synergies between and among different international institutions and actors in the fight against poverty are debated, and the responsibility of the State in alleviating poverty is considered from a juristic perspective.

The article by **Francois-Xavier Bangamwabo**, entitled “International criminal justice and the protection of human rights in Africa”, examines the current prosecution of international crimes perpetrated in Africa. Judicial institutions are explored, like the ad-hoc UN International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the International Criminal Court (ICC). Bangamwabo looks at the creation, mandate, legality and jurisdiction of these bodies and their relevance for the protection of human rights in Africa. He describes the dilemma that, on the one hand, these international judicial institutions have provoked criticism over their potential (political) impact, their pursuit of ‘abstract justice’ and – with regard to the ICC – the perceived

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prioritisation of Africa. On the other hand, these international institutions often complement weak and/or unwilling domestic legal institutions in Africa.

In **SECTION III**, entitled “**The African Union and the regional protection of human rights**”, the article “The African Union: Concepts and implementation mechanisms relating to human rights” by **Bience Gawanas** explains the different human rights premises of the Organisation of African Unity (OAU), which was preoccupied with human rights as a right to self-determination and independence in the context of the struggle for the decolonisation of Africa, and that of the African Union (AU), which – in contrast to the OAU – made human rights an explicit part of its mandate and officially mainstreamed human rights into all its programmes. For Gawanas, the AU also adopted a human rights approach to development with a focus on social, economic and cultural rights. She discusses the various human-rights-related charters and protocols of the OAU and the AU, including the New Partnership for Africa’s Development (NEPAD) and the African Peer Review Mechanism (APRM). The human-rights-related key issues for the AU identified include culture and African values, the right to development, HIV and AIDS, vulnerable groups, and gender. For Gawanas a more coherent approach of the AU on the human rights standards, their implementation and more effective mechanisms for their enforcement would further advance human rights in Africa.

The article by **Sheila Keetharuth** follows, entitled “Major African legal instruments and human rights”. An analysis of the following major African legal instruments is provided:

1. The African Charter on Human and Peoples’ Rights
2. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa
3. The Declaration of Principles on Freedom of Expression in Africa
4. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa
5. The African Charter on the Rights and Welfare of the Child
6. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa
7. The African Charter and the Protection of Refugees through Communications before the African Commission, and
8. The AU Convention on Preventing and Combating Corruption.

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The article presents a descriptive study of these major legal instruments, situates them in their historical context, and examines their key principles and provisions, guidelines and specificities. Despite the shortcomings and inherent problems with African legal instruments (apart from those associated with their implementation), Keetharuth shows that Africa has in many cases led the way in setting norms. In the field of international human rights law, African legal instruments have been trailblazers. Most significantly, the African Charter has incorporated the three categories/generations of human rights in one instrument, emphasising their indivisibility.

The Protocol on the Statute of the African Court of Justice and Human Rights, which merges the two continental courts – the African Court of Human and Peoples’ Rights and the African Court of Justice – and replacing their respective Protocols is dealt with by **Michelo Hansungule** in his article entitled “African courts of human rights and the African Commission”. The author discussed the evolution of the current justice architecture, the three courts and the African Commission, their mandate, structure, composition, communication and – for the courts – their jurisdiction. Hansungule critically reviews the challenges for these institutions, their problematic mechanisms and inherent limitations, as well as their shortcomings, which include a lack of focus and poor implementation. He hopes the new African Court of Justice and Human Rights and the African Commission will have a positive impact and benefit the African human rights architecture and, eventually, individual victims.

SECTION IV is themed “**Subregional human-rights-related institutions in Africa**”. Although regional economic communities (RECs), as subregional institutions, do not explicitly have human rights at the core of their agenda, it becomes increasingly evident that human-rights-related topics play an important role in their legal framework and implementation – as **Oliver Ruppel** shows us in his article, “Regional economic communities and human rights in East and southern Africa”. The RECs’ objective of deeper regional integration in order to enhance economic development includes the harmonisation of laws and jurisprudence. RECs have also integrated human rights into their various regional treaties since good governance and human rights have a beneficial effect on the investment climate. Ruppel introduces the respective backgrounds, human rights protection and enforcement mechanisms to the following RECs:

1. The Common Market for Eastern and Southern Africa (COMESA)
2. The Southern African Development Community (SADC)

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3. The Eastern African Community (EAC)
4. The Economic Community of Central African States (ECCAS), and
5. The Intergovernmental Authority on Development (IGAD).

Ruppel concludes that COMESA, SADC and the EAC have integrated human rights into their legal frameworks to a greater extent than have ECCAS and IGAD.

In his article, “Regional economic communities and human rights in West Africa and the African Arabic countries”, **Enyinna Nwauche** captures the following RECs which are officially acknowledged by the AU:

1. The Economic Community of West African States (ECOWAS)
2. The Arab Maghreb Union (AMU), and
3. The Community of Sahel-Saharan States (CEN-SAD)

as well as other regional economic institutions, not acknowledged as RECs by the AU, as follows:

4. The West African Economic and Monetary Union (WAEMU), and
5. The League of Arab States.

Nwauche explains the different objectives and challenges of these institutions, and describes their jurisdictions and judicial enforcement mechanisms. He concludes that human rights protection in West African and African Arabic regions can only be seen as fledging from the perspective of these communities and institutions, since they focus on regional economic integration. However, Nwauche commends the ECOWAS Court of Justice for building a normative regime around the African Charter on Human and Peoples’ Rights, and feels that its emerging jurisprudence will serve as an example for other regional courts.

In **SECTION V**, entitled “**National human rights institutions in Africa**”, the article by **Chris Maina Peter**, “Human Rights Commissions – Lessons and challenges”, provides an overview of the national dimension of the protection and promotion of human rights. The currently 31 national human rights institutions in Africa operate as commissions, ombudspersons or institutions. These bodies, although established by the State, are supposed to act independently of it, instead complementing the country’s efforts to protect its citizens and develop a culture that is conducive to the protection of human rights. The author elaborates on the commissions in South Africa, Uganda and Tanzania, and points out lessons

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and opportunities from these examples. These institutions are more flexible and accessible than courts of law, and can be effective in settling disputes amicably and peacefully. However, a lack of education and knowledge on (and, hence, ownership of) such institutions, a lack of funding, political obstacles and sometimes politically aligned and incompetent Commissioners pose threats to the effectiveness of these important institutions.

In his article, entitled “Can Truth Commissions in Africa deliver justice?”, **Dumisa Buhle Ntsebeza** argues that truth (and reconciliation) commissions cannot replace justice systems, but, in post-conflict societies, they can provide a complementary measure to criminal prosecution of past crimes by governments. For Ntsebeza, the public disclosure of egregious human rights violations and crimes and the added opprobrium constitute a blow to the perpetrator similar to that of a jail sentence. Unlike the notion of retributive justice with its criminal prosecution, the authors believes a truth commission can, through the notion of restorative justice and the non-prosecution of offenders, restore relations through forgiveness between victims/survivors and perpetrators. For Ntsebeza, the trend for truth commissions in Africa emanates from a traditional approach to dispute resolution and ubuntu, the African principle of humanity. He warns, however, that commissions can only achieve their aims in transitional societies if their mandates and composition are determined by broad consultation.

Thus, the 12 articles collected here speak of the human rights protection system in Africa and its current transformation; they elaborate on its achievements, but also mention the shortcomings evident in its implementation and effectiveness.

The publication is also a tribute to the increasing significance of human rights as a policy issue in Africa, and as a primary component of global regulatory policy and global governance.

With this publication the Konrad Adenauer Foundation aims to heighten awareness of and further promote human rights in Africa, and to strengthen the rule of law on the continent.

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List of abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AEC	African Economic Community
AFRC	Armed Forces Revolutionary Council
AIDS	acquired immune deficiency syndrome
AMU	Arab Maghreb Union
APRM	African Peer Review Mechanism
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment
CAR	Central African Republic
CDF	Civil Defence Forces
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEN-SAD	Community of Sahel-Saharan States
CERD	Convention on the Elimination of All Forms of Racial Discrimination
COMESA	Common Market for Eastern and Southern Africa
CRC	United Nations Convention on the Rights of the Child
DRC	Democratic Republic of Congo
DRD	Declaration on the Right to Development
EAC	East African Community
EACJ	East African Court of Justice
ECCAS	Economic Community of Central African States
ECOMOG	ECOWAS Ceasefire Monitoring Group
ECOSOCC	Economic, Social and Cultural Council
ECOWAS	Economic Community of West African States
FEMCOM	Federation of National Associations of Women in Business
FGM	female genital mutilation
FPLC	Les Forces Patriotiques pour la Liberation du Congo
FTA	free trade area
GATT	General Agreement on Tariffs and Trade
HIV	human immunodeficiency virus

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ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
IDP	internally displaced person
IGAD	Intergovernmental Authority on Development
IHRDA	Institute for Human Rights and Development in Africa
KAS	Konrad-Adenauer-Stiftung
LRA	Lord's Resistance Army
MLC	Mouvement de Libération du Congo
NDPP	National Director of Public Prosecution
NEPAD	New Partnership for Africa's Development
NGO	non-governmental organisation
NHRI	national human rights institution
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights
PAP	Pan-African Parliament
PDHRE	People's Decade for Human Rights Education
REC	regional economic community
RPF	Rwandese Patriotic Front
RUF	Revolutionary United Front
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCOI	United Nations Commission of Inquiry
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WAEMU	West African Economic and Monetary Union
WWII	Second World War

Human rights between universalism and cultural relativism? The need for anthropological jurisprudence in the globalising world¹

Manfred O Hinz

The *universal* in the Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) of 1948² and its fundamental law, the Charter of the United Nations (UN),³ laid the foundation of a human rights movement that changed the face of the world.⁴ Indeed, the manifestations of human rights after World War II were as revolutionary as the human rights declarations of the American and French Revolutions in the last years of the 18th century.

¹ This paper pursues further what I started with my contribution to the XIth International Congress of the Commission on Folk Law and Legal Pluralism in 1997 (Hinz 1999), followed by Hinz (1998) and taken up again with “Jurisprudence and anthropology” (Hinz 2006e). In the latter, I quoted Freeman’s (1994:509) *Introduction to jurisprudence*, where he called the development of sociological jurisprudence “one of the most characteristic features of the twentieth-century jurisprudence”. Referring to this, I added that, in view of increasing globalisation, *anthropological jurisprudence* would be the most characteristic feature of the jurisprudence of the new century. The Association of Southern African Anthropologists and the *Deutsche Gesellschaft für Völkerkunde* (DGV, the German Anthropological Association) had human rights and anthropology on the agenda of their respective 2005 congresses. An earlier version of this paper was presented at the 2005 ASnA Conference.

The quoted earlier papers and the current paper are theoretical reactions to projects in which the Centre for Applied Social Sciences (CASS) in the Faculty of Law of the University of Namibia (UNAM), the Faculty’s Human Rights and Documentation Centre, and the writer, in his capacity as UNAM’s United Nations Educational, Scientific and Cultural Organisation (UNESCO) Chair for Human Rights and Democracy, were involved since the Faculty’s institution in 1993, namely human rights education and good governance workshops with local stakeholders, traditional leaders, but also government officials from English-speaking African countries who attended World Trade Organisation (WTO) training programmes at UNAM.

² Resolution 217 (III) of the UN General Assembly on 10 December 1948.

³ The latter came into force on 24 October 1945.

⁴ Cf. Steiner & Alston (2000:137ff).

How *universal* was what was set in motion after WWII? How *universal* was the UDHR? The majority of the members of the UN as we see them today did not participate in the drafting, debate and adoption of the declaration because their respective countries were still under colonial rule.⁵ Some of the members of the UN at the time expressed their unease with the UDHR, amongst them Saudi Arabia, South Africa and the Soviet Union, albeit for different reasons.⁶

The 1948 plea and vote for human rights did not result in questioning the legitimacy of colonialism. The adoption of the UDHR also did not prevent the continuation of fascist rule in Greece, Portugal and Spain after the end of fascism in Germany and Italy; nor did it prevent colonial powers from pursuing their interests with oppression and wars. Furthermore, the UDHR did not save the world from traumatic wars such as that in Vietnam, and it did not prevent countries emerging from colonial rule from falling into the trap of domestic conflicts that caused the death of millions. Does all this not prove the American Anthropological Association's objections to the intended project of a UDHR right are valid?⁷

Looking back at what happened in the field of human rights after WWII, one has to acknowledge that tabling the UDHR to the world agenda was only the starting point of a movement that has grown steadily since then. The adoption of the UDHR was the adoption of a world vision which, although it did not terminate violations of human rights with the stroke of a pen, it did set a powerful movement in motion. The movement gradually reached out to areas that required protection by legal instruments; it became the platform for the production of many conventions and treaties and, with them, mechanisms to control their observance and, to some extent, to sanction violations.

The post-war human rights movement started as a direct reaction to what happened before and during WWII. The agreement between the allied powers to prosecute those responsible for war crimes before international tribunals (in Nuremberg and Tokyo) preceded the UN Charter. It set important precedents

⁵ The UN had 56 members when the UDHR was adopted.

⁶ A total of 48 members voted in favour, while 8 abstained; cf. Steiner & Alston (2000:138ff).

⁷ Cf. American Anthropological Association (1947; cited in Steiner & Alston (2000:372–374).

for an international understanding of crimes against humanity,⁸ and was the foundation of a new concept of international law that eventually resulted in the establishment of the International Criminal Court in 1998!⁹

The UDHR was meant to be what its title indicates: a *declaration*, not an internationally binding agreement. Today, however, dominant opinion in public international law regards it as having become part of international customary law.¹⁰ From a socio-political point of view, the UDHR expressed a *vision of cosmopolitanism*:¹¹ a vision with a plea for a world with more dignity and respect for human beings. Indeed, the UDHR became a powerful platform to argue cases of concern and build an ethical code from which to launch the development of human rights instruments. Some exemplary achievements include the Covenant on Economic and Cultural Rights; the Covenant on Civil and Political Rights;¹² the Convention on the Prevention and Punishment of the Crime of Genocide;¹³ the Convention on the Elimination of all Forms of Discrimination against Women;¹⁴ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment;¹⁵ and the Convention on the Right of the Child.¹⁶ It is important to understand that all these concretisations of human rights, including the many regional instruments developed in Africa, the Americas, and Asia, were inspired by the 1948 *cosmopolitan vision*. They needed the inspiration; they also needed

⁸ On 8 August 1945, France, the Soviet Union, the United Kingdom and the United States of America agreed in London on the creation of international military tribunals. Annexed to the agreement was the Charter of the International Military Tribunal at Nuremberg. Before the end of the Nuremberg trial, 19 additional countries had acceded to the Charter. The Tokyo Tribunal was created in January 1946 at the directive of the Commander-in-Chief of the Allied Forces by the Charter of the International Military Tribunal for the Far East. For this and further developments in the field of international criminal law, cf. Werle (2005: 1ff).

⁹ Cf. the Rome Statute of the International Criminal Court of 1998.

¹⁰ Cf. here Sieghart (1983: 53ff).

¹¹ I use *cosmopolitanism* as the human-faced alternative/complement to *globalisation*.

¹² It took 12 years to get the two Covenants adopted by UN General Assembly in 1966. The Convention on Civil and Political Rights came into force in the same year, but the Convention on Economic Social and Cultural Rights only entered into being in 1976.

¹³ In force since 1951.

¹⁴ In force since 1981.

¹⁵ In force since 1987.

¹⁶ In force since 1990.

time to reach a level of debatability; and they needed their environments and climates, without which they would not have gained the status of law.¹⁷

The amount of legally binding human rights provisions proves that the ethical intention of the UDHR was successful insofar as it at least consolidated the international discourse on human rights. By doing so, it contributed to the creation of an internationally agreed foundation in which this discourse is grounded. In other words, the international consensus sets limits to deviations from what is considered to be *universal*, and obliges alleged deviators to enter into further discourses in line with procedures, again agreed upon at international level. However, the successful promotion of internationally accepted human rights did not silence the voices who were reluctant to give unrestricted applause to the unconditional statement of the universality of human rights, as has accompanied the promotion of human rights at international level. An important indication of support for the cautioning voices against the euphoria of universality is the reservations registered by signatories of human rights instruments when acceding to them. *Reservations* are domestic back doors that allow domestic deviations to remain legal. Another – and even more significant – indication flows from growing attempts to reappropriate one’s own cultural values against alleged universal principles and norms.¹⁸ The pressure towards globalisation and corresponding attempts to counter economically motivated interests in globalisation through policies of levelling everything according to the rules prevailing in dominant features of culture has created space for what I call the *anthropology of diversity cum cosmopolitanism*.¹⁹ Interestingly, by these means the space has also been created for arguments against the notion of the *universality* of human rights. Cultural and social diversities and particularities are referred to in order to show that they do not provide for the necessary societal ground for the alleged universality of human rights.²⁰ This revival of cultural

¹⁷ Believers in the foundation of human rights in nature tend to forget this. There are many *limits to law*, as Allott (1980) has shown.

¹⁸ The right to culture has, by now, found entry into many constitutions; cf. e.g. Article 19 of the Constitution of the Republic of Namibia.

¹⁹ Cf. here Appiah (2006), but also Hinz (2006a) and (2006b); I will return to this concept later herein.

²⁰ Cf. here Murray & Kaganas (1991:125f), Hinz (1995:98ff) and, in particular, the recent article by Brown (2008:363ff), which is a very helpful summary of the resumed anthropological debate on cultural relativism and human rights. See also the well-documented overview of universalism and cultural relativism in Steiner & Alston (2000:366ff), particularly the contributions reprinted therein by An’Naim (1990), Howard (1991), Kuper (1999), and

relativism – or, more precisely, the more enlightened approach to determine the position of the relative in the universal – is high on the agenda of political and academic endeavours. The result of revisiting the debate about the universalism or relativism of human rights is a new concept of universality, which, in accordance with recent contributions to this topic, can be called *soft* or *weak universalism* (or *soft* or *weak relativism*, for that matter).²¹

The following observations are intended to elaborate on this concept of soft universalism (or relativism) from a jurisprudential perspective, as informed by anthropology. Practical examples will be used to show the interface between universality-inspired expectations and a situation-derived insistence on home-grown particularity. The application of the anthropological jurisprudential perspective will provide the foundation for the application of the suggested concept *soft relativism*. This will be done with a *normative interest*, i.e. an interest in considering avenues for responses to positions of relativism from a *soft* universalist point of view.

Human rights in legal anthropological perspective and the need for anthropological jurisprudence

What makes the perspective on human rights legal-anthropological? What is special about a legal-anthropological perspective on human rights? The legal-anthropological perspective applied in the following observations allows at least two things which are not usually employed in legal human rights discourses. The first is that the anthropological approach is not restricted to what is normally understood to be *law*, i.e. the rules under the authority of the State. The legal anthropologist reflects on all sorts of rules and norms, irrespective of their sources. The second matter is that legal anthropology is not bound to a

Pannikar (1982). Cf. also Kühnhardt (1987); Hoffmann (1991), with reports by scholars from Africa, Asia, Europe, the Islamic world, and Latin America; Höffe (1992); Dembour (1996); Wiredu (1996); Bielefeld (1998); Jerónimo (2001); Cowan et al. (2001); Kreff (2003); Maoz (2004); Heuser (2004); Baer (2004); the contributions to the symposium entitled “Critical Perspectives on Human Rights and Multiculturalism in Neoliberal Latin America” in *PoLAR (Political and Legal Anthropology Review)*, 28(1):2005; Bennett (1995, 1996, and 2004:76ff); Goodale (2006); Li (2006); and Wilson (2006). What Werner Menski achieves by going *beyond tradition and modernity* in analysing Hindu law (2003) or African and Asian legal systems (2007) illustrates the methodologically promising field *beyond universalism and cultural relativism*.

²¹ Cf. Brown (2008:263ff, 371ff).

given set of rules, i.e. the code which describes what ought to be. Instead, legal anthropology takes note of what *is*, or, in other words, what has an empirical dimension. The empirical dimension allows judgements beyond the borders of a State-law-centred interpretation; it permits questions about the functioning of the law, and about the way the law is applied by the people.

Three examples have, therefore, been selected to illustrate the interface – or, rather, the inherent tensions – between general law and the claims for the prevailing weight of the particular. The examples are taken from the three main levels of governance: local, national and international. With the exception of international governance, all the examples have emerged in constitutional systems bound to human rights, democracy and the rule of law.

The examples from the local and national level reveal that, although human rights have generally been accepted to apply, the respective practice has failed to develop the appropriate language for their translation. In the section on local governance later in this paper, it will be shown that social entities deriving their legitimacy from non-statal, i.e. traditional²² structures, in practice enjoy more acceptance than so-called democratically elected structures. With respect to *national governance*, the focus will be on problems arising from the fact that constitutional orders in countries such as Namibia or South Africa were more or less one-dimensionally modelled after constitutions of the Western world. For *international governance*, a critical example related to the World Trade Organisation (WTO) will be chosen. The WTO was opted for as it is probably the most efficient international body in terms of implementing its law. In its 13 years of existence, the WTO has produced far-reaching case law and, by doing so, shaped *world jurisprudence*. Although statutorily limited to trade matters, the WTO is acknowledged as a semi-hidden world government, representing more power than any other international organisation.²³

²² Understood in the sense of the law enacted by many African countries, such as the Traditional Authorities Act, 2000 (No. 25 of 2000) in Namibia.

²³ Usually, the literature on globalisation discusses the role and function of the WTO. Less commonly, but probably of greater theoretical significance, the WTO, its law, policies and decided cases have become the subject of legal philosophy. Cf. here Roederer & Moellendorf (2004:598ff), and the course programme for Jurisprudence (Legal Philosophy) at the Faculty of Law, University of Namibia (Hinz 2005c).

Local governance

In respect of local governance, the concept of *political* and/or *legal pluralism* has been promoted by many legal and anthropological scholars as the most adequate to reflect the fact that many (if not all) African countries have a plurality of legal systems.²⁴ The more conventional approach to the fact of plural legal systems was to speak of *legal dualism* and, in so doing, refer to the fact that most African countries have two principal legal systems: one that is called the *general law* system, and one that is the system in which *customary (indigenous) law(s)* prevail(s). To speak of *legal dualism* is obviously less provocative than the notion of *political and legal pluralism*, but why?

The provocation in the concept of *political and legal pluralism* lies in the theoretical context from which the concept of *pluralism* emerged. While speaking of *legal dualism* was basically nothing more than stating that there were two sets of legal rules that applied to a social situation which claimed to be under one political order, *legal pluralism* entailed more. Speaking of *legal pluralism* is speaking of a theory. *Legal pluralism* has become a far-reaching theoretical construct that has received recognition in jurisprudence.²⁵ Legal pluralism is not only a helpful tool in empirical legal research, but also encompasses a normative component which renders alternative thinking to be an empirically falsified, State-centred assumption.²⁶ While the employment of a community's own law as a result of pressure from the State to follow its law may, from an analytical perspective, be interpreted as resistance, the normative orientation of legal pluralism informs us that the factual resistance to employing the law of the State is an indication of a successfully claimed right to give effect to one's own culture.

Namibia (and, subsequently, South Africa) restored African customary law and gave it its recognised place in the country's constitutionally guaranteed legal orders. After years of marginalisation and exposure to abolition according to the whims of colonial and apartheid politics, African customary law received a constitutionally safeguarded place at the same level as the imported general common law in the form of Roman–Dutch law and its amendments.²⁷ In view

²⁴ Cf. here Hinz (2006d), with reference to further relevant literature.

²⁵ Cf. the Seventh Edition of *Jurisprudence* by Freeman (2001:919ff).

²⁶ See Hinz (2006d:29ff).

²⁷ Article 66 of the Constitution of the Republic of Namibia, and Section 211 of the Constitution of the Republic of South Africa.

of this important development towards the re-dignification of African customary law, one has to note that the implementation of the politically required decision to re-dignify customary law has, at the same time, created many problems that have taken years to find solutions – if found at all. The following cases will demonstrate the dimension of these problems.

Politicians in Namibia and South Africa are still not convinced of the need to give appropriate recognition to the quality of governance offered by traditional structures at local level. For example, the constitutionally required so-called *wall-to-wall* system in South Africa has not provided the necessary space for traditional authorities.²⁸ The Namibian decentralisation policy and law²⁹ has not achieved more than to relegate some authority from central to local government, and in so doing recognise the de facto decentralised (or, more precisely, the de jure, i.e. traditionally and locally already existing) competencies.³⁰

The problem of ownership of land under customary law is one that has occupied the debate between traditional authorities and the Namibian Government for several years.³¹ A promising compromise was reached with the enactment of the Communal Land Reform Act.³² Section 17 of the Act states that communal land vests in the State, but that it is held in trust for the respective traditional community. The Act even acknowledges that customary land rights have to be regarded as being at the same level as common law land rights, meaning that compensation is due to the holders of customary land rights in the case of expropriation to the same degree as that for holders of common law property rights.³³ The practice, however, is different. Arguments relating to inter-community land conflicts

²⁸ Cf Hinz (2002).

²⁹ Cf. the Decentralisation Enabling Act, 2000 (No. 33 of 2000).

³⁰ Cf. Hinz (2005a). Although the Namibian Traditional Authorities Act, 2000 (No. 25 of 2000) confirms, inter alia, certain administrative functions for traditional authorities, the decentralisation policy as such is silent about this as well as the fact that there are quasi-governmental administrative agents working at the level to which decentralisation is envisaged.

³¹ Cf. Malan & Hinz (1997).

³² No. 5 of 2002.

³³ See section 16(2) of the Act, which stipulates that holders of customary law land rights have to be compensated when land is withdrawn from a communal land area. The author's interpretation of this section is that customary land rights are like any other rights which are subject to the guarantee of Article 16 of the Namibian Constitution, but also subject to the right to compensation as required under the right to property.

illustrate that customary land rights are seen by many to be some kind of second-class right – if rights at all.³⁴ Conflicts between holders of customary land rights and expanding municipalities demonstrate how the latter ignore the legal position of the holders of customary land rights.³⁵

The famous *Bhe* case of the South African Constitutional Court,³⁶ in which crucial questions in the customary law of inheritance had to be answered,³⁷ in its main opinion failed to understand the social reasons behind the rule of male primogeniture. As demonstrated by the dissenting judge, the reinterpretation of the rule of male primogeniture could have led to a gender-neutral shape of primogeniture. But the dissenting opinion also failed to give African customary law its place in the pluralistic set-up of the South African legal system. What the author of the dissenting opinion did not consider was that African customary law is owned by the communities that have created and maintained it; on top of that, the authority to amend such customary law has not only been the inherent power of traditional authorities themselves, but also been confirmed by recent legislation.³⁸

The national level

The new African constitutionalism has been correctly associated with constitutional developments in countries such as Namibia and South Africa.³⁹ The constitutions of Namibia and South Africa contain a Bill of Rights that is binding on all State powers. Violations of constitutionally guaranteed human rights and freedoms can be investigated by courts of law and remedied by court orders. Although

³⁴ See the conflict between Owambo cattle farmers and the *Ukwangali* Traditional Authority (Mushimba 2008), as well as the recent report on comparable problems between traditional communities in the Kunene Region and settlers from the *Uukwaluudhi* and *Ongandjera* Traditional Authorities (*The Namibian*, 27 November 2008).

³⁵ Cf. the conflict between holders of customary land rights and the Helao Nafidi (Oshikango) Town Council (*The Namibian*, 12 May 2006).

³⁶ *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA & Another*, 2005 (1) BCLR 1 (CC); see also Hinz (2006f) on the case.

³⁷ Cf. Hinz (2008:99ff), which looks at some of the issues in the customary law of inheritance, which need urgent attention in respect of law reform.

³⁸ Cf. section 3(3)(c) of Namibia's Traditional Authorities Act, 2000 (No. 25 of 2000), and section 4(3) of South Africa's Traditional Leadership and Governance Framework Act, 2003 (No. 41 of 2003).

³⁹ Cf. Hinz (2006a, 2006b).

both countries' constitutions can be interpreted as liberating responses to social and political oppression, the legitimacy of both is still an issue of debate. The extraordinary consultation process that preceded the adoption of the Interim Constitution of South Africa as well as the adoption of the final Constitution did not end questions about the legitimacy of that country's supreme law.⁴⁰ In Namibia, the debate is less articulate, but has similar undertones.⁴¹

Questioning the legitimacy of the constitution as such may be an extreme position; but the fact that Judge Albie Sachs – a judge of South Africa's Constitutional Court – calls for references to *traditional African jurisprudence* in one of that Court's leading cases can also be interpreted as questioning legitimacy: it points in the direction where the lack of legitimacy can be identified.⁴² The call for references to traditional African jurisprudence appears in Judge Sachs's arguments against the death penalty after he concludes his arguments about international human rights instruments and the jurisprudence related to these. In other words, traditional African jurisprudence was additionally employed in order to give his judgement weight with respect to those whose mindsets were closer to this jurisprudence than to the conventional jurisprudence of Western provenance.⁴³

The international level

One of the burning questions with respect to the WTO – being one of the most elaborated structures of international governance – is not only about the employment of human rights in the interpretation and application of WTO law as it stands, but also about how human rights could assist in developing new trade-related policies. The debate about human rights in executing the mandate given to the WTO is certainly promising, but it is still far from being accepted as an integral part of WTO jurisprudence and policies.⁴⁴

⁴⁰ A prominent voice in this context is Ramose (2002).

⁴¹ Personal observation.

⁴² *S v Makwanyane & Another*, 1995 (6) BCLR 665 (CC), at 787.

⁴³ Cf. Hinz (2006e:465ff).

⁴⁴ Cf. Committee on International Trade Law (2004:543ff), but also Petersmann (2004); Cottier et al. (2005); and Cottier & Oesch (2005:520ff). A very comprehensive collection of articles on the WTO, its governance, dispute settlement, and developing countries by Janow et al. (2008) does not even have one entry on human rights. The final chapter, entitled "Future challenges", of the leading textbook on WTO law by Matsushita et al. (2003:589ff) holds on the one hand that "the WTO has a role to play in promoting human

This article is certainly not the place to evaluate human rights and the WTO in a comprehensive manner. The following will, instead, concentrate on two documents only, with the aim of showing a tendency in the consideration of human rights and their political and philosophical foundation. The first document is a semi-official publication written by the first Chairperson of the Appellate Body of the WTO,⁴⁵ James Bacchus, a lawyer from the USA. The second document is a case decided relatively recently by the WTO Appellate Body. The case has given rise to questions closely related to the issue of human rights in the context of the WTO.

In *Trade and freedom*, Bacchus⁴⁶ journeys back to his time at the WTO, and looks at all those who served with him in the Appellate Body.⁴⁷ He reflects on the ideological climate that inspired not only him but his colleagues as well in their approaches to the cases they had to hear. The first “faceless judge”⁴⁸ Bacchus portrayed was his Egyptian colleague, Said El-Naggar. El-Naggar studied in the London School of Economics under Karl Popper, and was obviously able to convince Bacchus to follow Popper and his powerful philosophy and plea for an “open society”.⁴⁹ Indeed, Bacchus states –⁵⁰

[t]hus, like Popper, I choose to believe that, in an open society, we can choose to be free.

As convincing as Bacchus’s reflections of the post-1995 period – when the WTO started operating – may be as a personal record, the ongoing debates (periodically

rights” (ibid.:605). On the other, the authors warn that “if the WTO ever were to try to become a human rights enforcement agency, there is little chance its dispute mechanism would survive; it soon would be engulfed in compliance problems, and the WTO itself would be under threat” (ibid.) In particular, Petersmann (2004), Cottier et al. (2005) and Cottier & Oesch (2005) have taken a different stand: Petersmann expresses the clear view that “[t]he universal recognition of ‘inalienable’ and ‘indivisible’ civil, political, economic, and social human rights, and of the general obligation of all governments to protect and promote human rights, requires interpreting international treaties in conformity with relevant human rights obligations” (in Cottier & Oesch 2005:522).

⁴⁵ Their task is to hear international trade law cases referred to them by the WTO Dispute Settlement Panel.

⁴⁶ Bacchus (2004).

⁴⁷ The portraits of the members of the Appellate Body are presented by Bacchus (2004:51ff); Said El-Naggar’s portrait is first (ibid.:53ff).

⁴⁸ (ibid.:18ff).

⁴⁹ Popper (1957, cited in Bacchus 2004:133ff).

⁵⁰ Bacchus (2004:137).

erupting in violence) about the legitimacy of the WTO, however, should lead one to ask whether Popper's powerful "open society" was powerful enough to convince participants in the international trade system who have not undergone training in the London School of Economics, i.e. who are rooted in systems of thought to which Popper's world view did not reach out!⁵¹

The second text referred to here is the case of *Pakistan v The European Communities*, and concerns the conditions for the granting of preferential tariffs to developing countries.⁵² The manner in which the Appellate Body of the WTO assessed the conditions in granting preferential treatment to developing countries is proof of the need to consider (or reconsider) the principles and assumptions underlying WTO judgements, and has an immediate bearing on the problem of the role and functions of human rights in matters related to international trade law. The legal question that the Appellate Body had to grapple with involved what the relationship was between the most-favoured-nation clause⁵³ (an achievement of trade liberalisation and prominent in the various agreements under the WTO) and the so-called "enabling clause"⁵⁴ (which allows special and preferential treatment of developing countries). The enabling clause can be interpreted as an acknowledgement of the *right to development* and, thus one of the issues that form part of the package that has become known as the *Doha Development Agenda*.

Do the two clauses stand side by side at the same level, or is the enabling clause an exception to the most-favoured-nation clause? The answer to this question has important legal consequences, particularly with respect to who will have the burden of proof, and for what. While the Appellate Body held that

⁵¹ Buchanan & Golove (2002) show how difficult it is to argue for a jurisprudential (legal philosophical approach) to international law.

⁵² European Communities. *Conditions for the granting of tariff preferences to developing countries. Report of the Panel WT/DS246/R and Report of the Appellate Body WT/DS246/AB/R.*

⁵³ The most-favoured-nation clause requires that "any advantage, favour, privilege or immunity granted" in one case "shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties" to the WTO (Article 1(1) of the General Agreement on Tariffs and Trade (GATT) of 1947, which is part of the treaty body governing the WTO.

⁵⁴ The members of GATT adopted the enabling clause as Decision I/4903 of 28 November 1979: Differential and more favourable treatment reciprocity and fuller participation of developing countries (The Enabling Clause).

the enabling clause was an exception to the most-favoured-nation clause, one member of the Dispute Settlement Panel held a dissenting opinion in regard to the rest of the adjudicating body. The most significant feature of the decision (including the dissenting opinion) is that the results were achieved on the basis of conventional interpretation, i.e. without reference to the principles that stand behind the application of the formal tools of interpretation and, thus, guide such interpretation. Noting what has been discussed in many international fora to give the right to development an applicable format, and noting further that the philosophy behind the Doha Development Agenda is, indeed, the very right to development, the Appellate Body would have come to a different interpretation of the relationship between the two rules of WTO law. While the most-favoured-nation clause is a procedural rule to achieve equality, the enabling clause accepts factual inequality as a reason to respect such a situation by providing special treatment – which, if provided effectively, would eventually lead the recipient of the treatment to be at a level that would prompt treating such recipient at the same level of formal equality as the provider of the special treatment. In other words, what we see as informing the enabling clause is the principle of *social justice*, which is no less important than justice through formal equality. In fact, had the Appellate Body only touched on arguments of this nature, it would have found plenty of support in constitutional jurisprudence, which would have been helpful in contributing to the development of the WTO jurisprudence.⁵⁵

The author's own experience in the Regional Trade Policy Programme, a major WTO training programme at the University of Namibia, complements what has been said so far.⁵⁶ The Programme's objective is to train African government officials in all WTO-related matters. When the author suggested that a module on WTO law and human rights be added to the programme, officials in the WTO reacted with reluctance. It was decided, therefore, to offer the module outside the official programme. While participating in the event, the officials' attitude changed: sitting at the back of the audience listening to the module, the WTO colleagues saw that the initiated discourse was guided by the need to argue

⁵⁵ The German discussion about the so-called *Sozialstaatsklausel* ("social State clause") – Article 20 of the German Constitution, which determines the State to be a social one – is but one example that could have been explored. For more on the social State clause in the German Constitution, see Gerstenmaier (1975).

⁵⁶ From 2005 to 2007, the author was the Academic Co-ordinator of the WTO UNAM Regional Trade Policy Programme for government officials from all English-speaking African countries.

human rights issues rather than solicit applause by emotionalised reference to human rights generalities!

In fact, analysing what happened around the suggestion to have the said module on WTO and human rights reminded me strongly of an experience with a human rights workshop for Namibian traditional leaders. To the workshop participants' surprise and shock, a distinguished traditional leader called human rights "monsters".⁵⁷ It took us some time to interpret this qualification of human rights. Only later did we begin to understand that, for the traditional leader concerned, human rights were incomprehensible entities: no appropriate translation for the concept *human rights* existed in the traditional leader's culture. Despite the years that had passed since the adoption of the Namibian Constitution, the human rights which were to have brought independence from the rule of apartheid had remained alien concepts. However, they did exist, so it was unnecessary to call them *monsters*.

The WTO officials' resistance to come closer to human rights and, in so doing, to consider whether the law of human rights would not even be an asset in interpreting WTO law, appears similar to the resistance of the quoted traditional leader (who, by the way, does not stand alone with his reluctance to accept human rights as a tool for administering his community). While the traditional leader's 'monster' is covered in the cloth of importation, the WTO-imagined 'monster' is covered in the cloth of the ghosts of Seattle: the very place where ministerial consultations were prevented by anti-globalisation and pro-human rights activists!⁵⁸

Where to look for answers

Where could we search for responses to the unsolved questions presented? Where could we find a *better* jurisprudence than the one usually offered, and which obviously did not guide us towards arguments that could produce reactions to

⁵⁷ Previously referred to in Hinz (2006e:461ff).

⁵⁸ How the traditional 'monster' can be humanised will be dealt with in the next part of this paper; the 'monster' in the WTO officials' perception will certainly be demystified by scholarly work, as quoted above, and which actually starts at a very technical level as Mavroidis (2008), for example, submits in his analysis of WTO-decided cases focusing on the interpretation of WTO law and the Vienna Convention on the Law of Treaties of 1969.

resolve difficulties of the nature described above? Answers to these questions will be investigated within the framework of what I call *anthropological jurisprudence*.⁵⁹ But what is *anthropological jurisprudence*, and what answers are hoped to be found in this jurisprudential approach?

Following the move of jurisprudence to a *sociological* sphere (by Max Weber, Eugen Ehrlich and the American and Scandinavian realists), new value was added by reaching out into the world of legal reality (and the perceptions with respect to law held by the people, i.e. the *social* functioning of law). In this same way, *anthropological* jurisprudence will add value to jurisprudence by breaking the wall of Western fixations and reaching out into other worlds: worlds with different legal and political realities and perceptions of justice.

This adding of value will be explained further by exploring some aspects of the debate about the universal nature of human rights as it has evolved in recent years, particularly in view of positions submitted by scholars from Indian and Muslim, but also African, backgrounds.⁶⁰ Views against the universality of human rights have taken different shapes and directions. However, there is some common ground as to their point of departure: scholars of different orientations highlight the specific and unique, socio-historically Western background of human rights. Human rights, as they have developed before and after the UDHR, are bound to this background and will, therefore, lead to social friction if forced on societal situations that differ from the socio-historic background of the West.

Important differences should be noted when it comes to the socio-political consequences that are to be drawn from this basic starting point. Two extreme positions are conceivable: one would be to give human rights uncompromised priority, and expect one-dimensional change to comply with them; the other extreme would be to leave the different worlds as they are, and accept that certain societies would not be part of human-rights-inspired civilisation. Conventional philosophical and sociological jurisprudence provides many offers to motivate as well as criticise these extreme positions.⁶¹ I will not explore the extremes here, but will focus instead on the *mediating positions* between the extremes, which

⁵⁹ See Footnote 1.

⁶⁰ See the references cited in Footnote 20, particularly An’Naim (1990); Brown (2008); Howard (1991); Kuper (1999); Pannikar (1982); and Wiredu (1996).

⁶¹ As can be seen in the literature quoted in Footnote 20.

appear to be more relevant to the envisaged anthropological jurisprudential orientation.

The reason for focusing on the mediating positions is simply that they are the only ones that are able to provide jurisprudential answers to anthropologists, which, as mentioned earlier in this article, have been described as *soft relativism*, *weak universalism*, or as Michael Brown puts it, relativism within reason.⁶² Brown⁶³ summarises the foundation of relativism within reason in six points, as follows:

- Firstly, ethnocentrism with respect to the values employed by a given community is a fact, but not one that is impossible to overcome. The globalised world in which we live has led to a situation where communities are unavoidably confronted with more than one value system.
- Secondly, cultural systems, although never closed, show considerable coherence. This requires that norms and practices first have to be understood within their own contexts. Put differently, norms and practices cannot be understood except within their own contexts. Any judgement about norms and practices presupposes understanding in this sense. This applies to all norms and practices – even those that are far from someone’s own societal and normative conceptualisation!⁶⁴

⁶² Brown (2008:371).

⁶³ (ibid.).

⁶⁴ As Brown (2008:366) says, “On the one hand, anthropologists are well represented among those calling attention to the suffering experienced by women as a result of patriarchal customs as well as the destructive impact of neo-colonialist policies. On the other, anthropologists stand ready to question simplistic moralizing that invokes the rhetoric of universal human rights. The latter kind of intervention is exemplified by Lila Abu-Lughod’s cautionary essay on Muslim women (2002), which challenges ill-considered assumptions about the oppressed status of women in the Muslim world. Abu-Lughod asks her readers to be “respectful of other paths towards social change that might give women better lives” (ibid:788), paths that may have Islamic variations difficult for non-Muslims to envision. With respect to the genital mutilation of women, the female anthropologist Gruenbaum (2001:203) holds the following in the concluding chapter of her study on female circumcision: “Agitation for change to deeply held beliefs and for modification or elimination of practices that define or reinforce important elements of identity is sure to encounter obstacles, not only from those who defend the practices, but also from those who have a different analysis of when and what the priorities would be”. Brown (2008:366) reaches out to the same cultural problem and holds that, even if one would not be convinced by arguments such as those quoted here, one would have to “acknowledge that ... [the] call for open dialogue and scrupulous attention to evidence should be taken seriously, especially when seen against a backdrop of the West’s previous efforts to impose its moral vision – too often coloured by economic and political vision – in Africa and elsewhere”. In

- Thirdly, Brown holds that the “vast majority” of societies have been able to provide rewarding lives for their members, lives that permit the expression of all human emotions, allow for some level of personal freedom and self-expression, and offer individuals satisfying social roles”.⁶⁵ This general feature should not distract our attention from the fact that particular practices prompt reservations, which, however, are to be expressed with caution.
- Fourthly, societies are never homogeneous. It is part of the internal dynamics of societies to challenge norms and practices which, at face value, may appear to be uncontested because of their being long-established.
- Fifthly, the interactions between different cultural systems call for special attention. The effects of these interactions have complex and far-reaching effects. They may offer a challenge to the receiving culture or distort its internal dynamics, and
- Sixthly, referring to results by scholars who follow a comparative approach according to which universals are of limited use in accounting for cultural differences, Brown pleads to keep universals in mind when analysing the norms and practices of different communities.⁶⁶

Observations of this nature generalise the results of empirical analyses. On the one hand, they acknowledge the existence of human rights as such and take note of the general legal claim of universality. On the other, on the basis of empirical data they warn against the one-dimensional claim of universality. They show that societal reality is much more complex than any one-dimensional language of universality could be. However, this is where anthropology – being basically concerned with the *is* – ends, and anthropological jurisprudence with its normative dimension begins; this is also where the mediating positions unfold their importance by enriching the conventional jurisprudential discourse on human rights. They open the discourse for the gravities of cultural diversity and, by doing so, contribute an additional dimension to the tools of legal interpretation.

Within the mediating approaches, one can distinguish between four positions. The first concedes that certain societies have not yet reached the *(social, cultural or economic) stage* required as the social basis for the societal implementation

his reaction to the comments solicited from fellow anthropologists by the editors of *Current Anthropology*, Brown (ibid.:380) concludes by calling on one “to pause before judging, to listen before speaking, and to widen one’s views before narrowing them” (ibid.:380).

⁶⁵ Brown (ibid.:372).

⁶⁶ (ibid.).

of human rights. The second position considers the *complexity of human rights*, thus allowing space for the specific societal orientation towards those parts of human rights that best correspond to the needs of the given society. The *third* accepts human rights as they have emerged in the mentioned socio-historic context as a code of principles, rules, or normative offers to be *translated* into the societies concerned in terms of *jurisprudential foundations* prevailing in those various societies. The *fourth* position is similar to the first, but much more difficult to accommodate in a legal order whose interest is eventually to deliver judgements on whether or not a given societal behaviour complies with the law, including human rights. This last position looks at situations which, at face value, are inconsistent with the letter of internationally drafted human rights but are nevertheless deeply rooted in the socio-cultural environment from which they have emerged. What is at stake here are cases of possible “paths’ variations” as put forward by Lila Abu-Lughod⁶⁷ and which need consideration before any conviction in terms of human rights violations is handed down. These four mediation position are presented in more detail as follows:

The first mediating position

Like the others do, this position refers to the observation that human rights are a product of special, i.e. Western, developments. It accepts them as desirable standards, but pleads – at least temporarily – for lenience, so that societies have time to work themselves closer to what would be expected from them from the point of view of human rights. This mediating position could be based on the evolutionist understanding according to which human societies are to undergo historically predetermined processes of change from more or less primitive conditions to stages of modernity, for which human rights are increasingly important. However, the evolutionist understanding is not a necessary condition for the first mediating position. It is also conceivable to interpret a given societal situation as one for which a learning process is required before a new normative dispensation will be accepted. In Namibian human rights and good governance training exercises, it has often been request that communities and individuals be given *time* before changes are implemented. In particular, this request for time was made with respect to equality-promoting changes in family law.⁶⁸

⁶⁷ See Footnote 64.

⁶⁸ The argument of needing time was raised in workshops on the Married Persons Equality Act, 1996 (No. 1 of 1996), which abolished the inherited marital power of the husband over his wife.

As problematic as this plea may be in view of a given situation violating human rights, one cannot really argue against the request for time to allow the process of reform to take its course, i.e. from the point of view of achieving progress in having the necessary human-rights-driven changes accepted. This is particularly true when procedural mechanisms are not yet available for remedying a given situation! In other cases, lenience in respect of time will certainly also depend on what is at stake, i.e. how serious the human rights violation is. At any rate, it would also then be up to the existing (governmental and non-governmental) human rights institutions to monitor the expected reform process so that the plea for time would not merely be buying time without producing results. At any rate, the time argument would most probably not stand the test of constitutionality if a case of violation is taken to court. In view of this, it may be worthwhile for the legislator to consider building a rule into an act of human rights implementation that would allow for its gradual implementation.

The second mediating position

The second position is of particular importance when legal systems meet which maintain distinct approaches to the balance of the various individual rights in the overall human rights system. Proponents of this second position, rather than emphasising the rights of the societally isolated individual, hold the alternative concept of the communitarian quality of the individual who achieves his/her humanity through the community in which s/he lives. Living in social relationships does not only mean having rights: it also mean having duties understood to be *constituent* components of the essence of being human – as *constituent* as the capacity to rights have been interpreted to be. The oft-quoted expression *umuntu ngumuntu nga bantu*⁶⁹ of the philosophical alternative to the Cartesian credo of enlightenment, *cogito ergo sum*. *Umuntu ngumuntu nga bantu* means “I am because others are” – namely, the very opposite to what Descartes claimed. “I am because others are” is also an alternative to Rousseau’s dictum, according to which fencing off a piece of land and declaring it as one’s own was the starting point of (bourgeois) society. For *umuntu ngumuntu nga bantu* society (community) starts with the proactive inclusion of persons (and nature, for that matter) and not with their exclusion.

It is interesting to explore the extent to which the call for traditional African jurisprudence has made headway in the application of law: *ubuntu*⁷⁰ appears to

⁶⁹ A saying which exists in many African languages.

⁷⁰ Ramose (2002:41) explains *ubuntu* to mean “the fundamental ontological and

be the very portal to traditional African jurisprudence. *Ubuntu* can be interpreted as the abstracting notion of *umuntu ngumuntu nga bantu*. *Ubuntu* appears in the postamble of the South African Interim Constitution of 1994 to denote the African concept of reconciliation as opposed to vengeance. *Ubuntu* was recalled to serve as a point of reference in the death penalty case of the South African Constitutional Court to demonstrate the value of life in African culture. *Ubuntu* was the theoretical and normative point of departure for the Court to make use of ethnographic data collected in South African traditional communities, with the purpose of illustrating the traditional African right to life as equal to the demonstration of the right to life derived from the dignity provision in the South African Constitution and international human rights instruments. *Ubuntu* appeared again in the *Bhe* case brought before the South African Constitutional Court,⁷¹ where it served as a reference for the interpretation of constitutional requirements in view of the ascertainment and development of customary law in line with societal needs. *Ubuntu* has generated theoretical reflections, of which Mogobe Ramose's *African philosophy through ubuntu* is but one prominent example.⁷²

The reorientation of constitutionally guaranteed human rights towards greater prominence of economic and social rights has become a challenge in the Namibian as well as the South African adjudication of cases. The Namibian Constitution contains only one so-called second-generation human right as a fully guaranteed human right, namely the right to education.⁷³ Other second- and third-generation rights are found in a special chapter titled *Principles of State Policy*.⁷⁴ State policy principles cannot be claimed as rights can,⁷⁵ at least as far as the text of the Constitution is concerned, and excluding possible obligations Namibia has accepted under international agreements. The South African Constitution has gone a different route by integrating rights beyond the first generation into the body of its entrenched fundamental rights and freedoms. Nevertheless, the Constitutional Court of South Africa has, in its interpretation of these rights (exemplified with respect to the right to housing), opted for an approach that

epistemological category in the African thought of the Bantu-speaking people. It is the indivisible one-ness and whole-ness of ontology and epistemology.”

⁷¹ See Footnote 42.

⁷² Ramose (2002).

⁷³ Article 20.

⁷⁴ Chapter 11, Namibian Constitution (Articles 95ff).

⁷⁵ See Article 101.

focuses on the limits to these rights, thus giving them a status not too different from that of principles in the Namibian Constitution.⁷⁶ However, it is obvious that claims for second- and third-generation rights will increasingly occupy national and international agendas, given the increasing inroads being made into national and sub-national social structures, prompted by ongoing globalisation.⁷⁷

The third mediating position

As mentioned previously, the third position confirms human rights as they emerged in the said socio-historic context as a code of principles and rules accepted as normative offers, but reserves the need to establish the jurisprudential foundations of such principles and rules prevailing in the societies concerned.

While the first mediating position attempted to achieve some type of coexistence between or even integration of the internationally suggested standard in human rights and the relativising view on human rights, the intention of the second mediating position is to employ a “soft human rights approach”,⁷⁸ through which the principal objectives of human rights would be secured by searching for and researching the *indigenous* foundations which – confirmed by or developed according to the secondary rules (Hart) applicable in the given community – would inspire and guide the community and its law-making or law-applying institutions to secure a legal order in which men, women and children would receive the necessary degree of respect and dignity.

This soft approach is based on three normative assumptions:

- That all societies have an inherent understanding that human beings deserve equal respect and dignity
- That this understanding is related to an at least orally maintained indigenous political philosophy, of which sages are the custodians,⁷⁹ and

⁷⁶ See section 26(1) and (2) and *Government of the Republic of South Africa v Grootboom*, 2000 (11) BCLR 1169 (CC).

⁷⁷ Cf. here Nakuta (2008), for example. The growing focus on second- and third-generation human rights is another challenge to the aforementioned interpretation of the enabling clause in the WTO law.

⁷⁸ This approach arose in view of strategies developed in human rights and good governance programmes within the UNAM Faculty of Law. See Footnote 1 and, in particular, Hinz (2006e).

⁷⁹ For example, they preserve and transmit the knowledge and wisdom contained in oral literature, particularly in proverbs; cf. Kavari (2006); Möhlig (2002).

- That both the understanding about respect and dignity as well as the indigenous philosophy will be flexible enough to respond to new needs and demands with applicable answers.

Flexibility, in particular, means having a structured openness in accordance with given rules of interpretation. For example, a legal system that is closed to such a structured interpretation will not meet the criterion of this third assumption.⁸⁰ Otherwise, the (albeit refutable) thesis is that any system of order would qualify as a potential candidate in terms of the second mediating position. Put differently, there is no society that does not have an inherent potential of a human rights system, although such system may be based on concepts, rules and procedures that are not identical to those that emerged socio-historically during the period of European enlightenment, as explained earlier.

It is by no means a novelty that Indian, Islamic and Chinese scholars have explored the various cultural codes prevailing in their respective regions in order to establish whether or not such cultures and codes offer arguments that would lead to protected standards of respect and dignity of human beings.⁸¹ The less-explored domain in these attempts is the domain of African cultures, although there are authors in the field of African philosophy/anthropology who have successfully contributed to the debate. They have focused on indigenous African systems of thought to determine the role of human beings vis-à-vis their communities.⁸² Indeed, some scholars of African philosophy who have analysed the structure of African customary law found that it did not follow the methodology applied in modern legal (hard or soft) positivism.⁸³

The fourth mediating position

While the ‘time’ argument in the first mediating position may even lead to an legally accepted delay in the application of human rights, the argument in the fourth mediating position goes beyond this. There is no claim for time; instead, here the claim is that, in certain sensitive cases, (international or national)

⁸⁰ The closure of interpretation was an issue in Roman law as well, and is high on the agenda in Islamic law; see Mayer (1990); Weiss (1978).

⁸¹ See literature cited in Footnote 20.

⁸² See e.g. Wiredu (1996); Ramose (2002: 81ff); and, in general, many contributions in Coetzee & Roux (2002).

⁸³ Among whom are Austin, Kelsen, and Hart. See Ramose (2002:81ff).

verdicts will miss the purpose of adjudicating cases if the verdicts do not accept that convictions would not meet the expectation of justice in a given social and cultural context. What is needed in cases of this nature, therefore, are delays: not in the implementation of an existing rule, but in the application of possibly existing rules to such cases. To illustrate, consider the way the Protocol to the African Charter on Human and Peoples' Rights of 2003 handles the issue of polygamous marriages. While many human rights activists will hold that polygamy is not in line with gender equality and other human rights,⁸⁴ the Protocol has obviously taken a lenient position by obliging the parties to the Protocol to "encourage monogamy as the preferred form of marriage".⁸⁵ In other words, instead of a clear verdict against polygamy, the Protocol expressed concerns with respect to polygamy, but nevertheless leaves it to the parties to the Protocol to decide on what would fit best into their respective socio-cultural environments. Notably, the parties were not given free discretion: they are obliged to encourage monogamy. Recalling the anthropological reservations quoted above from Brown's⁸⁶ revision of the Universalism v Relativism debate, one would certainly applaud the drafters of the Protocol for their wisdom in focusing on a open provision which takes note of the socio-cultural environment prevailing in many – if not most – African countries. We could call what we find in the Protocol a compromise; we could also interpret it to be a non-decision in a matter still under debate. Non-decisions are, indeed, very appropriate answers to questions that arrive at the "limits of law".⁸⁷ Instead of promoting law into fields of uncertainty, it is wise to accept it has limits. However, these curtailments should not prevent all sorts of societal stakeholders from exploring the space 'beyond the limits',⁸⁸ and even consider *paralegal* measures such as educational programmes, which would prepare the ground for future legal measures proper.

⁸⁴ Cf. Anyolo (2008:83ff).

⁸⁵ Cf. Article 6(c) of the Protocol.

⁸⁶ See Footnote 54.

⁸⁷ Cf. Allott (1980).

⁸⁸ For example, in discourses informed by ethics! An interesting example to refer to here is the current discussion about compensation for the genocide committed by the German colonial power in its former colony of German South West Africa against the *Ovaherero/Ovambanderu* and others. So far, the generally accepted law will not be helpful in finding solutions to this case. However, the ethical dimension remains and requires a response. Cf. Hinz (2005b); Patemann & Hinz (2006); to the concept of *beyond the limits of law* in more general terms, see Hinz (2006g).

Whether or not a case will end in a non-decision will certainly require careful exploration as to the justification of a *non-liquet*⁸⁹ decision. Comprehensive investigations will have to take place before a case can be accepted to qualify for such an exceptional treatment. “Relativism within reason” requires that failing to provide reason will result in failing to accept that the proposed case is a *non-liquet* case.

Conclusion

The task of this paper, as mentioned earlier, was not to offer a retrospective reflection of how cultural relativist anthropology reacted to the post-WWII project of the UDHR. Arguing whether or not the UDHR would have received a different format if anthropology had contributed to it in a more positive way would be mere speculation. Leaving aside reservations which argue against the epistemological possibility of cultural relativism, cultural relativism from Boas to Herskovits has certainly contributed to the acceptance of cultures as creations in their own rights – to the extent that even the best-informed applied anthropology would not “regard the culture that is applying anthropology as the equal of the culture to which anthropology is to be applied”.⁹⁰

The fact that cultural relativism as it was framed by leading anthropologists lost appeal does not mean that it also lost all its potential for fruitful provocation. However, relativist provocations cannot deny that times have changed. Practical philosophy, applied social science (sociology and, more so, anthropology) have taken over space left empty by ‘pure’ science. Indeed, there are good reasons to refer to the *return of justice*, as was done in the subtitle of a legal philosophy text published some years ago.⁹¹

How and where is justice returned, and what does it mean to speak of *the returned justice*? The quest for justice as expressed by the quoted textbook has returned: with the increasing public relevance of practical philosophy and its search for the ethical foundation of societies – a search which, today, can only be understood

⁸⁹ *Non-liquet* is conventionally referred to situations where a decision-relevant fact cannot be established, with the result that a decision has to be made as to which party will bear the burden resulting from the non-established fact.

⁹⁰ Wolf (1964:24); cf. also Gardner & Lewis (1996:28f, 156f); and more recently, Brown (2008).

⁹¹ Braun (2001).

as an inter- or multicultural project, i.e. an anthropological one: globalisation is unavoidable; and anthropological jurisprudence is applied anthropology – the aim of which is to contribute to the *cosmopolitan face of globalisation*.

The universalist vision to create a generally applicable code to ensure human dignity in all parts of the globe has the opportunity of coming closer to what it wishes to achieve. The quest for the *cosmopolitan face of globalisation* has given the post-WWII human rights movement a new drive – one that is even more challenging than the challenges faced after WWII itself!

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Transitional justice and human rights in Africa¹

Charles Villa-Vicencio

Introduction

Africa stands at the cutting edge of the international debate on transitional justice. The Juba talks between the Government of Uganda (GOU) and the Lord's Resistance Army (LRA) juxtapose local initiatives for justice and reconciliation with international demands for prosecutorial justice.² Joseph Kony's failure to show good faith in these talks by extending LRA terror into Democratic Republic of Congo (DRC) villages further evidences the need for Africa to address the demands of the International Criminal Court (ICC). On the other hand, the decision by the Pre-trial Chamber of the ICC to issue a warrant for the arrest of Omar Hassan Ahmad Al Bashir, President of Sudan, for war crimes and crimes against humanity raises significant questions concerning the appropriateness of the court's intervention in a growing African crisis.

The situation in the DRC raises similar questions. The trial of rebel leader Thomas Lubanga in The Hague for war crimes relating to the forced recruitment of child soldiers sends a strong message that warlords are not above the law. His trial could at the same time inflame an already fragile ethnic situation in the eastern part of the country, where he is seen as a protector of Hema rights in the ethnic rivalry for control of the region's vast mineral resources. Will the threatened trial of Laurent Nkunda, head of the *Congres National pour la Defense du Peuple*³ (CNDP), whether in The Hague or in Kinshasa, contribute to peace-building or further alienate his Tutsi ethnic followers, recognising that the United Nations (UN) has accused Nkunda's troops as well as government troops of mass killings and rape?⁴

¹ An expanded version of this paper is to be found in Villa-Vicencio [Forthcoming].

² *Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army*, Juba, Sudan, 29 June 2007. See also Baines (2007).

³ National Congress for the Defence of the Congolese People.

⁴ Having arrested Nkunda in Rwanda following a joint Rwandan–DRC military initiative, the DRC has asked for his extradition. The question is whether Rwanda will comply; whether the DRC prosecutes him in Kinshasa as a renegade Congolese soldier – which would signal a growing domestic capacity not to rely on the ICC for prosecutions; or

As an increasing number of African states move towards democracy, attempts to impose the ICC's demands for the prosecution of those alleged to be responsible for genocide, crimes against humanity and war crimes are likely to provoke increasing concern among some peace-builders on the continent. The fragile peace agreement between Robert Mugabe's Zimbabwean African National Union (ZANU-PF) and the Movement for Democratic Change (MDC) in Zimbabwe is a case in point.⁵

Confronted by decades of impunity that have spiralled into civil wars, regional conflict, genocide and oppressive rule, the international community insists that perpetrators of such deeds have their day in court. The fact that 30 African states – for whatever reasons – have ratified the Rome Statute, thereby accepting the jurisdiction of the ICC, suggests general acceptance of this proposition.

However, the level of political instability that characterises many African peace initiatives is such that even the most fervent proponents of prosecutions recognise the need to ensure that legal action against perpetrators does not throw the country back into war. Article 16 of the Rome Statute allows the UN Security Council to suspend ICC investigations for renewable one-year increments if those investigations relate to situations with which the Security Council is engaged under its Chapter VII powers relating to matters of peace and stability.⁶ Article 53 of the Statute, in turn, allows for a stay of prosecutions triggered by a State Party or Security Council referral if, taking into account the seriousness of the crime and the interests of the victims, this is judged to be “in the interest of justice” – which presumably includes situations where prosecutions might impede peace initiatives.⁷

Luc Huyse warns that the notion of *the interests of justice* is an “extremely technical and diffuse concept”.⁸ If this means that the criteria by which these technicalities are to be unravelled are solely those of international law, to the

whether he will ultimately face trial in The Hague on charges of genocide, crimes against humanity, or war crimes.

⁵ The fact that Zimbabwe, like Sudan, has not signed the Rome Statute will involve the direct intervention of the UN Security Council for this to happen.

⁶ Rome Statute of the International Criminal Court; available at <http://www.un.org/law/icc/statute/romeofra.htm>; last accessed 15 December 2008.

⁷ (ibid.); see also Lovat (2006).

⁸ Huyse & Salter (2008); see also Lovat (2006).

exclusion of the judgement of governments and others directly involved in peace-building, then the ICC effectively has the final word – reducing local and regional initiatives to be, at best, poor cousins in the peace process.

A choice between the ICC and national structures of justice, including African traditional mechanisms for justice and reconciliation, is not the most pressing issue facing African countries. Rather, it is to ensure that perpetrators of gross violations of human rights are held accountable for their deeds, and that there is sufficient political and socio-economic transformation to ensure that victims regain a sense of human dignity. For these developments to take place it is imperative that local and other peace-building initiatives be supported to ensure that the peace process does not slide back into conflict. Peace cannot be restored in conflict situations by persecutions alone. Nor can the international demand for an end to impunity be ignored or played down by less than decisive action being taken against those principally responsible for acts of genocide, crimes against humanity or war crimes.

This requires local initiatives for peace-building to respond to and, where necessary, be adapted to the demands of international law. The ICC, on the other hand, needs to ensure that its activities do not jeopardise local initiatives aimed at ensuring sustainable peace and social development in countries seeking to overcome conflict.

My intent in what follows is to –

- identify the limitations of prosecutorial justice as witnessed in the dominant transitional justice debate
- consider the challenge of traditional African mechanisms to Western notions of conflict resolution and peace-building, and
- ponder the origins and parameters of the transitional justice debate in Africa.

Transitional justice

The 2004 UN Report to the Secretary-General on *The rule of law and transitional justice in conflict and post-conflict societies* defines *transitional justice* as –⁹

⁹ United Nations (2004); see also United Nations (1992)

... 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.

A 2006 UN document entitled *Rule of law for post-conflict states: Truth commissions*, on the other hand, provides a much narrower focus for transitional justice and truth commissions, and fails to adequately affirm the necessary link between justice and reconciliation.¹⁰ In brief, the implication of the *Truth commissions* document is that justice is more important than reconciliation, accountability is more important than truth, and reparation is more important than reconstruction.

It is this emphasis in the transitional justice debate that is challenged in what follows. If justice is delivered through ad-hoc tribunals, the ICC or any other body that is perceived to bear the characteristics of 'imposed' or 'outsiders' justice', such body's ability to transform a nation is limited. The former UN Secretary-General acknowledges this as well:¹¹

Peace programmes that emerge from national consultations are ... more likely than those imposed from outside to secure sustainable justice for the future in accordance with international standards, domestic legal traditions and national aspirations.

Given the mandate of the ICC to intervene in national situations only where a State is "unwilling or unable"¹² to carry out investigations and prosecutions of its own, more energy could well be put into empowering and, where necessary, sensitising national courts and/or alternative structures authorised by States to deal with gross violations of human rights in a given situation, rather than taking the decision-making process out of their hands.

Victim demands invariably extend beyond what any formal international or national court of law can provide. This is why transitional justice mechanisms cannot be reduced to prosecutions. They need to include additional formal structures in order to meet victim demands. Differently stated, transitional justice proponents need to acknowledge the inherent limitations of trial justice in order to maximise the contribution of their discipline to peace-building. These limitations include the following:

¹⁰ UNHCHR (2006).

¹¹ Orentlicher (2004).

¹² Rome Statute.

- **Prosecution restrictions:** No legal system can prosecute more than a limited number of alleged perpetrators. The question is this: How does one hold those perpetrators who do not have their day in court accountable for their deeds?
- **Prosecutorial criteria:** The ICC's mandate is to prosecute the major proponents and architects of the most serious crimes under international law: genocide, crimes against humanity, war crimes and (the as yet undefined) crimes of aggression. Given the decisions on ICC persecutions to date, the question is by what criteria some perpetrators are judged to be major proponents and architects of serious crimes and others not.

When Dr Irae Baptista Lundin, a Maputo-based political analyst, was recently asked whether she thought Mozambique ought to have instituted criminal trials against those alleged to be responsible for gross violations in the post-independence conflict between the *Frente de Libertação de Moçambique*¹³ (FRELIMO) and the *Resistência Nacional Moçambicana*¹⁴ (RENAMO), she responded with a counter question: “Who ought we to have prosecuted? If not the Rhodesians, South Africans and other international players who funded the war, why RENAMO and FRELIMO?”¹⁵

- **Fixed charges:** Courts are required to prosecute against a fixed charge sheet. This means that, while trials are able to deliver justice on specific gross violations of human rights, they are unable to address broader aspects and patterns of injustice that have destroyed the lives of individual victims and communities. Included among the latter are invariably those who have neither the economic capacity nor the emotional will to resort to the courts.

To cite but one example, Saddam Hussein was convicted of crimes against humanity for the killing and torture of 148 Shi'ite villagers in Dujail following a failed attempt in 1982 to assassinate him. Hussein was sentenced to death and subsequently hanged. The courts did not address the more extensive record of his reign of terror. Questions about the United States (US) and the West encouraging Hussein to invade Iran in 1980 – an invasion that

¹³ Front for the Liberation of Mozambique.

¹⁴ Mozambique National Resistance Movement.

¹⁵ Maputo, May 2008.

led to the deaths of 1.5 million people – were not posed. Also not part of the court record is the supply of components of the chemical weapons with which Saddam drenched Iran and the Kurds. The chaos that resulted from the 2003 invasion of Iraq by US and allied forces and the subsequent use of Saddam's Abu Ghraib torture chambers by US soldiers are similarly not part of any court record.

- **Truth-telling:** Trials contribute to the demand for truth. Frequently, however, there is a need to go beyond the confines of the court in order for victims to engage perpetrators in face-to-face encounters, confrontation and dialogue in their quest for truth regarding their ordeal. Only through this process can they begin to understand the causes, motives and perspectives of those responsible for their suffering, which opens the possibility for victims to begin to bring closure to their trauma. This level of truth-telling takes time and levels of encounter between enemies and adversaries for which courts are ill-equipped.
- **Perpetrator responsibility:** Judgements handed down by courts can prescribe community service as a form of restorative justice, but the broader community is largely excluded from this process. Traditional community structures, on the other hand, provide a framework within which the responsibilities of perpetrators can be implemented and a context within which victim reparations and restoration can be delivered.
- **Reparations:** Deep and lasting community reparations and restitution can only happen as a result of dialogue and negotiation between an aggrieved and violated community and the State. The physical, psychological and material cost of suffering can be partially compensated by a court of law. This can open space within which victims can better more successfully aspire towards the restoration of their human dignity. Ultimately, however, the restoration victims' human dignity in a more complete sense is something that can only be achieved through their direct involvement in political struggle, social dialogue and self-determination.
- **Confrontation:** Courts are places of confrontation between prosecutor and accused. Prosecutorial justice can contribute towards the attainment of a holistic form of justice involving acknowledgement, truth recovery, political

reconciliation, comprehensive forms of reparation, and restoration of human dignity. However, far more is required to bring this process to completion, including the institution of appropriate forms of political, economic and social (re)construction – which are beyond the scope of formal courts.

Addressing the needs of victims, their communities and society as a whole, scholars and practitioners of peace-building are increasingly exploring the extent to which African traditional structures for justice and reconciliation can contribute to meeting these needs. In summary, there are immense moral, legal, political and practical concerns at the level of victim and community needs to which courts can contribute, but are invariably unable to bring closure.

African traditional justice systems

The political potency and appeal of African traditional systems is perhaps not essentially at the level of specific practices, recognising that practices are often culture-specific – differing not only from one country to another, but also between ethnic groups and clans within countries. Rather, this potency and appeal lie at the level of social legitimacy, grounded as these differing practices are in community involvement and established traditions. It is frequently pointed out that African traditional practices fall short of Western notions of due process and procedure. These traditional practices have also not demonstrated an obvious capacity to meet the sheer magnitude and complexities of contemporary political conflicts on the continent. Traditional courts and structures are often criticised for being gender-insensitive, although in some situations women preside over courts and ceremonies. While this is the case in the *gacaca*¹⁶ courts in Rwanda, where 30% of the *inyangamugayo*¹⁷ are women, many women continue to find the process intimidating in cases that involve issues of rape and sexual violence.¹⁸ In recent years, women have become *Bashingantahe*¹⁹ in Burundi, and women exercise significant power among traditional matriarchal groups in parts of Ghana, Mali, Mozambique and elsewhere on the continent. This said, Africa is largely a male-

¹⁶ A current adaptation of traditional courts.

¹⁷ Judges.

¹⁸ This resulted in cases of sexual violence being excluded from *gacaca* jurisdiction in 2004, although they were reinstated to their jurisdiction in 2008. It is not clear what changes have been introduced to address the earlier problems. For a discussion on the *gacaca* courts, see Clarke (2008a).

¹⁹ Community leaders and counsellors.

dominated society, which is reflected in most traditional judicial and governance structures. There are also situations where the competency and legitimacy of the presiding elders and other officials are questioned by local communities.

It is both wrong and unhelpful to overvalue the role of traditional African structures in dealing with crime and conflict. It is generally recognised that African traditional mechanisms need to undergo revision. The *gacaca* courts in Rwanda, for example, constitute an adaptation of original practices; and the July 2007 communiqué on the Juba talks between the GOU and the LRA refer to the need for “necessary modifications” to traditional Acholi, Iteso, Langi and Madi practices.²⁰ At the same time, it is important to acknowledge that political elites in Africa and elsewhere often seek to manipulate both international institutions and local practices to their own advantage or that of their cronies.

African traditional practices of justice and reconciliation clearly do not offer a panacea for Africa’s conflict. Assessing traditional African practices of justice and reconciliation in the Horn of Africa and, more particularly, Ethiopia, Tarekegn Adebo suggests that –²¹

African traditional structures have in many instances over the years been discredited and marginalised by colonial authorities and missionaries as well as by post-independent governments. This has often resulted in the emergence of incompetent elders and leaders who are open to manipulation and corruption.

Adebo suggests, however, that this does not detract from the fact that these institutions – though often compromised – are the carriers of traditional values and principles that people continue to place in high regard:²²

It is these ideas and values, rather than the existing structures or the presiding elders within these structures that should be incorporated into current peace-building structures.

Acknowledging the tension between tradition and modernity, he argues that the historic value and integrity of traditional institutions can be identified and adjusted to meet the demands of international law.

²⁰ *Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army*. Juba, Sudan, 29 June 2007.

²¹ Uppsala, October 2007.

²² (ibid.).

In the past, traditional reconciliation structures were rarely authorised or equipped to deal with blood feuds or murder. This, suggests Adebo, provides the required space within which traditional and modern judicial demands can meet. In parts of present-day Ethiopia, for example, traditional structures continue to be used to settle less serious crimes, while high-level crimes are referred to national courts. Similarly, in Rwanda, the *gacaca* courts deal with crimes up to a certain level, while so-called Category 1 crimes – involving those alleged to be involved in planning, organising, inciting, supervising or instigating the 1994 genocide or other crimes against humanity – being referred to the formal courts or the International Criminal Tribunal for Rwanda in Arusha.²³

Clearly, traditional justice and reconciliation practices continue to prevail across the continent. The question is whether and how these practices can be incorporated into the dominant transitional justice debate – with increasing evidence of African governments as well as scholars of transitional justice on the African continent and elsewhere addressing this concern.²⁴

Without addressing specific practices of African traditional mechanisms for justice and reconciliation, which in any event differ from context to context, the following tensions reflect a common – albeit apparently contradictory at first – dialectic that holds together the goals of these practices:

- **Individual and community accountability:** The strength of traditional reconciliation mechanisms is located in their participatory, community focus. The individual offender is encouraged to make peace with the victim, whether living or dead, as well as with the family, clan, community and their ancestors. What is important is the communal responsibility to restore the damage done to the victim and his or her community, through the affirmation of social values that have traditionally sustained the community. The latter requires the participation of the ancestors.

The dialectic between individual culpability and community responsibility stresses the negotiated nature of justice, which requires the democratic participation of citizens in the creation of structures of authority, and agreement on the rules by which people are governed. Disregard of the

²³ Since 2008, however, some Category 1 cases are being dealt with by *gacaca* courts, where those accused of ‘lesser’ crimes – including complicity in genocide – are tried.

²⁴ See Huyse & Salter (2008).

values, perceptions and demands of communities by international bodies, not least in volatile political situations, can have significant consequences for peace and social justice in a given situation. Demands by international bodies for individual culpability need to adjust to the implications of a broader African sense of responsibility as a basis for ensuring both acceptance and sustainable peace.

- **Retributive and restorative justice:** If the focus of formal justice systems is retributive, the focus of African traditional courts is essentially restorative. However, it would be quite wrong to castigate international justice as entirely punitive and romanticise African justice as entirely restorative. Both forms of justice are important, especially in societies seeking to extricate themselves from lawlessness and disregard for the rights of victims in an abusive society. This requires the transitional justice debate to draw on the essential principles of both retributive and restorative justice.

African traditional mechanisms offer a space within which not only the political elite may talk, but also the rank and file members of aggrieved and warring groups can encounter one another. It provides a platform for citizens to engage State-appointed custodians of justice, who often isolate themselves from the challenges of broader society.

- **Individual and social truth-telling:** From the perspective of Western-trained lawyers, African traditional ways of evidence-giving, which frequently reach beyond the confines of a specific charge sheet required in conventional court systems, are seen to fall short of the rigour and specificity required by Western jurisprudence. African traditional ways of giving evidence and of story-telling, on the other hand, can offer the possibility of a level of truth-telling overlooked by formal courts.

The quest for this broader understanding of truth-telling is captured in the discussion on four different levels of truth identified in the South African Truth and Reconciliation Commission (TRC) Report which includes factual or forensic truth, personal or narrative truth, social truth or dialogical truth, and healing and restorative truth.²⁵ This complexity of truth-seeking by victims and survivors in a post-conflict situation as well as by the broader

²⁵ Truth and Reconciliation Commission of South Africa (1998:110–114).

society involved in the conflict is largely beyond the capacity of courts to deliver. Recognising that while different victims and survivors demand different kinds of truth, in principle, trials only satisfy the demand for what is seen to be objective or factual truth.

Albie Sachs, an important participant in the debates preceding the establishment of the Commission and presently a Constitutional Court judge, suggests that “dialogue truth is social truth, the truth of experience that is established through interaction, discussion and debate”.²⁶ It is this level of ‘engaged truth’ that is required to enable societies of deep conflict to explore the possibility of transcending their own often narrow perceptions of the truth as a basis for overcoming the polarisation in them that bedevils fuller truth recovery. Courts of law can contribute to this process by helping to get disclosure on *who did what to whom*. However, more is required to uncover the cause, motives and perspectives of those involved in the conflict. It is this level of personal and narrative truth, social or dialogical truth, and healing and restorative truth that formal court processes rarely deliver. African traditional mechanisms offer the possibility of addressing these needs.

- **Victims and perpetrators:** Pertinent to transitional justice is the question of how to address individual culpability within a context of collective victimisation. The difficulty involved is graphically presented in a Justice and Reconciliation Project (JPR) field note on Dominic Ongwen, a high-ranking LRA soldier whose military career began when he was abducted at the age of 10 on his way to school in the Gulu District in Uganda in 1980.²⁷ He is reported to have been “too little [sic] to walk” and having been denied adequate social and moral development, he is seen to be unable to make responsible decisions in later life.²⁸ However, Ongwen cannot simply be viewed as a child who was forced to kill: he embraced his assigned task in a manner that resulted in his promotion into the high command of the LRA, and is allegedly responsible for an array of gruesome deeds.

Most advocates of formal trials would argue that perpetrators such as Ongwen need to have their day in court, contending that this kind of

²⁶ (ibid.:113).

²⁷ Justice and Reconciliation Project (2008).

²⁸ (ibid.).

decisive intervention by the courts will contribute to sustainable peace, help establish the rule of law in the wake of lawless rule, and counter the desire for revenge by victims. Above all, prosecution is seen to be a deterrent to future gross violations of human rights – although there is no evidence to date that the ICC indictments have deterred either government or rebel forces in Uganda, the DRC or elsewhere to stop committing atrocities. The question is whether the threat of prosecution in polarised communities – where killers are often driven by deep beliefs based on clan, ethnicity and other ideologies – is ever enough to deter killing. When prosecutions are seen as a form of victor’s justice imposed by outside agencies, which is often the case in international tribunals and the ICC, prosecutions may indeed do little more than intensify the spiral of violence.

While the moral status of Ongwen and others in similar situations can never be conclusively resolved, an African traditional approach to the complexities of his position offers a space within which the aftermath of armed conflict and war can be grappled with by those most affected by it. Most importantly, such traditional structures offer opportunities for the community to decide on the nature and extent of penalties that offenders like Ongwen ought to face, and on what terms they can be reincorporated into communities that include families, bush wives²⁹ and children. In brief, formal courts impose judgements, whereas African traditional structures reach for negotiated settlements. In post-conflict situations, the latter can contribute to preserving the peace. The question is whether such settlements are also forms of impunity that fail to re-establish the rule of law so desperately needed in emerging democracies.

- **Reparations and development:** A litmus test of any judgement is its implementation. This is especially true in situations where retributive justice is replaced by restorative measures. Bluntly stated, if reparations and restoration do not happen in restorative justice situations, victims are often left without any positive outcome in their quest for justice.

The gap between proposed reparations and the actual monetary compensation paid out in places like Malawi and Rwanda in the wake of the rule of Hastings Banda and the 1994 genocide, respectively, is sometimes identified

²⁹ Women with whom soldiers have had conjugal relations during the war.

as evidence of the failure of restorative as opposed to retributive responses to the rights of victims and survivors. In South Africa, the five-year delay in the government's response to the TRC's recommendations on reparations has, together with the drastically reduced amount ultimately paid to victims, in turn raised further questions about the integrity of restorative justice.³⁰

The value of community participation in decision-making with regard to reparations through African traditional mechanisms potentially results in a level of pressure from local chiefs and elders as well as clan-based forms of social pressure to deliver on agreed forms of compensation and reparation. In some situations, this level of community participation also results in a measure of benefit for parties on both sides of a conflict through the sharing of land and cattle, and the development of cooperative community projects.

- **Ritual and procedural accountability:** Rituals, ceremonies and symbols are high on the priority list of exploring options for justice and reconciliation in the wake of conflict and war in African traditional justice and reconciliation mechanisms. Such social practices and structures constitute an important space within which discussion on guilt, responsibility and restoration can happen.

These ceremonies can be one-off events, which is often the case in the Acholi practice of *Mato Oput*, which is augmented by related ceremonies. Magama spirit ceremonies in post-war Mozambique similarly comprise a single event, despite involving several components, and are seen to be a culmination of healing initiatives. In other situations the ceremonies are repetitive and cumulative, akin in some ways to successive counselling sessions. This is evident in traditional *palaver* ceremonies in Liberia and in other Mano River countries. It is also the case in serial encounters with the spirits of the dead in Sierra Leone; in the *abashingantahe* practices of dispute resolution in Burundi and in *Barza Intercommunautaire* in the DRC's North Kivu Province,³¹ and in southern African countries, where one's ancestors need to be consulted and appeased as part of ongoing negotiations between former enemies and adversaries.

³⁰ De Greiff (2006); see also Doxtader & Villa-Vicencio (2004).

³¹ The *Barza Intercommunautaire* is rejected in South Kivu as an attempt to ensconce government stooges at the local level; see Clarke (2008b).

The *gacaca* courts in Rwanda, among others, bring people together in an attempt to deal with genocide and related crimes, on the assumption that talking and social encounter creates the opportunity for social re-engagement between victims and offenders. The former head of the Rwandan National Unity and Reconciliation Commission, Aloisea Inyumba, put it as follows:³²

The very act of meeting under a tree or in a local council hall, with local judges in formal attire and the authority to rule on disputes, takes on a ritualistic form of its own. The process is as important as the content and detail of testimony and evidence offered in the hearings. The medium becomes a significant part of the message. It helps create a milieu conducive to reconciliation.

Ritual and ceremony provide an important space for both *preverbal* and *non-verbal* reflection, conversation and decision-making in African traditional justice and reconciliation mechanisms. The process seeks to break the silence on issues of suffering and aggression that often prevails, thus enabling perpetrators and victims to make a behavioural shift from a prelinguistic state to the point where they can begin to talk about their experiences. The aim is to enable perpetrators to acknowledge their violation of human rights, and victims to begin to deal with their suffering and resentment.

The link between ritual and behavioural response is a contested field. Some scholars working on the relationship between ritual and peace-building draw on neurobiological research to suggest ritual can impact on the physical structure of the brain, decision-making and behavioural change. Briefly stated, it is suggested that rituals, symbols and ceremonies impact on different levels of human consciousness, resulting in different ways of thinking – allowing a person to respond more thoughtfully and with less spontaneous aggression to the situation they face.³³

Transitional justice in Africa

At the heart of the transitional justice debate is the question: *Transition to what?* A narrow focus on legal impunity too frequently neglects major issues of social and economic impunity, which underpins every oppressive society on earth.

³² Kigali, September 2006.

³³ Schirch (1990); Schechner (1993).

It further neglects the need to create restorative cultures, inclusive histories, appropriate memorials, and the development of a restorative society. In brief, criminal prosecution alone is too weak a premise on which to build social stability and redress deep-seated historical conflicts.

The strength of African justice and reconciliation mechanisms is that they are grounded in the social fabric of the communities they represent. They seek to overcome social polarisation and, where appropriate, they explore ways of reintegrating perpetrators into society. They have community reconciliation as an ultimate goal, against which censure, retribution and restoration need to be measured.

To the extent that the ultimate goal of transitional justice is to hold perpetrators accountable for their deeds, restore the human dignity of victims, overcome political polarisation, (re)build societal structures, and promote civic trust, the exploration of complementary partnerships between the ICC and African traditional mechanisms for justice and reconciliation are both desirable and realistically possible.

Few scholars and practitioners have a principled objection to promoting a viable relationship between the ICC and domestic governments or traditional courts to ensure that these objectives are met. Difficulties emerge when it is assumed that international justice is the measure of all justice. This is particularly problematic on the African continent, which is burdened with the memory of colonialism and internationally imposed 'solutions' to domestic problems that have resulted in the endless suffering of African people. The question is how to accomplish a realistic level of complementarity between international and domestic institutions.

For this complementarity to emerge, it is necessary to address a range of concerns, which include the following:

- **The need for a higher level of transparency and debate concerning the priorities of the ICC:** When the ICC opened its investigations in northern Uganda, the Prosecutor indicated that the court's intervention would help end the war, stating that the role of the court was to contribute directly to peace. However, when Joseph Kony indicated a willingness to enter into peace negotiations provided charges against him were dropped, this

provoked the Prosecutor to say it was his job to prosecute and not to make peace. What, then, is the role of the Prosecutor, and how does this impact on Articles 16 and 53 of the Rome Statute?

- **The impact of international justice in particular situations:** To what extent, for example, does the arrest of former Liberian dictator Charles Taylor through the agency of the Sierra Leonean Special Court entrench other dictators in their positions in terms of refusing to accept political asylum or amnesty as a ‘reward’ for surrendering power – fearing that they may face the same fate as Taylor? To what extent ought local and regional leaders to be consulted in deciding whether justice or peace should be prioritised in situations of entrenched armed conflict and mass atrocities?

The extent of the legitimacy of international law in local or domestic situations, especially in isolated communities that are struggling to bring an end to armed conflict, war and mass atrocities: Jurgen Habermas reminds us that neither moral nor legal values emerge from some normative metaphysical or universal source: law, whether international or customary, is a social construction attainable through debate, persuasion and inclusive legal discourse involving the participation of everyone concerned.³⁴ Writing at the time of the first wave of African independence, Lon Fuller argued that, at its best, law was based on societal consensus concerning the “best route to a better future”, giving expression to “who we want to be” and the “kind of community we aim to have.”³⁵ While the moral legitimacy of international law is broadly accepted and established, the contextual efficacy of international law needs to be repeatedly questioned and renegotiated. In the words of Michael Ignatieff, “For the truth to be believed it has to be allowed by those who suffer its consequences”.³⁶

- **The fact that only Africans have been indicted by the ICC since its inception in 2002:** This elicits sentiments within the transitional justice debate that often detract from the thoughtfulness needed to promote justice and sustain peace. Questions are raised as to why certain African rebel leaders have been indicted to the exclusion of others, and why some heads of state are seen to be exempted from prosecutions while others are not. The

³⁴ Habermas (1998:222).

³⁵ Fuller (1958:630).

³⁶ Ignatieff (2004:214).

situations in the Central African Republic, the DRC, Sudan, and Uganda are clearly demanding of international attention in this regard. The resultant level of suspicion towards the ICC by many Africans could be resolved by greater candour and transparency on the part of the ICC.

- **The continuing underlying dichotomy between African communitarianism and colonial forms of liberal individualism:** Western notions of law and individual responsibility were an inherent part of colonialism. In the process, traditional law mechanisms were suppressed. With few exceptions, resistant traditional leaders were replaced by hand-picked collaborators. Post-colonial leaders rarely saw the need to deviate from such practices.

It is too late and it would also be quite wrong to attempt to undo centuries of history. Times and needs have changed. The challenge is to find ways to identify and introduce such communal values and practices into international law that can contribute to the creation of the kind of social cohesion and stability that so many African countries need.

The often-quoted observation by Kofi Annan, the former UN Secretary-General, on the mandate of the ICC and the South African experiment in transitional justice through a TRC to deal with its apartheid past, is pertinent here:³⁷

The purpose of the clause in the Statute [which allows the ICC to intervene where the State is 'unwilling or unable' to exercise jurisdiction] is to ensure that mass-murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.

Although the Rome Statute did not exist at the time of the South African TRC, the words of the former Secretary-General raise the question whether present and future African settlements can be considered in a similar, albeit modified, manner.

³⁷ Annan (1998).

Peace-building invariably involves political concessions, deal-making and moral compromises. The African contribution to this process is to turn a necessity into a potential for virtue by favouring maximum inclusivity and the pursuit of reconciliation in dealing with issues of conflict and national security. It offers the opportunity to rise above violent conflict and abuse through the repair of relationships and the rediscovery of the humanity of even those who seem to have sacrificed their right to be regarded as human. Africa, at the same time, needs to face the reality that where perpetrators are not willing to make peace, they need to face the strong arm of retribution and exclusion from society.

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Human rights education in Africa

Nico Horn

Introduction: Human rights education in the context of the United Nations

Human rights and education have gone hand in hand ever since the Charter of the United Nations (UN) was accepted. By signing the UN Charter, states committed themselves to cooperating with the UN to promote and achieve –¹

... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The emphasis on education gained further momentum when the Universal Declaration of Human Rights (UDHR) was adopted in 1948. Long before the UN declared 1995–2004² the Decade for Human Rights Education, the UDHR and the Covenants placed education at the centre of human rights activities.

The UDHR emphasises the importance of human rights education in the Preamble as an element that is fundamental to developing a human rights culture:

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms, ...³

Now, therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms ...⁴

¹ Article 56, read with Article 55(c).

² From a suggestion made at the World Conference on Human Rights in Vienna in December 2004, the UN General Assembly proclaimed the Decade for Human Rights Education as being from 1 January 1995 until 31 December 2004 (Resolution 49/184).

³ Preamble, para. 6.

⁴ (ibid.:para. 8).

The argument seems clear: the success of a post-World-War-II human rights dispensation is only partly dependent upon the signing of the UN Charter and political acceptance of the UDHR (and later ratification of the covenants and treaties). The General Assembly understood this, and at the adoption of the UDHR called on all nations –⁵

... to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories.

Andreopoulos and Claude note that, in the UDHR, education is more than a tool to promote human rights:⁶

It is an end in itself. In positing a human right to education, the framers of the Declaration axiomatically relied on the notion that education is not value-neutral. In this spirit, Article 30⁷ [sic] states that one of the goals of education should be “the strengthening of respect for human rights and fundamental freedoms”.

While Article 26(1) deals with education as a general human right, Article 26(2) makes the development of the human personality and the strengthening of respect for human rights and fundamental freedoms part of the content of human rights education. Education as a basic human right cannot be any education. Its content, says the UDHR, ought to be built on a substantive understanding of the dignity of all human beings and an appreciation of the rights and freedoms to which human beings are entitled.

The phrase *human rights education* can refer both to the human right to education – which is a right protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) – and, which is more often the case, to the content of education to develop a substantive knowledge and understanding of human rights.

The right to education and the teaching of human rights (*human rights education*) are intertwined. Children have a right to education, but the education that they ought to receive is not ideologically neutral: it is compelled to include education on human rights.

⁵ Session of the UN General Assembly, 10 December 1948, Palais de Chaillot, Paris.

⁶ Andreopolous & Claude (1997:3).

⁷ The authors (ibid.) in fact cite Article 26, not Article 30.

Article 26(2) placed human rights education in the centre of human development:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

Since the UDHR's adoption, the substantial moral authority unfolded in it pressed the international community continuously not only to agree to implement basic education programmes, but also to adopt all the other existing international human rights treaties.

Human rights law as a new development in international law after WWII could only grow into a generally accepted international benchmark if both the government and the people of each member state knew the UDHR, accepted its content and applied it: hence the strong emphasis on education.

The ICESCR and the International Covenant on Civil and Political Rights (ICCPR) were developed in the 1950s, completed in 1966, and adopted in 1976, with the intention of giving substance and form to human rights law, as well as attention to the importance of education as a foundation to implementing a human rights dispensation. Article 13 of the ICESCR not only mandates education as an economic right, but also, in a further elaboration of Article 26 of the UDHR, links it to the importance of developing the whole person and the ability to participate effectively in a free society:⁸

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Elaborating on the broad understanding of education in Article 26 of the UDHR, the ICESCR sees education as a process of developing the person to become a moral agent who accepts his/her own dignity, respects the rights of others,

⁸ Article 13(1).

and has the ability to participate in a free society and contributes to peace. This somewhat utopian understanding of the value of education underlines the fact that the ICESCR, with its emphasis on social justice, will be an exercise in futility if the poor and marginalised do not have the social skills and knowledge to exercise their rights.

While the ICCPR only refers to the right of parents to religious and moral education for their children, human rights education is implied in all the Articles that presuppose some intellectual sophistication. Andreopoulos and Claude refer to Article 19(1), namely the “right to hold opinions without interference”, and Article 19(2), the right –

... to receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

They point out that education is a process involving the sharing and dissemination of ideas.⁹ In other words, education is the gate to exercising all the rights and freedoms of the Covenant.

Several of the treaties created to elaborate on the protection of specific human rights include a section on the obligation of states to educate their citizens. The Convention on the Eradication of All Forms of Racial Discrimination, for example, makes education a central obligation of each state party:¹⁰

States Parties undertake to adopt immediate and effective measures, particularly in the fields of **teaching, education**, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention. [Emphasis added]

In the UN Convention on the Right of the Child, member states commit themselves to education directed to –

⁹ Andreopolous & Claude (ibid.:4).

¹⁰ Article 7.

- the development of the child's personality, talents and mental and physical abilities to their fullest potential¹¹
- the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the UN Charter¹²
- the development of respect for the child's parents, his or her own cultural identity, language and values, and roots¹³
- the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes, and friendship among all peoples, ethnic, national and religious groups, and persons of indigenous origin,¹⁴ and
- the development of respect for the natural environment.¹⁵

Bösl and Jastrzembski ask whether Article 29 creates a human right to human rights education.¹⁶ They note that this opinion has for a long time been proposed by activists and non-governmental organisations (NGOs). Opponents of the view point out that no such right is specifically mentioned in the other human rights instruments. However, it cannot be disputed that states have an obligation to teach and allow others to teach human rights. It is also generally agreed that human rights education is fundamental to the implementation of human rights.¹⁷

Africa and the UN system

From the outset, Africa was at a disadvantage in human rights education. Only Egypt and two sub-Saharan countries, Ethiopia and Liberia, voted in favour of the adoption of the UDHR in 1948,¹⁸ while South Africa abstained together with the Soviet bloc.¹⁹ All the other countries were still under colonial rule and represented de jure by the colonial powers.

¹¹ Article 29(1)(a).

¹² (ibid.:29(1)(b)).

¹³ (ibid.:29(1)(c)).

¹⁴ (ibid.:29(1)(d)).

¹⁵ (ibid.:29(1)(e)).

¹⁶ Bösl & Jastrzembski (2005:5).

¹⁷ (All ibid.).

¹⁸ Session of the UN General Assembly, 10 December 1948, Palais de Chaillot, Paris.

¹⁹ By 1948, the Nationalist Party, a racist political grouping in South Africa that excluded the black majority from political power, took over the helm of government. After that, South Africa was in constant conflict with the UN, of which it is a founding member, over its race policies and its occupation of the then South West Africa (now Namibia).

However, as the countries on the continent gained their independence one by one, they joined the UN and enthusiastically became part of most of the major human rights treaties. Viljoen points out that, as far as ratification or signing of the human rights instruments is concerned, by 2006, African participation had exceeded the total international average in most of these instruments.²⁰ Consider the following:²¹

- Some 94% of all African countries have ratified the ICCPR compared with 82% globally
- For the ICESCR, the figures are 91% (Africa) to 80% (global)
- For the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), it is 96% to 90%
- For the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), it is 79% to 74%
- For the Convention on the Right of the Child, it is 98% to 99%, and
- For the Convention on the Elimination of All Forms of Racial Discrimination (CERD), 92% of all African countries have ratified the treaty compared with 89% globally.

However, the enthusiastic ratification does not tell the full story. In many instances, ratification is not complemented by complying with the demands of the instrument itself. Viljoen comments that African states often submit their state reports late,²² and they lack detail.²³ CEDAW is the only exception. By 31 December 2006, only 11 African countries had not submitted any reports at all to the treaty body.²⁴

If state reporting is the most important review and evaluation instrument, the success of the UN system needs to be questioned. Viljoen observes that the impact of the monitoring mechanism of the prominent treaties on Africa is

²⁰ Viljoen (2007:149).

²¹ (ibid.).

²² By 31 December 2006, a total of 13 African countries were a minimum of ten years late in submitting at least one ICCPR state report (ibid.:104). Only 14 African countries have submitted a state report under the ICESCR (ibid.:123).

²³ (ibid.:104).

²⁴ (ibid.:129).

questionable.²⁵ While the UN sees the treaty system as one of the organisation's success stories,²⁶ there is little evidence of that system's success in Africa.²⁷

The African Charter on Human and Peoples' Rights

Following the tendency in the rest of the world, the Organisation of African Unity (OAU) adopted the African Charter on Human and People's Rights (ACHPR) on 27 June 1981. The Charter was met with little enthusiasm, however. It took five years for a majority of the member states to ratify the Charter, and 13 years for the African Commission to publish its first decision.²⁸ Only in 1999, when Eritrea ratified the Charter, did it finally attain the full ratification of all 53 OAU member states.

The ACHPR was the first of several African treaties. African countries were slow to ratify these African instruments. These countries appeared to dedicate their attention to the UN system rather than their own. While they were leading the world in ratifying UN instruments, it took a total of 18 years for all the African member states to ratify ACHPR. By December 2006, only 27 countries had ratified the Convention for the Elimination of Mercenarism in Africa; only 20 had ratified the Protocol to the African Charter on the Rights of Women in Africa;²⁹ and only 39 had ratified the African Charter on the Rights and Welfare of the Child.³⁰

The state reporting did not fare much better. By 2006, 15 of the member states of the OAU's successor, the African Union (AU), did not present any reports at all, while seven countries' reports were more than ten years overdue and only 14 states had actually complied with all their reporting responsibilities.³¹ Viljoen comments that, in contrast, the countries with the poorest records in this scenario performed much better when it came to reporting to the UN treaty bodies.³²

²⁵ (ibid.:129).

²⁶ See UNHCHR Report No. UN A/59/20045/Add.3, dated 25 May 2005, quoted in (ibid.:146).

²⁷ Viljoen (2007:146).

²⁸ Murray (1997).

²⁹ The resistance to the Protocol is partly related to the opposition to Article 6, subpar (c), requesting states parties to encourage monogamy as "... the preferred form of marriage".

³⁰ See Viljoen (2007:308).

³¹ (ibid.:377).

³² (ibid.).

State reporting does not tell the whole story, however. In an article on positive human rights developments in Africa, Odinkalu refers to three important human rights documents coming from the AU in 2002:³³

- A declaration formulating new Principles Governing Democratic Elections in Africa
- A declaration on Democracy, [and] Political, Economic and Corporate Governance in Africa, and
- The Ministerial Council of the AU agreed to the text of an African Union Convent on Preventing and Combating Corruption.

The existence of these documents at least points to a developing concern in Africa for the protection of human rights.

However, Africa is far from being a beacon of human rights conduct. A lack of knowledge and information is still a barrier preventing African people from claiming and exercising their human rights. By 1987, the ACHPR was generally unknown in Liberia.³⁴ Some 16 years later, in December 2003, Sierra Leone shared the Liberian experience.³⁵ Research in Zimbabwe in 1994³⁶ and in Kenya in 1997 came to the same conclusions.³⁷

It seems as if the African system is still reasonably unknown in Africa. Okafor points out that while doing well in taking cases to treaty bodies on behalf of aggrieved persons and being sympathetic towards the fate of the marginalised, civil society is predominantly elitist: its members come from the top echelons of urban life, and they often do not speak the vernaculars of the people they offer to represent.³⁸

Moreover, African judges seldom refer to the African system. Instead, they prefer to use the non-domestic jurisprudence of southern Africa, the US Supreme Court, the Supreme Court of Canada, and the European Court of human Rights.

Despite the initial emphasis in the international community, the UDHR and the covenants on human rights training in international human rights law, it seems

³³ Odinkalu (2003:105).

³⁴ Ellen Sirleaf (2007; in Okafor 2007:261).

³⁵ Kargbo (2007, pers. comm.; in Okafor (ibid.).

³⁶ Tigere (1994:64).

³⁷ Okafor (2007:261).

³⁸ (ibid.:268ff).

as if Africa has never really bought into it. While it caught up on the ratification of human rights treaties, it failed in teaching the weak, the marginalised, and society at large, but also the powerful judiciary. An African human rights culture and a general knowledge of the rights of all people are still not fully developed, therefore.

The road to the Decade for Human Rights Education³⁹

In the 1970s, the right to human rights education became a popular theme within the UN. While the UDHR and the ICESCR emphasised the need for education, role players wanted to move to the methods and content of human rights education.

Eventually the United Nations Educational, Scientific and Cultural Organisation (UNESCO) took the initiative and placed human rights education on the agenda of a General Conference in 1974, which led to UNESCO member states unanimously adopting the so-called Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education Relating to Human Rights and Fundamental Freedoms, which contained the following recommendations, among others:⁴⁰

The General Conference recommends that member states should apply the following provisions by taking whatever legislative or other steps may be required in conformity with the constitutional practice of each state to give effect within their respective territories to the principles set forth in its recommendation.

The General Conference recommends that Member States bring this recommendation to the attention of the authorities, departments or bodies responsible for school education, higher education and out-of-school education, of the various organisations carrying out educational work among young people and adults such as student and youth movements, associations of pupils' [sic], parents, teachers' unions and other interested parties.

Twenty years later, after the end of the Cold War, UNESCO held an International Congress on the education of human rights and democracy, in cooperation with

³⁹ I am appreciative to one of the editors, Dr A Bösl, for referring me to an article he had co-authored on this topic (Bösl & Jastrzembki 2005).

⁴⁰ Adopted by the General Conference at its 18th Session, Paris, 19 November 1974; available at http://www.unesco.org/education/nfsunesco/pdf/Peace_e.pdf; last accessed 9 April 2009.

the UN Centre for Human Rights in 1993 in Montreal, Canada, on the theme “World Plan of Action for Education in Human Rights and Democracy”. It made provision for the creation of extensive programmes for human rights education to further the ideals of tolerance, peace and friendly relations among states, peoples and marginalised groups.⁴¹ The Congress adopted, among other things, a plan to obtain its educational goals:⁴²

This Plan calls for methods which will reach the widest number of individuals most effectively, such as the use of the mass media, the training of trainers, the mobilisation of popular movements and the possibility of establishing a world-wide television and radio network under the auspices of the United Nations.

The next landmark in human rights education was the World Conference on Human Rights in Vienna in 1993. In the concluding document of the Conference, representatives of 171 countries affirmed the state’s obligation to training:⁴³

The World Conference on Human Rights reaffirms that States are duty-bound, as stipulated in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights and in other international human rights instruments, to ensure that education is aimed at strengthening the respect of human rights and fundamental freedoms. The World Conference on Human Rights emphasises the importance of incorporating the subject of human rights education programmes and calls upon States to do so. Education should promote understanding, tolerance, peace and friendly relations between the nations and all racial or religious groups and encourage the development of United Nations activities in pursuance of these objectives. Therefore, education on human rights and the dissemination of proper information, both theoretical and practical, play an important role in the promotion and respect of human rights with regard to all individuals without distinction of any kind such as race, sex, language or religion, and this should be integrated in the education policies at the national as well as international levels.

The UN Decade for Human Rights Education

Reacting to the undertakings by the World Conference, the UN General Assembly proclaimed the Decade for Human Rights Education on 23 December 1994, to begin on 1 January 1995.⁴⁴

⁴¹ World Plan of Action text available at http://www.unesco.org/webworld/peace_library/UNESCO/HRIGHTS/342-353.HTM; last accessed 10 April 2009.

⁴² (ibid.).

⁴³ UNHCHR (1993:Article 33).

⁴⁴ Resolution 49/184 of the UN General Assembly, 94th Plenary Meeting, 23 December 1994.

The associated UN Resolution points to Article 26 of the UDHR and Article 13 of the ICESCR in emphasising the importance and ongoing need for human rights education. It makes an important statement regarding the expected outcome of such education:

... that human rights education constitutes an important vehicle for the elimination of gender-based discrimination and ensuring equal opportunities through the promotion and protection of the human rights of women ...

Human rights knowledge is an indispensable component of the struggle for gender equality and equal opportunity for women. Without knowledge there can be no proper understanding of the possibilities and remedies available to women to reach their full potential. The fact that African states are reluctant to ratify the Protocol to the African Charter on the Rights of Women in Africa indicates a special need for gender education to enable women to be the persons they ought to be – and, indeed, the objectives of human rights education go beyond the transference of knowledge. The final outcome should be broader adherence to human rights principles, a stronger activist approach to violations (since people will know their rights) and, eventually, more peace.

The Plan of Action defines *education* as –⁴⁵

... training, dissemination and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes and directed to:

- (a) The strengthening of respect for human rights and fundamental freedoms;
- (b) The full development of the human personality and the sense of its dignity;
- (c) The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;
- (d) The enabling of all persons to participate effectively in a free society;
- (e) The furtherance of the activities of the United Nations for the maintenance of peace.

The following general principles were set out in the Plan of Action to guide the programme:⁴⁶

⁴⁵ Article 2, “Plan of Action for the United Nations Decade for Human Rights Education, 1995–2004: Human rights education – Lessons for life”; Appendix to The United Nations High Commissioner for Human Rights on the Implementation of the Plan of Action for the United Nations Decade for Human Rights Education (1995–2004), UN Document A/51/506/Add.1, 12 December 1996.

⁴⁶ (ibid.:Articles 3–9).

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- The programme should create the broadest possible awareness and understanding of all of the norms, concepts and values enshrined in the Universal Declaration of Human Rights, and the international human rights instruments;
- A comprehensive approach to education for human rights, including civil, cultural, economic, political and social rights and recognising the indivisibility and interdependence of all rights, shall be adopted;
- Education shall include the equal participation of women and men of all age groups and all sectors of society both in formal learning through schools and vocational and professional training, as well as in non-formal learning through institutions of civil society, the family and the mass media;
- Human rights education shall be relevant to the daily lives of learners, and shall seek to engage learners in a dialogue;
- Human rights education shall seek to further effective democratic participation in the political, economic, social and cultural spheres, and shall be utilised as a means of promoting economic and social progress and people-centred sustainable development;
- Human rights education shall combat and be free of gender bias, racial and other stereotypes; and
- Human rights education shall seek both to impart skills and knowledge to learners and to affect positively their attitudes and behaviour.

The Plan for Action identified five objectives:⁴⁷

- (a) The assessment of needs and the formulation of effective strategies for the furtherance of human rights education at all school levels, in vocational training and formal as well as non-formal learning;
- (b) The building and strengthening of programmes and capacities for human rights education at the international, regional, national and local levels;
- (c) The coordinated development of human rights education materials;
- (d) The strengthening of the role and capacity of the mass media in the furtherance of human rights education; and
- (e) The global dissemination of the Universal Declaration of Human Rights in the maximum possible number of languages and in other forms appropriate for various levels of literacy and for the disabled.

The associated UN Resolution includes a number of role players to participate in such education:⁴⁸

- Governments, who are encouraged to eradicate illiteracy, to develop the human personality and to strengthen the respect for fundamental rights and freedoms;

⁴⁷ (ibid.:Article 10(a)–(e)).

⁴⁸ (ibid.:Articles 11–19).

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- The High Commissioner for Human Rights for Human Rights, who is requested to coordinate the implementation of the Plan of Action;
- The Centre for Human Rights of the Human Rights Secretariat, the member states, non-governmental organisations and specialised agencies of the UN, who are requested to support the endeavour; and
- International, regional and national non-governmental organisations.

Governments are the main role players, therefore. They are expected to develop national plans of action for human rights education and introduce or strengthen national human rights curricula, conduct national information campaigns, and open public access to human rights resources.⁴⁹

The success of the Decade for Human Rights Education

Human rights education by governments

Cardenas comments that governmental human rights education in Africa predominantly dealt with the development of school curricula, while the training of officials was left to NGOs.⁵⁰ An additional result of the human rights education initiative in Africa was the formation of human rights commissions: these grew from six in 1996 to 38 by 1999. Human rights commissions thereby became the main role players in human rights education in Africa.⁵¹

Human rights commissions are an excellent vehicle for human rights education. Since government is responsible for such education, it may well be that they will use it for their own purposes. Human rights education carries a high risk for governments, comments Cardenas.⁵² The more successful such education is, the greater the risk that government action will be challenged and that the public will make serious demands for compensation and the punishment of human rights abusers. If government controls such education, therefore, it can set the pace and manage its content.

However, although human rights commissions are funded predominantly by the State, they are independent – or are at least perceived to be so. With the strong network of human rights commissions and other defenders of human rights such

⁴⁹ (ibid.:Article 11).

⁵⁰ Cardenas (2005:368).

⁵¹ (ibid.:368, 371).

⁵² (ibid.:365).

as public defenders and ombudspersons across Africa and globally, human rights commissions are exposed to developments in human rights education in other jurisdictions and regions. This exposure has the potential to create a common approach that will strengthen the universality of human rights.

Cardenas looked at the South African Human Rights Commission (SAHRC), whom she perceives to be the most active and best-funded commission in Africa – and, possibly, the world.⁵³ Human rights curricular development is a major function of this Commission.⁵⁴ But it is also involved in training officials such as the police and the army, and in regional training of other human rights commissions.

However, not even the SAHRC did not escape the criticism of overcompensating for the needs and aspirations of government. Cardenas, without accusing the SAHRC of subjectivity or bias, mentions that more than 90% of its budget comes from government.⁵⁵ This potential shortcoming applies to all human rights protectors and commissions. While institutional independence is officially guaranteed by the state, a lack of funds can cripple such bodies or force them to a subordinate position.⁵⁶

Evaluators of human rights education have emphasised the importance of a broad definition of *human rights in education*.⁵⁷ A broad understanding of human rights will prevent the concept from being understood as the right to education, rather than a substantive understanding as human rights as both the object and substance of human rights education. The SAHRC clearly operates with a broad definition and their work includes several projects on social and economic rights.

The SAHRC was also a pioneer in setting up a Centre for Human Rights Education Training.⁵⁸ While there were several human rights centres at universities at the time, no one coordinated the educational programmes of the different role players from government, civil society and educational institutions. The Centre

⁵³ (ibid.:371).

⁵⁴ See Keet & Carrim (2006); see also Candau (2004).

⁵⁵ Cardenas (2005:373).

⁵⁶ In 2002, the number of Commissioners of the SAHRC was drastically cut – despite the growing case load; see SAPA (2002; in Cardenas 2005:374).

⁵⁷ Rukanda (2002:285–286).

⁵⁸ Cardenas (2005:372).

still serves as an example of how educators from civil society and government can be brought together to coordinate focused human rights education without too much duplication.

The overall picture of African participation in the UN Decade for Human Rights Education is bleak. Only 7 of the 53 member states returned an evaluation questionnaire to the High Commissioner. Of the reports received, many were vague, contained little information, and certainly had no specifics on training programmes.

Other responses came from 13 NGOs, 3 national human rights institutions and 4 human rights and university institutes.⁵⁹ Very little was done by governments to take human rights education to professional groups such as the police, the defence force and immigration officers, and even less to vulnerable groups such as minorities, migrant workers, prisoners and people living in extreme poverty.⁶⁰ Moreover, African governments expected intergovernmental organisations to fund human rights education projects.⁶¹

The obstacles listed by the seven African governments that responded to the questionnaire in respect of implementing human rights education programmes are an indication of a lack of political will rather than the obstacles themselves being insurmountable. This lack of will is evidenced by there being no technical assistance for developing and executing national human rights education plan, and no provision of long-term State funding.⁶² NGOs, on the other hand, attribute many of the obstacles to a lack of political will.⁶³

Given the high expectation that the High Commissioner for Human Rights had and the important role that the UN Plan of Action gave to governments, a mere 14% response by governments can hardly be seen as successful after the first five years of the Plan's existence. Moreover, even those who responded did not necessarily indicate major successes.

The performance of governments in the second five years did not improve significantly. In a High Commissioner for Human Rights report in October 2003,

⁵⁹ UN (2000).

⁶⁰ (ibid.:points 33 and 34).

⁶¹ (ibid.:point 37).

⁶² (ibid.:points 39–41).

⁶³ (ibid.:point 42).

only 17 out of a potential total of 50 sub-Saharan-African countries were listed amongst UN member states who had in fact reported to the High Commissioner on initiatives taken in their countries as part of the Decade for Human Rights Education. Many of these sub-Saharan-African reports were outdated.⁶⁴ Also evidencing a lack of political will among African governments is the fact that Burundi has not reported to the High Commissioner since June 2000, Cameroon since May 1999, Cape Verde since February 1999, and the list goes on.

However, there were also countries who submitted elaborate reports. These included Mozambique, Namibia and Zimbabwe.⁶⁵ Unfortunately, the UN does not have any instruments by means of which to measure the success of human rights education efforts. For example, is a programme successful if human rights are the content of a well-structured and managed school subject? Zimbabwe is a case in point, where the country spent time, money and effort in setting up and implementing human rights education programmes, but the state of the country shows little real impact of these programmes. Indeed, on the contrary: the decline of human rights started at a time when one would have expected the education programmes to produce some results.

Civil society and human rights education

Civil society has played an important role in both education and advocacy in Africa. For example, Okafor attributes Nigeria's relatively successful interaction with the implementation of the African instruments to that country's strong civil society and numerous local civil society organisations.⁶⁶ Sceptical observers of human rights education see the contribution of NGOs as the only possible way of overcoming government apathy and lack of commitment.⁶⁷

While civil society seems to be able to conduct human rights education programmes with important role players such as the police, military and other government agents,⁶⁸ they are not very successful in delivering such education to marginalised groups. Okafor ascribes this shortcoming to the fact that human rights activists come from a small elite who understand the human rights environment,

⁶⁴ OHCHR (2003).

⁶⁵ Rukanda (2004).

⁶⁶ Okafor (2007:269).

⁶⁷ Rosemann (2003:6).

⁶⁸ Cardenas (2005:368).

but not necessarily what Okafor calls the language of the marginalised.⁶⁹ In other words, they share the life experiences of the governing elite rather than that of marginalised people. Consequently, they are unable to bridge the gap between the elite and the have-nots. While they may understand the needs of the people in terms of human rights, they are not the best people to communicate teach these rights to the marginalised groups.

However, despite the shortcomings, NGOs are the main role players in specialised grass-roots education. The work of the Metlhaetsile Centre in Botswana is a case in point.⁷⁰ While the country is proclaimed as the most stable democracy in Africa, women are still treated as second-class citizens, despite the landmark decision of *Attorney General v Unity Dow*.⁷¹ The Centre's education programmes include a wide range of activities in rural areas, including interaction with traditional authorities.

In Namibia, Women's Action for Development has been involved in empowering and educational programmes for rural women since 1994.⁷² In Nigeria, an activist group working from 1993–1996 for women's rights under Islamic law was launched as BAOBAB for Women's Human Rights in 1996. Its programmes include basic education at grass-roots level as well as paralegal training.⁷³

Similar organisations working specifically with women and children's rights mushroomed during the Decade for Human Rights Education. While it is still too early to determine the long-term impact and sustainability of all these organisations, NGOs were at the forefront of human rights education in fields not covered by African government programmes.

For the first half of the decade, civil society in Africa seemed to have performed somewhat better than their government counterparts, by reaching most target groups with their human rights education programmes.⁷⁴ However, education was seldom identified as the main focus of NGOs. They concentrated on the

⁶⁹ Okafor (2007:269).

⁷⁰ Dow et al. (1997; in Andreopoulos & Claude 1997:455–468).

⁷¹ Unreported case of the Court of Appeal, No. 4/91. The case declared certain discriminatory provisions of the Citizenship Act unconstitutional.

⁷² See <http://www.wad.org.na/>; last accessed 10 March 2009.

⁷³ See <http://www.baobabwomen.org> for further information; last accessed 10 March 2009.

⁷⁴ UN (2000:point 35).

human rights related to their mandate, “... and carry out generic work on human rights awareness to increase support for their particular concerns”.⁷⁵

The High Commissioner noted that the NGO programmes seldom included interaction with the government.⁷⁶ However, the long-term success of formal educational programmes in schools can hardly be sustainable without government participation.

Thus, while civil society has complied with some aspects of their mandate under the programmes and objectives of the Decade for Human Rights Education, the key objective – a global culture of human rights – has a long way to go in Africa.

Human rights education as part of formal education

While African governments have spent most of their resources on curricular development as far as human rights education is concerned, educators have questioned the effectiveness of incorporating such education into formal education. Meintjes, for example, asserts that while the rhetoric of empowerment suggests changes in education itself, “the ends and means will remain those of conventional education”.⁷⁷ In the same vein, Henry refers to the historical role of education to socialise students into the existing social structure. Students are taught to respect authority and to revere politicians – not to question them.⁷⁸

The criticisms by Meintjes and Henry have merit. However, critical thinking and analysis are no longer taboos in pedagogic literature. Hecht, a proponent of democratic education, points out that formal schooling is a very small part of the learner’s learning experience.⁷⁹ If freedom and uniqueness are integral aspects of their daily life, why should formal education be different?

One can apply the insights of democratic education to human rights education. Why should respect for the humanity of others or an understanding of one’s own rights contradict the socialising skills needed by young learners to integrate

⁷⁵ (ibid.:point 124).

⁷⁶ (ibid.).

⁷⁷ Meintjes (1997:70).

⁷⁸ Henry (1991:420).

⁷⁹ Hecht [n.d.].

into the group? If human rights are part of the common values of the society in which the young learner finds him-/herself, understanding human rights will be part of their socialising process. If, however, human rights education is an add-on to impress the international community, the tension between an autocratic political system and education philosophy on the one hand and freedom and respect of the dignity of others on the other will confuse the learner rather than contributing to his/her full development as a human being. In such a scenario, Meintjes's argument has relevance: the outcome will be formal education as it is known today.

Human rights after the UN Decade for Human Rights Education

Sceptics have suggested that the UN Decade for Human Rights Education has been a failure. Rosemann, a critic of the UN human rights system, sees the role of member states being the main educators as a recipe for failure.⁸⁰ The failure of the work of the Human Rights Commission⁸¹ over 50 years is a clear indication to Rosemann that states cannot exercise self-regulation. And human rights education can only work in "... an overall atmosphere where a rights-based approach to human dignity is accepted and a free society where individuals can claim their human rights without endangering their own lives".⁸²

This envisaged "free society" has not yet been created by 50 years of the human rights dispensation. In the mid-term global evaluation of the Decade programme, the UN pointed out that only a few national human rights strategies had been developed in the ten-year period. To solve the problem of non-commitment by governments, the High Commissioner for Human Rights suggested three strategies:⁸³

- Another decade dedicated to human rights education
- A special fund for human rights education, and
- A joint NGO–government committee to take human rights education forward.

⁸⁰ Rosemann (2003:1).

⁸¹ The Human Rights Commission has in the meantime been replaced by the Human Rights Council. Rosemann is possibly as opposed to the Council as he was to the Commission, since the core of the Council is still elected by member states.

⁸² Rosemann (2003:1).

⁸³ UNHCHR (2003).

Rosemann⁸⁴ sees only one possible way forward: less government participation, and more NGO participation. In this process, civil society should accept the role of a parliamentary opposition when it comes to human rights issues. In other words, if the UN is serious in developing communities where human rights are respected and individuals are free to claim their freedoms and rights, they will have to empower NGOs to become more aggressive in opposing human rights abuses – even if it means eliciting active antagonism from government.

Viljoen, while seeing the ratification of treaties as an important anchor that may help to stabilise the gains of democratisation, remains critical of the impact of the UN System on African countries.⁸⁵ A good record in ratification will not result in more rights and a more democratic society: it can merely prepare the ground.

Hathaway, like Viljoen, questions the positive conclusions that one can draw about Africa's excellent record of ratifying treaties.⁸⁶ Treaty ratification, she asserts, is often an indication of bad performance rather than an indication of an awakening human rights culture.⁸⁷ Her findings are carried by the signing and ratification history of at least one recent convention, namely the Merida Convention. This UN anti-corruption convention was adopted on 9 December 2003. Kenya signed and ratified the Convention on the same day. Only 12 countries ratified it in 2004, 9 of whom were from Africa (Algeria, Benin, Madagascar, Namibia, Nigeria, Sierra Leone, South Africa and Uganda).⁸⁸ This is not to say that all the countries that ratified early (i.e. in 2004) are corrupt; but neither does ratification say anything about the human rights performance of a state.

However, one should not lose sight of the gains of the Decade for Human Rights Education. While one cannot necessarily link the growth of human rights commissions in Africa with the initiatives of the Decade for Human Rights Education, the commissions became major role players as human rights educators during the Decade. And the initiatives of the High Commissioner for Human Rights during those ten years at least played a role in the emphasis on human rights education.

⁸⁴ Rosemann (2003:6).

⁸⁵ Viljoen (2007:146).

⁸⁶ Hathaway (2002).

⁸⁷ (ibid.).

⁸⁸ UN Office on Drugs and Crime (2009).

But the small victories do not compensate for the unfulfilled objectives and expectations of the programme. There are no indications that Africans in general have an awareness and understanding of the UN human rights instruments; neither can one speak of a general trend to see first- and second-generation human rights as indivisible and interdependent. Moreover, the programme hardly made any impact on the number of human rights educators in Africa.

The High Commissioner was positive in his evaluation of the Decade, as were the representatives of the member states at the adoption of a second Decade, this time called “The World Programme for Human Rights Education”.⁸⁹ The initial term for the Programme was 2005–2014, but this closing period has been extended indefinitely. As President of the General Assembly Mr Jean Ping of Gabon added, the first Decade was the catalyst for several human rights education programmes.⁹⁰ He did, however, also mention that the World Programme could only succeed if national and local actors used it as a mobilisation tool. He appealed to all states to combine their efforts to make human rights education a reality at home and a focus of discussions in the future. Effective human rights education – which enhances respect, equality, cooperation and understanding, therefore preventing human rights abuses and conflicts – remained one of the best prerequisites towards the achievement of a peaceful world, in his view.⁹¹

Although some programmes did develop as a result of the Decade for Human Rights Education, governments did not develop national strategies; they did not cooperate with NGO efforts; very few networks were created; and the idea that a more human-rights-friendly consciousness is developing in Africa remains a dream.

Bösl and Jastrzembski⁹² are correct in pointing out that the programme was not as positive as asserted by the High Commissioner. If the major role players – the governments themselves – performed so badly, and if the NGOs, who are praised for their contribution, participated in education only as a secondary interest to boost their main mandates, how can we speak of success at all?

It is also true, however, that governments cannot bear the responsibility for human rights education alone. It was unrealistic from the outset to expect governments

⁸⁹ UN (2004).

⁹⁰ (ibid.).

⁹¹ (ibid.).

⁹² Bösl & Jastrzembski (2005:5).

to coordinate the programme and to take responsibility for the national strategies and plans of action. Cardenas rightly points out that human rights education will place governments under pressure.⁹³ The more successful the education, the more citizens will insist on their rights and the more government will be forced to act against human rights violators.

And the vast majority of governments in Africa (and worldwide) prefer not to be pressurised by human rights bodies or human rights issues. They are usually forced by constitutional provisions, an independent judiciary and other regulatory bodies such as human rights commissions and Ombudsmen and the threat of action before a treaty body to comply with the expectations of the UN and regional human rights instruments.

A better strategy would have been a more vigorous drive to institute human rights commissions or other human rights protectors in all countries and use them as the central role player to develop national strategies, and to initiate cooperation between governments and other players.

Most of the African member states of the UN did not inform it about the status of their national human rights education efforts; nor did they draw up national action plans for education in human rights. Consequently, they made it practically impossible to evaluate the development of human rights education in Africa.

World Programme for Human Rights Education

Despite opposition from some European countries and the United States of America, the UN General Assembly adopted a second decade for human rights education, this time called World Programme for Human Rights Education.⁹⁴

The programme started on 1 January 2005 and will be ongoing. The first phase will run until the end of 2009, and focuses on primary and secondary education. The Human Rights Council, however, has remained silent on the focus areas of the second phase. National strategies and minimum standards were this time given to governments. The minimum standards expect governments to evaluate the human rights programmes in their education systems. Unfortunately, the programme assigns a politician – the minister of education – rather than a human rights

⁹³ Cardenas (2005:364f).

⁹⁴ UN (2004).

commission or Ombudsman to take responsibility for the implementation. Informal education and other role players will be dealt with in later phases. However, by repeating the mistakes of the first Decade, the prospects of a more successful second decade must be questioned.

Final comments

In his proposals at the end of the first Decade, the High Commissioner proposed cooperation between civil society and government as a vehicle to take the educational ideals forward. The idea of an intergovernmental or joint civil society–government endeavour makes sense. However, given the mediocre performance of governments during the first Decade, another suggestion by the High Commissioner may have more potential in terms of producing results:⁹⁵

The potential of the treaty monitoring system in advancing human rights education, in particular through the treaty bodies' review of country reports, could be maximised. Nongovernmental organisations and national human rights institutions, when they exist, should be more involved in this process, and could coordinate their efforts in publishing reports on human rights education as a tool of cooperation with their Governments and with the existing regional and international mechanisms. Treaty bodies could also consider adopting additional general comments concerning various aspects of human rights education, as appropriate.

The South African example has set a standard that can be copied by the growing number of human rights protectors in Africa. Human rights protectors can play an important role as a preventative force rather than a mere investigation body after a violation has taken place. Together with civil society, they were the driving forces of the Decade for Human Rights Education. Neither the human rights commissions nor the treaty bodies play any significant role in the first phase of the World Programme for Human Rights Education.

The treaty bodies have also not yet indicated in their endeavours that they are willing to make human rights education a general point in evaluating state reports. However, human rights education cannot be left to the Committee on Economic, Social and Cultural Rights. While the right to education is primarily the mandate of the said Committee, educating the masses, state officials and vulnerable societies are the responsibility of all the treaty bodies. Indeed, no

⁹⁵ UNHCHR (2003).

treaty report can be said to be completed if it does not include a section on human rights education in the country. It is unlikely that governments in Africa will take up their mandate on human rights education in the near future; so human rights institutions, treaty bodies and civil society will have to take the initiative if ever we are to see change.

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Transitional justice and human rights in Africa¹

Charles Villa-Vicencio

Introduction

Africa stands at the cutting edge of the international debate on transitional justice. The Juba talks between the Government of Uganda (GOU) and the Lord's Resistance Army (LRA) juxtapose local initiatives for justice and reconciliation with international demands for prosecutorial justice.² Joseph Kony's failure to show good faith in these talks by extending LRA terror into Democratic Republic of Congo (DRC) villages further evidences the need for Africa to address the demands of the International Criminal Court (ICC). On the other hand, the decision by the Pre-trial Chamber of the ICC to issue a warrant for the arrest of Omar Hassan Ahmad Al Bashir, President of Sudan, for war crimes and crimes against humanity raises significant questions concerning the appropriateness of the court's intervention in a growing African crisis.

The situation in the DRC raises similar questions. The trial of rebel leader Thomas Lubanga in The Hague for war crimes relating to the forced recruitment of child soldiers sends a strong message that warlords are not above the law. His trial could at the same time inflame an already fragile ethnic situation in the eastern part of the country, where he is seen as a protector of Hema rights in the ethnic rivalry for control of the region's vast mineral resources. Will the threatened trial of Laurent Nkunda, head of the *Congres National pour la Defense du Peuple*³ (CNDP), whether in The Hague or in Kinshasa, contribute to peace-building or further alienate his Tutsi ethnic followers, recognising that the United Nations (UN) has accused Nkunda's troops as well as government troops of mass killings and rape?⁴

¹ An expanded version of this paper is to be found in Villa-Vicencio [Forthcoming].

² *Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army*, Juba, Sudan, 29 June 2007. See also Baines (2007).

³ National Congress for the Defence of the Congolese People.

⁴ Having arrested Nkunda in Rwanda following a joint Rwandan–DRC military initiative, the DRC has asked for his extradition. The question is whether Rwanda will comply; whether the DRC prosecutes him in Kinshasa as a renegade Congolese soldier – which would signal a growing domestic capacity not to rely on the ICC for prosecutions; or

As an increasing number of African states move towards democracy, attempts to impose the ICC's demands for the prosecution of those alleged to be responsible for genocide, crimes against humanity and war crimes are likely to provoke increasing concern among some peace-builders on the continent. The fragile peace agreement between Robert Mugabe's Zimbabwean African National Union (ZANU-PF) and the Movement for Democratic Change (MDC) in Zimbabwe is a case in point.⁵

Confronted by decades of impunity that have spiralled into civil wars, regional conflict, genocide and oppressive rule, the international community insists that perpetrators of such deeds have their day in court. The fact that 30 African states – for whatever reasons – have ratified the Rome Statute, thereby accepting the jurisdiction of the ICC, suggests general acceptance of this proposition.

However, the level of political instability that characterises many African peace initiatives is such that even the most fervent proponents of prosecutions recognise the need to ensure that legal action against perpetrators does not throw the country back into war. Article 16 of the Rome Statute allows the UN Security Council to suspend ICC investigations for renewable one-year increments if those investigations relate to situations with which the Security Council is engaged under its Chapter VII powers relating to matters of peace and stability.⁶ Article 53 of the Statute, in turn, allows for a stay of prosecutions triggered by a State Party or Security Council referral if, taking into account the seriousness of the crime and the interests of the victims, this is judged to be “in the interest of justice” – which presumably includes situations where prosecutions might impede peace initiatives.⁷

Luc Huyse warns that the notion of *the interests of justice* is an “extremely technical and diffuse concept”.⁸ If this means that the criteria by which these technicalities are to be unravelled are solely those of international law, to the

whether he will ultimately face trial in The Hague on charges of genocide, crimes against humanity, or war crimes.

⁵ The fact that Zimbabwe, like Sudan, has not signed the Rome Statute will involve the direct intervention of the UN Security Council for this to happen.

⁶ Rome Statute of the International Criminal Court; available at <http://www.un.org/law/icc/statute/romeofra.htm>; last accessed 15 December 2008.

⁷ (ibid.); see also Lovat (2006).

⁸ Huyse & Salter (2008); see also Lovat (2006).

exclusion of the judgement of governments and others directly involved in peace-building, then the ICC effectively has the final word – reducing local and regional initiatives to be, at best, poor cousins in the peace process.

A choice between the ICC and national structures of justice, including African traditional mechanisms for justice and reconciliation, is not the most pressing issue facing African countries. Rather, it is to ensure that perpetrators of gross violations of human rights are held accountable for their deeds, and that there is sufficient political and socio-economic transformation to ensure that victims regain a sense of human dignity. For these developments to take place it is imperative that local and other peace-building initiatives be supported to ensure that the peace process does not slide back into conflict. Peace cannot be restored in conflict situations by persecutions alone. Nor can the international demand for an end to impunity be ignored or played down by less than decisive action being taken against those principally responsible for acts of genocide, crimes against humanity or war crimes.

This requires local initiatives for peace-building to respond to and, where necessary, be adapted to the demands of international law. The ICC, on the other hand, needs to ensure that its activities do not jeopardise local initiatives aimed at ensuring sustainable peace and social development in countries seeking to overcome conflict.

My intent in what follows is to –

- identify the limitations of prosecutorial justice as witnessed in the dominant transitional justice debate
- consider the challenge of traditional African mechanisms to Western notions of conflict resolution and peace-building, and
- ponder the origins and parameters of the transitional justice debate in Africa.

Transitional justice

The 2004 UN Report to the Secretary-General on *The rule of law and transitional justice in conflict and post-conflict societies* defines *transitional justice* as –⁹

⁹ United Nations (2004); see also United Nations (1992)

... 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.

A 2006 UN document entitled *Rule of law for post-conflict states: Truth commissions*, on the other hand, provides a much narrower focus for transitional justice and truth commissions, and fails to adequately affirm the necessary link between justice and reconciliation.¹⁰ In brief, the implication of the *Truth commissions* document is that justice is more important than reconciliation, accountability is more important than truth, and reparation is more important than reconstruction.

It is this emphasis in the transitional justice debate that is challenged in what follows. If justice is delivered through ad-hoc tribunals, the ICC or any other body that is perceived to bear the characteristics of 'imposed' or 'outsiders' justice', such body's ability to transform a nation is limited. The former UN Secretary-General acknowledges this as well:¹¹

Peace programmes that emerge from national consultations are ... more likely than those imposed from outside to secure sustainable justice for the future in accordance with international standards, domestic legal traditions and national aspirations.

Given the mandate of the ICC to intervene in national situations only where a State is "unwilling or unable"¹² to carry out investigations and prosecutions of its own, more energy could well be out into empowering and, where necessary, sensitising national courts and/or alternative structures authorised by States to deal with gross violations of human rights in a given situation, rather than taking the decision-making process out of their hands.

Victim demands invariably extend beyond what any formal international or national court of law can provide. This is why transitional justice mechanisms cannot be reduced to prosecutions. They need to include additional formal structures in order to meet victim demands. Differently stated, transitional justice proponents need to acknowledge the inherent limitations of trial justice in order to maximise the contribution of their discipline to peace-building. These limitations include the following:

¹⁰ UNHCHR (2006).

¹¹ Orentlicher (2004).

¹² Rome Statute.

- **Prosecution restrictions:** No legal system can prosecute more than a limited number of alleged perpetrators. The question is this: How does one hold those perpetrators who do not have their day in court accountable for their deeds?
- **Prosecutorial criteria:** The ICC's mandate is to prosecute the major proponents and architects of the most serious crimes under international law: genocide, crimes against humanity, war crimes and (the as yet undefined) crimes of aggression. Given the decisions on ICC persecutions to date, the question is by what criteria some perpetrators are judged to be major proponents and architects of serious crimes and others not.

When Dr Irae Baptista Lundin, a Maputo-based political analyst, was recently asked whether she thought Mozambique ought to have instituted criminal trials against those alleged to be responsible for gross violations in the post-independence conflict between the *Frente de Libertação de Moçambique*¹³ (FRELIMO) and the *Resistência Nacional Moçambicana*¹⁴ (RENAMO), she responded with a counter question: “Who ought we to have prosecuted? If not the Rhodesians, South Africans and other international players who funded the war, why RENAMO and FRELIMO?”¹⁵

- **Fixed charges:** Courts are required to prosecute against a fixed charge sheet. This means that, while trials are able to deliver justice on specific gross violations of human rights, they are unable to address broader aspects and patterns of injustice that have destroyed the lives of individual victims and communities. Included among the latter are invariably those who have neither the economic capacity nor the emotional will to resort to the courts.

To cite but one example, Saddam Hussein was convicted of crimes against humanity for the killing and torture of 148 Shi'ite villagers in Dujail following a failed attempt in 1982 to assassinate him. Hussein was sentenced to death and subsequently hanged. The courts did not address the more extensive record of his reign of terror. Questions about the United States (US) and the West encouraging Hussein to invade Iran in 1980 – an invasion that

¹³ Front for the Liberation of Mozambique.

¹⁴ Mozambique National Resistance Movement.

¹⁵ Maputo, May 2008.

led to the deaths of 1.5 million people – were not posed. Also not part of the court record is the supply of components of the chemical weapons with which Saddam drenched Iran and the Kurds. The chaos that resulted from the 2003 invasion of Iraq by US and allied forces and the subsequent use of Saddam's Abu Ghraib torture chambers by US soldiers are similarly not part of any court record.

- **Truth-telling:** Trials contribute to the demand for truth. Frequently, however, there is a need to go beyond the confines of the court in order for victims to engage perpetrators in face-to-face encounters, confrontation and dialogue in their quest for truth regarding their ordeal. Only through this process can they begin to understand the causes, motives and perspectives of those responsible for their suffering, which opens the possibility for victims to begin to bring closure to their trauma. This level of truth-telling takes time and levels of encounter between enemies and adversaries for which courts are ill-equipped.
- **Perpetrator responsibility:** Judgements handed down by courts can prescribe community service as a form of restorative justice, but the broader community is largely excluded from this process. Traditional community structures, on the other hand, provide a framework within which the responsibilities of perpetrators can be implemented and a context within which victim reparations and restoration can be delivered.
- **Reparations:** Deep and lasting community reparations and restitution can only happen as a result of dialogue and negotiation between an aggrieved and violated community and the State. The physical, psychological and material cost of suffering can be partially compensated by a court of law. This can open space within which victims can better more successfully aspire towards the restoration of their human dignity. Ultimately, however, the restoration victims' human dignity in a more complete sense is something that can only be achieved through their direct involvement in political struggle, social dialogue and self-determination.
- **Confrontation:** Courts are places of confrontation between prosecutor and accused. Prosecutorial justice can contribute towards the attainment of a holistic form of justice involving acknowledgement, truth recovery, political

reconciliation, comprehensive forms of reparation, and restoration of human dignity. However, far more is required to bring this process to completion, including the institution of appropriate forms of political, economic and social (re)construction – which are beyond the scope of formal courts.

Addressing the needs of victims, their communities and society as a whole, scholars and practitioners of peace-building are increasingly exploring the extent to which African traditional structures for justice and reconciliation can contribute to meeting these needs. In summary, there are immense moral, legal, political and practical concerns at the level of victim and community needs to which courts can contribute, but are invariably unable to bring closure.

African traditional justice systems

The political potency and appeal of African traditional systems is perhaps not essentially at the level of specific practices, recognising that practices are often culture-specific – differing not only from one country to another, but also between ethnic groups and clans within countries. Rather, this potency and appeal lie at the level of social legitimacy, grounded as these differing practices are in community involvement and established traditions. It is frequently pointed out that African traditional practices fall short of Western notions of due process and procedure. These traditional practices have also not demonstrated an obvious capacity to meet the sheer magnitude and complexities of contemporary political conflicts on the continent. Traditional courts and structures are often criticised for being gender-insensitive, although in some situations women preside over courts and ceremonies. While this is the case in the *gacaca*¹⁶ courts in Rwanda, where 30% of the *inyangamugayo*¹⁷ are women, many women continue to find the process intimidating in cases that involve issues of rape and sexual violence.¹⁸ In recent years, women have become *Bashingantahe*¹⁹ in Burundi, and women exercise significant power among traditional matriarchal groups in parts of Ghana, Mali, Mozambique and elsewhere on the continent. This said, Africa is largely a male-

¹⁶ A current adaptation of traditional courts.

¹⁷ Judges.

¹⁸ This resulted in cases of sexual violence being excluded from *gacaca* jurisdiction in 2004, although they were reinstated to their jurisdiction in 2008. It is not clear what changes have been introduced to address the earlier problems. For a discussion on the *gacaca* courts, see Clarke (2008a).

¹⁹ Community leaders and counsellors.

dominated society, which is reflected in most traditional judicial and governance structures. There are also situations where the competency and legitimacy of the presiding elders and other officials are questioned by local communities.

It is both wrong and unhelpful to overvalue the role of traditional African structures in dealing with crime and conflict. It is generally recognised that African traditional mechanisms need to undergo revision. The *gacaca* courts in Rwanda, for example, constitute an adaptation of original practices; and the July 2007 communiqué on the Juba talks between the GOU and the LRA refer to the need for “necessary modifications” to traditional Acholi, Iteso, Langi and Madi practices.²⁰ At the same time, it is important to acknowledge that political elites in Africa and elsewhere often seek to manipulate both international institutions and local practices to their own advantage or that of their cronies.

African traditional practices of justice and reconciliation clearly do not offer a panacea for Africa’s conflict. Assessing traditional African practices of justice and reconciliation in the Horn of Africa and, more particularly, Ethiopia, Tarekegn Adebo suggests that –²¹

African traditional structures have in many instances over the years been discredited and marginalised by colonial authorities and missionaries as well as by post-independent governments. This has often resulted in the emergence of incompetent elders and leaders who are open to manipulation and corruption.

Adebo suggests, however, that this does not detract from the fact that these institutions – though often compromised – are the carriers of traditional values and principles that people continue to place in high regard:²²

It is these ideas and values, rather than the existing structures or the presiding elders within these structures that should be incorporated into current peace-building structures.

Acknowledging the tension between tradition and modernity, he argues that the historic value and integrity of traditional institutions can be identified and adjusted to meet the demands of international law.

²⁰ *Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army*. Juba, Sudan, 29 June 2007.

²¹ Uppsala, October 2007.

²² (ibid.).

In the past, traditional reconciliation structures were rarely authorised or equipped to deal with blood feuds or murder. This, suggests Adebo, provides the required space within which traditional and modern judicial demands can meet. In parts of present-day Ethiopia, for example, traditional structures continue to be used to settle less serious crimes, while high-level crimes are referred to national courts. Similarly, in Rwanda, the *gacaca* courts deal with crimes up to a certain level, while so-called Category 1 crimes – involving those alleged to be involved in planning, organising, inciting, supervising or instigating the 1994 genocide or other crimes against humanity – being referred to the formal courts or the International Criminal Tribunal for Rwanda in Arusha.²³

Clearly, traditional justice and reconciliation practices continue to prevail across the continent. The question is whether and how these practices can be incorporated into the dominant transitional justice debate – with increasing evidence of African governments as well as scholars of transitional justice on the African continent and elsewhere addressing this concern.²⁴

Without addressing specific practices of African traditional mechanisms for justice and reconciliation, which in any event differ from context to context, the following tensions reflect a common – albeit apparently contradictory at first – dialectic that holds together the goals of these practices:

- **Individual and community accountability:** The strength of traditional reconciliation mechanisms is located in their participatory, community focus. The individual offender is encouraged to make peace with the victim, whether living or dead, as well as with the family, clan, community and their ancestors. What is important is the communal responsibility to restore the damage done to the victim and his or her community, through the affirmation of social values that have traditionally sustained the community. The latter requires the participation of the ancestors.

The dialectic between individual culpability and community responsibility stresses the negotiated nature of justice, which requires the democratic participation of citizens in the creation of structures of authority, and agreement on the rules by which people are governed. Disregard of the

²³ Since 2008, however, some Category 1 cases are being dealt with by *gacaca* courts, where those accused of ‘lesser’ crimes – including complicity in genocide – are tried.

²⁴ See Huyse & Salter (2008).

values, perceptions and demands of communities by international bodies, not least in volatile political situations, can have significant consequences for peace and social justice in a given situation. Demands by international bodies for individual culpability need to adjust to the implications of a broader African sense of responsibility as a basis for ensuring both acceptance and sustainable peace.

- **Retributive and restorative justice:** If the focus of formal justice systems is retributive, the focus of African traditional courts is essentially restorative. However, it would be quite wrong to castigate international justice as entirely punitive and romanticise African justice as entirely restorative. Both forms of justice are important, especially in societies seeking to extricate themselves from lawlessness and disregard for the rights of victims in an abusive society. This requires the transitional justice debate to draw on the essential principles of both retributive and restorative justice.

African traditional mechanisms offer a space within which not only the political elite may talk, but also the rank and file members of aggrieved and warring groups can encounter one another. It provides a platform for citizens to engage State-appointed custodians of justice, who often isolate themselves from the challenges of broader society.

- **Individual and social truth-telling:** From the perspective of Western-trained lawyers, African traditional ways of evidence-giving, which frequently reach beyond the confines of a specific charge sheet required in conventional court systems, are seen to fall short of the rigour and specificity required by Western jurisprudence. African traditional ways of giving evidence and of story-telling, on the other hand, can offer the possibility of a level of truth-telling overlooked by formal courts.

The quest for this broader understanding of truth-telling is captured in the discussion on four different levels of truth identified in the South African Truth and Reconciliation Commission (TRC) Report which includes factual or forensic truth, personal or narrative truth, social truth or dialogical truth, and healing and restorative truth.²⁵ This complexity of truth-seeking by victims and survivors in a post-conflict situation as well as by the broader

²⁵ Truth and Reconciliation Commission of South Africa (1998:110–114).

society involved in the conflict is largely beyond the capacity of courts to deliver. Recognising that while different victims and survivors demand different kinds of truth, in principle, trials only satisfy the demand for what is seen to be objective or factual truth.

Albie Sachs, an important participant in the debates preceding the establishment of the Commission and presently a Constitutional Court judge, suggests that “dialogue truth is social truth, the truth of experience that is established through interaction, discussion and debate”.²⁶ It is this level of ‘engaged truth’ that is required to enable societies of deep conflict to explore the possibility of transcending their own often narrow perceptions of the truth as a basis for overcoming the polarisation in them that bedevils fuller truth recovery. Courts of law can contribute to this process by helping to get disclosure on *who did what to whom*. However, more is required to uncover the cause, motives and perspectives of those involved in the conflict. It is this level of personal and narrative truth, social or dialogical truth, and healing and restorative truth that formal court processes rarely deliver. African traditional mechanisms offer the possibility of addressing these needs.

- **Victims and perpetrators:** Pertinent to transitional justice is the question of how to address individual culpability within a context of collective victimisation. The difficulty involved is graphically presented in a Justice and Reconciliation Project (JPR) field note on Dominic Ongwen, a high-ranking LRA soldier whose military career began when he was abducted at the age of 10 on his way to school in the Gulu District in Uganda in 1980.²⁷ He is reported to have been “too little [sic] to walk” and having been denied adequate social and moral development, he is seen to be unable to make responsible decisions in later life.²⁸ However, Ongwen cannot simply be viewed as a child who was forced to kill: he embraced his assigned task in a manner that resulted in his promotion into the high command of the LRA, and is allegedly responsible for an array of gruesome deeds.

Most advocates of formal trials would argue that perpetrators such as Ongwen need to have their day in court, contending that this kind of

²⁶ (ibid.:113).

²⁷ Justice and Reconciliation Project (2008).

²⁸ (ibid.).

decisive intervention by the courts will contribute to sustainable peace, help establish the rule of law in the wake of lawless rule, and counter the desire for revenge by victims. Above all, prosecution is seen to be a deterrent to future gross violations of human rights – although there is no evidence to date that the ICC indictments have deterred either government or rebel forces in Uganda, the DRC or elsewhere to stop committing atrocities. The question is whether the threat of prosecution in polarised communities – where killers are often driven by deep beliefs based on clan, ethnicity and other ideologies – is ever enough to deter killing. When prosecutions are seen as a form of victor’s justice imposed by outside agencies, which is often the case in international tribunals and the ICC, prosecutions may indeed do little more than intensify the spiral of violence.

While the moral status of Ongwen and others in similar situations can never be conclusively resolved, an African traditional approach to the complexities of his position offers a space within which the aftermath of armed conflict and war can be grappled with by those most affected by it. Most importantly, such traditional structures offer opportunities for the community to decide on the nature and extent of penalties that offenders like Ongwen ought to face, and on what terms they can be reincorporated into communities that include families, bush wives²⁹ and children. In brief, formal courts impose judgements, whereas African traditional structures reach for negotiated settlements. In post-conflict situations, the latter can contribute to preserving the peace. The question is whether such settlements are also forms of impunity that fail to re-establish the rule of law so desperately needed in emerging democracies.

- **Reparations and development:** A litmus test of any judgement is its implementation. This is especially true in situations where retributive justice is replaced by restorative measures. Bluntly stated, if reparations and restoration do not happen in restorative justice situations, victims are often left without any positive outcome in their quest for justice.

The gap between proposed reparations and the actual monetary compensation paid out in places like Malawi and Rwanda in the wake of the rule of Hastings Banda and the 1994 genocide, respectively, is sometimes identified

²⁹ Women with whom soldiers have had conjugal relations during the war.

as evidence of the failure of restorative as opposed to retributive responses to the rights of victims and survivors. In South Africa, the five-year delay in the government's response to the TRC's recommendations on reparations has, together with the drastically reduced amount ultimately paid to victims, in turn raised further questions about the integrity of restorative justice.³⁰

The value of community participation in decision-making with regard to reparations through African traditional mechanisms potentially results in a level of pressure from local chiefs and elders as well as clan-based forms of social pressure to deliver on agreed forms of compensation and reparation. In some situations, this level of community participation also results in a measure of benefit for parties on both sides of a conflict through the sharing of land and cattle, and the development of cooperative community projects.

- **Ritual and procedural accountability:** Rituals, ceremonies and symbols are high on the priority list of exploring options for justice and reconciliation in the wake of conflict and war in African traditional justice and reconciliation mechanisms. Such social practices and structures constitute an important space within which discussion on guilt, responsibility and restoration can happen.

These ceremonies can be one-off events, which is often the case in the Acholi practice of *Mato Oput*, which is augmented by related ceremonies. Magama spirit ceremonies in post-war Mozambique similarly comprise a single event, despite involving several components, and are seen to be a culmination of healing initiatives. In other situations the ceremonies are repetitive and cumulative, akin in some ways to successive counselling sessions. This is evident in traditional *palaver* ceremonies in Liberia and in other Mano River countries. It is also the case in serial encounters with the spirits of the dead in Sierra Leone; in the *abashingantahe* practices of dispute resolution in Burundi and in *Barza Intercommunautaire* in the DRC's North Kivu Province,³¹ and in southern African countries, where one's ancestors need to be consulted and appeased as part of ongoing negotiations between former enemies and adversaries.

³⁰ De Greiff (2006); see also Doxtader & Villa-Vicencio (2004).

³¹ The *Barza Intercommunautaire* is rejected in South Kivu as an attempt to ensconce government stooges at the local level; see Clarke (2008b).

The *gacaca* courts in Rwanda, among others, bring people together in an attempt to deal with genocide and related crimes, on the assumption that talking and social encounter creates the opportunity for social re-engagement between victims and offenders. The former head of the Rwandan National Unity and Reconciliation Commission, Aloisea Inyumba, put it as follows:³²

The very act of meeting under a tree or in a local council hall, with local judges in formal attire and the authority to rule on disputes, takes on a ritualistic form of its own. The process is as important as the content and detail of testimony and evidence offered in the hearings. The medium becomes a significant part of the message. It helps create a milieu conducive to reconciliation.

Ritual and ceremony provide an important space for both *preverbal* and *non-verbal* reflection, conversation and decision-making in African traditional justice and reconciliation mechanisms. The process seeks to break the silence on issues of suffering and aggression that often prevails, thus enabling perpetrators and victims to make a behavioural shift from a prelinguistic state to the point where they can begin to talk about their experiences. The aim is to enable perpetrators to acknowledge their violation of human rights, and victims to begin to deal with their suffering and resentment.

The link between ritual and behavioural response is a contested field. Some scholars working on the relationship between ritual and peace-building draw on neurobiological research to suggest ritual can impact on the physical structure of the brain, decision-making and behavioural change. Briefly stated, it is suggested that rituals, symbols and ceremonies impact on different levels of human consciousness, resulting in different ways of thinking – allowing a person to respond more thoughtfully and with less spontaneous aggression to the situation they face.³³

Transitional justice in Africa

At the heart of the transitional justice debate is the question: *Transition to what?* A narrow focus on legal impunity too frequently neglects major issues of social and economic impunity, which underpins every oppressive society on earth.

³² Kigali, September 2006.

³³ Schirch (1990); Schechner (1993).

It further neglects the need to create restorative cultures, inclusive histories, appropriate memorials, and the development of a restorative society. In brief, criminal prosecution alone is too weak a premise on which to build social stability and redress deep-seated historical conflicts.

The strength of African justice and reconciliation mechanisms is that they are grounded in the social fabric of the communities they represent. They seek to overcome social polarisation and, where appropriate, they explore ways of reintegrating perpetrators into society. They have community reconciliation as an ultimate goal, against which censure, retribution and restoration need to be measured.

To the extent that the ultimate goal of transitional justice is to hold perpetrators accountable for their deeds, restore the human dignity of victims, overcome political polarisation, (re)build societal structures, and promote civic trust, the exploration of complementary partnerships between the ICC and African traditional mechanisms for justice and reconciliation are both desirable and realistically possible.

Few scholars and practitioners have a principled objection to promoting a viable relationship between the ICC and domestic governments or traditional courts to ensure that these objectives are met. Difficulties emerge when it is assumed that international justice is the measure of all justice. This is particularly problematic on the African continent, which is burdened with the memory of colonialism and internationally imposed 'solutions' to domestic problems that have resulted in the endless suffering of African people. The question is how to accomplish a realistic level of complementarity between international and domestic institutions.

For this complementarity to emerge, it is necessary to address a range of concerns, which include the following:

- **The need for a higher level of transparency and debate concerning the priorities of the ICC:** When the ICC opened its investigations in northern Uganda, the Prosecutor indicated that the court's intervention would help end the war, stating that the role of the court was to contribute directly to peace. However, when Joseph Kony indicated a willingness to enter into peace negotiations provided charges against him were dropped, this

provoked the Prosecutor to say it was his job to prosecute and not to make peace. What, then, is the role of the Prosecutor, and how does this impact on Articles 16 and 53 of the Rome Statute?

- **The impact of international justice in particular situations:** To what extent, for example, does the arrest of former Liberian dictator Charles Taylor through the agency of the Sierra Leonean Special Court entrench other dictators in their positions in terms of refusing to accept political asylum or amnesty as a ‘reward’ for surrendering power – fearing that they may face the same fate as Taylor? To what extent ought local and regional leaders to be consulted in deciding whether justice or peace should be prioritised in situations of entrenched armed conflict and mass atrocities?

The extent of the legitimacy of international law in local or domestic situations, especially in isolated communities that are struggling to bring an end to armed conflict, war and mass atrocities: Jurgen Habermas reminds us that neither moral nor legal values emerge from some normative metaphysical or universal source: law, whether international or customary, is a social construction attainable through debate, persuasion and inclusive legal discourse involving the participation of everyone concerned.³⁴ Writing at the time of the first wave of African independence, Lon Fuller argued that, at its best, law was based on societal consensus concerning the “best route to a better future”, giving expression to “who we want to be” and the “kind of community we aim to have.”³⁵ While the moral legitimacy of international law is broadly accepted and established, the contextual efficacy of international law needs to be repeatedly questioned and renegotiated. In the words of Michael Ignatieff, “For the truth to be believed it has to be allowed by those who suffer its consequences”.³⁶

- **The fact that only Africans have been indicted by the ICC since its inception in 2002:** This elicits sentiments within the transitional justice debate that often detract from the thoughtfulness needed to promote justice and sustain peace. Questions are raised as to why certain African rebel leaders have been indicted to the exclusion of others, and why some heads of state are seen to be exempted from prosecutions while others are not. The

³⁴ Habermas (1998:222).

³⁵ Fuller (1958:630).

³⁶ Ignatieff (2004:214).

situations in the Central African Republic, the DRC, Sudan, and Uganda are clearly demanding of international attention in this regard. The resultant level of suspicion towards the ICC by many Africans could be resolved by greater candour and transparency on the part of the ICC.

- **The continuing underlying dichotomy between African communitarianism and colonial forms of liberal individualism:** Western notions of law and individual responsibility were an inherent part of colonialism. In the process, traditional law mechanisms were suppressed. With few exceptions, resistant traditional leaders were replaced by hand-picked collaborators. Post-colonial leaders rarely saw the need to deviate from such practices.

It is too late and it would also be quite wrong to attempt to undo centuries of history. Times and needs have changed. The challenge is to find ways to identify and introduce such communal values and practices into international law that can contribute to the creation of the kind of social cohesion and stability that so many African countries need.

The often-quoted observation by Kofi Annan, the former UN Secretary-General, on the mandate of the ICC and the South African experiment in transitional justice through a TRC to deal with its apartheid past, is pertinent here:³⁷

The purpose of the clause in the Statute [which allows the ICC to intervene where the State is 'unwilling or unable' to exercise jurisdiction] is to ensure that mass-murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.

Although the Rome Statute did not exist at the time of the South African TRC, the words of the former Secretary-General raise the question whether present and future African settlements can be considered in a similar, albeit modified, manner.

³⁷ Annan (1998).

Peace-building invariably involves political concessions, deal-making and moral compromises. The African contribution to this process is to turn a necessity into a potential for virtue by favouring maximum inclusivity and the pursuit of reconciliation in dealing with issues of conflict and national security. It offers the opportunity to rise above violent conflict and abuse through the repair of relationships and the rediscovery of the humanity of even those who seem to have sacrificed their right to be regarded as human. Africa, at the same time, needs to face the reality that where perpetrators are not willing to make peace, they need to face the strong arm of retribution and exclusion from society.

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Human rights education in Africa

Nico Horn

Introduction: Human rights education in the context of the United Nations

Human rights and education have gone hand in hand ever since the Charter of the United Nations (UN) was accepted. By signing the UN Charter, states committed themselves to cooperating with the UN to promote and achieve –¹

... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The emphasis on education gained further momentum when the Universal Declaration of Human Rights (UDHR) was adopted in 1948. Long before the UN declared 1995–2004² the Decade for Human Rights Education, the UDHR and the Covenants placed education at the centre of human rights activities.

The UDHR emphasises the importance of human rights education in the Preamble as an element that is fundamental to developing a human rights culture:

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms, ...³

Now, therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms ...⁴

¹ Article 56, read with Article 55(c).

² From a suggestion made at the World Conference on Human Rights in Vienna in December 2004, the UN General Assembly proclaimed the Decade for Human Rights Education as being from 1 January 1995 until 31 December 2004 (Resolution 49/184).

³ Preamble, para. 6.

⁴ (ibid.:para. 8).

The argument seems clear: the success of a post-World-War-II human rights dispensation is only partly dependent upon the signing of the UN Charter and political acceptance of the UDHR (and later ratification of the covenants and treaties). The General Assembly understood this, and at the adoption of the UDHR called on all nations –⁵

... to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories.

Andreopoulos and Claude note that, in the UDHR, education is more than a tool to promote human rights:⁶

It is an end in itself. In positing a human right to education, the framers of the Declaration axiomatically relied on the notion that education is not value-neutral. In this spirit, Article 30⁷ [sic] states that one of the goals of education should be “the strengthening of respect for human rights and fundamental freedoms”.

While Article 26(1) deals with education as a general human right, Article 26(2) makes the development of the human personality and the strengthening of respect for human rights and fundamental freedoms part of the content of human rights education. Education as a basic human right cannot be any education. Its content, says the UDHR, ought to be built on a substantive understanding of the dignity of all human beings and an appreciation of the rights and freedoms to which human beings are entitled.

The phrase *human rights education* can refer both to the human right to education – which is a right protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) – and, which is more often the case, to the content of education to develop a substantive knowledge and understanding of human rights.

The right to education and the teaching of human rights (*human rights education*) are intertwined. Children have a right to education, but the education that they ought to receive is not ideologically neutral: it is compelled to include education on human rights.

⁵ Session of the UN General Assembly, 10 December 1948, Palais de Chaillot, Paris.

⁶ Andreopolous & Claude (1997:3).

⁷ The authors (ibid.) in fact cite Article 26, not Article 30.

Article 26(2) placed human rights education in the centre of human development:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

Since the UDHR's adoption, the substantial moral authority unfolded in it pressed the international community continuously not only to agree to implement basic education programmes, but also to adopt all the other existing international human rights treaties.

Human rights law as a new development in international law after WWII could only grow into a generally accepted international benchmark if both the government and the people of each member state knew the UDHR, accepted its content and applied it: hence the strong emphasis on education.

The ICESCR and the International Covenant on Civil and Political Rights (ICCPR) were developed in the 1950s, completed in 1966, and adopted in 1976, with the intention of giving substance and form to human rights law, as well as attention to the importance of education as a foundation to implementing a human rights dispensation. Article 13 of the ICESCR not only mandates education as an economic right, but also, in a further elaboration of Article 26 of the UDHR, links it to the importance of developing the whole person and the ability to participate effectively in a free society:⁸

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Elaborating on the broad understanding of education in Article 26 of the UDHR, the ICESCR sees education as a process of developing the person to become a moral agent who accepts his/her own dignity, respects the rights of others,

⁸ Article 13(1).

and has the ability to participate in a free society and contributes to peace. This somewhat utopian understanding of the value of education underlines the fact that the ICESCR, with its emphasis on social justice, will be an exercise in futility if the poor and marginalised do not have the social skills and knowledge to exercise their rights.

While the ICCPR only refers to the right of parents to religious and moral education for their children, human rights education is implied in all the Articles that presuppose some intellectual sophistication. Andreopoulos and Claude refer to Article 19(1), namely the “right to hold opinions without interference”, and Article 19(2), the right –

... to receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

They point out that education is a process involving the sharing and dissemination of ideas.⁹ In other words, education is the gate to exercising all the rights and freedoms of the Covenant.

Several of the treaties created to elaborate on the protection of specific human rights include a section on the obligation of states to educate their citizens. The Convention on the Eradication of All Forms of Racial Discrimination, for example, makes education a central obligation of each state party:¹⁰

States Parties undertake to adopt immediate and effective measures, particularly in the fields of **teaching, education**, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention. [Emphasis added]

In the UN Convention on the Right of the Child, member states commit themselves to education directed to –

⁹ Andreopolous & Claude (ibid.:4).

¹⁰ Article 7.

- the development of the child's personality, talents and mental and physical abilities to their fullest potential¹¹
- the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the UN Charter¹²
- the development of respect for the child's parents, his or her own cultural identity, language and values, and roots¹³
- the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes, and friendship among all peoples, ethnic, national and religious groups, and persons of indigenous origin,¹⁴ and
- the development of respect for the natural environment.¹⁵

Bösl and Jastrzembki ask whether Article 29 creates a human right to human rights education.¹⁶ They note that this opinion has for a long time been proposed by activists and non-governmental organisations (NGOs). Opponents of the view point out that no such right is specifically mentioned in the other human rights instruments. However, it cannot be disputed that states have an obligation to teach and allow others to teach human rights. It is also generally agreed that human rights education is fundamental to the implementation of human rights.¹⁷

Africa and the UN system

From the outset, Africa was at a disadvantage in human rights education. Only Egypt and two sub-Saharan countries, Ethiopia and Liberia, voted in favour of the adoption of the UDHR in 1948,¹⁸ while South Africa abstained together with the Soviet bloc.¹⁹ All the other countries were still under colonial rule and represented *de jure* by the colonial powers.

¹¹ Article 29(1)(a).

¹² (*ibid.*:29(1)(b)).

¹³ (*ibid.*:29(1)(c)).

¹⁴ (*ibid.*:29(1)(d)).

¹⁵ (*ibid.*:29(1)(e)).

¹⁶ Bösl & Jastrzembki (2005:5).

¹⁷ (All *ibid.*).

¹⁸ Session of the UN General Assembly, 10 December 1948, Palais de Chaillot, Paris.

¹⁹ By 1948, the Nationalist Party, a racist political grouping in South Africa that excluded the black majority from political power, took over the helm of government. After that, South Africa was in constant conflict with the UN, of which it is a founding member, over its race policies and its occupation of the then South West Africa (now Namibia).

However, as the countries on the continent gained their independence one by one, they joined the UN and enthusiastically became part of most of the major human rights treaties. Viljoen points out that, as far as ratification or signing of the human rights instruments is concerned, by 2006, African participation had exceeded the total international average in most of these instruments.²⁰ Consider the following:²¹

- Some 94% of all African countries have ratified the ICCPR compared with 82% globally
- For the ICESCR, the figures are 91% (Africa) to 80% (global)
- For the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), it is 96% to 90%
- For the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), it is 79% to 74%
- For the Convention on the Right of the Child, it is 98% to 99%, and
- For the Convention on the Elimination of All Forms of Racial Discrimination (CERD), 92% of all African countries have ratified the treaty compared with 89% globally.

However, the enthusiastic ratification does not tell the full story. In many instances, ratification is not complemented by complying with the demands of the instrument itself. Viljoen comments that African states often submit their state reports late,²² and they lack detail.²³ CEDAW is the only exception. By 31 December 2006, only 11 African countries had not submitted any reports at all to the treaty body.²⁴

If state reporting is the most important review and evaluation instrument, the success of the UN system needs to be questioned. Viljoen observes that the impact of the monitoring mechanism of the prominent treaties on Africa is

²⁰ Viljoen (2007:149).

²¹ (ibid.).

²² By 31 December 2006, a total of 13 African countries were a minimum of ten years late in submitting at least one ICCPR state report (ibid.:104). Only 14 African countries have submitted a state report under the ICESCR (ibid.:123).

²³ (ibid.:104).

²⁴ (ibid.:129).

questionable.²⁵ While the UN sees the treaty system as one of the organisation's success stories,²⁶ there is little evidence of that system's success in Africa.²⁷

The African Charter on Human and Peoples' Rights

Following the tendency in the rest of the world, the Organisation of African Unity (OAU) adopted the African Charter on Human and People's Rights (ACHPR) on 27 June 1981. The Charter was met with little enthusiasm, however. It took five years for a majority of the member states to ratify the Charter, and 13 years for the African Commission to publish its first decision.²⁸ Only in 1999, when Eritrea ratified the Charter, did it finally attain the full ratification of all 53 OAU member states.

The ACHPR was the first of several African treaties. African countries were slow to ratify these African instruments. These countries appeared to dedicate their attention to the UN system rather than their own. While they were leading the world in ratifying UN instruments, it took a total of 18 years for all the African member states to ratify ACHPR. By December 2006, only 27 countries had ratified the Convention for the Elimination of Mercenarism in Africa; only 20 had ratified the Protocol to the African Charter on the Rights of Women in Africa;²⁹ and only 39 had ratified the African Charter on the Rights and Welfare of the Child.³⁰

The state reporting did not fare much better. By 2006, 15 of the member states of the OAU's successor, the African Union (AU), did not present any reports at all, while seven countries' reports were more than ten years overdue and only 14 states had actually complied with all their reporting responsibilities.³¹ Viljoen comments that, in contrast, the countries with the poorest records in this scenario performed much better when it came to reporting to the UN treaty bodies.³²

²⁵ (ibid.:129).

²⁶ See UNHCHR Report No. UN A/59/20045/Add.3, dated 25 May 2005, quoted in (ibid.:146).

²⁷ Viljoen (2007:146).

²⁸ Murray (1997).

²⁹ The resistance to the Protocol is partly related to the opposition to Article 6, subpar (c), requesting states parties to encourage monogamy as "... the preferred form of marriage".

³⁰ See Viljoen (2007:308).

³¹ (ibid.:377).

³² (ibid.).

State reporting does not tell the whole story, however. In an article on positive human rights developments in Africa, Odinkalu refers to three important human rights documents coming from the AU in 2002:³³

- A declaration formulating new Principles Governing Democratic Elections in Africa
- A declaration on Democracy, [and] Political, Economic and Corporate Governance in Africa, and
- The Ministerial Council of the AU agreed to the text of an African Union Convent on Preventing and Combating Corruption.

The existence of these documents at least points to a developing concern in Africa for the protection of human rights.

However, Africa is far from being a beacon of human rights conduct. A lack of knowledge and information is still a barrier preventing African people from claiming and exercising their human rights. By 1987, the ACHPR was generally unknown in Liberia.³⁴ Some 16 years later, in December 2003, Sierra Leone shared the Liberian experience.³⁵ Research in Zimbabwe in 1994³⁶ and in Kenya in 1997 came to the same conclusions.³⁷

It seems as if the African system is still reasonably unknown in Africa. Okafor points out that while doing well in taking cases to treaty bodies on behalf of aggrieved persons and being sympathetic towards the fate of the marginalised, civil society is predominantly elitist: its members come from the top echelons of urban life, and they often do not speak the vernaculars of the people they offer to represent.³⁸

Moreover, African judges seldom refer to the African system. Instead, they prefer to use the non-domestic jurisprudence of southern Africa, the US Supreme Court, the Supreme Court of Canada, and the European Court of human Rights.

Despite the initial emphasis in the international community, the UDHR and the covenants on human rights training in international human rights law, it seems

³³ Odinkalu (2003:105).

³⁴ Ellen Sirleaf (2007; in Okafor 2007:261).

³⁵ Kargbo (2007, pers. comm.; in Okafor (ibid.).

³⁶ Tigere (1994:64).

³⁷ Okafor (2007:261).

³⁸ (ibid.:268ff).

as if Africa has never really bought into it. While it caught up on the ratification of human rights treaties, it failed in teaching the weak, the marginalised, and society at large, but also the powerful judiciary. An African human rights culture and a general knowledge of the rights of all people are still not fully developed, therefore.

The road to the Decade for Human Rights Education³⁹

In the 1970s, the right to human rights education became a popular theme within the UN. While the UDHR and the ICESCR emphasised the need for education, role players wanted to move to the methods and content of human rights education.

Eventually the United Nations Educational, Scientific and Cultural Organisation (UNESCO) took the initiative and placed human rights education on the agenda of a General Conference in 1974, which led to UNESCO member states unanimously adopting the so-called Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education Relating to Human Rights and Fundamental Freedoms, which contained the following recommendations, among others:⁴⁰

The General Conference recommends that member states should apply the following provisions by taking whatever legislative or other steps may be required in conformity with the constitutional practice of each state to give effect within their respective territories to the principles set forth in its recommendation.

The General Conference recommends that Member States bring this recommendation to the attention of the authorities, departments or bodies responsible for school education, higher education and out-of-school education, of the various organisations carrying out educational work among young people and adults such as student and youth movements, associations of pupils' [sic], parents, teachers' unions and other interested parties.

Twenty years later, after the end of the Cold War, UNESCO held an International Congress on the education of human rights and democracy, in cooperation with

³⁹ I am appreciative to one of the editors, Dr A Bösl, for referring me to an article he had co-authored on this topic (Bösl & Jastrzembki 2005).

⁴⁰ Adopted by the General Conference at its 18th Session, Paris, 19 November 1974; available at http://www.unesco.org/education/nfsunesco/pdf/Peace_e.pdf; last accessed 9 April 2009.

the UN Centre for Human Rights in 1993 in Montreal, Canada, on the theme “World Plan of Action for Education in Human Rights and Democracy”. It made provision for the creation of extensive programmes for human rights education to further the ideals of tolerance, peace and friendly relations among states, peoples and marginalised groups.⁴¹ The Congress adopted, among other things, a plan to obtain its educational goals.⁴²

This Plan calls for methods which will reach the widest number of individuals most effectively, such as the use of the mass media, the training of trainers, the mobilisation of popular movements and the possibility of establishing a world-wide television and radio network under the auspices of the United Nations.

The next landmark in human rights education was the World Conference on Human Rights in Vienna in 1993. In the concluding document of the Conference, representatives of 171 countries affirmed the state’s obligation to training.⁴³

The World Conference on Human Rights reaffirms that States are duty-bound, as stipulated in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights and in other international human rights instruments, to ensure that education is aimed at strengthening the respect of human rights and fundamental freedoms. The World Conference on Human Rights emphasises the importance of incorporating the subject of human rights education programmes and calls upon States to do so. Education should promote understanding, tolerance, peace and friendly relations between the nations and all racial or religious groups and encourage the development of United Nations activities in pursuance of these objectives. Therefore, education on human rights and the dissemination of proper information, both theoretical and practical, play an important role in the promotion and respect of human rights with regard to all individuals without distinction of any kind such as race, sex, language or religion, and this should be integrated in the education policies at the national as well as international levels.

The UN Decade for Human Rights Education

Reacting to the undertakings by the World Conference, the UN General Assembly proclaimed the Decade for Human Rights Education on 23 December 1994, to begin on 1 January 1995.⁴⁴

⁴¹ World Plan of Action text available at http://www.unesco.org/webworld/peace_library/UNESCO/HRIGHTS/342-353.HTM; last accessed 10 April 2009.

⁴² (ibid.).

⁴³ UNHCHR (1993:Article 33).

⁴⁴ Resolution 49/184 of the UN General Assembly, 94th Plenary Meeting, 23 December 1994.

The associated UN Resolution points to Article 26 of the UDHR and Article 13 of the ICESCR in emphasising the importance and ongoing need for human rights education. It makes an important statement regarding the expected outcome of such education:

... that human rights education constitutes an important vehicle for the elimination of gender-based discrimination and ensuring equal opportunities through the promotion and protection of the human rights of women

Human rights knowledge is an indispensable component of the struggle for gender equality and equal opportunity for women. Without knowledge there can be no proper understanding of the possibilities and remedies available to women to reach their full potential. The fact that African states are reluctant to ratify the Protocol to the African Charter on the Rights of Women in Africa indicates a special need for gender education to enable women to be the persons they ought to be – and, indeed, the objectives of human rights education go beyond the transference of knowledge. The final outcome should be broader adherence to human rights principles, a stronger activist approach to violations (since people will know their rights) and, eventually, more peace.

The Plan of Action defines *education* as –⁴⁵

... training, dissemination and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes and directed to:

- (a) The strengthening of respect for human rights and fundamental freedoms;
- (b) The full development of the human personality and the sense of its dignity;
- (c) The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;
- (d) The enabling of all persons to participate effectively in a free society;
- (e) The furtherance of the activities of the United Nations for the maintenance of peace.

The following general principles were set out in the Plan of Action to guide the programme:⁴⁶

⁴⁵ Article 2, “Plan of Action for the United Nations Decade for Human Rights Education, 1995–2004: Human rights education – Lessons for life”; Appendix to The United Nations High Commissioner for Human Rights on the Implementation of the Plan of Action for the United Nations Decade for Human Rights Education (1995–2004), UN Document A/51/506/Add.1, 12 December 1996.

⁴⁶ (ibid.:Articles 3–9).

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- The programme should create the broadest possible awareness and understanding of all of the norms, concepts and values enshrined in the Universal Declaration of Human Rights, and the international human rights instruments;
- A comprehensive approach to education for human rights, including civil, cultural, economic, political and social rights and recognising the indivisibility and interdependence of all rights, shall be adopted;
- Education shall include the equal participation of women and men of all age groups and all sectors of society both in formal learning through schools and vocational and professional training, as well as in non-formal learning through institutions of civil society, the family and the mass media;
- Human rights education shall be relevant to the daily lives of learners, and shall seek to engage learners in a dialogue;
- Human rights education shall seek to further effective democratic participation in the political, economic, social and cultural spheres, and shall be utilised as a means of promoting economic and social progress and people-centred sustainable development;
- Human rights education shall combat and be free of gender bias, racial and other stereotypes; and
- Human rights education shall seek both to impart skills and knowledge to learners and to affect positively their attitudes and behaviour.

The Plan for Action identified five objectives:⁴⁷

- (a) The assessment of needs and the formulation of effective strategies for the furtherance of human rights education at all school levels, in vocational training and formal as well as non-formal learning;
- (b) The building and strengthening of programmes and capacities for human rights education at the international, regional, national and local levels;
- (c) The coordinated development of human rights education materials;
- (d) The strengthening of the role and capacity of the mass media in the furtherance of human rights education; and
- (e) The global dissemination of the Universal Declaration of Human Rights in the maximum possible number of languages and in other forms appropriate for various levels of literacy and for the disabled.

The associated UN Resolution includes a number of role players to participate in such education:⁴⁸

- Governments, who are encouraged to eradicate illiteracy, to develop the human personality and to strengthen the respect for fundamental rights and freedoms;

⁴⁷ (ibid.:Article 10(a)–(e)).

⁴⁸ (ibid.:Articles 11–19).

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- The High Commissioner for Human Rights for Human Rights, who is requested to coordinate the implementation of the Plan of Action;
- The Centre for Human Rights of the Human Rights Secretariat, the member states, non-governmental organisations and specialised agencies of the UN, who are requested to support the endeavour; and
- International, regional and national non-governmental organisations.

Governments are the main role players, therefore. They are expected to develop national plans of action for human rights education and introduce or strengthen national human rights curricula, conduct national information campaigns, and open public access to human rights resources.⁴⁹

The success of the Decade for Human Rights Education

Human rights education by governments

Cardenas comments that governmental human rights education in Africa predominantly dealt with the development of school curricula, while the training of officials was left to NGOs.⁵⁰ An additional result of the human rights education initiative in Africa was the formation of human rights commissions: these grew from six in 1996 to 38 by 1999. Human rights commissions thereby became the main role players in human rights education in Africa.⁵¹

Human rights commissions are an excellent vehicle for human rights education. Since government is responsible for such education, it may well be that they will use it for their own purposes. Human rights education carries a high risk for governments, comments Cardenas.⁵² The more successful such education is, the greater the risk that government action will be challenged and that the public will make serious demands for compensation and the punishment of human rights abusers. If government controls such education, therefore, it can set the pace and manage its content.

However, although human rights commissions are funded predominantly by the State, they are independent – or are at least perceived to be so. With the strong network of human rights commissions and other defenders of human rights such

⁴⁹ (ibid.:Article 11).

⁵⁰ Cardenas (2005:368).

⁵¹ (ibid.:368, 371).

⁵² (ibid.:365).

as public defenders and ombudspersons across Africa and globally, human rights commissions are exposed to developments in human rights education in other jurisdictions and regions. This exposure has the potential to create a common approach that will strengthen the universality of human rights.

Cardenas looked at the South African Human Rights Commission (SAHRC), whom she perceives to be the most active and best-funded commission in Africa – and, possibly, the world.⁵³ Human rights curricular development is a major function of this Commission.⁵⁴ But it is also involved in training officials such as the police and the army, and in regional training of other human rights commissions.

However, not even the SAHRC did not escape the criticism of overcompensating for the needs and aspirations of government. Cardenas, without accusing the SAHRC of subjectivity or bias, mentions that more than 90% of its budget comes from government.⁵⁵ This potential shortcoming applies to all human rights protectors and commissions. While institutional independence is officially guaranteed by the state, a lack of funds can cripple such bodies or force them to a subordinate position.⁵⁶

Evaluators of human rights education have emphasised the importance of a broad definition of *human rights in education*.⁵⁷ A broad understanding of human rights will prevent the concept from being understood as the right to education, rather than a substantive understanding as human rights as both the object and substance of human rights education. The SAHRC clearly operates with a broad definition and their work includes several projects on social and economic rights.

The SAHRC was also a pioneer in setting up a Centre for Human Rights Education Training.⁵⁸ While there were several human rights centres at universities at the time, no one coordinated the educational programmes of the different role players from government, civil society and educational institutions. The Centre

⁵³ (ibid.:371).

⁵⁴ See Keet & Carrim (2006); see also Candau (2004).

⁵⁵ Cardenas (2005:373).

⁵⁶ In 2002, the number of Commissioners of the SAHRC was drastically cut – despite the growing case load; see SAPA (2002; in Cardenas 2005:374).

⁵⁷ Rukanda (2002:285–286).

⁵⁸ Cardenas (2005:372).

still serves as an example of how educators from civil society and government can be brought together to coordinate focused human rights education without too much duplication.

The overall picture of African participation in the UN Decade for Human Rights Education is bleak. Only 7 of the 53 member states returned an evaluation questionnaire to the High Commissioner. Of the reports received, many were vague, contained little information, and certainly had no specifics on training programmes.

Other responses came from 13 NGOs, 3 national human rights institutions and 4 human rights and university institutes.⁵⁹ Very little was done by governments to take human rights education to professional groups such as the police, the defence force and immigration officers, and even less to vulnerable groups such as minorities, migrant workers, prisoners and people living in extreme poverty.⁶⁰ Moreover, African governments expected intergovernmental organisations to fund human rights education projects.⁶¹

The obstacles listed by the seven African governments that responded to the questionnaire in respect of implementing human rights education programmes are an indication of a lack of political will rather than the obstacles themselves being insurmountable. This lack of will is evidenced by there being no technical assistance for developing and executing national human rights education plan, and no provision of long-term State funding.⁶² NGOs, on the other hand, attribute many of the obstacles to a lack of political will.⁶³

Given the high expectation that the High Commissioner for Human Rights had and the important role that the UN Plan of Action gave to governments, a mere 14% response by governments can hardly be seen as successful after the first five years of the Plan's existence. Moreover, even those who responded did not necessarily indicate major successes.

The performance of governments in the second five years did not improve significantly. In a High Commissioner for Human Rights report in October 2003,

⁵⁹ UN (2000).

⁶⁰ (ibid.:points 33 and 34).

⁶¹ (ibid.:point 37).

⁶² (ibid.:points 39–41).

⁶³ (ibid.:point 42).

only 17 out of a potential total of 50 sub-Saharan-African countries were listed amongst UN member states who had in fact reported to the High Commissioner on initiatives taken in their countries as part of the Decade for Human Rights Education. Many of these sub-Saharan-African reports were outdated.⁶⁴ Also evidencing a lack of political will among African governments is the fact that Burundi has not reported to the High Commissioner since June 2000, Cameroon since May 1999, Cape Verde since February 1999, and the list goes on.

However, there were also countries who submitted elaborate reports. These included Mozambique, Namibia and Zimbabwe.⁶⁵ Unfortunately, the UN does not have any instruments by means of which to measure the success of human rights education efforts. For example, is a programme successful if human rights are the content of a well-structured and managed school subject? Zimbabwe is a case in point, where the country spent time, money and effort in setting up and implementing human rights education programmes, but the state of the country shows little real impact of these programmes. Indeed, on the contrary: the decline of human rights started at a time when one would have expected the education programmes to produce some results.

Civil society and human rights education

Civil society has played an important role in both education and advocacy in Africa. For example, Okafor attributes Nigeria's relatively successful interaction with the implementation of the African instruments to that country's strong civil society and numerous local civil society organisations.⁶⁶ Sceptical observers of human rights education see the contribution of NGOs as the only possible way of overcoming government apathy and lack of commitment.⁶⁷

While civil society seems to be able to conduct human rights education programmes with important role players such as the police, military and other government agents,⁶⁸ they are not very successful in delivering such education to marginalised groups. Okafor ascribes this shortcoming to the fact that human rights activists come from a small elite who understand the human rights environment,

⁶⁴ OHCHR (2003).

⁶⁵ Rukanda (2004).

⁶⁶ Okafor (2007:269).

⁶⁷ Rosemann (2003:6).

⁶⁸ Cardenas (2005:368).

but not necessarily what Okafor calls the language of the marginalised.⁶⁹ In other words, they share the life experiences of the governing elite rather than that of marginalised people. Consequently, they are unable to bridge the gap between the elite and the have-nots. While they may understand the needs of the people in terms of human rights, they are not the best people to communicate teach these rights to the marginalised groups.

However, despite the shortcomings, NGOs are the main role players in specialised grass-roots education. The work of the Metlhaetsile Centre in Botswana is a case in point.⁷⁰ While the country is proclaimed as the most stable democracy in Africa, women are still treated as second-class citizens, despite the landmark decision of *Attorney General v Unity Dow*.⁷¹ The Centre's education programmes include a wide range of activities in rural areas, including interaction with traditional authorities.

In Namibia, Women's Action for Development has been involved in empowering and educational programmes for rural women since 1994.⁷² In Nigeria, an activist group working from 1993–1996 for women's rights under Islamic law was launched as BAOBAB for Women's Human Rights in 1996. Its programmes include basic education at grass-roots level as well as paralegal training.⁷³

Similar organisations working specifically with women and children's rights mushroomed during the Decade for Human Rights Education. While it is still too early to determine the long-term impact and sustainability of all these organisations, NGOs were at the forefront of human rights education in fields not covered by African government programmes.

For the first half of the decade, civil society in Africa seemed to have performed somewhat better than their government counterparts, by reaching most target groups with their human rights education programmes.⁷⁴ However, education was seldom identified as the main focus of NGOs. They concentrated on the

⁶⁹ Okafor (2007:269).

⁷⁰ Dow et al. (1997; in Andreopoulos & Claude 1997:455–468).

⁷¹ Unreported case of the Court of Appeal, No. 4/91. The case declared certain discriminatory provisions of the Citizenship Act unconstitutional.

⁷² See <http://www.wad.org.na/>; last accessed 10 March 2009.

⁷³ See <http://www.baobabwomen.org> for further information; last accessed 10 March 2009.

⁷⁴ UN (2000:point 35).

human rights related to their mandate, “... and carry out generic work on human rights awareness to increase support for their particular concerns”.⁷⁵

The High Commissioner noted that the NGO programmes seldom included interaction with the government.⁷⁶ However, the long-term success of formal educational programmes in schools can hardly be sustainable without government participation.

Thus, while civil society has complied with some aspects of their mandate under the programmes and objectives of the Decade for Human Rights Education, the key objective – a global culture of human rights – has a long way to go in Africa.

Human rights education as part of formal education

While African governments have spent most of their resources on curricular development as far as human rights education is concerned, educators have questioned the effectiveness of incorporating such education into formal education. Meintjes, for example, asserts that while the rhetoric of empowerment suggests changes in education itself, “the ends and means will remain those of conventional education”.⁷⁷ In the same vein, Henry refers to the historical role of education to socialise students into the existing social structure. Students are taught to respect authority and to revere politicians – not to question them.⁷⁸

The criticisms by Meintjes and Henry have merit. However, critical thinking and analysis are no longer taboos in pedagogic literature. Hecht, a proponent of democratic education, points out that formal schooling is a very small part of the learner’s learning experience.⁷⁹ If freedom and uniqueness are integral aspects of their daily life, why should formal education be different?

One can apply the insights of democratic education to human rights education. Why should respect for the humanity of others or an understanding of one’s own rights contradict the socialising skills needed by young learners to integrate

⁷⁵ (ibid.:point 124).

⁷⁶ (ibid.).

⁷⁷ Meintjes (1997:70).

⁷⁸ Henry (1991:420).

⁷⁹ Hecht [n.d.].

into the group? If human rights are part of the common values of the society in which the young learner finds him-/herself, understanding human rights will be part of their socialising process. If, however, human rights education is an add-on to impress the international community, the tension between an autocratic political system and education philosophy on the one hand and freedom and respect of the dignity of others on the other will confuse the learner rather than contributing to his/her full development as a human being. In such a scenario, Meintjes's argument has relevance: the outcome will be formal education as it is known today.

Human rights after the UN Decade for Human Rights Education

Sceptics have suggested that the UN Decade for Human Rights Education has been a failure. Rosemann, a critic of the UN human rights system, sees the role of member states being the main educators as a recipe for failure.⁸⁰ The failure of the work of the Human Rights Commission⁸¹ over 50 years is a clear indication to Rosemann that states cannot exercise self-regulation. And human rights education can only work in "... an overall atmosphere where a rights-based approach to human dignity is accepted and a free society where individuals can claim their human rights without endangering their own lives".⁸²

This envisaged "free society" has not yet been created by 50 years of the human rights dispensation. In the mid-term global evaluation of the Decade programme, the UN pointed out that only a few national human rights strategies had been developed in the ten-year period. To solve the problem of non-commitment by governments, the High Commissioner for Human Rights suggested three strategies:⁸³

- Another decade dedicated to human rights education
- A special fund for human rights education, and
- A joint NGO–government committee to take human rights education forward.

⁸⁰ Rosemann (2003:1).

⁸¹ The Human Rights Commission has in the meantime been replaced by the Human Rights Council. Rosemann is possibly as opposed to the Council as he was to the Commission, since the core of the Council is still elected by member states.

⁸² Rosemann (2003:1).

⁸³ UNHCHR (2003).

Rosemann⁸⁴ sees only one possible way forward: less government participation, and more NGO participation. In this process, civil society should accept the role of a parliamentary opposition when it comes to human rights issues. In other words, if the UN is serious in developing communities where human rights are respected and individuals are free to claim their freedoms and rights, they will have to empower NGOs to become more aggressive in opposing human rights abuses – even if it means eliciting active antagonism from government.

Viljoen, while seeing the ratification of treaties as an important anchor that may help to stabilise the gains of democratisation, remains critical of the impact of the UN System on African countries.⁸⁵ A good record in ratification will not result in more rights and a more democratic society: it can merely prepare the ground.

Hathaway, like Viljoen, questions the positive conclusions that one can draw about Africa's excellent record of ratifying treaties.⁸⁶ Treaty ratification, she asserts, is often an indication of bad performance rather than an indication of an awakening human rights culture.⁸⁷ Her findings are carried by the signing and ratification history of at least one recent convention, namely the Merida Convention. This UN anti-corruption convention was adopted on 9 December 2003. Kenya signed and ratified the Convention on the same day. Only 12 countries ratified it in 2004, 9 of whom were from Africa (Algeria, Benin, Madagascar, Namibia, Nigeria, Sierra Leone, South Africa and Uganda).⁸⁸ This is not to say that all the countries that ratified early (i.e. in 2004) are corrupt; but neither does ratification say anything about the human rights performance of a state.

However, one should not lose sight of the gains of the Decade for Human Rights Education. While one cannot necessarily link the growth of human rights commissions in Africa with the initiatives of the Decade for Human Rights Education, the commissions became major role players as human rights educators during the Decade. And the initiatives of the High Commissioner for Human Rights during those ten years at least played a role in the emphasis on human rights education.

⁸⁴ Rosemann (2003:6).

⁸⁵ Viljoen (2007:146).

⁸⁶ Hathaway (2002).

⁸⁷ (ibid.).

⁸⁸ UN Office on Drugs and Crime (2009).

But the small victories do not compensate for the unfulfilled objectives and expectations of the programme. There are no indications that Africans in general have an awareness and understanding of the UN human rights instruments; neither can one speak of a general trend to see first- and second-generation human rights as indivisible and interdependent. Moreover, the programme hardly made any impact on the number of human rights educators in Africa.

The High Commissioner was positive in his evaluation of the Decade, as were the representatives of the member states at the adoption of a second Decade, this time called “The World Programme for Human Rights Education”.⁸⁹ The initial term for the Programme was 2005–2014, but this closing period has been extended indefinitely. As President of the General Assembly Mr Jean Ping of Gabon added, the first Decade was the catalyst for several human rights education programmes.⁹⁰ He did, however, also mention that the World Programme could only succeed if national and local actors used it as a mobilisation tool. He appealed to all states to combine their efforts to make human rights education a reality at home and a focus of discussions in the future. Effective human rights education – which enhances respect, equality, cooperation and understanding, therefore preventing human rights abuses and conflicts – remained one of the best prerequisites towards the achievement of a peaceful world, in his view.⁹¹

Although some programmes did develop as a result of the Decade for Human Rights Education, governments did not develop national strategies; they did not cooperate with NGO efforts; very few networks were created; and the idea that a more human-rights-friendly consciousness is developing in Africa remains a dream.

Bösl and Jastrzembski⁹² are correct in pointing out that the programme was not as positive as asserted by the High Commissioner. If the major role players – the governments themselves – performed so badly, and if the NGOs, who are praised for their contribution, participated in education only as a secondary interest to boost their main mandates, how can we speak of success at all?

It is also true, however, that governments cannot bear the responsibility for human rights education alone. It was unrealistic from the outset to expect governments

⁸⁹ UN (2004).

⁹⁰ (ibid.).

⁹¹ (ibid.).

⁹² Bösl & Jastrzembski (2005:5).

to coordinate the programme and to take responsibility for the national strategies and plans of action. Cardenas rightly points out that human rights education will place governments under pressure.⁹³ The more successful the education, the more citizens will insist on their rights and the more government will be forced to act against human rights violators.

And the vast majority of governments in Africa (and worldwide) prefer not to be pressurised by human rights bodies or human rights issues. They are usually forced by constitutional provisions, an independent judiciary and other regulatory bodies such as human rights commissions and Ombudsmen and the threat of action before a treaty body to comply with the expectations of the UN and regional human rights instruments.

A better strategy would have been a more vigorous drive to institute human rights commissions or other human rights protectors in all countries and use them as the central role player to develop national strategies, and to initiate cooperation between governments and other players.

Most of the African member states of the UN did not inform it about the status of their national human rights education efforts; nor did they draw up national action plans for education in human rights. Consequently, they made it practically impossible to evaluate the development of human rights education in Africa.

World Programme for Human Rights Education

Despite opposition from some European countries and the United States of America, the UN General Assembly adopted a second decade for human rights education, this time called World Programme for Human Rights Education.⁹⁴

The programme started on 1 January 2005 and will be ongoing. The first phase will run until the end of 2009, and focuses on primary and secondary education. The Human Rights Council, however, has remained silent on the focus areas of the second phase. National strategies and minimum standards were this time given to governments. The minimum standards expect governments to evaluate the human rights programmes in their education systems. Unfortunately, the programme assigns a politician – the minister of education – rather than a human rights

⁹³ Cardenas (2005:364f).

⁹⁴ UN (2004).

commission or Ombudsman to take responsibility for the implementation. Informal education and other role players will be dealt with in later phases. However, by repeating the mistakes of the first Decade, the prospects of a more successful second decade must be questioned.

Final comments

In his proposals at the end of the first Decade, the High Commissioner proposed cooperation between civil society and government as a vehicle to take the educational ideals forward. The idea of an intergovernmental or joint civil society–government endeavour makes sense. However, given the mediocre performance of governments during the first Decade, another suggestion by the High Commissioner may have more potential in terms of producing results:⁹⁵

The potential of the treaty monitoring system in advancing human rights education, in particular through the treaty bodies' review of country reports, could be maximised. Nongovernmental organisations and national human rights institutions, when they exist, should be more involved in this process, and could coordinate their efforts in publishing reports on human rights education as a tool of cooperation with their Governments and with the existing regional and international mechanisms. Treaty bodies could also consider adopting additional general comments concerning various aspects of human rights education, as appropriate.

The South African example has set a standard that can be copied by the growing number of human rights protectors in Africa. Human rights protectors can play an important role as a preventative force rather than a mere investigation body after a violation has taken place. Together with civil society, they were the driving forces of the Decade for Human Rights Education. Neither the human rights commissions nor the treaty bodies play any significant role in the first phase of the World Programme for Human Rights Education.

The treaty bodies have also not yet indicated in their endeavours that they are willing to make human rights education a general point in evaluating state reports. However, human rights education cannot be left to the Committee on Economic, Social and Cultural Rights. While the right to education is primarily the mandate of the said Committee, educating the masses, state officials and vulnerable societies are the responsibility of all the treaty bodies. Indeed, no

⁹⁵ UNHCHR (2003).

treaty report can be said to be completed if it does not include a section on human rights education in the country. It is unlikely that governments in Africa will take up their mandate on human rights education in the near future; so human rights institutions, treaty bodies and civil society will have to take the initiative if ever we are to see change.

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The United Nations and the advancement of human rights in Africa

Wilfred Nderitu¹

Abstract

This paper seeks to interrogate the rights-based approach to development and poverty reduction as espoused by the instruments and policies of the United Nations, considering Africa as the key beneficiary of the UN Millennium Development Campaign. The author will also enumerate the justifications for considering poverty as a human rights issue under international human rights law, and how this impacts on the advancement of human rights in Africa. Included is an endeavour to locate the direct and indirect contributions made by the different sections of the international community, including the international criminal justice system, to significantly reduce extreme poverty and hunger and, in so doing, preserve human dignity in Africa as envisioned by the international human rights regime.

Furthermore, the paper seeks to justify the responsibility of the State in poverty alleviation from a juristic perspective, and argues for the domestication of international human rights standards in developing countries as well as the ratification of the Rome Statute of the International Criminal Court as complementary actions towards improving the state of human rights in Africa. The paper will also analyse human rights gaps, particularly those emerging from the socio-economic fabric of developing countries, such as a lack of fundamental freedoms and impunity.

Introduction

That poverty is a universal phenomenon and a matter of significant global concern can hardly be disputable. The international community, under the auspices of the United Nations (UN) has itself recognised this and acted upon its responsibility to uphold the principles of human dignity, equality and equity at the global level, by committing to the Millennium Declaration, the targets of which are commonly referred to as the *Millennium Development Goals*.

One of the most important provisions of the Millennium Declaration is perhaps that of the commitment to development and poverty eradication. By this Declaration, the international community commits to spare no effort in their

¹ I wish to express my gratitude to James Gondi for his assistance with some of the background research that went into this paper.

pursuit of the complete eradication of poverty. The particulars of the international community's commitment towards poverty eradication include the following:²

To halve by the year 2015, the proportion of the world's peoples whose incomes are less than one dollar a day and the proportion of people who suffer from hunger and, by the same date, to halve the proportion of people who are unable to reach or to afford safe drinking water.

The particulars of the poverty scourge are more prevalent in developing countries, particularly Africa, and are characterised by hunger, no access to safe drinking water, and the inability of the majority of the population to achieve the minimum acceptable standards of living that are required in order to ensure basic human dignity.

In the Millennium Declaration, the global human family resolves to –³

[c]reate an environment – at the national and global level alike – which is conducive to development and to the elimination of poverty.

It is the position of this paper that creating such an environment requires a multi-pronged approach to dealing with poverty: an approach which dares to transcend the boundaries of economics and to address wider issues which affect the global environment's capacity to generate development and, in so doing, reduce poverty and hunger.

Any poverty eradication strategy would involve creating income-generation opportunities. The reality, however, is that such opportunities cannot be created in an anarchical or unstable socio-political environment. Hence, there is a need for a multifaceted approach to dealing with poverty which, in addition to addressing the strictly economic issues, also tries to enrich the socio-political fabric of a nation or region in which the war against poverty is being waged. Thus the Millennium Declaration calls upon the international community to –⁴

[s]pare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.

² UN General Assembly Resolution 55/2 at para. 19.

³ (ibid.:para. 12).

⁴ (ibid.:para. 19).

This averment in the Declaration is not a separate abstract goal, but is a complementary commitment made in full cognisance of the fact that poverty eradication efforts must have a strong socio-political base, characterised by respect for the rule of law, human rights and democracy.

Indeed, creating a stable political, legal and economic environment friendly to entrepreneurship and investment is a precursor for effectively fighting poverty.

Nobel Economist Amartya Sen⁵ acknowledges the argument set forth above in *Development as freedom*.⁶

Freedom, the ability of a person to make decisions about his or her life, is not only the most efficient means for building a healthy developed society, but also its ultimate goal. When you put assets in the hands of the poor in a politically distorted environment, not much happens.

This sums up the nexus which binds the human rights movement and the global effort to fight poverty and, more importantly, offers succinct authentication for considering poverty as a violation of human rights.

Defining poverty as a human rights issue

Arjun Sengupta⁷ argues that human rights are legal rights with binding obligations on the duty-bearers, who are primarily the States.

This legality of rights and the binding nature of their obligations is the main attraction of claiming human rights. It underlines the importance of bringing the issue of poverty within the realm of the human rights movement, and defining freedom from hunger and poverty within the framework of human rights norms

⁵ Amartya Sen is a Professor of Economics at Trinity College in Cambridge, a citizen of India, and winner of the 1998 Royal Swedish Academy of Sciences Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel, for his contributions to welfare economics.

⁶ Sen (1999).

⁷ Arjun Sengupta is a former Professor at the School of International Studies, Jawaharlal Nehru University, and currently an Adjunct Professor at the Harvard School of Public Health and Chairman of the Center for Development and Human Rights in New Delhi. He is also the former UN Independent Expert on the Right to Development, and current United Nations Independent Expert on Human Rights and Extreme Poverty.

and standards. It follows that, once the aforementioned are accepted as human rights, then they become legal rights and the State becomes a legal duty-bearer, charged with ensuring that its citizens are free from extreme hunger and poverty as demanded by the Millennium Declaration. Sengupta adds:⁸

The duty[-]bearers are primarily the states. They are supposed to be accountable for any failures to carry out their obligations and are expected to take remedial actions if their non-compliance with their duties is determined by an appropriate independent mechanism.

Hence, the theoretical advantage of placing the global poverty eradication effort under the realm of the international human rights philosophy is clear. It establishes a legal aspect to the fight against poverty and, most importantly, devises a duty-bearer in the form of the State. It is also important for jurists to establish a theoretical basis for defining poverty eradication as a human rights issue.

Taking a human rights approach to poverty is a path towards the empowerment of the poor. A background paper published by the Office of the High Commissioner for Human Rights (OHCHR) states that the modern-day challenge in the fight against poverty is to establish mechanisms which erode powerlessness and enhance the social capacity of the poor. The OHCHR advances the case for a human rights approach to poverty reduction as follows:⁹

When human rights are introduced in policy[-]making, the rationale of poverty reduction no longer derives only from the fact that the poor have needs but is based on the rights of poor peoples' entitlements that give rise to obligations on the part of others that are enshrined in law.

The OHCHR furthers the juristic approach to the eradication of poverty from a practical angle exemplified by empowerment. The argument is that defining poverty in a human rights context not only gives it a legal status and legal rights which can be claimed with respect to poverty, but also serves to empower the poor. Just as civil and political rights have, with the aid of the civil rights movement, empowered minorities and disadvantaged groups in the past, the components of a human rights normative framework can contribute to the empowerment of the poor in Africa.

⁸ Sengupta [Forthcoming].

⁹ OHCHR (2002).

The following is an account of the ‘evidence’ – first in political theory, then by international human rights law – that serves to advance our proposition that the issue of poverty can be defined as a human rights issue. By extension, failure by the State to intervene in curbing poverty becomes a violation of human rights. The medium which brings the aspects of poverty eradication and human rights together is *the inherent dignity of humankind*, which the State has a duty to protect as established by early political theorists. The protection of the inherent dignity of humankind is also entrenched in modern international human rights law.

Social and political theory

Jurists come across various political and social theories in search of jurisprudential concepts that form a good proportion of the basis for legal learning. In *Leviathan*, Thomas Hobbes¹⁰ advances the theory of the *social contract*. This is the contract between the citizen and the State, i.e. the body politic, in which the people advance from an anarchical ‘state of nature’ by handing over their instincts of self-preservation and, as such, mutually destructive powers to a central authority (the *Leviathan*) to enable the central authority to exercise the collective power for the benefit of the whole populace. Liberal analysis of the social contract theory stipulates that it is from this contract between man and State, that the latter derives its legitimacy. In return, the populace is entitled to certain fundamental rights and freedoms.

Like any contract, the social contract entails both rights and duties for both parties. As such, citizens have duties to fulfil as subjects, and have natural rights they should enjoy as human beings. Hence, the very legitimacy of the State is partially based on the ability of the citizens to enjoy certain basic rights. It is the proposition of this paper that no right could be more fundamental, basic or natural than the right to basic human dignity: a right recognised by the social contract, and which forms the basic ethos of the human rights philosophy. Hobbes, John Locke and Jean-Jacques Rousseau are the best-known proponents of this immensely influential theory, which has been one of the most dominant within the moral and political ambit. Rousseau, an influential 18th-Century

¹⁰ Hobbes (1998/1651).

political theorist, elaborates on the social contract (also referred to as the *social compact*) as follows:¹¹

The social compact sets up among the citizens an equality of such a kind, that they all bind themselves to observe the same conditions and should therefore all enjoy the same rights. Thus from the nature of the compact, every act of Sovereignty, i.e., every authentic act of the general will, binds or favours all the citizens equally; so that the sovereign recognizes only the body of the nation, and draws no distinctions between those of whom it is made up. It is legitimate, because based on the social contract, and equitable, because common to all; useful because it can have no other object other than the general good, and stable because it is guaranteed by the public force and the supreme power.

To retain its legitimacy, the sovereign must meet its obligations to the citizen, which include ensuring that the citizen is entitled to his or her fundamental rights. This includes the right to minimum standards of human dignity – which may, from one perspective, be interpreted as the right to be free from poverty and hunger. This is because poverty and hunger deny the citizen the ability to live within minimum acceptable standards of human dignity.

This brings out the equality dimension of liberal political theory. In reality, true equality is difficult to achieve, but the argument is that there should be a certain basic minimum standard available to all citizens to ensure that their lives are commensurate with the basic acceptable standards of human dignity. It follows that the right to basic human dignity entails the right to be free from poverty and hunger.

International human rights law

As members of the international community that recognise human rights and ratify treaties and covenants, all States and institutions take on the obligation of ensuring these rights.

Poverty has always been considered as a degradation of human dignity. Indeed, poor people lack the freedom to lead a life with dignity. International human rights law preserves and protects the inherent dignity of the human being and the states parties to international human rights treaties, particularly the Universal

¹¹ Boyd (1963).

Declaration of Human Rights (UDHR),¹² are obligated to preserve and protect the inherent dignity of their citizens. By logical abstraction, states parties to international human rights instruments such as the UDHR are obliged to take active measures to deal with all things which violate the inherent dignity of their citizens. Poverty and its consequences are, from a juristic perspective, some of the greatest hindrances to human dignity.

An analysis of the provisions of international human rights instruments which emanate from the forum of the UN reveals the express protection of human dignity and the protection of human beings from the derogatory conditions that are synonymous with poverty. The following sample of international human rights instruments portrays this position.

The UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) will be applied below to expound the international legal basis under which poverty can be viewed as a violation of human rights.

The Preamble to the UDHR is unequivocal about the need to preserve human dignity.¹³

The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

This is the root of the protection of inherent human dignity in international law as well as of the argument set forth herein that poverty is a violation of human rights because it deprives people of the capacity to live within the minimum acceptable standards of human dignity.

Article 22 of the UDHR stipulates the following:¹⁴

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

¹² Universal Declaration of Human Rights; adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

¹³ (ibid.).

¹⁴ (ibid.).

This provision fully portrays the aspect of multiple responsibility and approaches to ensuring human dignity by setting out certain minimum rights requiring pursuit through the concerted efforts of a wide spectrum of actors at national and international level. By preserving the right to social security, protecting economic, social and cultural rights – including the free development of the individual – and placing the onus for the fulfilment of these rights at the at both the national and international level, this provision of the UDHR cements the value of ensuring certain minimum standards of living for citizens by way of the use of State resources as a precursor to preserving human dignity. When poverty prevails, these minimum standards are out of reach. Therefore, any poverty alleviation effort needs to consider ensuring these basic rights as a cornerstone of its strategy.

Similarly, Articles 23, 25 and 26 of the UDHR address issues related to basic minimum living standards aimed at preserving human dignity, and similarly crucial to poverty eradication. In summary, the aforesaid articles of the UDHR demand that everyone has the following rights:

- Work
- A standard of living adequate for his health and well-being and that of his family, including food, clothing, housing and medical care, and the necessary social services, and
- Education.

In similar fashion, the International Covenant on Economic, Social and Cultural Rights (ICESCR) contains provisions which aim to preserve basic rights related to living standards.

Article 11(2) of the ICESCR states the following:¹⁵

The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

- (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

¹⁵ Ghandhi (2002).

- (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

This goes to the heart of the juristic argument that poverty is a human rights issue, and that creating stable political and socio-economic structures in which respect for human rights related to ensuring minimum standards of human dignity are observed is a precursor to any credible poverty eradication strategy.

Furthermore, Articles 6, 7, 9, 12 and 13 of the ICESCR seek to preserve the following:

- The right to work and to enjoy just and favourable conditions at work, which ensure fair wages and equal remuneration for work of equal value.
- The right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and
- The right to the highest attainable standard of physical and mental health.

Article 14(2) of CEDAW states the following:¹⁶

States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- (a) To participate in the elaboration and implementation of development planning at all levels;
- (b) To have access to adequate health care facilities, including information, counseling and services in family planning;
- (c) To benefit directly from social security programmes;
- (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their technical proficiency;
- (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment;
- (f) To participate in all community activities;
- (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
- (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

¹⁶ (ibid.).

The relationship between the rights of women and development vis-à-vis poverty eradication is well established. In developing countries, the burden of direct provision for the family in terms of basic necessities is predominantly carried by women. It is they that till the soil. Thus, the empowerment of women serves as a useful avenue to the achievement of poverty eradication goals and objectives. Hence, it is important that women are not denied a suitable environment for the creation of opportunities for the generation of income.

This means that women in developing countries should have similar access to capital as their male counterparts. This includes access to loans, membership of cooperatives, and equal treatment in land matters among other rights, as stipulated in CEDAW. To improve the position of women with respect to access to capital, the support for women's inheritance rights should be strengthened. As such, human rights non-governmental organisations (NGOs) in the developing world that promulgate women's inheritance rights should be applauded and given additional support by the international community. The argument here is that inherited property, such as land, serves as an asset that can be used to obtain investment capital and generate income and, in so doing, contribute to the eradication of poverty.

Furthermore, particular attention should be directed at the education of women as a means of raising their living standards, in conformity with minimum acceptable standards inspired by the inherent dignity of man – which the international community seeks to preserve and protect.

Preservation of the above rights under the various international instruments ensures minimum standards of living commensurate with human dignity. Hence, the fulfilment of these rights by States and the participation of the international community are an invaluable contribution to efforts aimed at eradicating extreme poverty and hunger as per the Millennium Declaration.

The People's Decade for Human Rights Education (PDHRE)¹⁷ asserts that the human right to live in dignity is a fundamental right and, more importantly,

¹⁷ Founded in 1988, PDHRE International is a non-profit, international service organisation that works directly and indirectly with its network of affiliates – primarily women's and social justice organisations – to develop and advance pedagogies for human rights education relevant to people's daily lives in the context of their struggles for social and economic justice and democracy. PDHRE's members include experienced educators, human rights experts, UN officials, and world-renowned advocates and activists who collaborate to

is essential to the realisation of all other human rights. The PDHRE specifies the particular rights that constitute the overall right to live in dignity. These include –

- the right to be free from hunger
- the right to live in adequate housing
- the right to safe drinking water, and
- the right to a healthy and safe environment.

These rights are not static and inelastic: they are fluid, interconnected, and interdependent.

Synergy between the efforts of different international institutions and other actors in the fight against poverty

Women, conflict and poverty

The Millennium Declaration resolves as follows:¹⁸

To promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable.

The focus on gender in the poverty eradication effort is significant. Modern thinking demands improvement of gender equality as a means of reinforcing the development agenda. Women who have low levels of education and training, poor health and nutritional status, and limited access to resources have the

conceive, initiate, facilitate, and service projects on education in human rights for social and economic transformation. The organisation is dedicated to publishing and disseminating demand-driven human rights training manuals and other teaching materials, and otherwise servicing grass-roots and community groups engaged in a creative, contextualised process of human rights learning, reflection, and action. The PDHRE views human rights as a value system capable of strengthening democratic communities and nations through its emphasis on accountability, reciprocity, and people's equal and informed participation in the decisions that affect their lives. The PDHRE was pivotal in lobbying the UN to found a Decade for Human Rights Education, and in drafting and lobbying for various resolutions by the World Conference on Human Rights, the UN General Assembly, the UN Human Rights Commission, the UN Treaty Bodies, and the Fourth World Conference on Women.

¹⁸ UN General Assembly Resolution 55/2 at para. 20.

effect of reducing the quality of life of the entire population. This is because women are the driving force behind the family – the basic unit of the community. Discrimination against women then impairs other elements of development.

Different components of the human rights normative framework can contribute to the empowerment of the poor and provide useful poverty alleviation input. Women's rights are one such component. The empowerment of women is central to combating all manner of international scourges and the pursuit of developmental goals worldwide. The participation of women in mainstream development activity and poverty reduction strategies is essential. For this to take place, all factors which tend to discriminate against the participation of women in income-generating opportunities and other poverty reduction strategies need to be abolished.

In cases of genocide, war crimes and crimes against humanity, over which the International Criminal Court (ICC) has jurisdiction, women and children are the primary victims of inhumane and cruel acts, which are inextricably connected to armed conflict. Women are captured, raped and tortured. In recognition of this, the Rome Statute includes such acts of cruelty against women in defining *war crime* and *crime against humanity*.

In seeking to combat impunity, the Rome Statute seeks accountability to women for gender-specific offences that are expressly defined in it. In the past, treaties have failed to address crimes against women with the requisite specificity:¹⁹

Treaties have been drafted outlawing, in excruciating detail, everything from particular kinds of bullets to the destruction of historical buildings, while maintaining enormous silence or providing only vague provisions on crimes against women. Provisions are needed in international humanitarian law that take women's experiences of sexual violence as a starting point rather than just a by-product of war.

The experiences of the ad hoc tribunals for Rwanda and Yugoslavia have contributed greatly to the growing recognition for and action against crimes committed against women in armed conflict. This journey has culminated in the express definition of crimes of sexual violence being included in the Rome Statute. In a United Nations Development Fund for Women (UNIFEM) publication

¹⁹ Askin (1997).

entitled *Women, war and peace*, Elizabeth Rehn and Ellen Sirleaf capture the recent history of mainstreaming crimes against women into international law:²⁰

The campaign to end violence against women took root and gained momentum throughout the 1990's on the agendas of the UN World Conferences, from Vienna in 1993 to Cairo in 1994 to Beijing in 1995, where the principles for codifying international law on violence against women began to be recognized. Those principles were later tested in landmark decisions by the International Criminal Tribunals for the Former Yugoslavia and Rwanda and ultimately informed the definition of crimes of sexual violence included in the Rome Statute of the ICC.

The continued progress of bringing gender violence issues to the fore of international law now lies partly with the ICC. It is our hope that the gains already made will be tested and strengthened further in proceedings before the Court. Justice Theodore Morton of the International Criminal Tribunal for the former Yugoslavia (ICTY) echoed these sentiments:²¹

The crimes recognized by the ICC Statute, including the gender-specific offences, may well take on a life of their own as an authoritative and largely customary statement of international humanitarian and criminal law and become a model for national laws to be enforced under the principle of universality of jurisdiction.

In addition, post-conflict jurisdictions are normally devastated and the remaining populations stay destitute as a result of the destruction of assets and economic endeavour. Yet again, those who suffer the most are women, as they bear the onus of rebuilding their family structures. This is part of the ethos behind the establishment of the ICC's Trust Fund for victims of these atrocities, since it recognises the poverty scourge that is characteristic of post-conflict jurisdictions. Thus, in addition to seeking justice for the victims of genocide, war crimes and crimes against humanity (for which women suffer the most), the ICC recognises the poverty dimension. It is hoped that proceeds from the Trust Fund will help victims, particularly women, to have a fresh start to their lives by creating income opportunities which help to alleviate poverty.

Traditionally, reparations for violations of international humanitarian law are the subject of States, and are paid to States rather than to the individual. Now, however, important developments are taking place in this respect. The OHCHR

²⁰ Rehn & Sirleaf (2002).

²¹ (ibid.).

has appointed a Special Rapporteur on the right to reparations, and principles relevant to reparative remedies have been drafted by the Office of the High Commissioner for Human Rights.²² In fact, the *Draft 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*, if adopted as they are, will require the State to —²³

[p]rovide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

Also interesting to note in the above respect is that the Preamble to the *Draft basic principles* refers to a right to remedy for victims of violations of international human rights found in regional conventions, particularly the *African Charter on Human and Peoples' Rights* at Article 7, among other regional human rights instruments.²⁴ Article 75 of the Rome Statute of the ICC extends reparation rights to individual victims. Article 75, titled *Reparations to victims*, reads as follows:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

²² (ibid.).

²³ Van Boven (2004).

²⁴ (ibid.).

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

It is hoped that the proceeds from such reparations will go towards rebuilding efforts and, in so doing, inject some finance, however modest, towards re-establishing post-conflict economies.

Thus, two dimensions are recognised here by the goals of the ICC and the Trust Fund in relation to poverty alleviation:

- The first dimension, as argued above, is that the empowerment of women serves as a useful avenue to the alleviation of poverty because women in the developing world are the driving force of the family, the basic unit of society, and
- The second dimension is to seek justice for the victims of war crimes – the most ravaged group being women. Reparations for victims, as envisaged by the Rome Statute, are a key component of this quest for justice.

Convergence between international criminal justice and poverty alleviation efforts

The legendary philosopher, pacifist, and leader of the people of India, the late Mahatma Gandhi, saw the human being as a limited creature capable of cruelty, narrow-mindedness and violence. Indeed, this character or weakness is observed daily when we see women and children marching in their thousands across national borders trying to escape from violence and genocide. Such are the human weaknesses which make the world susceptible to breeding a culture of impunity. With this in mind, the international criminal justice system seeks justice for the victims of genocide, war crimes and crimes against humanity, with one of the intended outputs being deterrence against the culture of impunity.

The link is clear: impunity leads to armed conflict, which leads to anarchy, which in turn yields poverty. Nevertheless, we realise that this relationship between

impunity, conflict and poverty is not absolutely linear, and that each factor contributes to the other in some way. However, the experience of those involved in international criminal justice is that a poverty-stricken environment is always one of the most grievous outcomes of a post-conflict situation. As such, from the lens of transitional justice, dealing with impunity contributes to preventing the exacerbation of poverty brought about by armed conflict.

As stated earlier, the fight against poverty is itself a demonstration of respect for the inherent right to human dignity. A world community in which a culture of impunity is allowed to thrive will be characterised by gross contempt for human dignity. In tackling the problem of impunity through ad hoc tribunals, special tribunals and the ICC, the international community is effectively combating one of the triggers of poverty. Thus, the international criminal justice system should be viewed partly as an indirect actor in the effort to eradicate poverty. This would be in keeping with the collective responsibility with which the entire international community (including all international institutions) is charged by the Millennium Declaration.

Furthermore, it is agreed that poverty alleviation requires the creation of income-generating opportunities. History teaches us that armed conflict destroys the economic fabric of society and creates anarchy. It is impossible for income-generation activities to take place in an armed conflict situation. Having seen that a culture of impunity provides a breeding ground for armed conflict which yields poverty, it is arguable that the international criminal justice system, by deterring impunity, indirectly acts to prevent the destruction of stable socio-economic environments and, in so doing, helps to prevent the exacerbation of poverty.

A further area of convergence and synergy between international criminal justice and the global poverty eradication effort – keeping in mind that international criminal justice mechanisms are arms of the wider system of international law – is revealed by a conceptual analysis of *justice* in international law on the one hand, and economic and social justice on the other.

Any conceptual analysis of *justice* explores the ideals of equity and fairness. *Justice* in the international realm comprises a sense of horizontal equity between States, and vertical equity between States and their citizens. This is a conceptual

analysis of *justice* as viewed through the lens of international law. The same is expressed by Sengupta:²⁵

International law should concern itself with a just and fair relationship between the States, and the vertical relationship between the States and their citizens should be treated separately, through constitutional reforms within the sovereign states. But when the claims of equality of relationship are advanced in terms of human rights, such as the right to development, vertical relations also come within the purview of discussions.

If the equality of human rights relationships referred to by Sengupta include freedom from extreme poverty and hunger (and, by extension, the right to development), as we have experienced in our sample analysis of key international human rights instruments, the vertical equity conceptual aspect of justice in international law also encompasses the duty of States to take all necessary measures to free their citizens from hunger and poverty. Thus, in seeking justice from the perspective of international law, States are, by extension, simultaneously obliged to address the economic and social aspects of justice by fighting poverty.

This analysis reveals that, although all international actors in the global fight to eradicate poverty may pursue separate avenues and be inspired by various economic, social and political concepts which all contribute greatly to the fight, we are all intrinsically motivated by a desire to achieve justice. The international criminal justice system pursues legal justice for victims of crimes against humanity through international courts, while other international actors (more inclined towards scientific and economic approaches) seek economic and social justice for the world population through the implementation of poverty eradication programmes on the ground. Indeed, this idea of a common intrinsic motivation finds support in the Preamble to the Constitution of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), which declares as follows:²⁶

The wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable for the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern.

The vertical equity relationship between States and their citizens, as sought by international human rights law and explored above, is similar to the Hobbesian

²⁵ [Forthcoming].

²⁶ Preamble to the UNESCO Constitution, which came into force on 4 November 1946 after ratification by 20 countries.

social contract. Hence, the common intrinsic pursuit of justice by various international actors (including the international criminal justice system and the poverty eradication movement) is visible both at the level of international law and within the sphere of political theory.

Responsibility of the State in poverty alleviation from a juristic perspective

Domestication of international human rights standards

A proposed new focus within the human rights framework itself would aid the fight against poverty and, in so doing, cement the human rights approach to poverty eradication. For decades, human rights advocacy has leaned more towards civil and political rights and less towards the sister economic and social rights. This is due partly to the impetus for democratisation and ending discrimination, which were major features of international affairs after World War II.

The 21st Century presents the international community with new challenges and new priorities. The human rights movement and the international community as a whole must, in keeping with new priorities espoused by the Millennium Declaration such as the eradication of extreme poverty and hunger, apply economic and social rights advocacy towards the reduction of poverty. The OHCHR supports such a renewed approach.²⁷

Recognition of the complementary relationships between civil and political rights on the one hand, and economic, social and cultural rights on the other, can strengthen as well as broaden the scope of poverty eradication strategies.

In expounding on the scope of the right to health, the Economic and Social Rights Committee – a body established by the ICESCR to monitor compliance by states parties with its provisions – says that –²⁸

[t]he right includes a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.

²⁷ OHCHR (2002).

²⁸ (ibid.).

These underlying determinants go to the heart of the most crucial poverty-related problems, and would constitute part of an effective human rights approach to poverty eradication as well as support the arguments in favour of defining *poverty* as a violation of human rights.

Returning to the obligation of States to their citizens under international law and backed by political theory, the ICESCR demands that states parties take steps, utilising their maximum available resources, to progressively achieve the realisation of the rights contained in the Covenant by, among other initiatives, adopting appropriate legislative measures to this end. The duty to take steps constitutes an immediate obligation. The aspect of duties and obligations (to be performed by the State for the benefit of the citizen) attached to economic and social rights, which include factors central to poverty eradication such as the provision of food and clean water, provide a legalistic colour to the provision of basic human needs and, in so doing, support the juristic view of poverty as a violation of human rights.

Overall, the domestication of international human rights standards – civil and political, and economic, social and cultural – in the national legal systems of developing countries would create a suitable foundation for the generation of income opportunities and contribute to the alleviation of poverty, while reinforcing the juristic consideration of poverty as a violation of human rights.

Ratification of the Rome Statute and implementation of the necessary national legislation

The Millennium Declaration calls upon States to consider signing and ratifying the Rome Statute as part of their commitment to peace, security and disarmament. Looking at the Millennium Declaration holistically, a perspective is developed which portrays the different development goals and declarations in pursuit of those goals (e.g. peace, security and disarmament; development and poverty eradication; human rights democracy and good governance) as interlinked and interdependent.

Thus, the commitment to the theme of peace and security, for example, is not a commitment to the theme in itself, but a complementary commitment to the wider, more holistic goals of the Millennium Declaration, which includes

the pursuit and achievement of the other thematic goals such as development and poverty eradication. These portray the challenges facing the international community in the 21st Century in striving to make the world a better place for the entire human family.

Therefore, just as the commitment to peace, security and disarmament is complementary to the goal of development and poverty eradication, the signing and ratification of the Rome Statute is a correlative and facilitative pathway to the achievement of both poverty eradication and the aforesaid wider objective.

More directly, the ratification of the Rome Statute and the implementation of relevant legislation in national legal systems provide a stable platform for transitional justice, and deal a fatal blow to the culture of impunity which is the cause of international armed conflict, characterised by genocidal ambivalence, within the remit of the ICC. To belabour the point, transitional justice in the developing world contributes to peace, stability and the rule of law – which are the ingredients of a suitable income-generation environment that, in turn, is crucial to the eradication of poverty and hunger.

The substance of this paper poses certain fundamental questions worth pondering. What part can jurists play in the fresh impetus to eradicate poverty, as embodied in the Millennium Declaration? What is the role of the international criminal justice system in these efforts? Just as justice is fundamental to the widening of democratic space, it is equally important to bridging the poverty gap. The international criminal justice system will play its role in contributing to these efforts by adhering to the principles of zero tolerance for impunity and delivering justice to the victims of genocide, war crimes and crimes against humanity.

The international criminal justice system recognises that impunity breeds violence, which destroys the environment for income-generation and, thus, exacerbates poverty. This is why the Preamble to the Rome Statute recognises that grave crimes threaten the peace, security and well-being of the world, and is determined to put an end to impunity for the perpetrators of these crimes.

The Millennium Declaration further resolves to –²⁹

²⁹ UN General Assembly Resolution 55/2 at para. 12.

[c]reate an environment at the national and global levels alike – which is conducive to development and to the elimination of poverty.

In so doing, the Declaration recognises the importance of international systems that, through various aspects and initiatives, contribute to dealing with the causes, triggers and aggravators of poverty. International criminal justice mechanisms seek justice and deter impunity – a cause of conflict and, thus, an aggravator of poverty. This recognition, coupled with the plea to ratify the Rome Statute in the Millennium Declaration, inspires an increasing convergence of thought, effort and interaction between the spheres of international criminal justice and economic development.

Conclusion

Poverty is a violation of human rights because States are obligated, under international human rights law and the social contract from which the State derives its legitimacy, to remove the impediments to the enjoyment of resources required to sustain a standard of living commensurate with the minimum acceptable level of human dignity. The consequences of poverty deny the citizen a standard of living commensurate to his or her inherent dignity. Thus, a human rights approach to poverty eradication has a strong foundation both in theoretical dimensions and at a practical level.

The OHCHR argues for the active participation of the poor in poverty reduction strategies, in keeping with the right of citizens to participate in decision-making. In arguing for such participation, the OHCHR provides a linkage between poverty reduction and human rights, arguing that the poor –³⁰

[m]ust be free to organize without restriction (right of association), to meet without impediment (right of assembly), and to say what they want without intimidation (freedom of expression); they must know the relevant facts (right to information) and they must enjoy an elementary level of economic security and well-being (right to a reasonable standard of living and associated rights).

In so doing, all persons will enjoy the basic rights and freedoms that enable them to participate in the conduct of public affairs and decision-making. This ultimately involves the distribution of resources key to the alleviation of poverty.

³⁰ OHCHR (2002).

Thus, not only is poverty itself a violation of human rights, but the key to its alleviation lies in the conferment and entrenchment of fundamental rights and freedoms in developing nations.

Considering poverty as a violation of human rights is not merely a theoretical endeavour: the output of such consideration addresses the specific issue of the lack of sufficient quantities of basic necessities. Once poverty is well established as a violation of human rights, resultant advocacy will pursue the attainment of basic necessities by advocating for the right to food, the right to health, the right to education, and so on. In so doing, the human rights movement will be contributing directly and substantially to the global effort to eradicate extreme poverty and hunger, as resolved in the Millennium Declaration.

Therefore, through the construction of poverty reduction as a positive human rights obligation, the adoption of a rights-based approach to development and support for international criminal justice, the UN has accelerated efforts to advance human dignity, particularly on the African continent, which is most affected by the scourge of poverty.

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International criminal justice and the protection of human rights in Africa

Francois-Xavier Bangamwabo

Introduction

For many decades, Africa has been subjected to and ravaged by protracted intra- and interstate conflicts. It is, thus, a sad reality that Africa is home to many international human rights violations and atrocities, even in peacetime. The past and continuing cycles of inter-ethnic and civil wars on the continent have exposed millions of innocent civilians to egregious crimes such as genocide, war crimes, torture, sexual violence, and massive killings.

Against this grim picture, it is painful to remark that the African human rights system is still weak and, indeed, in its infancy. True, the enforcement mechanism of human rights protection in Africa is yet to be fully operational.¹ However, the African system of human rights does not address the more troubling issue of impunity and individual criminal responsibility for international crimes often committed on the African continent. Thus, victims of international crimes rely on national courts in their respective states. Not only are these national legal systems inherently weak, but – more importantly – they are not sufficiently balanced and impartial so as to adjudicate upon international crimes which are, more often than not, committed by ruling parties, members of armed forces or senior government officials.²

¹ An African Court of Human and Peoples' Rights, which was adopted in 1998 in terms of the African Charter on Human and Peoples' Rights, entered into force in 2004; however, to date it is still not yet operational. This Court has now been merged with the African Court of Justice (which has not yet entered into force) to give birth to a single judicial body, that is, the African Court of Justice and Human Rights. The new court will have two chambers: one for general legal matters and disputes among member states of the African Union (AU) and/or its other institutions, and the other for the interpretation and application of the African Charter on Human and Peoples' Rights. For more on this, see <http://www.rnw.nl/internationaljustice/courts/ACHPR/080613-africancourt>; last accessed 25 March 2009.

² In this regard, Prof. William A Schabas (2004:1) writes that national justice systems have often proven themselves to be incapable of being balanced and impartial in cases involving international crimes. It is worth noting that most national legal systems, even in the most developed states in the West, do not have penal codes which provide for the prosecution of international crimes.

Because the response of national courts to international crimes has long been disappointing, and because state courts have normally taken a ‘nationalistic’ or ‘introverted’ – as opposed to ‘international’ – view, it explains why international tribunals or courts or, in some instances, hybrid courts are better placed to deal with international crimes. In addition, international crimes are serious breaches of international law; thus, international courts are the most appropriate judicial fora to pronounce on them as they are in better position to know and apply international law.³

Since Africa does not have a continental criminal tribunal or court, and since domestic courts are neither well prepared nor willing to deal with individual criminal responsibility for international crimes, crimes of an international nature committed on African continent have been referred to either ad-hoc international criminal tribunals or the recently created (permanent) International Criminal Court. The purpose of this paper is, therefore, to examine the ongoing prosecutions of international crimes which have been or are being perpetrated in Africa. In this regard, three judicial institutions are explored, namely the United Nations (UN) ad-hoc International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the International Criminal Court (ICC). The author will look at the creation, mandate, legality and/or jurisdictions of these judicial bodies and, where necessary, their work and contribution to the protection of human rights and the fight against impunity in Africa. Ultimately, the purpose of the paper is to demonstrate that international prosecutions contribute to the protection and promotion of human rights in Africa.

The UN International Criminal Tribunal for Rwanda – ICTR

The creation, jurisdiction and legality of the ICTR

Rwanda went up in flames on the evening of 6 April 1994, when President Juvenal Habyarimana and his colleague, Cyprien Ntaryamira, the then President of Burundi, were killed in a mysterious plane crash while returning from neighbouring Tanzania, where the former was negotiating a settlement to his country’s civil war.⁴ Within hours of the plane crash, a mass murder of

³ See Cassese (2004:182–183).

⁴ To date, there has not been any formal inquiry or investigation into this terrorist act to identify the perpetrators and their possible motives. There is, however, a final report by a

unprecedented scope, conducted by thugs armed with machetes, spears, and homemade grenades, was unleashed. Targets included both Tutsi and Hutu believed to be supporters or accomplices of the Rwandese Patriotic Front (RPF). Although initially confined to the capital, the massacres soon spread to the countryside and lasted for three months, until 18 July 1994, when the RPF defeated the *Forces Armées Rwandaises* (FAR). Many experts and scholars on the Rwandan crisis believe that the assassination of President Habyarimana was a trigger that sparked the genocide of Tutsi and massacres of Hutu suspected of allying with the RPF.⁵

In the aftermath of the genocide, the UN and the international community – which had dismally failed to prevent or stop the massacres – thought that a creation of an ad-hoc criminal tribunal for Rwanda would restore peace and stability in the region, and contribute to national reconciliation in Rwanda.⁶ In this context, through UN Security Council Resolution 955 (1994), the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR) with the mandate to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring states between 1 January 1994 and 31 December 1994.⁷

French Investigating Terrorist Judge, J de Bruguere, who was seized by the late President's widow and spouses of the crew members. Although early publications suspected Hutu extremists for shooting down Habyarimana's plane, recent publications and the French Judge's report implicate the former Commander of the then Tutsi rebel movement, General Paul Kagame, the incumbent President of Rwanda, of being the mastermind behind the assassination; see e.g. Onana (2005:88–115); Pean (2005:7–23); Ruzibiza (2005:237–251).

⁵ See e.g. UN Doc. S/1994/1405 (1994). *Final Report of the Commission of Experts*, p 55; *The 1995 Summary Report of the Special Rapporteur [Dr R Degni-Segui] on the Situation of Human Rights in Rwanda*, UN Doc. E/CN.4/1995/71 (1995), p 7 (hereinafter *1995 Summary Report*); Onana (2005:8–115); Ruzibiza (2005:237–258).

⁶ See e.g. Prof. A Cassese (2004:186–188), who argues that, when the Great Powers and the UN are unwilling or unable to put an end to atrocities and serious political crisis, they tend to fall back on the establishment of a tribunal.

⁷ The ICTR has been in operation since 1996, and it was due to close in 2008, but its life was extended by one year to finalise first instance cases and other related administrative matters. For further reading on the creation, mandate, jurisdiction and work of the ICTR, see Beresford (2000:99); Howland et al. (1998:135); Mettraux (2005:400–428); Morris et al. (1998); Schabas (2006a).

The legality of the ICTR, which is exactly the same as its sister institution, the International Criminal Tribunal for the former Yugoslavia, was discussed in the Report submitted by the UN Secretary-General after the Tribunal's creation.⁸ In brief, the Secretary-General stated that the Security Council was legally empowered to establish the ICTR under Chapter VII of the UN Charter since the latter had already determined and was convinced that the situation in Rwanda continued to constitute a threat to international peace and security.⁹ In the opinion of the Secretary-General –¹⁰

... [t]he establishment of the international tribunal under Chapter VII, notwithstanding the request from the government of Rwanda to create such a court, was necessary not only to ensure the cooperation of Rwanda [with the tribunal], but the cooperation of all states in whose territory persons alleged to have committed serious violations of international humanitarian law and acts of genocide might be situated.

Moreover, a tribunal based on the Chapter VII resolution was necessary to ensure a speedy and expeditious method of establishing the tribunal.¹¹ En passant, all Security Council resolutions taken under Chapter VII are binding on all member states of the United Nations.¹²

Article 5 of the ICTR Statute provides that the ICTR has jurisdiction over natural persons pursuant to the provisions of its statute.¹³ The phrase *natural persons* excludes corporate bodies or organisations, something which is permitted under many national systems of criminal justice.¹⁴ The personal jurisdiction of the ICTR was reiterated by one of its Trial Chambers in the *Kanyabashi* case, where it was held that –¹⁵

⁸ See Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134 (1995); for further reading on this, see also Morris et al. (1998:101–109, Vol. 1).

⁹ 1994 Report of the Secretary-General (ibid.:para. 6).

¹⁰ (ibid.).

¹¹ (ibid.).

¹² Article 25, UN Charter.

¹³ Article 5, ICTR Statute.

¹⁴ Schabas (2006a:139).

¹⁵ See *Prosecutor v Kanyabashi*: ICTR Trial Chamber Decision on the Defence Motion on Jurisdiction (18 June 1997), ICTR–96–15–T.

[p]ursuant to Article 1 of the ICTR Statute, **all persons** who are suspected of having committed crimes falling within the jurisdiction of the Tribunal are liable for prosecution. [Emphasis added]

Article 7 of the Statute defines the temporal jurisdiction of the ICTR. The temporal jurisdiction extends to a period beginning on 1 January 1994 and ending 31 December 1994. However, some indictments have referred to crimes committed prior to the starting point of the Tribunal's jurisdiction. It was stated that such prior events could provide a basis from which to draw inferences concerning intent and to establish a pattern, design or systematic course of conduct by the accused.¹⁶ In regard to territorial jurisdiction, Article 7 of the ICTR Statute provides that the Tribunal has jurisdiction over crimes committed in the territory of Rwanda and other neighbouring states.¹⁷

The achievements and legacy of the ICTR

The work of the ICTR can be analysed in terms of its two main objectives, namely –

- the prosecution and bringing to justice of those responsible for acts of genocide and other violations of international humanitarian law, and
- the Tribunal's contribution towards the national reconciliation process within Rwanda.

With regard to prosecution, the first trial at the ICTR started in January 1997. As of March 2009, the Tribunal had arrested 79 suspects, 23 of whom are on trial, 8 are awaiting trial, 16 are serving their sentences in Italy and Mali, 6 have been acquitted, and 7 are awaiting the outcome of their appeals.¹⁸

¹⁶ See the case of Ngeze et al. (ICTR-96-11 AR72-I) Decision on the Prosecutor's Request for Leave to Amend Indictment, 5 November 1999, at para. 3; and the Nahimana case (ICTR-96-11-T) Decision on the Prosecutor's Request for Leave to File and Amend the Indictment, 5 November 1999, at para. 28.

¹⁷ The subject-matter jurisdiction of the Rwanda Tribunal is provided in Articles 2, 3 and 4 of the Statute. The Tribunal has power to prosecute crimes of genocide, war crimes, and crimes against humanity.

¹⁸ See the ICTR website, <http://69.94.11.53/default.htm>; last accessed 27 March 2009. Note that, among the arrested persons, some have died in custody, others have been released for lack of evidence, and others are awaiting transfer to national jurisdictions.

On 18 December 2008, the ICTR handed down its judgement in the famous *Theoneste Bagosora* case,¹⁹ also nicknamed the ‘mastermind’ of genocide in Rwanda. In this case, also known as the *Military I* trial, Bagosora and three other senior army officers were charged with conspiracy to commit genocide, genocide, crimes against humanity, and war crimes, based on direct or superior responsibility for crimes committed in Rwanda in 1994. After 409 trial days, the ICTR delivered its judgement in which it found Bagosora and two of the other accused guilty of genocide, war crimes, and crimes against humanity.²⁰ However, the Trial Chamber acquitted all four accused persons of the charge of conspiracy to commit genocide.²¹ The acquittal of Bagosora and his co-accused of the latter charge has been interpreted by some legal experts to mean that there was no genocide in Rwanda.²² Moreover, the defence counsel in casu suggested that there was an alternative explanation for the Rwandan genocide, and that the blame for the killings could be placed on the RPF – the then Tutsi-dominated rebel movement.²³ True, the conundrum here is this: can a court or tribunal convict an accused person of genocide in a case where the prosecution has failed to prove beyond reasonable doubt the existence of a plan to commit genocide or genocidal conspiracy? The reading of the ICTR judgement in the *Bagosora* case does not offer an answer to this lingering issue.²⁴ Be that as it may, it is worth noting that the ICTR Appeals Chamber has taken judicial notice of the fact that genocide took place in Rwanda in 1994; thus, this fact cannot be disputed.²⁵

The national reconciliation within Rwanda and the ICTR

In addition to its prosecutorial duty, the ICTR is mandated to contribute to national reconciliation between the arch-rival ethnic groups in Rwanda. Many observers

¹⁹ *The Prosecutor v Theoneste Bagosora et al.*, ICTR-98-41-T.

²⁰ The fourth accused, General G Kabirigi, was acquitted of all charges; the Prosecution Office has indicated that it will not appeal against the verdict.

²¹ See para. 18 of the Oral Summary of the Judgement, 18 December 1998.

²² See comments on the judgement by Schabas (2009).

²³ (ibid.).

²⁴ In very confusing and contradictory language, the Trial Chamber held at para. 2090 as follows: “... at the outset, the Chamber emphasizes that the question under consideration is not whether there was a plan or conspiracy to commit genocide in Rwanda. Rather it is whether the prosecution has proven beyond reasonable doubt that the four accused (including Bagosora who is considered [sic] the mastermind of genocide in Rwanda) committed genocide”.

²⁵ See *Prosecutor v Karemera et al.*, ICTR-98-44-AR 73(C), 16 June 2006.

submit that the ICTR has failed to fulfil this mandate. This is so because, to date, the ICTR's Prosecution Office has applied 'selective prosecutorial policy'. True, the Tribunal's work since 1996 has focused on the prosecution of one ethnic group (Hutu) to the civil war of 1990 which culminated in acts of genocide and grave breaches of international humanitarian law. Yet, there is a plethora of reports and documents evidencing the horrendous massive human rights abuses and serious violations of international humanitarian law by the Tutsi ex-rebel movement.²⁶ This policy of 'selective justice' has attracted many criticisms from Rwandans, particularly Hutus, who see the ICTR as a form of victor's justice.

Notwithstanding the above, there is another 'school of thought' which posits that the Rwanda Tribunal has succeeded in doing what it was set up to do, to wit, prosecuting many of the leaders of the 1994 genocide.²⁷ The conundrum here, however, is whether the ICTR was set up solely for prosecuting the crime of genocide. This could be addressed by looking at the intention of the drafters of the Tribunal's Statute and the proper reading thereof. The Tribunal's jurisdiction *ratione materiae* is provided for in Articles 2, 3, and 4 of the Statute. These provisions respectively deal with genocide, crimes against humanity, and violations of international humanitarian law applicable in internal armed conflicts. There is no doubt that genocide, the crime of crimes, is the first category of crimes over which the Rwanda Tribunal has jurisdiction by virtue of its Statute. In addition, it is not disputed that the UN set up the Rwanda Tribunal following corroborative reports that the crime of genocide had been committed in Rwanda between April and July 1994. Nonetheless, the UN Security Council could not accept Rwanda's proposal that the Rwanda Tribunal's jurisdiction should be limited to the genocide committed by the Hutu-dominated government, while excluding the atrocities committed by the Tutsi-dominated RPF.²⁸ In this regard, Virginia Morris and Michael P Scharf write as follows:²⁹

A tribunal established to prosecute atrocities committed by only one party to the armed conflict would not achieve the aims of the Security Council in terms of: (i) attaining a major of justice with respect to the atrocities committed by both parties to the internal

²⁶ See Bangamwabo (2008:258).

²⁷ See e.g. Schabas (2006a:31).

²⁸ See Shraga (1996:501,508). In refusing to vote for the ICTR Statute, the Rwandan Government argued that the subject-matter jurisdiction of the Tribunal should be limited to the crime of genocide; see UN Security Council Resolution, 49th Session, 3453rd Meeting, at 15; UN Doc.S/PV.3453 (1994).

²⁹ Morris & Scharf (1998:164–165).

armed conflict; (ii) providing a deterrent to future atrocities by either party; (iii) promoting national reconciliation by ensuring independent and impartial justice; and (iv) alleviating the threat to international peace and security by ending the cycle of ethnic violence [in Rwanda].

Undoubtedly, the refusal or failure by the ICTR Chief Prosecutor to deal with crimes against humanity and other violations of international humanitarian law committed by the other party to the conflict, that is, the RPF, clearly violates the Tribunal's Statute. Certainly, this prosecutorial policy is at variance with the aims and the objectives of the Rwanda Tribunal, which include the fight against impunity and the promotion of national unity and reconciliation within Rwanda between Hutu and Tutsi. True, the priority of the Tribunal should be the prosecution of the crime of crimes, that is, genocide, but does this mean that other crimes as per Articles 3 and 4 of the Statute should be ignored in toto? Whether the RPF crimes will ever be prosecuted by the Rwanda Tribunal is doubtful, since the Tribunal's life is nearly coming to an end.

The Special Court for Sierra Leone – SCSL

Creation and mandate

The SCSL is different from the ICTR in that the former was created by an agreement between the UN and the Government of Sierra Leone.³⁰ However, like the ICTR, the SCSL applies international law, and both its Statute and Rules of Evidence and Procedure are the same as those of the ICTR. The jurisdictional scope of the SCSL is to try persons who bear the greatest responsibility of the commission of crimes against humanity, war crimes, and other serious violations of international humanitarian law in Sierra Leone that occurred after 30 November 1996.³¹ In addition, the Court has the power to prosecute certain crimes under the national law of Sierra Leone. While some judges and prosecutors are appointed by the UN, others are designated by the Government of Sierra Leone. Thus, the SCSL constitutes a treaty with mixed jurisdiction and composition – a *hybrid* court. The first SCSL judges were sworn into office in December 2002, in which month the court became fully operational.

³⁰ See Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002. For further reading on the SCSL, its jurisdiction and creation, see Schabas (2006a:34–40).

³¹ UN Doc. S/RES/1315 (2000), para. 3; see also Article 1 of the SCSL Statute.

Work and achievements of the SCSL³²

So far, the SCSL has indicted 13 people for war crimes, crimes against humanity and other violations of international humanitarian law. However, three indictments were later dropped because the indictees had died. Of the ten remaining indictees, nine are in the custody of the Special Court. If found guilty, convicts may be sentenced to prison or have their property confiscated. The Court, as with all other tribunals established by the UN, does not have the power to impose the death penalty.

Although the indictees are individually charged, the trials have been placed into three groups, namely Civil Defence Forces (CDF), the Revolutionary United Front (RUF), and Armed Forces Revolutionary Council (AFRC). Three of the defendants are CDF leaders, i.e. Allieu Kondewa, Moinina Fofana, and former Interior Minister Samuel Hinga Norman. Their trial started on 3 June 2004 and concluded with closing arguments in September 2006.

Five RUF leaders were indicted, namely Sam Bockarie, Augustine Gbao, Morris Kallon, Foday Sankoh and Issa Hassan Sesay. The charges against Bockarie and Sankoh were dropped after their deaths were officially ascertained. The trial of Gbao, Kallon and Sesay began on 5 July 2004 and was concluded on 24 June 2008. Final oral arguments were conducted on 4 and 5 August 2008.

Three of the detained indictees belonged to the AFRC, namely Alex Tamba Brima (also known as *Gullit*), Brima Bazzy Kamara and Santigie Borbor Kanu (also known as *Five-Five*). Their trial began on 7 March 2005. The only indicted person who is not detained and whose whereabouts remain uncertain is the former dictator and AFRC Chairman, Johnny Paul Koroma, who seized power in a military coup on 25 May 1997. He was widely reported to have been killed in June 2003, but as definitive evidence of his death has never been provided, his indictment has not been dropped.³³

³² For a detailed reading on the SCSL cases, see <http://www.sc-sl.org/CASES/CivilDefenceForcesCDFCompleted/tabid/104/Default.aspx>, <http://www.sc-sl.org/CASES/RevolutionaryUnitedFrontRUF/tabid/105/Default.aspx>, and <http://www.sc-sl.org/CASES/ArmedForcesRevolutionaryCouncilAFRCComplete/tabid/106/Default.aspx>; all last accessed 20 March 2009.

³³ (ibid.).

On 20 June 2007, the three suspects in the AFRC trial – Brima, Kamara and Kanu – were each convicted of 11 of 14 counts. These were –

- acts of terrorism
- collective punishments
- extermination
- murder – a crime against humanity
- murder – a war crime
- rape
- outrages upon personal dignity
- physical violence – a war crime
- conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities
- enslavement, and
- pillage.

They were found not guilty of three counts:³⁴

- sexual slavery and any other form of sexual violence
- other inhumane acts – forced marriages, and
- other inhumane acts – crimes against humanity.

These were the first judgements from the SCSL. It was also the first time ever that an international court had ruled on charges relating to child soldiers or forced marriages, and that an international court had delivered a guilty verdict for the military conscription of children. This was a landmark decision, therefore, and the SCSL has created a major legal precedent in international criminal law by means of it.

On 19 July 2007, Brima and Kanu were sentenced to 50 years in jail, while Kamara was sentenced to 45 years' imprisonment. The three are likely to serve their sentences in Europe rather than Sierra Leone due to security concerns. On 22 February 2008, the Appeals Chamber denied their appeal and reaffirmed the verdicts.

On 2 August, 2007, the two surviving CDF defendants, Fofana and Kondewa, were convicted of murder, cruel treatment, pillage and collective punishments. Furthermore, Kondewa was found guilty of the use of child soldiers. The CDF

³⁴ (ibid.).

trial was perhaps the most controversial, as many Sierra Leoneans considered the CDF to be protecting them from the depredations of the RUF. On 9 October 2007, the Court decided on the punishment. Kondewa was sentenced to eight years' imprisonment, while Fofana got six. These sentences were considered a success for the defence as the prosecutors had asked for 30 years' imprisonment for both. The Court imposed a lesser sentence because it saw some mitigating factors. These included the CDF's efforts to restore Sierra Leone's democratically elected government, which, the Trial Chamber noted, –

... [c]ontributed immensely to re-establishing the rule of law in this Country where criminality, anarchy and lawlessness ... had become the order of the day.

On 28 May 2008, the Appeals Chamber overturned the convictions of both defendants on the collective punishments charge as well as Kondewa's conviction for the use of child soldiers. However, the Appeals Chamber also entered new convictions against both for murder and inhumane acts as crimes against humanity. Furthermore, the Appeals Chamber enhanced the sentences against the two, with the result that Fofana will serve 15 years and Kondewa 20.³⁵

On 25 February 2009, convictions of each of the three RUF defendants were handed down. Kallon and Sesay were each found guilty on 16 of the 18 counts with which they had been charged. Gbao was found guilty of 14 of the 18 charges. Convictions were entered on charges including murder, enlistment of child soldiers, amputation, sexual slavery, and forced marriage. The three were all convicted on charges of forced marriage – the first such convictions ever handed down in an international criminal court. On 23 March 2009, the RUF sentencing effectively ended the three concurrent trials handled by the SCSL in Sierra Leone, although the convicted still have the right to appeal. Only the trial of Charles Taylor in The Hague remains under the authority of the SCSL.

The trial of Charles Taylor³⁶

In a category on his own is the former President of Liberia, Charles Taylor, who was heavily involved with the civil war in neighbouring Sierra Leone. Taylor was originally indicted in 2003, but he was given asylum in Nigeria after fleeing

³⁵ (ibid.).

³⁶ <http://www.sc-sl.org/CASES/CharlesTaylor/tabid/107/Default.aspx>; last accessed 22 March 2009.

Liberia. In March 2006, Taylor fled from house arrest in Nigeria and was arrested at the Liberian border in a car full of cash. Taylor was extradited to the Special Court following a request to this effect by the Liberian Government. He was immediately turned over to the SCSL for trial.

Because Taylor still enjoyed considerable support in Liberia at the time of his arrest, and since the region was not entirely stable, his trial in Freetown was deemed undesirable for security reasons since the UN Mission to Sierra Leone (UNAMSIL) had considerably reduced its presence there. By virtue of UN Security Council Resolution 1688 of 17 June 2006, the SCSL was allowed to transfer Taylor's case to The Hague, Netherlands, where the physical premises of the International Criminal Court would be used, but with the trial still being conducted under SCSL auspices. Taylor's trial started on 4 June 2007, with the first witness appearing on 7 January 2008.

The prosecutor originally indicted Taylor on 3 March 2003 on a 654-count indictment for war crimes and crimes against humanity committed during the conflict in Sierra Leone. But, on 16 March 2006, an SCSL judge gave leave to amend this indictment. Under the amended indictment, Taylor is charged with 650 counts. At Taylor's initial appearance before the Court on 3 April 2006, he entered a plea of not guilty.³⁷ On 15 June 2006, the British Government agreed to jail Taylor in the event that the SCSL convicted him. This removed the obstacle of the Dutch Government having stated they would host the trial, but would not jail him if convicted, while a number of other European countries had also refused to host him.³⁸

When Taylor's trial on 11 counts of war crimes and crimes against humanity opened on 4 June 2007, Taylor boycotted the proceeding and was not present. Through a letter which was read by his lawyer to the Court, he justified his absence by alleging that at that moment he was not ensured a fair and impartial trial.³⁹ On 20 August 2007, Taylor's defence obtained a postponement of the trial until 7 January 2008.⁴⁰

³⁷ SCSL press release: "Chief Prosecutor announces the arrival of Charles Taylor at the SCSL"; <http://www.sc-sl.org/PRESSROOM/tabid/73/Default.aspx>; last accessed 20 March 2009.

³⁸ BBC News, 15 June 2006: "UK agrees to jail Charles Taylor".

³⁹ *New Africa* (Sierra Leone), February 2007: "Will Taylor get a fair trial?".

⁴⁰ See Footnote 36.

At the time of writing, Taylor's trial is under way in The Hague, and the prosecution has closed its case. Charles Taylor may be the first African head of State to be dragged before court for his grave violations of international humanitarian law, and for inciting violence in a neighbouring state, but he will probably not be the last. It is no secret that many wars waged on African continent are proxy wars which are remote-controlled by either neighbouring states or by Western powers.

The International Criminal Court – ICC

Creation and jurisdiction

The Rome Statute of the International Criminal Court (hereinafter *the Rome Statute*) was adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) on 17 July 1998.⁴¹ The Rome Statute creating the ICC entered into force on 1 July 2002 after the magic number of 60 ratifications was reached on 11 April 2002. Following this entry into force, the first Session of the Assembly of States Parties was held from 3 to 10 September 2002. On this occasion, both the Elements of Crimes over which the Court has jurisdiction and the Rules of Procedure and Evidence were formally adopted.⁴² It is worth noting that the ICC is already operational and there are now four situations (cases) referred to it for prosecution.⁴³ However, considering its tender age, we are yet to benefit from its jurisprudence.

The ICC is considered the court of last resort in that it will investigate and/or prosecute the most serious crimes perpetrated by individuals (not corporate entities or organisations) only when national jurisdictions are unwilling and/or unable to do so.⁴⁴ This represents the principle of complementarity, which reaffirms the argument that the prosecution of international crimes rests squarely on domestic legal frameworks. This principle also reflects the widely shared

⁴¹ As corrected by the procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001, and 16 January 2002.

⁴² See Schabas (2006b:26).

⁴³ See *The Situation in Uganda* (ICC–02/04), *The Situation in the Democratic Republic of Congo* (ICC–01/04), and *Prosecutor v Lubanga* (ICC–01/04–01), *The Situation in Darfur referred to the ICC by the UN Security Council in terms of Article 13 of the Rome Statute*; and *The Situation in the Central African Republic*.

⁴⁴ See para. 10 of the Preamble to the Rome Statute; see also Article 17, Rome Statute.

view that systems of national justice should remain the front-line defence against serious human rights abuses, with the ICC only serving as a backstop.

The ICC can only adjudicate upon the most serious international crimes of concern to the international community as a whole. These are genocide, war crimes, crimes against humanity, and the crime of aggression as defined in the Statute, and as committed on or after 1 July 2002.⁴⁵ Article 12 of the Rome Statute sets up preconditions before the ICC can exercise jurisdiction. The Article provides that the Court may exercise jurisdiction only if –

- the state where the alleged crime (as per Article 5) was committed is a party to the Statute (territoriality principle), or
- the state of which the accused is a national is a party to the Statute (nationality principle).

Article 13 of the Rome Statute defines the three ways in which the ICC can exercise its jurisdiction, as follows:

- Acting under Chapter VI of the UN Charter: The UN Security Council may refer a situation in which crimes within the Court's jurisdiction appear to have been committed⁴⁶
- A state party may refer a situation to the Court, requesting the Prosecutor to investigate such situation for the purpose of determining whether one or more specific persons should be charged with the commission of crimes within the Court's jurisdiction,⁴⁷ and
- The Prosecutor may investigate proprio motu on the basis of information on crimes within the jurisdiction of the Court.⁴⁸

After nearly seven years of its entry into force, four situations have been referred to the ICC. One of these was referred to the Court by the UN Security Council under Chapter VII of the UN Charter. This is the situation in Darfur (in western Sudan). Three other situations are self-referrals by member states to the Rome Statute: the conflict in northern Uganda, the situation in eastern Democratic

⁴⁵ See Article 5, Rome Statute, for the subject-matter jurisdiction. For detailed definitions of the three crimes, see Articles 6, 7, 8, Rome Statute. There is not yet a common definition of *aggression* in international law. Thus, the Court will be able to hear cases involving aggression once member states have agreed on the definition of such crime.

⁴⁶ See Article 13(b).

⁴⁷ Articles 13(a) and 14(1).

⁴⁸ Articles 13(c) and 15(1).

Republic of Congo (DRC), and the situation in the Central African Republic.⁴⁹ The proprio motu powers by the Prosecutor are yet to be invoked. It is worth mentioning that all cases pending before the ICC are from Africa. These four situations (or referrals) are discussed hereunder.

The ICC and the situation in Darfur – Sudan

On 4 March 2009, the Pre-trial Chamber of the ICC issued an arrest warrant against the incumbent Sudanese President, Omar Hassan Ahmad Al Bashir, for war crimes and crimes against humanity. He is suspected of being criminally responsible, as an indirect (co-)perpetrator, for intentionally directing attacks against the civilian population of Darfur in Sudan. This is the first warrant of arrest ever issued against a sitting head of State by the ICC.⁵⁰ In the following lines, the author discusses the ICC's involvement in Sudan, the issue of immunity, and the likely repercussions of the indictment on the African continent.

The UN Security Council referral of the situation in Darfur⁵¹

Sudan signed the Rome Statute on 8 September 2000, but has not yet deposited its ratification. Thus, the ICC can only exercise its jurisdiction over acts committed on Sudanese territory pursuant to a referral by the UN Security Council acting under Chapter VII of the UN Charter, and in accordance with Article 13 of the Rome Statute.

In September 2004, the UN Security Council established an International Commission of Inquiry (hereinafter *the Commission*) on Darfur under Resolution 1564. The mandate and terms of reference of the Commission were to investigate reports of violations of international humanitarian law and human rights by all belligerent parties. In addition, the Commission was mandated to determine whether or not acts of genocide had been committed in Darfur, and identify the alleged perpetrators of such violations and acts with a view to ensuring that those responsible were held accountable.⁵² In January 2005, after its investigation, the Commission reported back to the UN Secretary-General. Briefly, the Commission

⁴⁹ See Schabas (2006b:28–29).

⁵⁰ See ICC press release, 4 March 2009: “ICC issues a warrant of arrest for Omar Al Bashir, President of Sudan”, ICC–CPI–20090304–PR394.

⁵¹ For a much more detailed reading on this, see Schabas (2006b:37–38).

⁵² UN Doc. S/RES/1564 (2004), para. 12.

concluded that the atrocities committed in Darfur were not acts of genocide but rather crimes against humanity and war crimes. The Commission called for prosecution by the ICC.⁵³ In March 2005, responding to the Commission's report and recommendations, the UN Security Council, through Resolution 1593, referred the situation in Darfur to the ICC Prosecutor. Following this referral, the ICC Prosecutor received the document archive of the Commission of Inquiry, and in June 2005, the court initiated its own investigation in Darfur. Two years later, the ICC issued arrest warrants for a former Sudanese Government minister and a former leader of the Janjaweed militia in Darfur. The Sudanese Government has refused to comply with or enforce the Court's warrants, and both suspects are still at large.⁵⁴ On 14 July 2008, the ICC Prosecutor applied for a warrant of arrest for the Sudanese President Omar Hassan Al Bashir for genocide, crimes against humanity, and war crimes.⁵⁵ On 4 March 2009, the Pre-trial Chamber I of the ICC issued the arrest warrant, but only for crimes against humanity and war crimes.⁵⁶ There are many legal implications and challenges pertaining to the Darfur situation, one of which is the sovereign immunity of President Bashir. This issue forms part of our discussion in the ensuing paragraphs.

The ICC and the doctrine of sovereign immunity

One of the more difficult questions faced by international lawyers in recent times has been the question of sovereign immunity from criminal jurisdiction. This doctrine is based on the argument that all states are equal, and no one of them can be subjected to the jurisdiction of another without surrendering its fundamental rights. Thus, *sovereign immunity* means that heads of foreign states or government officials or departments of foreign states cannot be brought before courts of other states against their will.⁵⁷ The conundrum, therefore, is this: Can an indicted incumbent head of State such as the Sudanese President be arrested and prosecuted for the alleged international crimes? This issue was addressed by both national and international courts. In the famous *Pinochet* cases, the House of Lords in England denied immunity to Pinochet in his capacity as a former head of State of Chile. However, their Lordships made it clear that if he had still

⁵³ Schabas (2005:871).

⁵⁴ See Alexis (2008:25–27).

⁵⁵ (ibid.).

⁵⁶ See Footnote 51.

⁵⁷ Dugard (2005:238).

been an acting head of State, he would have enjoyed immunity from prosecution as per international law. In this regard, Lord Nicholls held as follows:⁵⁸

There can be no doubt that if Senator Pinochet had still been the head of the Chilean state, he would have been entitled to immunity.

Lord Millet in the third *Pinochet* case confirmed the above findings, when he held that –⁵⁹

... Senator Pinochet is not a serving head of state. If he were, he could not be extradited

The dicta in the *Pinochet* cases were echoed and confirmed by the International Court of Justice (ICJ) in the *Arrest Warrant* case.⁶⁰ In the latter, the ICJ held that Belgium had violated international law by issuing a warrant of arrest against the DRC Foreign Minister (Mr Yerodia) on charges of crimes against humanity and war crimes committed in the DRC in that it (Belgium) had failed to respect immunity from criminal jurisdiction which the Minister enjoyed under international law before national courts. The relevance and meaning of the above jurisprudence is that the recently indicted Sudanese President cannot be arrested and/or prosecuted by Sudanese national courts, even for the most serious international crimes he is now facing. Having said that, it is worth noting that the warrant of arrest against Bashir was issued pursuant to the UN Security Council acting under Chapter VII of the UN Charter. All member states of the UN are, therefore, expected to comply with any action taken by the ICC in this regard.⁶¹ Thus, in the event that Bashir travels to any country (including African and Arab countries which are close friends with the current regime in Sudan), such countries are obliged to arrest him and surrender him to the ICC. However, this is not to suggest that the domestic courts of such countries would have the jurisdiction to prosecute the indicted President: indeed, not even those that have internalised the Rome Statute within their domestic legal frameworks have such jurisdiction.⁶²

⁵⁸ *R v Bow St. Magistrate, Ex Parte Pinochet Ugarte*, 1998 4 ALL ER (Pinochet 1), at 938.

⁵⁹ *Pinochet Case* (No. 3), [1999] 2 WLR 824, at 905.

⁶⁰ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* 2000 ICJ Rep. 3.

⁶¹ Article 25 of the UN Charter provides that UN Security Council Resolutions taken under Chapter VII are binding on all UN member states.

⁶² See, however, the position in South Africa as per section 4(2)(a) of Implementation of the

In sharp contradiction to the rulings in the *Arrest Warrant* and *Pinochet* cases, international courts do not recognise sovereign immunity from criminal prosecution. For instance, both the ICTR Statute and that for the International Criminal Tribunal for the former Yugoslavia provide that neither former nor sitting heads of State or senior government officials are immune from prosecution for international crimes. The same applies with the ICC Statute, in which Article 27 provides as follows:

Official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute.

Therefore, an individual indicted by the ICC is stripped of immunity: his or her official status is no longer allowed to lead to impunity in respect of alleged crimes.

The ICC can, thus, be seen as a mechanism put in place to cure the defects of both national and international criminal systems. The act of punishing particular individuals – be they leaders, star generals, or foot soldiers of Africa – becomes an instrument through which individual accountability for massive human rights violations is part and parcel of African society.⁶³ Through this system of individual criminal responsibility, the culture of impunity on the African continent may be eradicated. Whether President Bashir will be arrested and surrendered into the custody of the ICC will depend on the cooperation of states across the globe. This is because the ICC has no police force or agency to enforce and/or execute its judicial decisions.

The situation in Uganda

Unlike Sudan, Uganda is a state party to the Rome Statute, which it ratified in June 2002. Therefore, the ICC has the jurisdiction to adjudicate upon crimes committed on Ugandan territory in terms of Articles 5 and 13 of the Rome Statute. The Government of Uganda referred the situation in northern Uganda to the ICC

International Criminal Court Act, 2002 (No. 27 of 2002).

⁶³ Du Plessis (2005:11).

in December 2003.⁶⁴ The letter of referral noted the “Situation Concerning the Lord’s Resistance Army (LRA) in northern and western Uganda”.⁶⁵

The situation in Uganda is a self-referral by a state party to the Rome Statute in accordance with Article 14. In terms of Article 53 of the ICC Statute, when a case is referred, the Prosecutor is required to initiate an investigation unless s/he determines, after evaluation of information made available to him/her, that there is no reasonable basis to proceed under the Statute. In June 2004, the ICC Prosecutor made public his conclusion that there was “a reasonable basis” to proceed with an investigation. In the following weeks, at the Third Session of the Assembly of States Parties, the Prosecutor revealed that there was credible evidence of widespread and systematic attacks committed by the LRA against civilian populations since July 2002. Some of the horrendous crimes included rape, abductions of thousands of girls and boys, sexual violence, torture, and forced displacements. Subsequently, in May 2005, the ICC Prosecution Office submitted applications for five arrest warrants. On 8 July 2005, the Pre-trial Chamber II of the ICC issued five sealed warrants of arrest against five leaders of the LRA: Joseph Kony, Rasa Lukiwaya, Okot Odhiambo, Dominic Ongwen, and Vincent Otti.⁶⁶ To date, none of the accused has been apprehended yet. In February 2006, a number of UN peacekeepers in the DRC were killed while attempting to arrest one of the suspects who was believed to be in the eastern part of that country.⁶⁷ Lukiwaya and Otti have reportedly been killed since the warrants were issued, while the three others are allegedly still hiding in the dense forests in the eastern DRC.

Despite widespread documentation of LRA abuses and atrocities, the ICC actions in Uganda have met with some strong domestic and international opposition and criticism. The main debate centres on what would constitute justice for the war-torn communities of northern Uganda, and whether the ICC involvement has helped or hindered the pursuit of a peace agreement between the LRA and Museveni’s government.⁶⁸ Some observers argue that ICC arrest warrants were

⁶⁴ Press release, Office of the Prosecutor, ICC, 29 January 2004: “The President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC”.

⁶⁵ The LRA is a rebel group that has been fighting in northern Uganda for over two decades.

⁶⁶ *The Situation in Uganda* (ICC-02/04-84), Decision on the Prosecutor’s Application for Warrants of Arrest under Article 59, July 2005.

⁶⁷ See Schabas (2006:30).

⁶⁸ See e.g. Allen (2009).

a crucial factor in bringing the LRA to the negotiating table in 2006 for peace talks with the Ugandan Government, brokered by the Government of South Sudan. In fact, in August 2006, rebel and government representatives signed a landmark cessation of hostilities agreement. In February 2008, the government and LRA reached several other significant agreements, including a ceasefire. However, threats of ICC prosecutions are considered by some to render a final peace deal elusive.⁶⁹ The LRA has reportedly demanded that the ICC arrest warrants be annulled as a prerequisite to a final agreement. On the other hand, the Ugandan Government has offered a combination of amnesty and domestic prosecutions for low- and mid-ranking LRA fighters, and is reportedly willing to prosecute LRA leaders in domestic courts on condition that the rebels accept a peace accord. This development could entail challenging the admissibility of LRA's cases before the ICC under the principle of complementarity. However, the Prosecutor has reportedly stated that he will fight any move to drop the LRA prosecutions.⁷⁰

Finally, the ICC Prosecution Office has been accused of bias in regard to the situation in Uganda as it has allegedly failed or neglected to investigate crimes and atrocities committed by the Ugandan armed forces.⁷¹

The self-referral by the Democratic Republic of Congo⁷²

The DRC ratified the Rome Statute on 11 April 2002. As a result, the ICC has jurisdiction over the territory of the DRC as from the beginning of its operation, that is, over any act that took place after 1 July 2002. Thus, as early as July 2003, the ICC Prosecutor demonstrated his willingness to use his proprio motu powers in terms of Article 15 of the Statute to investigate atrocities committed in the Ituri Region of the DRC. However, in March 2004, the DRC followed Uganda's example and referred the situation in Ituri to the ICC. In its letter of referral, the DRC Government explained that it did not have the capacity to investigate and/or prosecute the alleged serious crimes in the Ituri Region without the ICC's assistance.

⁶⁹ See Alexis (2008:33).

⁷⁰ (ibid.).

⁷¹ See Schabas (2006b:30–32).

⁷² For a detailed reading on this, see Schabas (ibid.:32–37).

In June 2004, the Prosecutor announced that between 5,000 and 8,000 unlawful killings had been committed in Ituri since 1 July 2002, and opened a formal investigation. In January 2006, the Prosecutor filed an application for an arrest warrant against a certain Thomas Lubanga Dyilo, the alleged founder and leader of *Union des Patriotes Congolais* (UPC) in Ituri and its military wing, *Les Forces Patriotiques pour la Liberation du Congo* (FPLC). At the time, Lubanga had been in Congolese custody for nearly a year awaiting trial by domestic courts in the DRC. He was apparently arrested by the Congolese authorities after the killing of nine UN peacekeepers in Ituri in February 2005.⁷³

On 10 February 2006, the Prosecutor's application for a warrant to arrest Lubanga was granted by the Pre-trial Chamber I. The warrant concerned the recruitment and use of child soldiers by the FPLC, of which Lubanga was the leader. It is worth noting that, under the Rome Statute, in particular in its Articles 8(2)(b)(xxiv) and 8(2)(e)(vii), enlistment and conscription of child soldiers is war crime prosecutable in terms of Article. Thus, Lubanga was charged as a co-perpetrator, with three counts of war crimes pursuant to Article 35(3)(a) of the Rome Statute.⁷⁴ After a determination of admission by Pre-trial Chamber I, Lubanga was transferred to ICC custody in March 2006. Despite anticipation that the case would lead to a straightforward conviction, in June 2008, and prior to trial, the Pre-trial Chamber I stayed the proceedings against the accused because the Prosecutor had allegedly failed to disclose exculpatory evidence. On 2 July 2008, the ICC ordered Lubanga's release. A preliminary application by the Prosecutor to lift the stay of proceedings was rejected by the ICC Trial Chamber in early September 2008.⁷⁵ The trial in the *Lubanga* case commenced on 26 January 2009.⁷⁶

Thus, the first trial ever at the ICC was marred by many procedural irregularities, especially on the part of the Prosecution Office. However, while it would be tragic to release a suspected war criminal like Lubanga because of a procedural error, it would represent a resounding declaration that the ICC was committed to

⁷³ Human Rights Watch (2006).

⁷⁴ ICC, *The Prosecutor v Thomas Lubanga Dyilo, Documents Containing the Charges, Article 61(3)(a), (Public Redacted Version)*, 28 August 2006.

⁷⁵ ICC press release, 4 September 2008: "Trial Chamber I maintains stay of proceedings in the *Thomas Lubanga Dyilo* case".

⁷⁶ ICC press release, 13 January 2009: "Confirmation of the beginning of the Lubanga Dyilo trial".

justice at all costs. Both the rights of the accused person and those of the victims and prosecution ought to be respected.

Besides Lubanga, there are other three Congolese indictees, namely Mathieu Ngudjolo Chui, Germain Katanga, and Bosco Ntaganda. The first two are now in ICC custody and are being prosecuted for allegedly directing attacks against ‘Hema civilians’ in Ituri in 2003. The ICC issued arrest warrants against Katanga and Ngudjolo in July 2007, and they are jointly facing four counts of crimes against humanity and nine counts of war crimes related to murder, sexual crimes, the use of child soldiers, rape, and other abuses. The case is still at pre-trial stage.⁷⁷ However, on 27 March 2009, Trial Chamber II set the commencement of the trial for 29 September 2009.⁷⁸

With regard to Bosco Ntaganda, an unsealed arrest warrant was issued against him in April 2008. Ntaganda is facing three counts of war crimes related to the alleged recruitment and use of child soldiers in 2002 and 2003. Bosco Ntaganda was the former Deputy Chief of General Staff for Military Operations in Lubanga’s FPLC, but he is currently the leader of the infamous *Congres National pour la Defence du Peuple* (CNDP).⁷⁹ Ntaganda remains at large and attempts to arrest him have been complicated by his involvement in peace negotiations with the DRC Government.

The Central Africa Republic situation: *The Prosecutor v Jean Pierre Bemba Gombo*⁸⁰

The Government of the Central African Republic (CAR), a state party to the Rome Statute, referred the “situation of crimes within the jurisdiction of the ICC

⁷⁷ ICC, *Combined Facts Sheets: Situation in DRC, Germain Katanga and Mathieu N Chui*, 27 June 2008.

⁷⁸ ICC press release, 27 March 2009: “Situation: Democratic Republic of the Congo (DRC), Case: The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui”, ICC–CPI–20090327–PR402.

⁷⁹ The CNDP is a Tutsi-dominated rebel movement fighting in the eastern region of the DRC. It was founded and led by Laurent Nkunda, who was later toppled by Bosco Ntaganda. There are reports that the CNDP is remote-controlled, financed, equipped, and trained in and from Rwanda where Laurent Nkunda is currently held under house arrest. For some unknown reason, Rwanda has refused to extradite Nkunda to the DRC for possible prosecution.

⁸⁰ ICC–01/05–01/08.

committed anywhere on CAR territory” to the Court’s Prosecutor in January 2005.⁸¹ The CAR situation concerns Jean-Pierre Bemba Gombo, a DRC national, and President and Commander-in-Chief of the *Mouvement de Libération du Congo* (MLC), who was arrested on 24 May 2008 by the Belgian authorities following the Court’s warrant of arrest. He was surrendered and transferred to the ICC on 3 July 2008.

According to the Prosecution, Jean-Pierre Bemba Gombo is allegedly criminally responsible – jointly with another person or through other persons – for five counts of war crimes (rape, torture, committing outrages upon personal dignity, in particular humiliating and degrading treatment, pillaging a town or place, and murder) and three counts of crimes against humanity (rape, torture and murder), committed on the territory of the CAR from 25 October 2002 to 15 March 2003.⁸² On 5 March 2009, Pre-trial Chamber III of the ICC adjourned the confirmation of charges against Bemba Gombo to allow the prosecution to amend the indictment.⁸³

Bemba Gombo’s prosecution by the ICC has been controversial in the DRC, where the MLC is now the largest opposition party. After the end of the Congolese civil war in 2003, the rebel movement transformed itself into a political party. In the 2006 presidential elections, Bemba Gombo came in second – with 42% of the vote – behind the incumbent President, Joseph Kabila. The MLC has rejected the outcome of the elections and accused President Kabila of electoral fraud. Bemba Gombo won a Senate seat in January 2007, but was forced into exile abroad in April after his relations with the President deteriorated. Thus, some observers see the prosecution of Bemba Gombo by the ICC as politically expeditious for President Kabila. The Prosecutor has vigorously denied that any political consideration played a role in the decision to pursue Bemba Gombo.⁸⁴

⁸¹ ICC Office of the Prosecutor, press release, 7 January 2005: “Prosecutor receives referral concerning Central Africa Republic”.

⁸² Bemba Gombo’s MLC, based in northern DRC, was invited into the CAR by the then President Ange-Felix Patasse to help quell a rebellion led by Francois Bozize. Bozize took power in a military coup in 2003 and is the current president of CAR.

⁸³ ICC press release, ICC-CPI-20090305-PR 395, 5 March 2009.

⁸⁴ Alexis (2008:27).

Conclusion

This paper has attempted to examine the role of international criminal justice in the protection of human rights on the African continent. In this regard, the ongoing and possible prosecutions of international crimes committed in Africa have been examined. There is no doubt that African national legal systems are inherently weak and, thus, not well-balanced enough to prosecute serious international crimes and grave breaches of international humanitarian law. To bridge this gap, and to fight the culture of impunity on the continent, ad-hoc international criminal tribunals were created by the UN, either through a treaty or by the UN Security Council acting under Chapter VII of the UN Charter.

This paper has looked at the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, their respective mandates, jurisdictions, and achievements. Since these two judicial institutions are ad hoc and will, therefore, soon close their doors, the creation of a permanent ICC came at the right time.

The paper also discussed all African cases pending and/or likely to be brought before the ICC.

True, the contributions by the two ad-hoc international criminal tribunals vis-à-vis the development of international criminal law have been tangible and significant. Through their jurisprudence, the SCSL and the ICTR (and, of course, its sister institution, the International Criminal Tribunal for the former Yugoslavia) have developed a very sophisticated body of law in which the definitions and scope of war crimes, crimes against humanity and genocide have been explored, as have the various forms of participation and liability, the available excuses and defences, procedural matters, issues pertaining to the rights of the accused, and relevant considerations in regard to sentencing. There can be no doubt that the case law developed by these tribunals will serve as a guide to the newly established permanent ICC. Already, the legal principles and norms developed by the UN ad-hoc criminal tribunals are very influential in the work of the so-called hybrid courts established by the UN in Cambodia, East Timor and Kosovo. More importantly, there is increasing evidence that national courts, including those in Africa, are relying on the case law of the international tribunals.⁸⁵

⁸⁵ On the legacy of ad-hoc international criminal tribunals, see Schabas (2006a:44–46).

In regard to the ongoing and/or likely prosecutions at the ICC, it is clear that the African continent has been given the lion's share. Many observers have praised the ICC's investigations and prosecutions in Africa as a crucial step against widespread impunity on the continent. Nevertheless, the Court's actions have provoked debates and criticism over its potential impact, its perceived prioritisation of Africa over other regions, its selection of cases, and the effect of international prosecutions on peace processes. Thus, critics have accused the ICC of jeopardising the settlement of long-running civil wars in the pursuit of an often 'abstract justice'. In the same context, the ICC's investigations in sub-Saharan Africa have stirred concerns over African sovereignty. For instance, some commentators have alleged that the ICC Prosecutor has limited his investigations and prosecutions to Africa because of geopolitical pressure, or as a tool of Western foreign policy. Particularly, the issuance of arrest warrant against Sudanese President Bashir has drawn rebuke from both African governments and regional organisations.

On the other hand, supporters of the Court's actions have pointed out that domestic legal systems in Africa are not sufficiently balanced or prepared to deal with the prosecution of international crimes, i.e. they are either unable or unwilling to do so. It follows, therefore, that the ICC needs to step in under the principle of complementarity.⁸⁶

Undoubtedly, the prosecution of the most serious crimes committed in Africa contributes to the protection and promotion of human rights on the continent. African leaders (political or military) who commit massive violations of human rights and grave breaches of international humanitarian law are no longer immune from prosecution as international criminal law has done away with the principle of sovereign immunity in respect of international crimes. International prosecutions will serve as a deterrent element, and thus contribute to the eradication of the rampant culture of impunity in Africa.

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⁸⁶ Alexis (2008:27).

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The African Union: Concepts and implementation mechanisms relating to human rights

Bience Gawanas

Introduction

This paper focuses on the evolution of human rights within the African Union (AU), starting from the founding of the Organisation of African Unity (OAU) in 1963.

The paper therefore takes as its basic premise the following:

- Since its establishment, the OAU has been preoccupied with human rights, as evidenced by the struggle for the decolonisation of Africa and the right to self-determination and independence. Embodied within this, no doubt, is the fact that those agitating and fighting for independence used human rights standards to justify their struggle, as colonialism had no regard for the human rights of colonised people.
- The AU, in contrast to the OAU, made human rights an explicit part of its mandate, as embodied in its Constitutive Act, and mainstreamed human rights in all its activities and programmes. However, it is clear that the current methodologies require strengthening with a view to developing a holistic, comprehensive and integrated approach to ensure that all human rights are respected.
- Because it is linked to the above points, the human rights discourse cannot be divorced from its historical context or the prevailing political, social, economic and cultural conditions on the continent – particularly when it is understood that the struggle for human rights and the establishment of a human rights system are products of a concrete social struggle.¹ In this regard, human rights are also as much about civil and political rights as they are about economic, social and cultural rights.
- Africa's common positions and collective voice have asserted tremendous influence in the evolution of the continent's human rights architecture and in shaping Africa's future.

¹ Heyns (2006:15) calls it a 'struggle approach' to human rights.

- The adoption of a human rights approach to development, including the effective implementation of the right to development and to social, economic and cultural rights would promote people's active participation, thereby giving them a voice and a platform from which to assert their rights. This is achieved through effective democratic processes and the full exercise of political and civil rights.

OAU to AU: A brief overview

The OAU

The Charter establishing the OAU, adopted in 1963, was based on the principles of state sovereignty and non-interference, and stipulated the fight for the decolonisation of Africa among its main objectives, as it was believed that Africa could not be considered free unless the last colony had gained its independence, achieved the right to self-determination, and won the fight against apartheid. Linked to this was an obligation on OAU member states to provide support to people involved in liberation struggles, as set out in Article 20(3) of the African Charter. Namibia was one such colony, and it benefited greatly from the support it received from the OAU and its Liberation Committee. It was through Africa's collective voice and adoption of common positions on colonisation and independence at international fora such as the United Nations (UN) that pressure was brought to bear on the South African Government to relinquish its hold on Namibia and, eventually, accede to majority rule in South Africa.

Furthermore, in their fight for independence, African peoples drew upon human rights standards to justify their struggle. On account of colonisation, African people suffered from years of oppression and gross human rights abuses. As such, they used their struggle to expose these abuses and fight for their liberation. Additionally, many independent countries who supported the liberation movements by, for example, providing shelter to refugees, suffered the brunt of South Africa's wrath when that country retaliated with bombings and destabilising incursions across its borders. The sacrifices made by such countries could only have been done as part of a wider pan-African agenda, as embodied in Africa's search for human rights, dignity and identity.

Thus, it is clear that the concept of human rights has strong roots in the struggle against colonialism and apartheid. Indeed, a Declaration adopted at the 1945

Pan-African Congress clearly illustrates this point.² Furthermore, there has been recognition of the legitimacy of the anti-colonial struggles in some human rights instruments as well as in resolutions adopted by the UN.

Article 20(2) of the African Charter on Human and Peoples' Rights (the African Charter), which was adopted in 1981 and came into force in 1986, states that –

... colonised or oppressed peoples shall have the right to free themselves from the bonds of oppression by resorting to any means recognised by the international community.

It also provided the first explicit official recognition of the right to development and elevated human rights as an issue deserving particular attention by the OAU as well. The values underpinning the Charter include notions of community, rights and responsibilities, solidarity, and the right to development, which are seen as values that inform and inspire grass-roots approaches to human rights.

During the OAU, various other human rights instruments were also adopted. These included the African Charter on the Rights and Welfare of the Child (ACRWC); the Convention Governing the Specific Aspects of Refugee Problems in Africa; the Protocol establishing the African Court of Human and Peoples' Rights (the African Court); and the 1999 Grand Bay (Mauritius) Declaration and Plan of Action.

However, it has been argued that, while the OAU played a significant role in the decolonisation and freedom of countries and peoples, it did not expressly uphold the values inherent in human rights norms and standards as they relate to individuals and groups. Furthermore, by adopting an unconditional position on non-interference, the OAU became ineffective in the promotion and protection of human rights in a decolonised and free Africa.³

The AU

Two important developments extended and deepened Africa's commitment to human rights, democracy, governance and development. The first was the adoption of the African Union's Constitutive Act, which reaffirms Africa's commitment to promote and protect human rights. The second was the New

² (ibid.). For a general discussion on human rights in Africa, see also Zeleza (2006:42–43).

³ Murray (2004); Ahmadou (2007).

Partnership for Africa's Development (NEPAD), which also places human rights at the centre of development. Both aim to reinforce social, economic and cultural rights, as well as the right to development.⁴

The establishment of the AU was hailed as a welcome opportunity to put human rights firmly on the African agenda. The AU's Constitutive Act, adopted in 2000, marks a major departure from the OAU Charter in the following respects:

- Moving from non-interference to non-indifference, including the right of the AU to intervene in any member state's affairs
- Explicit recognition of human rights
- Promotion of social, economic and cultural development
- An approach based on human-centred development, and
- Gender equality.

Given the dynamism of human rights, both the OAU and AU began to take on broad emerging human rights issues over the years, as evidenced by the increasing number of conferences, meetings, declarations and resolutions adopted pertaining to human rights, in addition to the express human rights instruments such as the African Charter on Human and People's Rights (ACHPR), the African Charter on the Rights and Welfare of the Child (ACRWC), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter *Women's Rights Protocol*), the Protocol on the Establishment of the African Court on Human and People's Rights,⁵ and the Charter on Democracy, Governance and Elections. To effectively enforce these instruments, various bodies were established with an express human rights mandate such as the African Commission on the Charter on Human and Peoples' Rights (the African Commission), the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), and the African Court.

All the key original objectives contained in the OAU Charter have been retained in the AU Constitutive Act. However, and more importantly, in order to reflect

⁴ In the case of NEPAD, however, it has been argued that it did little to embrace a human rights approach to development.

⁵ A decision was taken and a Protocol adopted for the merger of the African Court of Justice and the African Court on Human and Peoples' Rights at the AU Assembly in July 2008 in Sharm El Sheik, Egypt. However, the Protocol has not been ratified yet and only the African Court on Human and Peoples' Rights has become operational.

current realities and address contemporary challenges, the Act also enumerates other key objectives that were not captured in the OAU Charter, such as –

... the protection and promotion of human rights in accordance with the ACHPR and other relevant human rights instruments and in this regard, pay particular attention to the issues of gender equality, good governance, and democracy as well as promoting cooperation in all fields of human activity to raise the living standards of the African people.

The major point of departure on which the establishment of the AU is predicated is that it should represent a qualitatively higher form of unity and integration for the African continent. Thus, the fundamental objective is to put in place an efficient and effective AU to deliver a better Africa. An efficient AU should have the capacity and the commitment to meet the aspirations of the African people in their desire for participatory and efficient governance systems, human rights, peace and security, development, social justice, and integration.

Whereas the principle of non-intervention in member states' affairs was a principle upheld by the OAU, the AU has adopted a more interventionist approach to end genocide, war crimes and crimes against humanity, human rights violations, and unconstitutional changes of government, through the mechanism of employing sanctions. It has also continued to develop legal frameworks and establish relevant institutions.⁶ In so doing, it has paved the way towards creating a culture of non-indifference towards war crimes and crimes against humanity in Africa. Furthermore, these principles reflect the new thinking and approach among African states on how to coordinate common responses to present-day political and socio-economic challenges, and to be responsive to the contemporary demands and aspirations of ordinary people.

According to one analysis, the transformation of the OAU to the AU has brought about huge potential for human rights to play a greater part in the AU.⁷ Furthermore, as the AU continues to adopt human rights instruments and strengthen existing institutions or establish new ones for their implementation, it has enriched the African human rights protection system and provided an enabling environment within which to pursue human rights promotion and protection vigorously. Amongst these mechanisms are the Pan-African Parliament (PAP),

⁶ One such instrument is the OAU Declaration on the Framework for an OAU Response to Unconstitutional Changes in Government (AHG/Decl.5 (XXXVI) 1997).

⁷ Murray (ibid.:267).

the Economic, Social and Cultural Council (ECOSOCC), the Peace and Security Council (PSC), the African Peer Review Mechanism (APRM) and the African Court. Unlike the OAU, where human rights remained the preserve of the African Commission, the AU has expressly ensured that human rights are mainstreamed throughout its organs, activities and programmes.

Despite the above, there are legitimate concerns about the AU's ability to live up to the high expectations of making a real difference to human rights in Africa. Amongst these concerns are the following:

- A well-articulated gender framework on women's rights and gender was lacking in the African Charter. This has now been corrected with the adoption of the Women's Rights Protocol.
- Human rights mechanisms lack the necessary resources and political backing to make a difference by compelling respect for human rights
- Organisational and financial challenges face the AU
- The many institutions with human rights remit need to be consolidated so that they can function effectively
- Challenges are posed by endemic poverty, unemployment, corruption, disease and ongoing conflicts
- The varying levels of development and governance by African countries undoubtedly impact on the extent to which the AU will achieve the goals of the Constitutive Act, namely promotion and protection of human rights, increased development, the combating of poverty and corruption, and the securing of peace and security on the continent
- Implementation and enforcement mechanisms are toothless
- Approaches vary when it comes to the domestication of ratified international and continental instruments
- Countries fail to comply with the requirement to report on the domestic implementation of ratified instruments, and
- The political will is lacking, as evidenced by the failure to implement agreed policies, values and standards.

It is recognised that much more needs to be done at continental, regional and national level to promote a human rights culture and respect for human rights.

African leaders have also committed themselves to a respect for human rights by ratifying international and continental human rights instruments, and enacting laws and policies aimed at protecting the rights of people and ensuring good governance and accountability.

Key issues

The AU is faced with many challenges with political, economic and social dimensions. Meeting these challenges will require commitment at the highest levels of the organisation as well as resources. This section highlights some of the key issues relating to the protection and promotion of human rights.

Culture and African values

African cultures have rightfully being criticised for not respecting the rights of women, mostly because of harmful practices which negate gender equality. Many campaigns have been launched against these practices, which include female genital mutilation/cutting, and early marriage. National laws and policies have been passed to combat such practices and to end discrimination against women. At the continental level, the Women's Rights Protocol and the ACRWC both aim to combat such practices. Yet these practices still continue. Women's organisations themselves have accepted that traditional practices, which are deeply rooted in society, cannot simply be legislated away; but they also realise that combating such practices requires political will and commitment, dialogue within communities and with traditional leaders, and civic and human rights education.

It would be equally wrong, therefore, to argue that culture has no place in the human rights discourse. In this context, Africa's struggle for liberation was also a struggle for its identity and cultural heritage as well as respect for human rights because the goal of colonialism in Africa was to undermine African cultures and the rights of the African people. To ensure the protection of African cultures, the OAU adopted the African Cultural Charter in 1976. Today, Africa is once again faced with having to defend its cultural heritage against the impacts of globalisation and Western lifestyles on traditional modes of living and social mores. Paradoxically, for cultures to survive the test of time, they must both interact with other cultures and change, and yet maintain their own unique characteristics.

In 2006, the AU adopted the Charter for the Cultural Renaissance of Africa,⁸ recognising that the birth of the African Union brought in a new African

⁸ This Charter (awaiting ratification) complements the 1976 Cultural Charter.

consciousness encapsulated in the African Renaissance, which will inform, inspire and allow Africans to search for and discover their true African identity. The AU also adopted various instruments on culture such as the Nairobi and Algiers Declarations.⁹ The Algiers Declaration reiterated that *culture* represents a set of ways and means through which the peoples of Africa, individually and collectively, affirm their identity, and protect and transmit such identity from generation to generation. The Declaration reaffirmed the role of culture for sustainable development, continental integration and the realisation of the African Renaissance with a view to building a united, peaceful and prosperous Africa. Therefore, the AU aspires to use culture as a vehicle for social and economic development in order to meet the various challenges facing the continent such as the HIV and AIDS pandemic, malaria and tuberculosis; abject poverty; high rates of illiteracy; and conflicts and emerging challenges such as climate change, the food crisis, the financial crisis, and the economic meltdown.

Although Africa is a continent of great diversity, its people are the common thread that binds all Africa. *Culture* has been understood to be the foundation of society and development, integrating the values, customs and characteristics of a people, and promoting interaction and dialogue amongst people. Therefore, culture should serve the great cause of holding the African people together and strengthening their unity in diversity: whether within families, public life, communities or organisations. Culture should help Africa to make sense of itself in order to assert its roots, reflect on its troubled past, and forge a better, safer and prosperous way forward through a shared African Vision.

Cultural policies and programmes should provide the leaders and principal development actors with appropriate data and instruments to assist in the promotion of peace in a sustainable and humane manner; to ensure that African democracy does not become the hostage of tribalism or ethnic preferences; to promote pluralism, ethnic/cultural diversity, tolerance and respect for human rights; to ensure that the issues of development are couched in African rationality; to produce universal African texts which reflect the genius of the African people; and promote indigenous know-how as a basis for a truly “African Cultural Renaissance”.¹⁰

⁹ Both these Declarations were adopted at the AU Conferences of Ministers of Culture (Nairobi Declaration in 2005 and the Algiers Declaration in 2008) and endorsed by the AU Executive Council and the Assembly thereafter.

¹⁰ AUC programme on Culture.

The African Charter places emphasis on people's rights because African culture is firmly grounded in the age-old traditions of the supremacy of collectivism, sense of belonging to a community, humanism and *ubuntu*.¹¹ Africa's languages, history and traditions remain fundamental to the coexistence of its people.

In drafting the African Charter, it was vital to reflect respect for the universality of rights and also take into account the cultural context pertaining in Africa. Addressing the expert meeting convened in 1979 to develop the African Charter, the then President of Senegal, Leopold Senghor,¹² therefore noted the following:

As Africans we shall neither copy, nor strive for originality ... We could get inspirations from our beautiful and positive traditions. Therefore, you must keep constantly in mind our values of civilization and the real needs of Africa.

In explaining the exclusion of people's rights, he further stated that –¹³

[w]e simply meant ... to show our attachment to economic, social and cultural rights, to collective rights in general, rights which have a particular importance in our situation of a developing country.

As will be elaborated on below, criticism has been levelled against the inclusion of cultural values in the African Charter, some of which have been found discriminatory towards women.¹⁴

Human rights and development

The establishment of the AU provides hope – and it is imperative that appropriate social and cultural policies accompany its construction. Such policies need to be harmonised so that they can mutually reinforce each other for the promotion of Africa's overall political, economic, cultural and social agenda. Furthermore, social development has to be based on approaches that guide human actions and interactions. A case in point is the human rights approach to development.

¹¹ Meaning that we exist as people only in relationships with others.

¹² Senghor (2006:51).

¹³ (ibid.:51).

¹⁴ Welsh (1993:555).

Right to development

The right to development¹⁵ finds clear recognition and expression in the ACHPR. The same meaning has also subsequently been advanced by the adoption of the UN Declaration on the Right to Development (DRD) (contained in the 1986 UN General Assembly Resolution 41/126). The right to development is not merely about economic or social development: it is both an independent right and one that is intrinsically linked to the full enjoyment of a range of human rights with social, cultural, political and economic dimensions.

The key elements of the right to development are as follows:¹⁶

- **Direct participation in development:** This implies meaningful connection to resources and opportunities as well as to institutions and systems of social organisation and governance. It is not enough for people to be passive beneficiaries of welfare and social benefits or to vote in elections. Such participation is achieved through the exercise of civil and political rights which create discussion and debate, and in turn make room to influence policies.¹⁷
- **Sustainable development:** This includes environmental rights and encompasses duties that mutually exist between the individual and his/her family, community and society.
- **The promotion of peace and security,** and
- **The right to self-determination:** This refers to a people's right to elect their government freely; to choose their own manner of pursuing social, economic and cultural development; and to have control over their resources and wealth.

The right to development seeks to protect all rights and, hence, do away with the artificial distinction made between so-called first-generation (civil and political) and second-generation (social, economic and cultural) rights. Therefore, it is argued¹⁸ that a violation of any of these rights is tantamount to a violation of the right to development in all its facets.

¹⁵ For a full discussion on the right to development, see Gutto (2004).

¹⁶ (ibid.:9); see also Patel (2005).

¹⁷ African Charter on Popular Participation in Development and Transformation, 1990.

¹⁸ Guevara (2005).

According to another analysis¹⁹ on the DRD, the development challenges faced by developing countries came about as a result of a history of exploitation and, therefore, need to be corrected by ensuring equitable economic development throughout the world. However, it is acknowledged that internal factors such as corruption, mismanagement and bad governance also have a role to play. In this sense, the argument is that the DRD creates an interconnectedness between nations; for this reason, the right to development affects the entire global community. In this regard, development assistance is viewed as a duty that developed countries have in ensuring the effective enjoyment of human rights in their developing counterparts.²⁰

Contrary to the assertion made by some²¹ that the right to development has legal force, Guevara²² claims that, as long as the Declaration on the Right to Development does not create a legal obligation by delineating duties, recipients and the means of claiming redress, no such right exists. Given his reasoning on the legal enforceability of the right to development, Guevara²³ argues that the most effective way to give meaning to this right is through the exercise of the social, economic and cultural rights that are found in most constitutions, although they do not always have the same legal force as civil and political rights.

Recognising the importance that the AU attaches to the enjoyment of all human rights, the AU Commission adopted a Strategic Plan which placed human rights at the core of its social development programmes and activities. One of the key roles of the AU's Department of Social Affairs is to provide the political leadership to harmonise and coordinate Africa's efforts in ensuring that noticeable improvements are made in the lives of all Africans. It does so within the context of the right to development, as embodied in the African Charter on Human and Peoples' Rights, the AU Constitutive Act, and the Vision and Mission of the AU Commission. The Department of Social Affairs' programmes encompass numerous issues, including health and endemic diseases, migration, population, reproductive health and rights, culture, sport, social protection of vulnerable

¹⁹ (ibid.).

²⁰ Guevara (ibid.) sees the right to development as a form of recovery by less-developed countries from developed countries, despite developed countries not providing development assistance as a legal obligation.

²¹ See e.g. Gutto (2004); Nakuta (2008).

²² Guevara (ibid.).

²³ (ibid.).

groups, gender equality, education, and human resource development. Special attention is given to marginalised and disadvantaged groups and communities.

Examples of specific measures which have been taken by the AU Commission in addressing the social challenges at continental level include the following:

- The 2004 Ouagadougou Declaration and Plan of Action on Employment and Poverty Alleviation,²⁴ which expresses concern about the sustainable livelihoods of the African population in general, and those of vulnerable groups in particular. The Declaration calls for equal opportunities for all and commits its signatories to empowering the most vulnerable groups, including them in poverty alleviation programmes and policies, and ensuring their full participation in the implementation of these programmes.
- The 1999 Charter for Social Action incorporates the following principles, amongst others: respect for basic human rights, the basic needs and aspirations of the population, pursuit of the goals of social justice and equity, and accessibility of social services to all. Amongst its strategies, the Charter calls for the formulation of national social policy and the incorporation of the social dimension at all level of planning, programming and implementation.
- The 2008 AU Continental Social Policy Framework provides guidance to member states in the promotion of the rights and ensuring the welfare of marginalised and excluded groups, including orphans, other vulnerable children, the youth in general, people with disabilities, refugees and displaced people, families, the elderly, and people living with HIV and AIDS. The development of the Policy Framework was informed by Africa's need to combine economic dynamism (including "pro-poor" growth policies), social integration (societies that are inclusive, stable, just, and based on the promotion and protection of all human rights, non-discrimination, respect for diversity and participation of all peoples), and an active role for government in the provision of basic services at local and national level. In this context, it has been recognised that social policy should (a) promote equity and fairness amongst certain segments of society and certain regions within a country (otherwise it leads to social exclusion) by providing equitable access to rights and resources; (b) address the social tension between cultural identity and aspirations towards the freedoms

²⁴ Adopted at the Extraordinary Summit of Heads of State and Government in September 2004.

promised by modernity; (c) reflect the true realities of Africa that bring together economic and social policies, thus recognising the interdependency between the two; and (d) promote a human development approach that puts people at the centre of development, by investing in people.

Based on the above, it is clear that development is not just about economic growth: it encompasses social advancement and the betterment of livelihoods. In this sense, development is as much about increasing people's capabilities and choice as it is fundamentally also about values, systems, processes and institutions of social and political organisation.²⁵ This is particularly true because the condition of poverty is not merely about being relegated to a low-income status group, but also about being deprived of freedom of choice. The purpose of development is, therefore, to enhance the capability of individuals to overcome poverty and other social and economic challenges, human rights violations, neglect of women, and threats to the environment.²⁶

Moving beyond the discussions outlined above, all sides agree that the objective of the right to development needs to focus on poverty eradication and narrowing the inequality gap, because – as mentioned above – *poverty* is also understood to be the failure to improve the enjoyment of human rights. The poverty eradication approach should involve the active participation of vulnerable and marginalised groups in the design, execution and implementation of development policies and programmes.

Social, economic and cultural rights

Whenever reference is made to the promotion and protection of human rights, there is an inclination to speak about civil and political rights only. In this regard, the yardstick for measuring the enjoyment of such rights has been the full and active participation of people in democratic processes such as elections, freedom of expression, and the right to life. African countries have been hailed for increasing respect for human rights as more countries emerged through democratic transitions following elections through which people freely choose their governments. However, participation in elections should not be the only

²⁵ Gutto (ibid.).

²⁶ Sen (1999). Sen explains *development* as the expansion of freedom of choice for human beings – both in terms of processes that allow freedom of actions and decisions, and the actual opportunities that people have.

human rights indicator; rather, and more importantly, the indicator should be the full and equal enjoyment of social, economic and cultural rights, since these are intertwined with civil and political rights and are two sides of the same coin. In this respect, the OAU recognised that human rights should include all rights, and that corruption in Africa was an obstacle to the enjoyment of social, economic and cultural rights in particular, but also to socio-economic development in general.

Therefore, although it can be argued that the situation regarding the respect for civil and political rights has improved, the same cannot be said of economic, social and cultural rights because Africa continues to face grave challenges and threats. These include HIV and AIDS, diseases, poverty, exclusion, racism, xenophobia, inequality, corruption, conflicts, bad governance, and violence against women and children. As long as these challenges affect people's everyday lives, the problems of sustaining democracy and development and the protection and promotion of human rights will continue to haunt the continent. For example, poverty is recognised by Oxfam as –²⁷

... a symptom of deeply rooted inequities and unequal power relations, institutionalized through policies and practices at all levels of state, society, and household.

Therefore, poverty can be seen as a violation of human rights, and its reduction will contribute to the full and equal enjoyment of all human rights.

The issue which arises is how the AU can ensure the equal recognition and relevance,²⁸ including their enforceability and the unnecessary distinction between civil and political rights on the one hand, and social, economic and cultural rights on the other. Indeed, an all-encompassing human rights approach requires that the AU has to promote social, economic and cultural rights – which embrace the right to development as contained in the African Charter – in the same way as civil and political rights are promoted.

Most AU member states have adopted a bill of rights in their constitutions to guarantee fundamental human rights and freedoms, but these pertain mostly to civil and political rights, which are regarded as enforceable. However, Nakuta²⁹ argues that, given that social, economic and cultural rights play a greater role in

²⁷ Green (2008:27); Sen (ibid.).

²⁸ This was a recommendation by the APRM Panel to participating countries to accord economic, social and cultural rights the same recognition and relevance.

²⁹ Nakuta (2008:95); see also Agbakwa (2006:70–75).

improving people's lives and standard of living, they should be justiciable. This argument is supported by the fact that, in the 21st century, the challenge lies in making rights a reality for the majority of the people by addressing poverty and inequality.

Since the enforcement of social, economic and cultural rights largely depend on the availability of resources, the AU will have to step up its advocacy for increased resources both internationally and domestically not only to fulfil these rights, but also to effectively monitor compliance by member states, which should use the same approach as they do to advance civil and political rights – albeit with added methods and competencies.

Vulnerable groups

It is generally believed that the groups made vulnerable by social exclusion and inequality are best protected through the effective implementation of social, economic and cultural rights and the right to development in addition to civil and political rights. Poverty and exclusion from mainstream development policies and programmes result in vulnerability. The delivery of affordable basic services remains a big problem, and this can be addressed through promoting access by vulnerable groups to health, education, water, sanitation and shelter, amongst other things. Vulnerable groups include children, the elderly, persons with disabilities, the youth, orphans and other vulnerable children, persons living with HIV and AIDS, poor families, and refugees and displaced persons. All of these vulnerable groups have been targeted by AU Commission programmes.

As mentioned previously, the OAU/AU developed key legal and policy frameworks that embody commitments made by African leaders to promote and protect the rights and welfare of vulnerable groups, and thereby address their vulnerability and social exclusion. In addition to the legal instruments already referred to, policy instruments adopted to augment the legal protection framework include the following:

- The Declaration and Plan of Action on Africa Fit for Children (2001)
- The Call for Accelerated Action on the Implementation of the Plan of Action on Africa Fit for Children (2007)
- The Policy Framework and Plan of Action on Ageing (2003). In collaboration with the African Commission, the AU Commission is elaborating a Protocol on the Rights of the Elderly. A Steering Committee has been set up to prepare for the establishment of the Advisory Council for the Elderly within two years

- The Declaration and Plan of Action on the African Decade of Disabled Persons (1999–2009)
- The Plan of Action on the Education Decade (2008)
- The Continental Policy Framework on Human Rights and Persons Living with HIV/AIDS (2006), in addition to the declarations and plans of action adopted at two Special Summits of Heads of State and Government such as the Abuja Declaration and Framework Plan of Action on HIV/AIDS, Tuberculosis, and Other Related Infectious Diseases (2001)
- The Africa Health Strategy (2007) and the Africa Regional Nutrition Strategy (2005-2015)
- The Plan of Action on the Family (2005)
- The EU-Africa Plan of Action to Combat Trafficking in Human Beings, especially Women and Children (2007)
- The Policy Framework on the Sustainable Development of Sport in Africa (2008)
- The Social Policy Framework (2008), and
- The Study on Social Protection Systems in Africa (conducted in 2008).

Human rights, democracy and governance

It is undeniable that the conducting of democratic elections has increased across Africa. However, democracy – if measured only by the outcome of elections – has produced mixed results: at times it has generated prosperity, and at others factionalism and discord.³⁰ The AU has effectively deployed sanctions against any country that comes to power through unconstitutional means, so military coups as well as any takeover of power from an elected government are becoming something of the past. Regrettably, recent events in Africa have shown that democracy still remains fragile³¹ Equally, good governance, including the fight against corruption and its impact on social and economic rights, has become a measure of democracy. To this end, the AU adopted the Charter on Democracy, Governance and Elections³² and the Convention on Combating Corruption.³³

³⁰ Vadi (2008).

³¹ For example in Guinea Bissau, Mauritania and Madagascar.

³² See also the OAU Declaration on the Framework for an OAU Response to Unconstitutional Changes in Government (ibid.), and the Declaration on the Principles Governing Democratic Elections in Africa (AHG/Decl.1(XXXVIII) 2002), which reflects a wider perspective on democracy than simply being a focus on electoral processes.

³³ Members of an Advisory Board serving to implement the Convention were appointed in 2008.

The AU Commission's Department of Political Affairs is mandated to deal with human rights, democracy, elections and humanitarian affairs, amongst other things. It has established an electoral fund to facilitate election observance in member states, and has conducted workshops on human rights and corruption with national human rights and anti-corruption institutions, respectively. The establishment of PAP, with the important role of promoting democracy, aims at galvanising people to participate and building the visibility of the AU to increase its relevance and credibility to the people of Africa.

A notable development in the area of democracy, human rights and governance is the establishment of the African Court and the appointment of judges in 2007. Another is the APRM which followed the adoption by the Durban Summit in July 2002 of the Declaration on Democracy, [and] Political, Economic and Corporate Governance as a supplement to NEPAD. According to the 2002 Declaration, states participating in NEPAD "believe in just, honest, transparent, accountable and participatory government and probity in public life". Accordingly, they "undertake to work with renewed determination to enforce", among other things, the rule of law; the equality of all citizens before the law; individual and collective freedoms; the right to participate in free, credible and democratic political processes; and adherence to the separation of powers, including protection for the independence of the judiciary and the effectiveness of parliaments.

The 2002 Declaration also committed participating states to establishing an APRM to promote adherence to and fulfilment of its commitments. On 9 March 2003, the NEPAD Heads of State and Government Implementation Committee, meeting in Abuja, Nigeria, adopted a Memorandum of Understanding (MOU) on the APRM. This MOU effectively operates as a treaty. It came into effect immediately, with six countries agreeing to be subject to its terms. Those countries that do not accede to the MOU are not subject to review. The March 2003 meeting also adopted a set of objectives, standards, criteria and indicators for the APRM. The meeting agreed to the establishment of an APRM Secretariat and the appointment of a seven-member panel of eminent persons to oversee the conduct of the APRM process and ensure its integrity. The APRM is a voluntary mechanism open to any AU country. A country formally joins the APRM upon depositing the signed MOU at the NEPAD Secretariat.

The APRM process is based on a self-assessment questionnaire,³⁴ which is divided into four sections: democracy and political governance, economic governance

³⁴ The questionnaire was formally adopted in February 2004, in Kigali, Rwanda, by the first meeting of the African Peer Review Forum, made up of representatives of the Heads of State or Government of all states participating in the APRM.

and management, corporate governance, and socio-economic development. Its questions are designed to assess states' compliance with a wide range of African and international human rights treaties and standards.

Some shortcomings in the questionnaire have been pointed out, such as its complicated nature, overlapping areas of reporting, the participation of civil society organisations. The question has also been asked whether there is political will to make the APRM process a success story.³⁵ However, it should be acknowledged that, by participating in the APRM, African governments have voluntarily subjected themselves to public scrutiny and accountability as shown by the various missions and reports issued by the APRM panel. By March 2009, 29 countries had formally joined the APRM by signing the 2003 MOU.³⁶

It should also be clear from the discussion in this paper that democracy is not just about elections, but about respect for human rights and the meaningful participation of people at all levels of society, both during and after elections – hence the generally held view that sustainable development requires a viable democracy and respect for all human rights. Social development and democracy go hand in hand, as both require the full and active participation of people in decisions affecting their lives. This will require that the AU be seen as a people-driven organisation, and that ECOSOCC should become more active in facilitating the participation of civil society organisations in the AU's work. This should be complemented by efforts at national level to encourage a closer relationship between governments and civil society organisations.

Gender equality

An earlier critique of the African Charter was the omission of women's rights in its provisions, as it gave little or no direct attention to women as a group. This is despite the fact that women brought issues on gender inequalities to the

³⁵ Killander (2008); see also Adisa (2002).

³⁶ Algeria, Burkina Faso, Republic of Congo, Ethiopia, Ghana and Kenya signed the MOU in March 2003; Cameroon, Gabon and Mali in April and May 2003; Benin, Egypt, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, South Africa, and Uganda in March 2004; Angola, Lesotho, Malawi, Sierra Leone and Tanzania in July 2004; Sudan and Zambia in January 2006; São Tomé and Príncipe in January 2007; Djibouti in July 2007; Mauritania in January 2008; and Togo in July 2008. This is more than half of the AU's 53 countries. However, Mauritania was suspended in October 2008 AU due to a coup earlier in the year.

African agenda through their participation in liberation struggles – albeit within the limits of power relations – and, thus, directed OAU and AU attention to the position of women in society. As was stated earlier, the adoption and ratification of the Women’s Rights Protocol sought to address these omissions.

Another criticism levelled against the Charter is the emphasis given to cultural values. This emphasis conveys an ambiguous message and, according to Khadija Elmadmad,³⁷ –

[t]he African Charter [i]s characterized by a dualism of norms regarding women’s rights, a contradiction between modernism and traditionalism as well as between universalism and regionalism ... The African Charter has placed the rights of women in a ‘legal coma’.

This view is based on the fact that, in general, African cultures militate against women by according them low status and through harmful traditional practices such as female genital mutilation/cutting, despite many African constitutions providing for gender equality and non-discrimination.

In addition to the Women’s Rights Protocol, the AU Commission has prioritised activities to promote gender equality that include the adoption of commitments such as the Solemn Declaration on Gender Equality in Africa, the Policy Framework and Plan of Action on Sexual and Reproductive Health and Rights, and an AU Gender Policy. The Heads of State and Government, through their adoption of the 2004 Ouagadougou Declaration on Employment and Poverty Alleviation, expressed concern about the major challenges and obstacles to gender equality as well as the low levels of women’s representation in social, economic, and political decision-making structures which still persist; the increasing feminisation of poverty, aggravated by discrimination and unequal opportunities and treatment; and the underutilisation of the entrepreneurial creativity and job creation potential of African women.

It should also be noted that most instruments adopted since 2003 make provision for gender equality and women’s participation. Some even provide expressly for the inclusion of women in the AU’s decision-making bodies. For example, the AU has achieved a 50:50 gender balance with the appointment of five women and

³⁷ As quoted in Welsh (ibid.:555).

five men to its Commission.³⁸ The first President of the Pan-African Parliament is a woman, whilst the first Interim President of ECOSOCC was also a woman.

The AU Commission also established a Women, Gender and Development Directorate in the Office of the Chairperson to coordinate all its activities and programmes relating to gender, as well as to ensure that gender is mainstreamed into all AU programmes and policies in accordance with the Decision on Mainstreaming Gender and Women's Issues within the African Union. There is also the AU Women's Committee, an advisory body to the AU Commission Chairperson. Among its roles, the Committee works with governments and civil society to monitor the implementation of the Women's Rights Protocol and the Solemn Declaration on Gender Equality in Africa.

Despite commitments to gender equality, discrimination against women and the lack of effective participation by women in decision-making continues. Among the examples are that women are accorded low status in society; they suffer violence and abuse; the rate of maternal mortality remains high; and poverty is increasingly feminised. This is attributed to various factors, such as the deep-seated discrimination in African societies, patriarchal attitudes and stereotypes about women's role in society, and a limited number of women's organisations that make human rights an express part of their mandate – despite a human development approach enjoining us all to link human rights and development.

Therefore, legal and policy commitments always need to be accompanied by measures to combat societal discrimination to address gender inequalities and women's unequal access to education, health and other social services. These measures would include combating harmful traditional practices through increased awareness-raising activities and the active involvement of traditional and community leaders; the economic empowerment of women; concrete actions and strategies to end violence and abuse against women and girls; increased access to basic social services such as education of the girl child; and increased access to sexual and reproductive health services and rights. Much, therefore, needs to be done to accelerate action in order to achieve the Millennium Development Goals, as they all directly and indirectly impact on women's lives.

³⁸ Statutes of the AU Commission.

Strategies for enhancing human rights protection and promotion

An inclusive approach to human rights

Notwithstanding some rights being regarded as enforceable and others not, the AU should avoid their polarisation and ensure that all rights – including social, economic and cultural rights – are protected and promoted. To avoid the usual polarisation between the latter rights and political and civil rights, it is suggested that a human-rights-based approach to development be adopted. Such an approach combines social, economic and cultural rights with civil and political rights, and the building of a just, equitable social contract between State and citizen.³⁹

A human-rights-based approach will also assist in linking the human rights agenda to the broader development agenda. The current discourse on human security and human rights is very relevant to the AU agenda. A human rights approach would also require governments to develop clear plans of action with targets, objectives and measures for achieving them, and to allocate substantial resources to their achievement.

Institutional and constitutional arrangements

The Constitutive Act of the AU provides Africa with a continental legal framework for the protection and promotion of human rights. In the spirit of the Constitutive Act, the AU has adopted an institutional focus on human rights, and explicitly recognises the mainstreaming of human rights in all AU activities and programmes. However, it needs to ensure that of human rights norms, standards and principles are effectively integrated into a range of activities and practices, including the AU's peacekeeping operations, election observation, and conflict management. For example, in carrying out their mandates, all portfolio Departments in the AU Commission are required to mainstream human rights into their programmes; therefore, the issue of human rights is no longer limited to the African Commission on Human and Peoples' Rights. The Peace and Security Council also sees the protection of human rights as part of its mandate. In addition, social, economic and cultural rights should be part of the peace and security agenda because conflicts exacerbate social issues such as a lack of

³⁹ Green (2008:27).

access to food, water, health care, sanitation and education, and these require special attention during and after conflicts.

It is equally important that the AU should also promote the mainstreaming of respect for values inherent in human rights, both in members states' laws and their policymaking. Strengthening the capacity of institutions with a human rights remit and providing them with adequate resources at the continental, regional and national level to effectively fulfil the mandate of promoting and protecting human rights remains critical.

Better coordination of mechanisms with a human rights remit

Along with the adoption of legal instruments targeting human rights came mechanisms for their implementation, such as the African Commission, The African Court, the ACERWC, the APRM, the PAP, national human rights institutions, and NGOs. Given the scarcity of resources and to avoid duplication of effort, the question always remains whether there will be adequate funding to ensure the effectiveness of all these mechanisms. There might also be a need to avoid a proliferation of institutions with a human rights remit. For example, a common question is whether it was necessary to establish a separate body for the protection of children. Whatever the answer may be, it is important that there is proper coordination between all these human rights mechanisms, such as the ACERWC and the African Commission, as well as with other institutions. Equally, the APRM process should complement the efforts of existing human rights institutions.

It may be advisable for these mechanisms to develop a programme of activities that build on each other's initiatives to create coherence and synergy between their approaches and activities. There might also be a need to rationalise existing African institutions.

Coherent and comprehensive approach to the elaboration of standards and their implementation

As noted above, many legal instruments, policy instruments and policymaker statements with a human rights focus have been adopted by the OAU/AU over the years. However, it is imperative that all these are consolidated and build

upon as part of Africa's institutional history. This will also serve as the AU's contribution to the creation of a continent-wide human rights protection system, and the development of a coherent and comprehensive approach to the elaboration of standards.

According to Murray,⁴⁰ a development of standards should include the following:

- A review of existing instruments and bodies with a human rights agenda
- A streamlining of the operations of such institutions, and
- The development of a coherent and consolidated institutional approach to human rights.

In addition to the above, it might also be necessary to promote –

- dialogue on critical human rights issues and challenges in Africa, and
- research to inform policy development and lawmaking.

Implementation or enforcement mechanisms and processes

As noted above, the OAU/AU and regional organisations have adopted various legal and policy instruments to promote and protect human rights. There has also been an increased realisation of rights on the domestic level through the adoption of constitutions, laws and policies, and the establishment of institutions such as parliaments, courts, human rights institutions, ombudspersons, and certain civil society and non-governmental organisations.

Although all these instruments and mechanisms exist to promote and protect human rights, many lack resources and political backing. In the absence of the political will and financial and logistical support to operationalise the institutions with a human rights remit, they will be ineffective in their tasks. Thus, the enforcement and implementation of obligations and commitments remain a challenge, as explained below.

By signing and ratifying continental or international legal or human rights instruments, member states incur legal obligations to implement the values and standards embodied in them at domestic level. However, what is more important than the ratification process is making the rights enshrined in those instruments a

⁴⁰ Murray (ibid.).

practical reality through their domestication and implementation.⁴¹ The systems of incorporating such standards into domestic laws differ across member states.⁴² Even if countries like Namibia do not need parliamentary involvement to incorporate such instruments once ratified, it is preferable to give meaning to them by enacting laws and adopting policies and plans of action. These need to be aligned with human rights standards as well as with sustained financial backing so as to ensure their effective implementation.

The enforceability of rights also depends on access to courts. Courts are often inaccessible to ordinary people, who are also not necessarily familiar with the court system. The AU should, therefore, also promote the establishment of alternative mechanisms such as national human rights commissions and ombudspersons, who employ both formal and informal complaints processes and are easily accessible to people. However, to be effective, these mechanisms have to be independent, well resourced, and complemented by an independent judiciary and an active legislature.

These numerous resolutions and decisions by AU bodies which have a huge potential to contribute to the human rights protection system are not always well known across the continent, and neither are the mechanisms for their enforcement/implementation. Therefore, there is a need for mass education and dissemination of information on the Constitutive Act, national constitutions and laws, other human rights instruments, and their implementation mechanisms. Indeed, the African Charter obligates states to create awareness of the rights enshrined in it. People can only exercise their rights if they are aware of them and how to enforce them.

The current mechanisms for enforcement and implementation include reporting, fact-finding missions, and advice and recommendations of implementation mechanisms. One of the AU's roles is to ensure effective follow-up and monitoring, but it does not have a presence in member states. Consequently, member states have to – although they are not always legally obliged to – submit reports to the AU. Nonetheless, this is not always complied with, the reports are delayed, or they are not submitted frequently enough.

⁴¹ The APRM recognised the importance of domestication, given the differences that exist between countries as regards ratification and domestication.

⁴² Some countries require parliamentary involvement, while others make it automatically applicable, backed up by laws and policies.

In addition, member states which have ratified international and African human rights instruments also have reporting obligations to separate bodies such as the UN and the AU, thus placing additional burdens on governments. It was found that countries usually provided better and more frequent reporting to international organisations such as the UN in comparison with continental organisations such as the AU. Linkages and partnerships between continental and national mechanisms would, therefore, facilitate accurate and effective reporting as well as harmonise such reporting.

The fact that there are no sanctions attached to failing to comply with reporting obligations is seen as a major weakness in the enforcement and implementation system. To ensure compliance, it has been suggested that there is a need to move beyond reporting obligations and fact-finding missions, and instead impose sanctions for human rights violations and redress for victims of such violations,⁴³ in addition to institutional support and enforcement mechanisms. The AU will also have to build a closer partnership with the regional economic communities, which are regarded as the pillars of the AU, and with civil society organisations.

Focus on vulnerability and exclusion

It has been pointed out that vulnerability is caused by the exclusion and marginalisation of certain groups. Thus, strategies for addressing vulnerability and exclusion should include integrated, multisectoral and multidisciplinary approaches, and should have the following elements:

- **Be rights-based:** This approach promotes, protects and defends the rights – particularly the social, economic and cultural rights – of the most vulnerable and marginalised as being integral to sustainable development.
- **Focus on poor people's realities:** This will require their active involvement and participation.
- **Invest in organisational capacities:** Community-driven approaches led by community-based organisations and informal networks have been always been critical for the survival of communities. Communities need to have control over funds, resource allocation, and decision-making, as this relies on people's strengths and knowledge. Such empowerment also helps

⁴³ Gutto (ibid.).

people to address inequalities inherent in the way society is structured and organised.

- **Promote social protection policies:** This is based on a scaled-up community-driven model aimed at strengthening community capacity to provide support during times of need, coupled with an effective monitoring and evaluation system to assess the social and economic impact of the programmes that target poverty reduction and inequality.
- **Change social norms:** This can be done through effective awareness-raising campaigns, civic and human rights education, and the involvement of traditional and community leaders, in order to address harmful traditional practices and gender inequalities.
- **Recognise the importance of social policy:** Social policy should be viewed as a web of policies that act in a complementary, multidimensional, multisectoral and multidisciplinary manner, and
- **Implement poverty reduction strategies:** These strategies should not only take into account income and consumption, but – more importantly – the factors that place people at risk of poverty or that worsen their poverty, including enhancing their capabilities to overcome poverty and other social and economic challenges.

Conclusion

It has been maintained throughout this paper that the AU needs to adopt an inclusive and holistic approach to human rights, and effectively advance social, economic and cultural rights as well as the right to development in its promotion of an African human rights protection system. This will include the effective implementation of instruments at the national level to have real impact on socio-economic development and the lives of the people, and to put in place proper monitoring and evaluation mechanisms. The hallmarks of any democracy would be measured by the extent to which not only governments but also all other stakeholders ensure that human rights and laws are respected and upheld.

The AU should focus on the protection of the rights of vulnerable groups by advocating for the implementation of various commitments made by governments through the adoption of national laws and policies, and by increasing the allocation of resources to the social sector to enhance access and build capacity in institutions, particularly those that strengthen human rights protection mechanisms.

Although African leaders have undertaken to promote the principles of the AU and NEPAD, including respect for human rights in all member states, the implementation of these principles remains a challenge. Therefore, the AU Commission should step up its advocacy, follow-up and monitoring role, and conduct proper assessments and evaluations of the impact of human rights instruments.

The debate on the effectiveness of the AU relating to the role and functions of its organs, the budget, and the extent to which the various bodies can work together to achieve the African human rights protection system is still ongoing, five years after the AU's establishment. This is because the AU continues to create more instruments and mechanisms with limited resources and overlapping jurisdictions, thus limiting their role in providing effective oversight and enforcement. Time will tell whether the AU has lived up to the expectations of making respect for human rights a reality.

In remarks on the AU that relate to this debate, the then UN Secretary General, Kofi Annan,⁴⁴ expressed himself as follows in his address to the AU Summit in 2006:

The African Union itself is in many ways the most eloquent testimony of progress, in development, in security, in human rights -- the three interlinked pillars on which the human family must build its future. An institution, which was created only six years ago, has established itself as a defining voice in each one of those areas.

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⁴⁴ Annan (2006).

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Major African legal instruments

Sheila B Keetharuth

Introduction

The African Charter on Human and Peoples' Rights (hereinafter *the African Charter* or *Charter*), at the very core of the African human rights system, has reached full ratification status. With the deposit of Eritrea's instrument of ratification on 14 January 1999, all member states of the African Union (AU) have signified their willingness to be bound by the obligations created by the Charter. Yet given the state of human rights enjoyment from Asmara to Abidjan, from Cape Town to Cairo and everywhere in between, one would be tempted to question the commitment of states to translate the rights contained in the African Charter into tangibles. Ten years after the adoption of the Grand Bay (Mauritius) Declaration and Plan of Action in April 1999, little has changed in the list of 19 identified causes of human rights violations in Africa.¹ Economic, social and cultural rights still receive less attention than civil and political rights, while violations of civil and political rights continue on a massive scale. The concept of group rights is still in an embryonic stage.

The African Commission on Human and Peoples' Rights (hereinafter *the African Commission*), established under Article 30, is the treaty body monitoring

¹ First Organisation of African Unity Ministerial Conference on Human Rights in Africa, (12–16 April 1999), Grand Bay, Mauritius, Grand Bay Declaration and Plan of Action, paragraph 8 identifies the following as the causes of violations of human rights in Africa: (a) contemporary forms of slavery; (b) neo-colonialism, racism and religious intolerance; (c) poverty, disease, ignorance and illiteracy; (d) conflicts leading to refugee outflows and internal population displacement; (e) social dislocations which may arise from the implementation of certain aspects of structural adjustment programmes; (f) the debt problem; (g) mismanagement, bad governance, and corruption; (h) lack of accountability in the management of public affairs; (i) monopoly in the exercise of power; (j) harmful traditional practices; (k) lack of independence of the judiciary; (l) lack of independent human rights institutions; (m) lack of freedom of the press and association; (n) environmental degradation; (o) non-compliance with the provisions of the OAU Charter on territorial integrity and inviolability of colonial borders and the right to self-determination; (p) unconstitutional changes of governments; (q) terrorism; (r) nepotism; and (s) exploitation of ethnicity.

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implementation of the African Charter. Set up in 1987, it is mandated to watch over states' compliance of the human and peoples' rights therein contained and to ensure their protection. While it was not the purpose of this paper to review the African Commission, it is through its work that the Charter becomes a living document and not just words with little real strength when people need its protection. Reference has inevitably been made to its jurisprudence.

Article 66 of the African Charter provides that –

... special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

To date, two protocols have been enacted. The first is the Protocol on the Establishment of an African Court on Human and Peoples' Rights. Enacted on 10 June 1998, it entered into force on 25 January 2004. It will remain in force for a transitional period not exceeding one year or any period determined by the AU Assembly, after the entry into force of the Protocol of the Court of Justice and Human Rights.²

The second, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter the *Women's Protocol*), was adopted in Maputo, Mozambique, in 2003 and entered into force on 25 November 2005. So far, 26 countries have ratified the Women's Protocol.³ It provides for the protection of women's human rights and its key provisions are highlighted below.

Under Article 45(c) of the African Charter, the African Commission is mandated –

² A resolution to integrate the African Court on Human and Peoples' Rights (established by the Protocol to the African Charter) and that of the African Court of Justice (established under the Constitutive Act of the African Union) was adopted by the AU Summit in July 2004. A protocol merging the two courts – the Protocol of the Court of Justice and Human Rights – was adopted in June 2008 in Sharm el Sheikh, Egypt, replacing the 1998 and the 2003 protocols. See Protocol on the Statute of the African Court of Justice and Human Rights.

³ These are Algeria, Benin, Burkina Faso, Cape Verde, the Comoros, Djibouti, The Gambia, Ghana, Guinea-Bissau, Libya, Lesotho, Liberia, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, Senegal, the Seychelles, South Africa, Tanzania, Togo, and Zambia; available at <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf>; last accessed 8 March 2009.

Major African legal instruments

... to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation.

The Declaration of Principles on Freedom of Expression in Africa and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa were developed in pursuance to this provision. These are also reviewed as part of the body of 'soft law' developed by the African Commission.

The African Charter on the Rights and Welfare of the Child (hereinafter *the African Children's Charter*) was adopted at the 26th Ordinary Session of the Assembly of Heads of State and Government (OAU Assembly) on 11 July 1990 in Addis Ababa, Ethiopia. It entered into force on 29 November 1999. Its distinctive features are highlighted.

The 1969 OAU Refugee Convention addresses the specific circumstances of refugees in Africa. As one of the early documents within the African human rights system, it contains no provisions regarding groups with specific protection needs such as children and women, and yet they are at risk during displacement. These risks have been recognised and addressed to prevent violations and enhance protection through other regional human rights instruments setting standards relating to permissible conduct towards children and women facing forcible displacement in the relevant documents, that is, the Women's Protocol and the African Children's Charter. Given the 1969 OAU Refugee Convention's relevancy due to massive refugee movements in Africa, it remains a major document, and is also reviewed in this paper.

The Convention on Preventing and Combating Corruption is the AU's response to what was identified as one of the root causes of human rights violations on the continent during the First OAU Ministerial Conference on Human Rights in Africa.⁴ Its objectives and principles, as well as an overview of its main features, are presented.

It is recognised that the challenges of translating commitments to human rights at the regional level into tangible rights for individuals requires changing the attitudes of those in decision-making positions, teaching people about the existence and content of these rights, and being creative with solutions – be

⁴ See Footnote 1.

they legal or non-legal. Yet, it is an imperative which cannot be understated or minimised.

It is beyond the scope of this paper to present an in-depth analysis of each identified instrument. Therefore, the favoured approach has been to submit a short descriptive study, quoting abundantly from the texts. Reference is made to relevant case law developed by the African Commission, where applicable. In specific situations, comments are also given and reflections shared.

The African Charter on Human and Peoples' Rights

The African Charter is the foundational normative instrument for the protection and promotion of human rights in Africa. It has been applauded as a document which departs from the norms in that it contains civil, political, economic, social and cultural rights. In addition, it provides for “peoples’ rights” and several rights not found in other instruments; and specific “third-generation” or collective rights such as the right to development, the right to a satisfactory environment, the right to peace, and the right of people to dispose of their wealth and natural resources. Such an approach enhances universality and indivisibility, and demonstrates the interdependence attaching to all human rights – at least on paper. It has also been labelled as the –⁵

... newest, the least developed or effective, the most distinctive and the most controversial of the regional human rights regimes.

This part of the paper first situates the African Charter in its historical context and then goes on to discuss three specific aspects, namely, the ‘claw-back clauses’, the concept of duties, and finally, collective rights. A brief discussion on civil and political rights follows, before completing with a presentation of economic, social and cultural rights. It is submitted that, as the foundation document of the African human rights system, the Charter still has potential to provide protection of the rights in Africa through proactive interpretation and increased use of the individual complaint’s procedure.

Situating the African Charter in its historical context

The context from which the African Charter emerged requires to be briefly addressed. Post-colonial Africa in the 1960s and early 1970s was notorious for

⁵ Steiner & Alston (2000:354).

its excesses in human rights violations perpetrated by several leaders⁶ in defiance of the rule of law. The exact figure of those who lost their lives during that period would never be known, but hundreds were brutally massacred and thousands crossed borders to save their lives. Other dictators such as Mobutu Sese Seko in Zaïre (now *Democratic Republic of Congo*) moved in to exercise unlimited power at the expense of their population's development and welfare, leaving a legacy of human rights violations in their wake. Military coups followed one another in countries such as Nigeria, engendering civil wars and uprisings.

It was also a time when the Cold War between East and West was at its peak.⁷ The OAU, set up in 1963, stood by and watched silently, fettered by its conservative interpretation of national sovereignty and territorial integrity, which was the main argument to explain its inaction, even when massive violations were committed. It considered human rights to be in the realm of domestic matters, internal to the country concerned.

Discussions concerning the adoption of a treaty dealing with human rights for Africa started at a Congress of African jurists in Lagos, Nigeria, in 1961. The idea was further considered by French-speaking jurists in Dakar, Senegal, in 1969. Such a document became pressing in the light of egregious violations being witnessed across the continent. "Real impetus" was gained during the OAU's 16th Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979.⁸ The OAU adopted a decision requesting its Secretary General, Edem Kodjo, to organise a meeting entrusted with the preparation of a preliminary draft of the envisaged treaty.

A first draft, reflecting the history, values, traditions and economic needs of the continent, was produced by a selected group of jurists from November 28 to 7 December 1979, exhorted by Senegal's President Leopold Sedar Senghor to be inspired by "those of our traditions that are beautiful and positive" while constantly keeping in mind "our values and [the] real needs of Africa".⁹ The second draft of the Charter was prepared in Banjul, The Gambia, in June 1980 and in January 1981. This is why the document is also known as the *Banjul*

⁶ Macias Nguema in Equatorial Guinea, Jean Bedel Bokasa in the Republic of Central Africa, and Idi Amin Dada in Uganda showed the extent of State viciousness.

⁷ Mbazira (2006:338).

⁸ Pers. comm., Henry Reed Cooper, former Chief Justice of Liberia, April 2007.

⁹ Ankumah (1996:6).

Charter. On 27 June 1981, at its 18th General Assembly Meeting in Nairobi, Kenya, the Heads of State and Government of the OAU adopted the African Charter on Human and Peoples' Rights. It came into force on 21 October 1986.

While all the members of the African Union have adhered to the African Charter, its domestication, hence applicability by national laws, still remains an issue. It is left to the discretion of states parties to decide how to give effect to treaties in their national law. Some countries, like Namibia, include provisions defining the role of international law at the national level.¹⁰ South Africa mandates courts to take international law into consideration when interpreting its Bill of Rights. The Preamble to the 1992 Constitution of the Malagasy Republic adopts the African Charter and declares it to be an integral part of its law.¹¹

Among the 'dualist countries', Nigeria has enacted legislation to incorporate the African Charter into its national law. However, the African Commission holds the view that states are bound by ratification of the Charter, no matter what their system is, and —¹²

... any doubt that may exist regarding [a party's] obligations under the Charter is dispelled by reference to Article 1.

It also held that if a country (in the instant case, Nigeria) wanted to rescind its obligations by withdrawing its ratification, it would have to go through an "international process involving notice" and that it "cannot negate the effects of its ratification of the Charter through domestic action".¹³

¹⁰ Chapter XXI, Final Provisions, Article 144 of the Constitution of the Republic of Namibia: "International Law: Unless 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"; http://www.servat.unibe.ch/law/icl/wa00000_html, last accessed 21 March 2009.

¹¹ Preamble to the Constitution of Madagascar. http://www.servat.unibe.ch/law/icl/wa00000_html; last accessed 21 March 2009.

¹² *129/94 Civil Liberties Organization v Nigeria*, 9th Annual Activity Report [in *Compilation of Decisions of the African Commission on Human and Peoples' Rights 1994–2001*, IHRDA, Banjul 2002, pp.203–206]. Article 1 of the African Charter reads as follows: "The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them".

¹³ *129/94 Civil Liberties Organization v Nigeria*, 9th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.203–206], para. 13.

Selected features of the African Charter

The African Charter has remained the same as it was 28 years ago, except for the adoption of the above-mentioned protocols and the development of guidelines and principles in relation to specific guaranteed rights.¹⁴ The African Charter provides for amendments, but –

... [a] State party [has to] make a written request to that effect to the Secretary General of the Organisation of African Unity.¹⁵

‘Claw-back’ clauses

The African Charter contains several ‘claw-back’ clauses which can have the effect of curtailing a specific right in question in normal circumstances for specified public reasons.¹⁶ A number of civil and political rights are limited by, inter alia, terms such as “except for reasons and conditions previously laid down by law”,¹⁷ “subject to law and order”,¹⁸ or “within the law”.¹⁹ These limitations have been severely criticised, given the concern that they subject guaranteed rights to domestic law, thus weakening their content and scope. Such clauses are not unique to the African Charter. Article 10(2) of the European Convention on Human Rights represents one such instance, where the right to freedom of expression –

... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by the law and are necessary in a democratic society ...

and it goes on to specify the limits. The difference with the African Charter is that the ‘claw-back’ clauses were left rather broad.

Right from the early days when it started the examination of individual complaints, the African Commission rejected subjecting protected rights to domestic law.

¹⁴ In addition to the two discussed below, there are also the Robben Island Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002).

¹⁵ African Charter, Article 68.

¹⁶ Term coined by Professor Rosalyn Higgins, quoted in Udombana (2000:45).

¹⁷ African Charter, Article 6 (Right to liberty and security).

¹⁸ (ibid.: Article 8 – Freedom of conscience and religion).

¹⁹ (ibid.: Article 9 – Freedom of expression); discussed further below.

For example, in *Civil Liberties Organization (In respect of the Nigerian Bar Association) v Nigeria*, regarding freedom of association, the Commission held that –²⁰

... in regulating the use of this right, the competent authorities should not enact provisions which should limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.

The jurisprudence of the African Commission abounds in examples in which it has stated that limitations are to be in accordance with states parties' obligations under the Charter.²¹ Thus, the Commission was able to “neutralise the claw-back clauses”²² by relying on its duty to interpret the Charter in light of international human rights jurisprudence, as required by Articles 60 and 61.

Duties

Articles 27 to 29 in Part I of Chapter II of the African Charter emphasise the duties of the African citizen (if such a term could be used). Article 27(1) imposes duties on the individual towards his/her “family and society, the State and other legally recognised communities and the international community”, while being called upon to exercise his/her rights “with due regard to the rights of others, collective security, morality and common interest”.²³

While the inclusion of duties in an international instrument is not unique²⁴ to the African Charter, one author has considered it to be the Charter's “most radical

²⁰ *101/93 Civil Liberties Organization (in respect of the Nigerian Bar Association) v Nigeria*, 8th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.200–202], para. 16.

²¹ *147/95 and 149/96 Sir Dawda K Jawara v The Gambia*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 108–121]; *212/98 Amnesty International v Zambia*, 12th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.371–382].

²² Heyns (2002:143).

²³ African Charter, Article 27(2).

²⁴ For example, duties are found in The American Declaration on the Rights and Duties of Man, Chapter V. Personal Responsibilities, Article 32, Relationship between Duties and Rights, American Convention on Human Rights, both of which predate the African Charter. The American Convention on Human Rights was signed in 1969 and entered into force in 1978.

contribution to human rights law”.²⁵ The individual has inalienable rights which attach to him/her because of his/her humanity, and the State is held responsible for breaches of fundamental rights. The imposition of duties on the individual is viewed as giving the State the opportunity on a golden platter to restrict guaranteed human rights.

Wa Mutua views this as “simplistic” and considers that a “valid criticism” would be to question the “precise boundaries, content and conditions of compliance contemplated by the Charter”.²⁶ Furthermore, he invites the African Commission to clarify, in its jurisprudence, which – if any – of these duties are moral or legal obligations, and what the scope of their application ought to be. N Barney Pityana, a former Commissioner of the African Commission, holds the view that “[f]ar from duties creating an environment for a gratuitous invasion of rights, duties should be understood as reinforcing rights”,²⁷ and that the moral duties referred to in the Charter need to be seen as quite separate from the legal duties.

Collective rights – peoples’ rights

The Charter provides for “peoples’ rights”, also categorised as collective or “group rights”. These include the right of people to self-determination, political sovereignty over their natural resources, the right to development, and the right to a clean environment. Articles 19–26 specifying these rights have tended to be among the most controversial.

The Charter gives no definition to the term *people*. It has been left to the Commission to provide interpretation, therefore, depending on the cases brought before it. For example, in the *Mauritania* cases²⁸ dealing with slavery and discrimination against black Mauritians, amongst others, the African Commission interpreted “people” in Article 19²⁹ as representing a specific group of the population within the boundaries of a country.

²⁵ Wa Mutua (1995:339, footnote 4).

²⁶ (ibid.).

²⁷ Pityana (2002:230).

²⁸ 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l’Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l’Homme v Mauritania*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 161–191].

²⁹ “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.”

In the *Congrès du Peuple Katangais v Zaïre*,³⁰ the African Commission examined a claim of self-determination by the Katangese, as per the provisions of Article 20(1). It recognised that while all people had the right to self-determination, there might be a controversy as to the definition of *peoples*. It went on to give instances in which self-determination could be exercised, namely through “independence, self-government, local government, federalism, confederation, unitarism ...”.³¹ It felt —³²

... obligated to uphold the sovereignty and territorial integrity of Zaïre, member of the Organisation of African Unity and a party to the Charter.

This is a “no secessionist” approach, in line with the Commission’s historical background of preservation of a status quo as far as colonial boundaries were concerned.

In recent years, the African Commission has developed its work in the area of collective rights through, inter alia, a study on indigenous populations. The Commission established a Working Group on Indigenous Populations in Africa mandated to examine the concept of indigenous people and communities in Africa, study the implications of the African Charter and well-being of indigenous communities, consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities, and produce a report of its findings.³³

Land alienation and dispossession as well as the dismissal of indigenous communities’ customary land rights and other natural resources resulted in the “negation of their livelihood systems and deprivation of their means”.³⁴ As a consequence, the very existence of indigenous peoples was threatened and they were becoming destitute and poverty-stricken, in violation of the —³⁵

... African Charter (Article 20, 21 and 22), which states clearly that all peoples have the right to existence, the right to their natural resources and property, and the right to their economic, social and cultural development.

³⁰ 75/92 *Congrès du Peuple Katangais v Zaïre*, 8th Annual Activity Report [in Compilation 1994–2001, IHRDA, Banjul 2002, pp.359–360].

³¹ (ibid.:para. 4).

³² (ibid.:para. 5).

³³ African Commission on Human and Peoples’ Rights (2005).

³⁴ (ibid.:108).

³⁵ (ibid.).

Thus, the term *people* can lend itself to various interpretations, given its broad scope. It is submitted that the Commission can indeed play a great role in creating defining jurisprudence in this area, contributing to the advancement and respect of collective rights in Africa.³⁶

Civil and political rights

While the African Charter has been hailed as a unique document, a three-in-one formula containing all three generations of rights, one author notes that –³⁷

... the more ‘traditional’ civil and political rights constitute the daily staple of regional[,] and indeed domestic, human rights mechanisms.

Articles 2 and 3 of the Charter enshrine the underpinning principles of non-discrimination and equality before the law. The enjoyment of the rights and freedoms recognised in the Charter apply equally and to all –

... without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any opinion, national and social origin, fortune, birth or other status.

The inclusion of “other status” renders the list non-exhaustive, for example, discrimination on the basis of age, disability or sexual orientation could be read into it.

Other rights protected are –

- life and integrity of the person (Article 4)
- dignity, and freedom from slavery, the slave trade, torture, and cruel, inhuman or degrading punishment and treatment (Article 5)
- liberty and security of the person (Article 6)
- a fair trial (Article 7)
- freedom of conscience and religion (Article 8)
- freedom of expression (Article 9)
- freedom of association (Article 12)

³⁶ See also *155/96 Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, 15th Annual Activity Report [in *Decisions of the African Commission on Human and Peoples’ Rights on Communications 2002–2007*, IHRDA, Banjul 2008, pp.277–293] discussed below.

³⁷ Heyns (2002:137).

- participation in government (Article 13), and
- property (Article 14).

In this part of the paper, a brief examination will be made of the sacrosanct right to life and integrity of the person, in the absence of which all the other rights become immaterial. The right to a fair trial and to freedom of expression, as well as other civil and political rights, have also been dealt with as pertinent elsewhere in the paper.

Article 4 of the African Charter provides as follows:

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Through its case law, the Commission has progressively distilled the elements of the right to life. In its earlier decisions, the Commission had a tendency to be rather laconic in its pronouncements – stating the facts of a particular case and then declaring whether a violation of the right to life had occurred or not. For example, presenting the contention of the complainants in one particular case, the Commission states –³⁸

... Communication 47/90, in addition to alleged arbitrary arrests, arbitrary detention and torture, alleges extrajudicial executions which are a violation of Article 4.

It then goes to hold there has indeed been a violation of Article 4.³⁹

Contrast this with a later case, that of *Forum of Conscience v Sierra Leone*, where the Commission had this to say:⁴⁰

The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life. Having found above that the trial of 24 soldiers constituted a breach

³⁸ 25/89, 47/90, 56/91, 100/93 *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Inter africaine des Droits de l'Homme, Les Témoins de Jehovah v Zaïre*, 9th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.360–366], para. 43.

³⁹ (ibid.).

⁴⁰ 223/98, 14th Annual Activity Report [in *Compilation of Decisions 1994–2001*, IHRDA, Banjul 2002, pp. 331–334] para. 20.

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of due process of law as guaranteed under Article 7(1)(a) of the Charter, the Commission finds their execution an arbitrary deprivation of the right to life provided for in Article 4 of the Charter.

Although this process cannot bring the victims back to life, it does not exonerate the Government of Sierra Leone from its obligations under the Charter.

The Commission also found that to consider only deprivation of life as a violation of Article 4 would be too narrow an interpretation. It held as follows:⁴¹

It cannot be said that the right to respect for one's life and the dignity of his person ... would be protected in a state of constant fear and/or threats, as experienced by the [victim].

Therefore, the acts of security agents, which forced the victim into hiding to avoid arbitrary arrest, constituted a violation of Article 4.⁴²

The following are some instances where the Commission has held there has been a violation of Article 4:

- Shootings by police officers⁴³
- Executions based on the authority of a defective trial⁴⁴
- Denial of food and medical attention, burning people in sand and subjecting them to torture⁴⁵

⁴¹ 205/97 *Kazeem Aminu v Nigeria*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 282–286], para. 18.

⁴² (ibid.).

⁴³ 64/92, 68/92, 78/92 *Krishna Achutan (On behalf of Aleke Banda)*, *Amnesty International (On behalf of Orton and Vera Chirwa)*, *Amnesty International (On behalf of Orton and Vera Chirwa) v Malawi*, 8th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.155–160].

⁴⁴ 137/94, 134/94, 154/96 and 161/97 *International PEN, Constitutional Rights Project, Interights and Civil Liberties Organization (On behalf of Ken Saro Wiwa Jnr) v Nigeria*, 12th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.230–247] and 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.161–191].

⁴⁵ 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul

- Killings, disappearances, assassination by unknown people, which the government did not attempt to prevent or investigate afterwards,⁴⁶ and
- Massacre of a large number of Rwandan villagers by the Rwandan armed forces and the many reported extrajudicial executions for reasons of their membership of a particular ethnic group.⁴⁷

The Commission has adroitly used the right to life in the Charter to infer the right to food as well, thus demonstrating a holistic approach to all the rights therein protected. See the discussion on the SERAC Decision below.

Economic, social and cultural rights

The inclusion in the African Charter of economic, social and cultural rights at a time when the Cold War was in full swing can be considered as proof enough that the continent ignored the influences and effects of diverging world politics. Thus, Africa was endowed with a unique foundational document on which the continent's human rights system could be built.

Economic, social and cultural rights as guaranteed by the African Charter are not circumscribed by claw-back clauses and limitations, in comparison with civil and political rights.⁴⁸ There is an obligation on states parties to implement economic, social and cultural rights without the progressive approach envisaged in the UN International Covenant on Economic, Social and Cultural Rights.

The right of an individual to “freely take part in the cultural life of his community” and “the promotion and protection of morals and traditional values recognized by the community [as] the duty of the state” are enshrined in the Charter.⁴⁹

2002, pp.161–191].

⁴⁶ 74/92 *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, 9th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 72–76].

⁴⁷ 27/89, 46/91, 99/93, *Organisation Mondiale contre la Torture and Association Internationale des Juristes Démocrates, Comité International des Juristes (CIJ), Union Interafricaine des Droits de l'Homme v Rwanda*, 10th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 320–324]. These communications were filed before the 1994 genocide, but were decided afterwards, in 1996–1997.

⁴⁸ Odinkalu (2002:195).

⁴⁹ ACHPR, Article 17.

The State's duty is extended to "assist the family[,] which is the custodian of morals and traditional values recognised in the community".⁵⁰ In the *Mauritania* cases, the African Commission commented that –⁵¹

... [l]anguage is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him to take an active part in the community and in its activities. To deprive a man of such participation amounts to depriving him of his identity.

The SERAC Decision

The African Commission delivered a landmark decision in the jurisprudence of economic, social and cultural rights in the *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria* (referred to as *the SERAC Decision*).⁵² The contention was that operations of the military government of Nigeria, through the State oil company, the Nigerian National Petroleum Company – the majority shareholder in a consortium with Shell Petroleum Development Corporation – caused environmental degradation and health problems resulting from contamination of the environment among the Ogoni people.⁵³ The case was filed by two non-governmental organisations (NGOs) after the execution of Ogoni activist Ken Saro Wiwa.⁵⁴

⁵⁰ (ibid.:Article 18).

⁵¹ 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 161–191], para. 137.

⁵² 155/96 *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, 15th Annual Activity Report [in *Decisions of the African Commission on Human and Peoples' Rights on Communications 2002–2007*, IHRDA, Banjul 2008, pp.277–293].

⁵³ (ibid.:para. 1).

⁵⁴ 137/94, 134/94, 154/96 and 161/97 *International PEN, Constitutional Rights Project, Interights and Civil Liberties Organization (On behalf of Ken Saro Wiwa Jnr) v Nigeria*, 12th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.230–247].

The complainants alleged violations of the right to life,⁵⁵ the right to health,⁵⁶ the right to a healthy environment,⁵⁷ the right to property,⁵⁸ the right to housing and food, and the protection of the family.⁵⁹ The petroleum consortium disposed of toxic waste in the environment and local waterways, thus polluting water, air, soil and crops. The consortium also did not adequately maintain its facilities, causing avoidable spills near villages. Environmental pollution caused skin infections, gastrointestinal and respiratory diseases, increased risk of cancers, and neurological and reproductive problems. Security forces as well as unidentified gunmen attacked and burnt villages, killed inhabitants, and destroyed crops and animals, thus putting in jeopardy the villagers' food sources – amongst other things.

Drawing on international law, the Commission restated the four obligations of states regarding human rights: to respect, protect, promote and fulfil them. The Commission insisted that these obligations applied to all guaranteed rights contained in the Charter. The Commission found that the right to health and the right to a generally satisfactory environment were violated. While the Government had the right to produce oil, it had failed in its obligation to prevent environmental degradation. The right to a healthy environment –⁶⁰

... requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources.

The failure not only to involve local communities in decisions affecting their development but also to monitor the oil consortium's activities violated Nigeria's duty to protect its residents from exploitation and plundering of their wealth and natural resources. "[T]he Government of Nigeria facilitated the destruction of Ogoniland", in breach of Article 21.⁶¹

⁵⁵ African Charter, Article 4.

⁵⁶ (ibid.:Article 16).

⁵⁷ (ibid.:Article 24).

⁵⁸ (ibid.:Article 14).

⁵⁹ (ibid.:Article 18).

⁶⁰ *155/96 Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, 15th Annual Activity Report [in Decisions 2002–2007, IHRDA, Banjul 2008, pp.277–293], para. 52.

⁶¹ (ibid.:para. 58).

As indicated above, the complainants alleged violations of the right to shelter or to housing, a right which the African Charter does not explicitly guarantee. Using proactive interpretation, it found that –⁶²

... the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health ... the right to property, and the protection accorded to the family[,] forbids the wanton destruction of shelter

This right obliges a State not to destroy the housing of its citizens, and not to obstruct efforts by individuals or communities to rebuild destroyed homes. It encompasses the right to protection against forced evictions, harassment and other means of coercion detracting from the right to shelter. The Commission found that “the conduct of the Nigerian government clearly demonstrates the violation of this right enjoyed by the Ogoni as a collective right”.⁶³

The right to food is also not explicitly stated in the African Charter. The Commission found it closely linked to the dignity of human beings and, therefore, essential to the enjoyment of other rights such as health, education, work and political participation. A State is obliged “to protect and improve existing food sources and to ensure access to adequate food for all citizens”. Furthermore –⁶⁴

... the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples’ efforts to feed themselves.

The Commission reached the decision that the destruction and contamination of crops by government and non-State actors violated the duty to respect and protect the implied right to food.

The African Commission ordered the Nigerian Government to stop its attacks on Ogoni communities and leaders, to carry out investigations into the human rights violations, to prosecute those responsible for the violations, and to compensate the victims adequately. The government also had to prepare environmental and social impact assessments for future oil development and, finally, provide information on health and environmental risks.

⁶² (ibid.:para. 60).

⁶³ (ibid.:para. 63).

⁶⁴ (ibid.:para. 65).

The SERAC Decision is remarkable, not only given the array of rights dealt with, but also with regard to the approach taken, that is, creative interpretation to infer rights not expressly guaranteed in the African Charter. It drew from several sources, including the International Covenant on Economic, Social and Cultural Rights, and the jurisprudence of the European Court of Human Rights as well as the Inter-American Court of Human Rights.

Nonetheless, what impact such a decision has on the lives of those whose plight it highlights is a question that remains; the question is also relevant to those who suffer from similar situations in different contexts. Africa is beset with severe problems in the enjoyment of economic, social and cultural rights, with widespread difficulties in access to clean water, food security, education, adequate shelter, comprehensive health care, and environmental degradation, among others. The stark reality is that even if these rights were protected, a vast majority do not have access to them because the facilities simply do not exist.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

In addition to the broad provisions regarding the right to equality and freedom from discrimination, the African Charter contains only one specific Article referring to women in its 68 Articles. More precisely, it provides that —⁶⁵

... the state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the **woman** and the child as stipulated in the international declarations and conventions. [Emphasis added]

Inserting women's rights into the context of an article referring to the family and other vulnerable groups (children, the aged and the disabled) was considered problematic and inadequate. Furthermore, juxtaposing women and children could be construed as detrimental to over half of the African population, lacking the necessary specificity to enhance effective enjoyment of their rights.

It is submitted that this inadequacy could be a main reason why no specific complaint dealing with women's rights was ever forwarded to the African Commission for consideration under the individual complaints procedure.

⁶⁵ African Charter, Article 18(3).

Consequently, the African Commission's jurisprudence on women's rights is almost non-existent.

On the other hand, the African Charter can be considered as a catalyst for better protection of women's rights through the adoption of the Protocol on the Rights of Women in Africa. It presents several advances both for women in Africa and for those well beyond the continent's shores.

The preamble to the Protocol recalls that women's rights have been recognised and guaranteed in all international human rights instruments as inalienable, interdependent and indivisible human rights.⁶⁶ States parties are –⁶⁷

... firmly convinced that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated ...

and states parties are –⁶⁸

... determined to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights.

Selected key principles and provisions of the Protocol on the Rights of Women in Africa

Equality, elimination of discrimination, and participation

The Women's Protocol is premised on the principles of equality between the sexes, the elimination of discrimination against women, and their participation in all spheres of life. These fundamental principles run like a thread throughout the Protocol.

Discrimination is defined as –⁶⁹

... any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment

⁶⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Preambular para. 5.

⁶⁷ (ibid.:Preambular para. 13).

⁶⁸ (ibid.:Preambular para. 14).

⁶⁹ (ibid.:Article 1(f)).

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or the exercise by the women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

States parties are to combat –⁷⁰

... all forms of discrimination against women through appropriate legislative, institutional and other measures ... [and] take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist.

They are also required to –⁷¹

... commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women.

Regarding the other substantive provisions, women enjoy equal rights as refugees⁷² and in marriage,⁷³ and, in the case of separation, divorce or annulment of marriage, women enjoy equal rights to an equitable sharing of the joint property deriving from the marriage.⁷⁴ Concerning rights to inheritance, a widow has the right to an equitable share in inheritance of the property of her husband, and women and men have the right to inherit their parents' properties in equitable shares.⁷⁵ Elderly women are protected from discrimination based on age⁷⁶ and disabled women from discrimination on the basis of their disability.⁷⁷

Women have equal protection before the law, and equal representation in the judiciary and law enforcement organs.⁷⁸ Women have the right to equal participation in the political life of their countries; therefore, they participate without any discrimination and be equally represented at all levels with men in all electoral processes. Furthermore, they are equal partners with men at all

⁷⁰ (ibid.:Article 2(1)).

⁷¹ (ibid.:Article 2(2)).

⁷² (ibid.:Article 4).

⁷³ (ibid.:Article 6).

⁷⁴ (ibid.:Article 7).

⁷⁵ (ibid.:Article 21).

⁷⁶ (ibid.:Article 22).

⁷⁷ (ibid.:Article 23).

⁷⁸ (ibid.:Article 8).

levels in the development and implementation of State policies and development programmes.⁷⁹ With regard to the right to peace, women have the right to participate in the promotion and maintenance of peace.⁸⁰

Concerning the right to education and training, states parties are bound to take appropriate measures to eliminate all forms of discrimination against women, and guarantee equal opportunity and access in the sphere of education and training. States are also obliged to eliminate all stereotypes in textbooks, syllabuses and the media perpetuating such discrimination.⁸¹

As far as economic and social welfare rights are concerned, states parties guarantee equal opportunities in work and career advancement, as well as other economic opportunities. States are also obliged to promote equality of access to employment, equal remuneration for jobs of equal value, and equal application of taxation laws to both sexes.⁸² Women have equal access to adequate housing, whatever their marital status.⁸³ The Women's Protocol further requires the participation of women "at all levels" in the determination of cultural policies and in the formulation of cultural practices.⁸⁴

Moreover, states parties are obliged to ensure greater participation by women in the planning, management and preservation of the environment and sustainable use of natural resources "at all levels".⁸⁵ States have the obligation to introduce a gender perspective in national development procedures and ensure participation by women "at all levels" in the conceptualisation, decision-making, implementation and evaluation related to development policies and programmes.⁸⁶

Public v private spheres of life

One of the positive gains in the field of human rights protection generally, but more specifically regarding women's human rights, is the deconstruction of the

⁷⁹ (ibid.:Article 9).

⁸⁰ (ibid.:Article 10).

⁸¹ (ibid.:Article 12).

⁸² (ibid.:Article 13).

⁸³ (ibid.:Article 16).

⁸⁴ (ibid.:Article 17).

⁸⁵ (ibid.:Article 18).

⁸⁶ (ibid.:Article 19).

formerly strict divide between the public and private spheres of life. This division represented the basis on which states justified their reluctance to ‘interfere’ in domestic violence cases, for example, arguing that such behaviour fell within the confines of the ‘private’ sphere. Keeping the woman’s world restricted to the home acted as a means to keep control over her.

The public/private divide debate is still alive, however, and it would seem that it is a situation of two steps forward and one backward, but still with gradual progress for the advancement of women’s rights. For example, with reference to the definition of violence against women in the Women’s Protocol, reference is specifically made to “deprivation of fundamental freedoms in private or public life”, which settles the matter positively.

Violence against women

The Women’s Protocol addresses the issue of violence against women head on. Explicit mention of violence against women is made in Article 4, which deals with the rights to life, integrity and security of the person. States parties are obliged to prohibit “all forms of exploitation, [and] cruel, inhuman or degrading punishment and treatment”. They are bound to take appropriate and effective measures to –⁸⁷

... 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 in public.

Article 4 is quite comprehensive, with obligations on states parties ranging from the identification of causes and consequences of violence with a view towards their elimination,⁸⁸ to the establishment of mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence.⁸⁹

The Women’s Protocol gives a definition of *violence against women* at Article 1, as follows:

“Violence against women” shall mean all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the

⁸⁷ (ibid.:Article 4(2)(a)).

⁸⁸ (ibid.:Article 4(2)(c)).

⁸⁹ (ibid.:Article 4(2)(f)).

threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflict or of war.

In comparison with the definition in the UN Declaration on the Elimination of Violence against Women,⁹⁰ the Women's Protocol's version extends violence against women to conflict situations. History provides countless examples where women were considered as 'the spoils of war'. A case in point was during the Rwandan genocide, where women were targeted because of their sex and the violence inflicted upon them was even more atrocious as a result.⁹¹

Elimination of harmful practices

Many harmful practices, be they traditional or deriving from customs, may be viewed as violations of the human rights of women through the perpetuation of violence against them. To name but a few such practices: female genital mutilation (FGM), forced marriages, child marriages, levirate and similar forms of marriage, the treatment of widows generally by the community, and food taboos.

Article 5 of the Women's Protocol deals exclusively with women's protection from harmful practices. States parties are obliged to –

... prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards.

Harmful practices are described as –⁹²

... all behaviour, attitudes and/or practices that negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.

All forms of FGM, scarification, medicalisation and para-medicalisation of FGM are prohibited through legislative measures backed by sanctions.⁹³

⁹⁰ Article 1, Declaration on the Elimination of Violence against Women, A/RES/48/104, adopted by the UN General Assembly on 20 December 1993.

⁹¹ The Prosecutor v Jean Paul Akayesu, Case No. ICTR-96-4-T.

⁹² Women's Protocol, Article 1(g).

⁹³ (ibid.:Article 5).

The language of Article 5 should be contrasted with that of Article 21 of the African Charter on the Rights and Welfare of the Child,⁹⁴ which deals with the protection of children from harmful *social and cultural*⁹⁵ practices. There is no mention of cultural, traditional or customary practices in the Women's Protocol.

Firsts in the Women's Protocol

The Women's Protocol contains "a number of global firsts"⁹⁶ in relation to women's human rights. Some examples are highlighted herein.

The controversial issue of monogamy and polygamy is resolved for the first time in an explicit manner by indicating that "monogamy is encouraged as the preferred form of marriage", and "rights of women ... in polygamous marital relationships are promoted and protected".⁹⁷ It is also the first time that an international treaty creates a specific obligation for the elimination of FGM.

The Women's Protocol presents the first articulation in an international human rights treaty of a woman's right to abortion,⁹⁸ medically, —⁹⁹

... in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

Furthermore, the Women's Protocol is the first human rights instrument that specifically highlights women's rights in the context of the HIV and AIDS pandemic.¹⁰⁰ Women have —¹⁰¹

... the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS ...

and the right to be informed on their health status, including as regards HIV and AIDS.

⁹⁴ See below.

⁹⁵ Author's emphasis.

⁹⁶ Centre for Reproductive Rights (2006).

⁹⁷ Women's Protocol, Article 6(c).

⁹⁸ Centre for Reproductive Rights (2006).

⁹⁹ Women's Protocol, Article 14(2)(c).

¹⁰⁰ Durojaye (2006:188).

¹⁰¹ Women's Protocol, Article 14(2)(d).

The Women's Protocol is also the first binding treaty in international law introducing a gender perspective in national development procedures.¹⁰²

Last, but not least, it is the first human rights treaty to acknowledge that the implementation of trade rules can have a disparate impact on women's rights.¹⁰³ It therefore imposes an obligation on states parties to –¹⁰⁴

... ensure that the negative effects of globalization and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

Concluding remarks

The above represents an impressive catalogue of rights, aiming at equality, non-discrimination, increased participation and gender sensitivity, all leading to the empowerment of women in Africa. Yet women remain persistently unequal partners in their homes, communities, countries and at continental level.

As an example, customary laws relating to marriage, family, inheritance, and land rights still endure and are given precedence over domestic laws. They perpetuate centuries-old discriminatory practices denying women the very fundamental human rights contained in the Women's Protocol. Domestication and implementation of the Women's Protocol requires innovative approaches from governments as well as women's rights advocates, who, despite prevailing circumstances, have reason to celebrate the adoption of this ground-breaking instrument.

In international law, states take up the obligation, upon acceding to or ratifying a treaty, to bring their domestic law – not only the enacted ones through the formal legislative process, but also customary and traditional law – into conformity with the provisions of the treaty in question. Therefore, it is incumbent on states parties to a human rights treaty to change their religious and customary law even in view of the “difficulty and complexity of the task”.¹⁰⁵

¹⁰² (ibid.:Article 19(a)).

¹⁰³ Mengesha (2006:208).

¹⁰⁴ Women's Protocol, Article 19(c).

¹⁰⁵ An'Naim (1994:184).

Declaration of Principles on Freedom of Expression in Africa

Freedom of expression is a basic human right and –¹⁰⁶

... a potent and indispensable instrument for the creation and maintenance of a democratic society and the consolidation of development.

Nonetheless, the right to free expression and access to information remains under threat, with countless impingements due to restrictive laws and practices. With repressive laws still on statute books across Africa, legal guarantees for their enjoyment are weak, or worse, non-existent.

Even today, exercising the right to free expression can be fraught with danger. The following gives a non-exhaustive list of prevalent perils: harassment, assaults and attacks, persecutions, prosecutions and civil suits, various bans,¹⁰⁷ imprisonment, disappearances¹⁰⁸ and murders.¹⁰⁹ Such dangers or threats thereof affect veteran journalists or media professionals¹¹⁰ as well as human rights defenders and ordinary citizens daily.¹¹¹

It befits to refer to the adoption in 2000 of the Constitutive Act of the African Union, reiterating the often cited “respect for democratic principles, human rights, the rule of law and good governance”,¹¹² and the African Charter on

¹⁰⁶ African Commission, Resolution on Freedom of Expression adopted at its 29th Ordinary Session in Tripoli, Libya, in May 2001, Preambular para. 2.

¹⁰⁷ In the wake of the African Union Summit in June 2006, authorities in The Gambia, host of the Summit and of the African Commission on Human and Peoples’ Rights, banned a Forum on Freedom of Expression meant to bring together journalists and members of civil society organisations, on the grounds that no prior official authorisation had been obtained.

¹⁰⁸ On 5 June 2008, the Court of Justice of the Economic Community of West African States (ECOWAS) gave a ruling ordering the release of Chief Ebrima Manneh, a Gambian journalist detained incommunicado since his arrest on 11 July 2006.

¹⁰⁹ Said Tahlil, former Director of HornAfrik, one of Somalia’s leading radio and television stations, was gunned down on 3 February 2009 in the course of duty; see the press statement by the Committee to Protect Journalists, “*Another murder in Somalia as HornAfrik director is killed*”; available at <http://www.cpj.org>; last accessed 7 March 2009.

¹¹⁰ Baglo (2008).

¹¹¹ Similar concerns were expressed in the African Commission’s Resolution on Freedom of Expression adopted at its 29th Ordinary Session in Tripoli, Libya, in May 2001.

¹¹² Article 4(m), African Union Constitutive Act.

Democracy, Elections and Governance¹¹³ at this juncture. The latter Charter calls for the “holding of regular, transparent, free and fair elections”, and it directs states to “take all appropriate measures to ensure constitutional rule, particularly constitutional transfer of power”.¹¹⁴ In the recent past, the continent witnessed attacks on these very principles. The most notorious instances were the presidential and legislative elections in Kenya on 27 December 2007, and the presidential elections in Zimbabwe six months later, on 27 June 2008. Both impacted negatively on freedom of expression.

In Kenya, an order was issued on 30 December 2007 to ban live broadcasts, which in effect imposed a media blackout regarding the outbreak of violence following the controversial re-election of President Mwai Kibaki. The ban was lifted on 4 February 2008, following a lawsuit filed by the Media Institute and the Kenya Editors Guild in the High Court of Kenya against the government to quash the ban, accompanied by challenges from civil society and international media.¹¹⁵

Several human rights defenders received death threats in the aftermath of these contentious elections. They were targeted for having voiced their views against what they considered abnormalities during the election process, and against violations committed by the police and armed groups across Kenya. As a measure of precaution for their personal safety and that of their families, some of them stopped making declarations in public.¹¹⁶

In Zimbabwe, in the run-up to the presidential elections, –¹¹⁷

... numerous journalists and leading cast members of plays perceived as critical of the government, were allegedly harassed, arrested and some detained ... [and] journalists

¹¹³ While 25 countries have signed this document, only Mauritania has ratified it; available at http://www.africa-union.org/root/au/Documents/Treaties/list/Charter_on_Democracy_and_Governance.pdf; last accessed 27 March 2009.

¹¹⁴ Article 3(3), African Charter on Democracy, Elections and Governance, adopted on 30 January 2007.

¹¹⁵ Article 19, *Around Africa – January 2008*; available at <http://www.article19.org>; last accessed 5 March 2009.

¹¹⁶ Author’s interviews in Nairobi, Kenya, in January 2008.

¹¹⁷ Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, presented at the 44th Ordinary Session of the African Commission on Human and Peoples’ Rights, 10–24 November 2008, Abuja, Federal Republic of Nigeria; on file with the author.

allegedly ... convicted based on provision of the media law for offences such as “intentionally publishing falsehoods”.

The seminal document protecting human rights in Africa, the African Charter, provides for freedom of expression and access to information “within the law”.¹¹⁸ Considering that these provisions did not offer the much sought-after guarantees, the African Commission developed a Declaration of Principles on Freedom of Expression in Africa, adopted at its 32nd Ordinary Session in 2002.

The first objective of this contribution is to analyse the scope of the right to freedom of expression and access to information through the jurisprudence developed by the Commission. Secondly, it proposes a bird’s eye view of the Declaration of Principles on Freedom of Expression.

Scope of freedom of expression and the right to information

The African Commission ruled that –¹¹⁹

... freedom of expression is a basic human right, vital to an individual’s personal development and political consciousness, and to his participation in the conduct of public life in his country.

In a subsequent case, the Commission held that –¹²⁰

... in keeping with its important role of promoting democracy in the continent, the African Commission should also find that a speech that contributes to political debate must be protected.

Moreover, Article 9 of the African Charter comprises the right to receive information and to express one’s opinion. Therefore, the intimidation and arrest or detention of journalists for articles published and questions asked deprived not only the journalists of their rights to freely express and disseminate their opinions, but also the public of their right to information.¹²¹

¹¹⁸ “Article 9(1) Every individual shall have the right to receive information. (2) Every individual shall have the right to express and disseminate his opinion within the law.”

¹¹⁹ *140/94, 141/94, 145/95 Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.248–256], para. 36.

¹²⁰ *228/99 The Law Offices of Ghazi Suleiman v Sudan*, 16th Annual Activity Report [in *Decisions 2002–2007*, IHRDA, Banjul 2008, pp. 352–361], para. 53.

¹²¹ *147/95 and 149/96 Sir Dawda K Jawara v The Gambia*, 13th Annual Activity Report [in

The proscription of specific newspapers without a hearing to allow them to defend themselves represents harassment of the press. In addition, it has the effect of hindering those directly affected to disseminate their opinions while posing an immediate risk of self-censorship.¹²²

Article 9 guarantees to every individual the right to free expression, within the confines of the law.¹²³ Implicit in this is that if such opinions were contrary to laid-down laws, the affected individual or government has the right to seek redress in a court of law. The Commission considered this to be the essence of the law of defamation. Therefore, it found a violation of Article 9 in circumstances where the government opted to arrest and detain a complainant without trial and to subject him/her to a series of inhuman and degrading treatments.¹²⁴

However, while the dissemination of opinions may be restricted by law, it does not mean that the national law can set aside the right to express and disseminate one's opinion guaranteed at international level. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and, indeed, the whole essence of treaty-making. The justifications of limitations are required to be strictly proportionate with and absolutely necessary for the anticipated advantages. Most importantly, a limitation may not erode a right such that the right itself becomes illusory.¹²⁵

The Commission reiterated that there was no derogation allowed in the Charter and that, where it was necessary to restrict rights, the restriction should be as minimal as possible and should not undermine fundamental rights guaranteed under international law. In imposing a blanket restriction on the freedom of expression, a state party would be committing a violation of the spirit of Article 9(2).¹²⁶

Compilation 1994–2001, IHRDA, Banjul 2002, pp. 108–121], para. 63.

¹²² *140/94, 141/94, 145/95 Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.248–256], para. 37.

¹²³ See above discussion on 'claw-back' clauses.

¹²⁴ *232/99 John D Ouko v Kenya*, 14th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.144–150], para. 28.

¹²⁵ *140/94, 141/94, 145/95 Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.248–256], para. 40.

¹²⁶ *48/90, 50/91, 52/91, 89/93, Amnesty International, Comité Loosli Bachelard, Lawyers'*

The later case of *Liesbeth Zegveld and Mussie Ephrem v Eritrea*¹²⁷ reaffirmed the above principles, which were further elaborated on in the Declaration of Principles on Freedom of Expression in Africa. The Declaration lays down a more comprehensive framework to further strengthen freedom of expression and access to information in relation to Article 9 of the African Charter on Human and Peoples' Rights.

Bird's eye view of the Declaration of Principles on Freedom of Expression in Africa

The Declaration expanded on the meaning and scope of *freedom of expression* and *access to information* as provided for in the Charter and the Commission's own case law in its interpretation of Article 9. Also, it addressed gaps and shortcomings in the enjoyment of freedom of expression and access to information.

In the Preamble to the Declaration, the African Commission reaffirms the –¹²⁸

... fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms.

In Principle I(1), *freedom of expression* is defined to include –

... the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers.

The definition expands that of the Charter and gives scope to address new forms of expression through modern channels.

Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002: 335–352], para. 80. All of these communications pertain to the situation in Sudan between 1989 and 1993, with arbitrary arrests and detentions that took place following a coup on 30 July 1989. Hundred of members of opposition groups, trade unionists, lawyers, and human rights activists were detained and arrested following a decree that permitted the detention of anyone “suspected of being a threat to political or economic security” under a state of emergency.

¹²⁷ 250/02 *Liesbeth Zegveld and Mussie Ephrem v Eritrea*, 17th Annual Activity Report [in *Decisions 2002–2007*, IHRDA, Banjul 2008, pp.124–136].

¹²⁸ Preambular para. 1, Declaration of Principles on Freedom of Expression in Africa.

Freedom of expression and information is stated in the Declaration to be a “fundamental and inalienable human right and an indispensable component of democracy”. Specific reference is made to this fundamental principle in *The Law Office of Ghazi Suleiman v Sudan*.¹²⁹ It restates the basic principle of equal opportunity and non-discrimination in the exercise of the “right to freedom of expression and to access information”.¹³⁰

No “arbitrary interference” is permitted in the enjoyment of freedom of expression. Any restriction would have three components: it should (i) be provided by the law; (ii) serve a legitimate interest; and (iii) be necessary in a democratic society.¹³¹

The Charter makes no specific reference to freedom of the media or the press. The practice thus far has been for the African Commission to consider such issues, through its decisions, under the broad ambit of Article 9. Broadcasting (private and public), print media and attacks on media practitioners are addressed in some detail in the Declaration as well.

States should encourage a diverse, independent private broadcasting sector. The principles do not favour a state monopoly of broadcasting, which is considered incompatible with freedom of expression. An independent regulatory body should be responsible for issuing broadcasting licences and for observance of licence conditions.¹³²

With regard to public broadcasting, the principles provide that State- and government-controlled broadcasters should be transformed into public service broadcasters, accountable to the public through legislature rather than to the government. The editorial independence of public broadcasters should be guaranteed. Furthermore, their public service ambit should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.¹³³

¹²⁹ 228/99 *The Law Office of Ghazi Suleiman v Sudan*, 16th Annual Activity Report [in *Decisions 2002–2007*, IHRDA, Banjul 2008, pp. 352–361], para. 40.

¹³⁰ Declaration of Principles on Freedom of Expression in Africa, Principle I (2).

¹³¹ (*ibid.*:Principle II).

¹³² (*ibid.*:Principle V).

¹³³ (*ibid.*:Principle VI).

Concerning the print media, no registration system should impose substantive restrictions on the right to freedom of expression. In addition, efforts should be made to increase the scope of circulation of media, particularly to rural communities.¹³⁴

Attacks on media practitioners are considered to undermine independent journalism, freedom of expression and the free flow of information. Such attacks include murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, and the material destruction of communications facilities. States are obliged to take effective measures to prevent such attacks. When they occur, states have an obligation to investigate them and punish perpetrators, while ensuring that victims have access to effective remedies.¹³⁵ In addition, media practitioners are not required to reveal confidential sources of information or to disclose other material held for journalistic purposes, except in specific circumstances, clearly laid down in the Declaration.¹³⁶

In conclusion, the Declaration of Principles on Freedom of Expression in Africa acts as a point of reference to evaluate states parties' compliance with Article 9. States parties to the African Charter are pressed into make every effort to give practical effect to the principles.

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

The right to a fair trial protected by Article 7 of the Charter is a pillar of the rule of law. In the African Charter, this right should be viewed in conjunction with the duty befalling states under Article 26 to guarantee the independence of the courts.

The Commission explained the nexus between Articles 7 and 26 in *Civil Liberties Organization v Nigeria*, saying that —¹³⁷

¹³⁴ (ibid.:Principle VIII).

¹³⁵ (ibid.:Principle XI).

¹³⁶ (ibid.:Principle XV).

¹³⁷ *129/94 Civil Liberties Organization v Nigeria*, 9th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.203–206], para. 15.

Major African legal instruments

... [w]hile Article 7 focuses on the individual's right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right. This Article clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual's right against the abuses of State power.

The right to a fair trial and the duty of states to guarantee the independence of courts have been the substance of a high percentage of cases decided by the Commission. However, in the early days, it felt the void and gaps in the terse provisions of the Charter and started to have recourse to its powers under Articles 60 and 61 to borrow from other international law instruments to beef up the protection afforded by Article 7. For example, in *Media Rights Agenda v Nigeria*, it said the following:¹³⁸

Neither the African Commission nor the Commission's Resolution on the Right to Recourse Procedure and Fair Trial contain any express provision for the right to public trial. That notwithstanding, the Commission is empowered by Articles 60 and 61 of the Charter to draw inspiration from international law on human and peoples' rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine. Invoking these provisions, the Commission calls in aid General Comment 13 of the UN Human Rights Committee on the right to a fair trial.

Recognising the need to further strengthen and supplement the provisions relating to fair trial in the African Charter¹³⁹ and to reflect international standards, the African Commission established a Working Group in 1999 to prepare general principles and guidelines on the right to a fair trial and legal assistance under the Charter. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa were adopted at the AU Heads of State and Government Summit in Maputo, Mozambique, in 2003.

Overview of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

The Principles and Guidelines are fairly extensive, covering a broad spectrum of issues from general principles applicable to all legal proceedings to more specific

¹³⁸ 224/98 *Media Rights Agenda v Nigeria*, 14th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.286–300], para. 66.

¹³⁹ Specifically Articles 5, 6, 7 and 26 of the Charter.

ones such as *locus standi*, the role of prosecutors, legal aid and assistance, and children and the right to a fair trial.

The Principles and Guidelines seek predominantly to protect individuals from unlawful and arbitrary infringements of their basic rights, such as the right to life and liberty.¹⁴⁰ In *Avocats Sans Frontières (on behalf of Gaëtan Bwampamy) v Burundi*, the African Commission noted that –¹⁴¹

... the right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all.

Among the general principles applicable to all legal proceedings, a fair and public hearing is given prominence. A fair hearing enshrines the principle of equality – “equality of arms between parties to a proceeding, whether they are administrative, civil, criminal or military”,¹⁴² equality of all persons before any judicial body,¹⁴³ equality of access by women and men to judicial bodies, as well as equality before the law in any legal proceedings.¹⁴⁴ Respect for the inherent dignity of human persons is stressed, with specific mention made about the dignity of women who participate in any legal proceedings.¹⁴⁵

No undue delay

A fundamental element of a fair hearing is the –¹⁴⁶

... entitlement to a determination of ... rights and obligations without undue delay and with adequate notice of and reasons for the decisions.

The African Commission found a violation of Article 7 where several people were arbitrarily arrested by security forces and never brought before a court,

¹⁴⁰ Udombana (2006:301).

¹⁴¹ *231/99 Avocats Sans Frontières (On behalf of Gaëtan Bwampamy) v Burundi*, 14th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.53–60].

¹⁴² Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A(2)(a).

¹⁴³ (*ibid.*:Article A(2)(b)).

¹⁴⁴ (*ibid.*:Article A(2)(c)).

¹⁴⁵ (*ibid.*:Article A(2)(d)).

¹⁴⁶ (*ibid.*:Article A(2)(i)).

even if they were eventually set free.¹⁴⁷ In another case, where a complainant was detained in prison for seven years without trial, the Commission held it was a violation of Article 7.¹⁴⁸ However, the Commission itself falls foul of this provision in that its efficiency in delivering decisions in cases brought to it is quite poor. A case in point is the SERAC Decision discussed above, which was lodged in 1996. The decision was delivered in 2000, at a time when the military regime which perpetrated the violations was no longer in power.

Public hearings

All hearings are public; however, in camera hearings are permitted only —¹⁴⁹

- ... (1) in the interest of justice for the protection of children, witnesses or identity of victims of sexual violence; [and]
- (2) for reasons of public order or national security in an open and democratic society that respects human rights and the rule of law.

Furthermore, judgements in legal proceedings are pronounced in public. In *Media Rights Agenda v Nigeria*,¹⁵⁰ relying on comments of the UN Human Rights Committee, the African Commission held that trials should be in public, even if this was not provided for in the African Charter or the Commission's Resolution on the Right to Recourse Procedure and Fair Trial.

Independence of judicial bodies

The independence of judicial bodies is to be guaranteed by domestic laws, including the constitution, and “is respected by the government, its agencies and authorities”.¹⁵¹ The Guidelines and Principles reaffirm the basic precept relating to security of tenure so important in the separation of powers, in that judicial officers —¹⁵²

¹⁴⁷ 74/92 *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, 9th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 72–76].

¹⁴⁸ 103/93 *Alhassan Abubakar v Ghana*, 10th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.133–135].

¹⁴⁹ (ibid.:Article A(3)(f)).

¹⁵⁰ 224/98 *Media Rights Agenda v Nigeria*, 14th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.286–300] at p. 293).

¹⁵¹ (ibid.:Article A(4)(a)).

¹⁵² (ibid.:Article A(4)(p)).

... may only be removed or suspended from office for gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties.

Actio popularis

The Principles and Guidelines provides for *actio popularis*, thus allowing individuals, groups of individuals or NGOs not directly affected by human rights violations to lodge cases on behalf of victims. On many occasions, this principle has permitted NGOs to bring cases for consideration before the African Commission on behalf of groups of victims.¹⁵³ This is a crucial provision, as a close scrutiny of the individual communications procedure under Article 55 of the African Charter does not explicitly provide for NGOs to institute cases on behalf of victims. Nevertheless, the Guidelines and Principles are addressed to states parties and *locus standi* provisions in several national jurisdictions still do not cater for *actio popularis*.

Military courts and special tribunals

Of particular relevance in Africa, the Principles and Guidelines state that military or other special tribunals that –¹⁵⁴

... do not use the duly established procedure of the legal process should not be created to displace the jurisdiction belonging to ordinary judicial bodies.

Furthermore, the Principles and Guidelines reiterate the right of civilians not to be tried by military courts, and prohibit special or military tribunals to try offences which fall under the jurisdiction of ordinary courts.¹⁵⁵ A similar provision features under Article 5 of the UN Basic Principles on the Independence of the Judiciary.¹⁵⁶

¹⁵³ See e.g. *155/96 Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, 15th Annual Activity Report [in *Decisions 2002–2007*, IHRDA, Banjul 2008, pp.277–293].

¹⁵⁴ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article A(4)(e).

¹⁵⁵ (*ibid.*:Article L).

¹⁵⁶ This article stipulates as follows: “Everyone shall have the right to be tried by the ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals”.

Examples of states that contravene the provision still prevail on the continent, however. For instance, in the Democratic Republic of Congo (DRC), military courts are competent to try cases which normally fall under the jurisdiction of ordinary courts.¹⁵⁷ Such military or special courts can present serious problems as far as the equitable, impartial and independent administration of justice is concerned.¹⁵⁸

Non-derogability

The Principles and Guidelines use strong language in the provision on non-derogability. Accordingly, no circumstances whatsoever – be it a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency – can be invoked to justify derogations from the right to fair trial. This is a reaffirmation of the non-derogability principle established by the African Commission on Human and Peoples' Rights in one of its early decision against Chad.¹⁵⁹

Effective remedy

Regarding the right to an effective remedy, the Principles and Guidelines provide that –¹⁶⁰

... the granting of amnesty to absolve perpetrators of human rights violations from accountability violates the rights of victims to an effective remedy.

Legal aid and legal assistance

Given that the vast majority of ordinary people on the continent do not have access to legal aid and to the courts, it is extremely pertinent that the Guidelines

¹⁵⁷ In the DRC, military courts are competent over cases dealing with human rights violations committed by soldiers in violation of principles of international law. Leandro Despouy, the UN Special Rapporteur on the Independence of Judges and Lawyers, mentioned this in the report following his mission to the DRC (15–21 April 2007). See Despouy (2008).

¹⁵⁸ From the General Comment on Article 14 (Right to a Fair Trial), International Covenant on Civil and Political Rights, quoted in *224/98 Media Rights Agenda v Nigeria*, 14th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.286–300], para. 65.

¹⁵⁹ *74/92 Commission Nationale des Droits de l'Homme et des Libertés v Chad*, 9th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.72–76].

¹⁶⁰ (ibid.:Article C(d)).

and Principles assert the right to legal aid and legal assistance in both criminal and civil cases.¹⁶¹ Indeed, in the case of *Avocats Sans Frontières (on behalf of Gaëtan Bwampamy) v Burundi*, the Commission recalled “emphatically ... that the right to legal assistance is a fundamental element of the right to a fair trial”.¹⁶²

Where the interest of justice so require, an accused or a party in a civil case has a right to have legal assistance without payment if s/he does not have sufficient means. Article H(b) further provides for criteria to determine the interest of justice. In a criminal case, these are the seriousness of the offence and the severity of sentence. In a civil matter, the complexity of the case and the ability of the party to be adequately self-represented, the rights affected and the likely outcome of the case on the wider community should be considered.¹⁶³ In capital offences, legal aid and representation are always required. The right to an effective defence or representation is stressed, as is the right to choose one’s own legal representative at all stages of a case.

The Women’s Protocol also makes specific reference to legal aid, but the duty on the State is limited to ensuring “support to local, national, regional and continental initiatives directed at providing women [with] access to legal services, including legal aid”.¹⁶⁴

The Principles and Guidelines implicitly recognise that the challenge to provide legal aid and assistance requires the participation of a variety of legal service providers and partnerships with different stakeholders. They therefore call on professional associations of lawyers to cooperate in the organisation and provision of services, facilities and other resources. In addition, lawyers should ensure that they offer their services when legal assistance is provided through a judicial body and that, where no legal aid is available in important or serious human rights cases, they provide legal representation to the accused or party in a civil case without any payment by him or her.¹⁶⁵ Specific reference is made to the role

¹⁶¹ (ibid.:Article H(a)).

¹⁶² 231/99 *Avocats Sans Frontières (On behalf of Gaëtan Bwampamy) v Burundi*, 14th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.53–60], para. 30.

¹⁶³ (ibid.:Article H(b)).

¹⁶⁴ Women’s Protocol, Article 8(b).

¹⁶⁵ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Article H(f).

that paralegals could play in the provision of legal assistance,¹⁶⁶ and NGOs are encouraged to establish legal assistance programmes and to train paralegals.¹⁶⁷

Concluding remarks

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa attempt to collate standards relevant to fair trial in one single document. Many of these norms can also be found in the several non-treaty standards at universal level.¹⁶⁸ Also, several of these principles have been distilled from the Commission's own case law. They serve as benchmarks when determining state compliance. While the Guidelines and Principles do not have the binding legal force of a treaty, they are strongly persuasive, in that they have been formally accepted by the AU.

The African Charter on the Rights and Welfare of the Child

Children in Africa face enormous, even life-threatening, vulnerabilities. Out of an extensive list, the following represent the most challenging ones affecting large proportions of African children:

- Infant and child mortality are among the highest in the world¹⁶⁹
- They are exposed to malnutrition and diseases
- The HIV and AIDS pandemic causes havoc with their tender lives, either through suffering from opportunistic diseases, having to care for ailing parents, or forcing them to take on responsibilities within child-headed households
- They have limited access to education¹⁷⁰

¹⁶⁶ (ibid.:Article H(g)).

¹⁶⁷ (ibid.:Article H(i)).

¹⁶⁸ The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; The Standard Minimum Rules for the Treatment of Prisoners; The Basic Principles on the Role of Lawyers; The Guidelines on the Role of Prosecutors; The UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty; The UN Basic Principles on the Independence of the Judiciary.

¹⁶⁹ UNDP (2007:264). Life expectancy at birth for the period 2000–2005 in sub-Saharan Africa was 49.1; in 2005, the infant mortality rate at birth per 1,000 births was 102; and the under-five mortality rate per 1,000 births was 172.

¹⁷⁰ (ibid.:172). In sub-Saharan Africa, the net primary enrolment rate in 2005 was 72%, while the net secondary enrolment rate was 26%.

- They are exposed to child labour and violence, and enlisted as child soldiers, and
- Huge numbers become refugees or are internally displaced, following conflicts or natural disasters.¹⁷¹

Africa sought to address the plight of her children through the African Charter on the Rights and Welfare of the Child (hereinafter *the African Children's Charter*). Adopted in July 1990, eight months after the UN Convention on the Rights of the Child¹⁷² (hereinafter *the CRC*), the African Children's Charter entered into force on 29 November that same year. Based on the provisions enshrined in the African Children's Charter, the body mandated to promote and protect the rights of the African child, namely the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), was established by the Assembly of Heads of State and Government during its 37th Session in Lusaka, Zambia, in July 2001.

In this short review, the African Children's Charter specificities are examined, while brief reference is made to the provisions of the CRC. An overview of the ACERWC's work is also presented,

Historical background to the African Children's Charter

The CRC has attained near universal ratification status and, in comparison, 44 of the 53 AU member states have so far ratified the African Children's Charter.¹⁷³ The African Children's Charter contains several provisions akin to those of the CRC, thus begging the question: Was there any need for a specific document dealing with child rights in Africa?

¹⁷¹ Preambular para. 3 of the African Charter on the Rights and Welfare of the Child expresses "concern that the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he or she needs special safeguards and care".

¹⁷² Adopted by the UN General Assembly on 20 November 1989, the CRC entered into force on 2 September 1990.

¹⁷³ The Central African Republic, Djibouti, the DRC, the Sahrawi Arab Democratic Republic, São Tomé & Príncipe, Somalia, Swaziland, Tunisia and Zambia have not yet ratified the Children's Charter; available at <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf>; last accessed 18 March 2009.

During the drafting of the CRC, the general view was that the document did not encapsulate the prevailing specificities of African children. In addition, only Algeria, Egypt, Morocco and Senegal had participated significantly in the drafting exercise, thus bringing about the reflection that Africa was under-represented. Therefore, it was considered necessary for the continent to formulate its own Children's Charter, which would reflect its social and cultural values.

Thus, the preamble to the African Children's Charter recognises the "unique and privileged position" of the child in African society¹⁷⁴ and declares that the "reflection on the concept of the rights and welfare of the child" should take into consideration the "virtues of their cultural heritage, historical background and the values of the African civilization".¹⁷⁵

The African Children's Charter draws inspiration from the African Charter on Human and People's Rights and from other human rights instruments at regional and international level, including the CRC. While emphasising the African grounding of the African Children's Charter, the notion of complementarity between the CRC and the African Children's Charter is recognised. Both contain key principles of the best interests of the child, non-discrimination, participation, survival, and development of the child. However, the African Children's Charter includes explicit references to issues such as protection against harmful social and cultural practices, protection of children in armed conflicts, protection against apartheid, to name but these few. On its adoption, the African Children's Charter became the first – and, to date, only – regional children's rights document in the world.

Selected specificities of the African Children's Charter

The CRC defines a *child* as "every human being below the age of 18, unless under the law applicable to the child, majority is attained earlier".¹⁷⁶ The African Children's Charter, on the other hand, answers the question "Who is a child?" unequivocally: every human being below the age of 18.¹⁷⁷ The definition is clear and precise, with no exception or qualification.

¹⁷⁴ African Charter on the Rights and Welfare of the Child, Preambular para. 4.

¹⁷⁵ (ibid.:Preambular para. 6).

¹⁷⁶ CRC, Article 1.

¹⁷⁷ (ibid.:Article 2).

In line with the approach taken in the African Charter on Human and People's Rights, the African Children's Charter provides for the civil, political, economic, social and cultural rights of children. Hence, states parties are obliged to implement the African Children's Charter without making any distinction among the different categories of rights.¹⁷⁸ Regarding economic, social and cultural rights, states parties to the CRC only undertake to implement –¹⁷⁹

... such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

The African Children's Charter takes a strong stand when asserting that –¹⁸⁰

... any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

This supremacy of the Charter is further strengthened in the detailed provision binding states parties to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child. The Charter also explicitly sets the minimum age for marriage at 18 years.¹⁸¹

Conversely, the education of a child should, inter alia, be directed towards “the preservation and strengthening of positive African morals, traditional values and cultures”; the “preservation of national independence and territorial integrity”; and the “promotion and achievements of African Unity and Solidarity”.¹⁸² The child should also be prepared for –¹⁸³

... responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups.

¹⁷⁸ African Children's Charter, Article 1.

¹⁷⁹ CRC, Article 4.

¹⁸⁰ African Children's Charter, Article 1(3).

¹⁸¹ (ibid.:Article 21).

¹⁸² (ibid.:Article 11(2)(f)).

¹⁸³ (ibid.:Article 11(2)(d)).

An African child has responsibilities and duties towards his/her “family, society, the State and other legally-recognized communities and the international community”.¹⁸⁴ The child has the duty –¹⁸⁵

... to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need.

Respect for parents, superiors and elders can be seen as an impediment to the child’s participation in decision-making which has an effect on him/her. The family, as the “natural unit and basis of society”¹⁸⁶ is given prominence. However, this does not take into account the fact that duties imposed on the child can be construed as allowing for the exploitation of children by adults, and that the family can also be a space where children’s rights are violated.¹⁸⁷

The African Children’s Charter has several clearly spelt out obligations on states parties to provide protection to children in specific circumstances. States have to ensure access to education for “female, gifted and disadvantaged children”. There is also an obligation on states to ensure that pregnant girls are able to continue with their education on the basis of their individual ability.¹⁸⁸ For children with disabilities, it imposes measures which ensure their dignity, and promote their self-reliance and active participation in the community.¹⁸⁹ Specific measures are required to protect children from abduction and all forms of begging.¹⁹⁰ A person can only take part in hostilities at the age of 18, that is, when no longer a child,¹⁹¹ and the protection afforded to refugee children is equally extended to internally displaced children.¹⁹²

The African Children’s Charter makes two references to discipline. First of all, it is presented as an obligation on states parties, in that they have to –¹⁹³

¹⁸⁴ (ibid.:Article 31).

¹⁸⁵ (ibid.:Article 31(a)).

¹⁸⁶ (ibid.:Article 18(1)).

¹⁸⁷ See e.g. Osarenren (2006).

¹⁸⁸ African Children’s Charter, Article 11(7).

¹⁸⁹ (ibid.:Article 13(1)).

¹⁹⁰ (ibid.:Article 29).

¹⁹¹ (ibid.:Article 22(2)).

¹⁹² (ibid.:Article 23).

¹⁹³ (ibid.:Article 11(5)).

... take all appropriate measures to ensure that a child who is subjected to school or parental discipline shall be treated with humanity and with inherent dignity of the child and in conformity with the present Charter.

Secondly, parents have the responsibility to ensure that “domestic discipline” is “administered with humanity and in a manner consistent with the inherent dignity of the child”.¹⁹⁴ These provisions leave the door open for corporal punishment, despite its recognisably negative effects on children. These provisions also represent stark distinctions from Article 19 of the CRC, which protects children from –

... all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Obviously, the protection in the CRC extends to corporal punishment.

The Committee of Experts on the Rights and Welfare of the Child

The ACERWC was established to “promote and protect the rights and welfare of the child”.¹⁹⁵ It is composed of 11 members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child. The members are appointed by the AU Assembly of Heads of State and Government from a list of persons nominated by states parties.¹⁹⁶ Members of the ACERWC serve for a five-year term and are not eligible for re-election.¹⁹⁷

The mandate of the ACERWC concentrates on the promotion and protection of the rights contained in the African Children’s Charter, particularly to collect and document information, commission interdisciplinary assessment of situations on African problems relating to the rights and welfare of the child, monitoring the implementation of the African Children’s Charter, and reviewing reports from states parties. If so required, the ACERWC gives its views and recommendations to governments and provides interpretation of the Charter at the request of a state party, institution of the AU, or an African organisation recognised by the AU.¹⁹⁸

¹⁹⁴ (ibid.:Article 20(1)(c)).

¹⁹⁵ (ibid.:Article 32).

¹⁹⁶ (ibid.:Articles 33, 34).

¹⁹⁷ (ibid.:Article 36).

¹⁹⁸ (ibid.:Article 42).

A globally unique function of the ACERWC is to consider communications forwarded to it, as per the provisions of Article 44 of the Children's Charter, which gives it the legal basis to receive such communications.¹⁹⁹ In its Guidelines developed for the consideration of communications, a *communication* is considered as any correspondence or complaint from a state, individual, or NGO denouncing acts that are prejudicial to a right or rights of the child.²⁰⁰

Individuals, including the victimised child, his/her parents or guardians or legal representatives, witnesses, a group of individuals or an NGO recognised by the AU, by member states or any institution of the UN can forward a communication to the ACERWC.²⁰¹ A communication may be presented on behalf of a victim without his/her agreement on condition that the author is able to prove that his/her action is taken in the supreme interest of the child.²⁰²

A provision in the Guidelines which could prove problematic in application is that the ACERWC may admit a communication in the overall best interest of the child from a state party which is a non-signatory to the Charter. In so doing, the Committee is required to collaborate with other related agencies implementing Conventions and Charters to which the non-signatory country is a party.²⁰³ It would be interesting to see how such a provision would work in practice, given the principles on the law of treaties in international law, which provide that treaties are binding on parties. Exceptions are permitted only if the norms therein contained have become peremptory norms of *jus cogens*, that is, norms which are of concern to the international community as a whole. Some of these are the —²⁰⁴

... prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy.

¹⁹⁹ The CRC does not provide for an individual complaints procedure at the moment, though there is a move to adopt one. The UN Committee on the Rights of the Child examines states reports.

²⁰⁰ Guidelines for the Consideration of Communications Provided for in Article 44 of the African Charter on the Rights and Welfare of the Child, ACERWC/8/4, Chapter 1, Article 1(1).

²⁰¹ (*ibid.*:Chapter 2, Article 1(I)(1)).

²⁰² (*ibid.*:Chapter 2, Article 1(I)(3)).

²⁰³ (*ibid.*:Chapter 2, Article 1(II)(2)).

²⁰⁴ Brownlie (1990:513).

Torture is also considered part of this category.²⁰⁵

Since its establishment, the ACERWC has received only one communication²⁰⁶ and, at the time of writing, no decision on the said communication had been made public. While the benefits of bringing a communication are yet to be tested, it remains to be seen how the ACERWC, through the individual complaints procedure, will advance the protection of children's rights and what difference it can make in the way states treat children in Africa.

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa²⁰⁷

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter *the 1969 OAU Refugee Convention* or *1969 Convention*) was adopted on 10 September 1969 in Addis Ababa. It entered into force on 20 June 1974, following the deposit of instruments of ratification by one third of OAU member states.²⁰⁸ To date, 45 countries have ratified or acceded to the 1969 Convention.²⁰⁹

Africa's refugee population was conservatively estimated at 2,608,000 in 2007.²¹⁰ Conflicts, (inter-state as well as those caused by changes in government or ethnic clashes), socio-economic challenges, human rights violations, other life-threatening calamities and natural disasters are among the top causes of massive population movements within and beyond borders on the continent. Refugees

²⁰⁵ Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Regina v Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet House of Lords (On Appeal from a Divisional Court of the Queen's Bench Division); available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>; last accessed 27 March 2009.

²⁰⁶ This is a communication submitted in 2005 by the Centre for Human Rights, University of Pretoria, against Uganda for numerous violations on children's rights in the conflict-ridden northern part of the country.

²⁰⁷ Available at <http://www.africa-union.org/root/au/Documents/Treaties/List/Convention%20on%20Refugees.pdf>; last accessed 11 April 2009.

²⁰⁸ 1969 OAU Refugee Convention, Article XI.

²⁰⁹ Countries that have not yet ratified or acceded to the Convention are Djibouti, Eritrea, Madagascar, Mauritius, Namibia, the Sahrawi Arab Democratic Republic, São Tomé & Príncipe and Somalia.

²¹⁰ UNHCR (2007).

are forced to flee their countries and cross borders in order to look for safety and protection in states where they are not citizens. They derive rights from global instruments, supplemented by legal texts at regional level and by the national laws of the countries in which they find themselves.

This legal framework provides refugees with a range of rights (civil, political, socio-economic and cultural). They also have the right to *non-refoulement*, that is, the right not to be returned to a country where they may face persecution or be discriminated against. However, in practice, few refugees are able to assert rights found in legal instruments. The next section of this paper highlights the distinctive aspects of the 1969 OAU Refugee Convention. It also deals briefly with how refugees on the continent have made use of the 1969 Convention in a relevant legal forum, that is, at the African Commission on Human and Peoples' Rights.

The Draft African Union Convention on the Protection and Assistance for Internally Displaced Persons in Africa

Africa is home to approximately 12 million internally displaced persons (IDPs) out of a global total of 25 million IDPs. The main difference in the framework applying to IDPs and refugees is that the former remain under the legal responsibility of their own states, as they have not crossed international borders. However, they also face serious deprivation, harsh conditions and human rights violations – a situation which underlines gaps in their protection. Lack of protection to IDPs was considered a major gap in the 1969 OAU Convention on Refugees.

In November 2008, African ministers in charge of forced displacement adopted a draft AU Convention on the Protection and Assistance for Internally Displaced Persons in Africa, paving the way for its adoption at a special Summit of Heads of State and Government in 2009.²¹¹ With the adoption of this draft convention, four decades after the adoption of the 1969 OAU Refugee Convention, Africa again leads the way in safeguarding the rights of displaced people. Indeed, both the 1969 OAU Refugee Convention and the IDP Convention (when adopted)

²¹¹ “African ministers adopt historic Draft IDP Convention”. *Daily Monitor*, 16 November 2008.

would be the only legally binding regional treaties in the world protecting the rights of displaced people – including refugees and IDPs.

Historical background of the 1969 OAU Refugee Convention

African states faced increased refugee problems in the 1960s. The founding fathers of the OAU grappled with mass population displacement caused by independence struggles, apartheid, and man-made or natural disasters. The applicable law was derived mainly from the 1951 UN Convention relating to the Status of Refugees, adopted in the aftermath of World War II, whose particular socio-political context inspired many of the latter Convention's provisions. A follow-up Protocol to the UN Convention on Refugees was adopted in 1966, entering into force in 1967 (hereinafter *the 1967 Protocol*).

Given that the unique aspects of the refugee situation on the continent were still not adequately addressed, African states concentrated their efforts in the drafting of an instrument that would bring a distinctive regional approach to refugee situations on the continent. The 1969 OAU Refugee Convention sought to be “the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees”²¹² and the 1967 Protocol, while addressing the deficiencies which rendered such a specific instrument a matter of necessity.

Highlights of the 1969 OAU Refugee Convention

Who is a refugee?

The 1969 OAU Refugee Convention expands the definition of *refugee*. The 1951 UN Refugee Convention and 1967 Protocol define a *refugee* as someone who has a well-founded fear of persecution because of his or her race, religion, nationality, membership in a particular social group, or political opinion, is outside his/her country of nationality, and is unable to or, owing to such fear, is unwilling to avail him-/herself the protection of that country.²¹³

The 1969 OAU Refugee Convention went beyond these criteria to include external aggression, occupation, foreign domination and, significantly, events

²¹² 1969 OAU Refugee Convention, Article VIII(2) and Preambular para. 's 9, 10 and 11.

²¹³ 1951 UN Convention on Refugees, Article 1(2).

seriously disturbing public order as a source of refugee creation.²¹⁴ This definition demonstrates clearly the intent of the drafters to address the specific nature of the refugee problem in Africa. The fear of persecution criterion focuses on “the ideas a person holds, and not on the socio-political context itself”, whereas the broader definition gives the possibility of raising more factors while seeking refugee status – such as serious natural disasters – and need not affect a whole country.²¹⁵

This broader definition has been of particular significance in situations of a massive influx of people forced to flee. In these circumstances, it would be impractical to examine individual claims for refugee status. Under the 1969 OAU Refugee Convention, refugee status can be granted to whole groups, not just individuals, whereas the UN refugee protection framework providing for a “well-founded fear of persecution” presupposes individual screening when individuals or small groups cross borders in search of safety and protection. Thus, while removing the condition that an individual demonstrates a personal risk of persecution, the 1969 OAU Convention on Refugees permits *prima facie* group determination.

Grounds of disqualification

The 1969 OAU Refugee Convention adds three further grounds to those found in the 1951 UN Refugee Convention in respect of disqualification as a refugee. A person would cease to enjoy or would not be granted refugee status if s/he has been guilty of acts contrary to the purposes and principles of the OAU,²¹⁶ has seriously infringed the purposes and objectives of the 1969 Convention,²¹⁷ or has committed a serious non-political crime outside his/her country of refuge prior to admission to that country as a refugee.²¹⁸

Subversive acts

The prohibition of subversive activities is dealt with in Article III of the 1969 Convention. The Article prescribes, first of all, the duty of the refugee to conform to the laws and regulations of the host country as well as measures taken for the

²¹⁴ 1969 OAU Refugee Convention, Article 1(2).

²¹⁵ Viljoen (1997).

²¹⁶ 1969 OAU Refugee Convention, Article I(5)(c).

²¹⁷ (*ibid.*:Article I(4)(g)).

²¹⁸ (*ibid.*:Article I(5)(b)).

maintenance of public order. Moreover, the refugee “shall also abstain from any subversive activities against any member of the OAU”.²¹⁹ The duty of signatories to the 1969 Convention extends to prohibiting —²²⁰

... refugees residing in their respective territories from attacking any state member of the OAU, by any activity likely to cause tension between member states, and in particular by use of arms, through the press, or by radio.

The language of duties in the 1969 Convention can be considered as a forerunner to that found in the African Charter, discussed above.

While the prohibition of subversive activities can be considered as critical in Africa, given the militarisation and politicisation of refugee camps, the 1969 Convention does not provide for sanctions in cases of violations.

Asylum

The 1969 OAU Convention on Refugees is unequivocal about signatories’ obligations to grant asylum to refugees:²²¹

... they shall use their best endeavours, consistent with their respective legislation to receive refugees and to secure the settlement of those who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

Asylum may be described briefly as the granting of protection on its territory by a state to persons fleeing persecution or serious danger from another state. Asylum comprises several elements, as indicated in the quoted Article, such as *non-refoulement*, permission to remain on the territory of the asylum country, and humane standards of treatment.

Non-refoulement

The 1969 OAU Convention does not allow *refoulement*. By contrast, the 1951 UN Refugee Convention allows for an exception in times of national emergency or in situations where national security is at stake. *Non-refoulement* represents a strong pillar of refugee law obliging a State to extend admission to its territory

²¹⁹ (ibid.:Article III(1)).

²²⁰ (ibid.:Article III(2)).

²²¹ 1969 OAU Refugee Convention, Article II(1)).

(at the very least until determination whether there is a need for protection), prohibiting it from returning refugees to countries in which their lives or freedom may be threatened.

Several African countries continue to host large numbers of refugees, in line with the principle of *non-refoulement*.²²² However, instances of *refoulement* have occurred. One of the many examples was the return of 5,000 Rwandans from Burundi in June 2005. In the period covering March to June 2005, the United Nations High Commission for Refugees (UNHCR) estimated that about 8,000 Rwandans from the Butare and Gikongoro Provinces entered Burundi, looking for asylum.²²³ Many of these asylum-seekers expressed alarm about the implementation of the *gacaca* courts,²²⁴ claiming that these could be controlled to persecute Hutus regardless of whether or not they had taken part in the genocide. Such claims were dismissed by the Rwandan Government on the grounds that these were unsubstantiated rumours, and that those fleeing were concerned about evading justice. During bilateral meetings between the Burundian and Rwandan Governments, it was concluded that these asylum-seekers were ‘illegal immigrants’, following which 5,000 Rwandans were quickly deported from Burundi. The UNHCR and local NGOs were not permitted to observe the exercise.²²⁵ The UNHCR’s response was that claims of individuals should have been assessed and it should have been allowed to monitor the proceedings. Under the circumstances, the operation constituted a violation of the principle of *non-refoulement*.

African solidarity

Another distinctive feature of the 1969 Convention is that, in the spirit of African solidarity and international cooperation, states call on others when faced with a huge refugee influx. The others are required to take appropriate measures to lighten the burden of the member state granting asylum.²²⁶ There is not much

²²² As at 1 January 2007, Tanzania was hosting 485,000 and Chad 287,000 refugees (Office of the United Nations High Commissioner for Refugees 2007).

²²³ UNHCR (2006:80).

²²⁴ *Gacaca* courts are community-led traditional justice mechanisms aimed at promoting reconciliation after the 1994 genocide. These courts have been revived in order to deal with the huge number of genocide-related cases clogging up the formal justice system and jails in Rwanda.

²²⁵ Amnesty International (2005); Rutazana (2006).

²²⁶ 1969 OAU Convention on Refugees, Article II(4).

evidence to show the extent to which this provision has been successfully applied.

Voluntary repatriation

Voluntary repatriation is the return to the country of origin based on the refugee's free and informed decision. The 1969 OAU Refugee Convention was the first international legal instrument to specifically include the now universally accepted principles of voluntary repatriation.

Article 5 demonstrates that the drafters of the 1969 Convention envisioned that repatriation would take place in an organised manner, planned and supported by both sending and receiving states. There is no provision stipulating that there has to be a fundamental change in circumstances and human rights standards in the home country, prior to promoting, encouraging, or even allowing repatriation to occur.

One recent example of voluntary repatriation operations on the continent is that of Mauritanian refugees from Senegal, launched by the Mauritanian authorities and the UNHCR in line with decisions of the African Commission, on the case over the 1989 mass expulsion of black Mauritanians to Senegal and Mali.²²⁷ To date, more than 4,500 deportees have voluntarily returned to Mauritania. The repatriation process is still ongoing.²²⁸

Vulnerable groups

The 1969 OAU Refugee Convention does not address vulnerable groups, including children and women. However, such lacunae have been rectified. For example, the African Charter on the Rights and Welfare of the Child imposes an obligation on signatory states for the protection of and provision of humanitarian

²²⁷ 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, 13th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp. 161–191].

²²⁸ Information obtained at a workshop on the subject matter held in Dakar, Senegal, 1–2 December 2008, by the Institute for Human Rights and Development in Africa (IHRDA) and Rencontre africaine pour la défense des droits de l'homme (RADDHO).

assistance to refugee children, whether unaccompanied or accompanied by parents, legal guardians or close relatives.²²⁹ States have the further obligation to undertake efforts aimed at family reunification. A noteworthy stipulation is that all the protections —²³⁰

... apply *mutatis mutandis* to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, [and] breakdown of economic and social order

The 1969 OAU Refugee Convention is gender-blind. Yet the rights of women and girls may be violated at all stages of their lives as refugees, be it during flight or in their host countries. There is ample documentation to this effect around the continent. Unimaginable numbers of women are victims of violence and mutilation and an untold number of women and girls are raped (Sierra Leone²³¹ and Liberia conflicts, Rwanda genocide, DRC conflicts, Darfur alleged genocide, to name but these few).

The Women's Protocol addresses the plight of women in situations of displacement. States parties are first of all obliged to take measures to ensure the increased participation of women in local, national, regional, continental and international decision-making structures to ensure the physical, psychological, social and legal protection of asylum-seekers, refugees, returnees and displaced persons, particularly women, as well as in the management of camps and settlements for such women.²³² In situations of armed conflict, states parties undertake to protect the foregoing group of women against all forms of violence, rape and other forms of sexual exploitation, and to ensure that perpetrators of such acts are brought to justice.²³³

The African Charter and the protection of refugees through communications before the African Commission

The 1969 OAU Convention on Refugees remains the determining document relating to the protection of refugees in Africa. However, the protection of refugees

²²⁹ African Charter on the Rights and Welfare of the Child, Article 23: Refugee Children.

²³⁰ (ibid.:Article 23(4)).

²³¹ *249/02 Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea*, 20th Annual Activity Report [in *Decisions 2002–2007*, IHRDA, Banjul 2002, pp.203–214].

²³² Protocol on the Rights of Women, Article 10(2)(d) and (e).

²³³ (ibid.:Article 11(3)).

in Africa should be viewed in conjunction with the equally important African Charter and its mechanism for protection, that is, the African Commission.²³⁴

The African Charter provides that —²³⁵

... every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.

This provision is distinctive in that it provides for the double right to seek but also to obtain asylum. Therefore, it may be argued that all AU states, regardless of whether or not they are party to the 1969 OAU Refugee Convention, are obliged to receive refugees and to grant them asylum. Article 12(3) also contains a provision against the mass expulsion of national, racial, ethnic or religious groups. The African Commission is an important quasi-judicial body before which states are accountable for the way they treat their own citizens and others who are within their jurisdiction, including asylum-seekers and refugees.²³⁶

The relevance of the mechanisms within the African system of human rights, including the African Commission, is that asylum-seekers and refugees on the continent can exercise their right to petition the Commission by taking their cases individually or in groups to seek protection of their rights where these have been violated by the host countries.²³⁷

In one such case, involving 14 Gambian nationals deported from Angola from March to May 2004 during the *Operação Brilhante*, the African Commission found, inter alia, that Article 12(4) of the African Charter relating to due process before expulsion had been violated.²³⁸ In addition, while underscoring that

²³⁴ Protection standards for refugee children and women found in the Protocol on the Rights of Women and the African Charter on the Rights and Welfare of the Child have been discussed above.

²³⁵ Article 12(3) of the African Charter.

²³⁶ *71/92 Rencontre africaine pour la défense des droits de l'homme v Zambia*, 10th Annual Activity Report [in *Compilation 1994–2001*, IHRDA, Banjul 2002, pp.367–371], at p.369.

²³⁷ They can also exercise this right by petitioning the African Court on Human and Peoples' Rights.

²³⁸ While the Gambians were economic migrants, others among the scores who faced expulsion were refugees.

any expulsions or deportations were required to comply with the human rights obligations in the African Charter, it found Angola in violation of Article 12(5) of the Charter.²³⁹

The AU Convention on Preventing and Combating Corruption

Although the 53 AU states differ considerably in various regards,²⁴⁰ one common challenge seems to be the presence of corruption,²⁴¹ despite the fact that this phenomenon is illegal almost everywhere. Interwoven deeply into the fabric of society, corruption has “devastating effects on the political, economic, social and cultural stability of the African people”.²⁴²

Corruption costs Africa approximately US\$148 billion annually, impacting negatively on development, investment and business, with prices of goods increased by as much as 20 per cent, most of which become the burden of the poor.²⁴³ Corruption has other far-reaching consequences, as it undermines good governance, accountability and transparency. Politically, it challenges democracy through the tainting of the electoral process, thus bringing into disrepute the legitimacy of government. Lack of an independent judiciary makes a mockery of the rule of law. Corruption can spawn additional criminal activities, including drug trafficking and money laundering, to pinpoint but these two.

While the causes encouraging corruption are numerous, its connection with poor governance leaps to the forefront. Weak public institutions, poor capacity to implement effective policies and procedures to curb corruption, inadequately paid civil servants, and recruitment and promotion systems that are not merit-

²³⁹ 292/04 *Institute for Human Rights and Development in Africa v Angola*, 23rd and 24th Annual Activity Report of the African Commission on Human and Peoples’ Rights; available at www.achpr.org; last accessed 29 March 2009.

²⁴⁰ Including size, population, gross domestic product, legal traditions and political dispensation.

²⁴¹ First OAU Ministerial Conference on Human Rights in Africa, 12–16 April 1999, Grand Bay, Mauritius; para. 8 of the Grand Bay Declaration and Plan of Action identifies the following as the cause of violations of human rights in Africa: “(g) Mismanagement, bad governance, and corruption; (h) Lack of accountability in the management of public affairs ...”.

²⁴² African Union, Convention on Preventing and Combating Corruption, Preambular para. 6.

²⁴³ Blunt (2004).

based – all combine to create a situation where opportunism flourishes. The lack of or poorly-resourced oversight bodies capable of tackling in-country as well as trans-border corruption efficiently, limited access to modern information and communications technology, laws that undermine independent media, and a civil society that is not vocal enough across Africa: all contribute to a culture of impunity that renders corruption rife.

The AU recognised “the need to address the root causes of corruption on the Continent”²⁴⁴ in a coordinated manner and to develop workable solutions at continental level. Its response was the drafting of a legally binding treaty in order to prevent, detect and punish corruption.

African Union Heads of State and Government adopted the Convention on Preventing and Combating Corruption (hereinafter *the 2003 AU Corruption Convention* or simply *the 2003 Convention*) on 11 July 2003 in Maputo, Mozambique.²⁴⁵ The 2003 AU Corruption Convention entered into force on 5 August 2006, after the deposit of the 15th instrument of ratification.²⁴⁶ The 2003 Convention represents the AU’s blueprint in fighting the scourge of corruption by –²⁴⁷

... formulat[ing] and pursu[ing], as a matter of priority, a common penal policy, ... including the adoption of appropriate legislative and adequate preventive measures ...

and in the field of international cooperation.

Objectives and Principles of the AU Convention on Preventing and Combating Corruption

Article 2 presents the five main objectives of the 2003 AU Corruption Convention. The first one is rooted in the continent’s programme to –²⁴⁸

²⁴⁴ Convention on Preventing and Combating Corruption, Preambular para. 8. The Grand Bay Declaration also recognised corruption as a major cause of human rights violations. See Footnote 1 in this paper.

²⁴⁵ A total of 28 countries have ratified the 2003 Convention; see <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Convention%20on%20Combating%20Corruption.pdf>; last accessed 11 April 2009.

²⁴⁶ Convention on Preventing and Combating Corruption, Article 23(2).

²⁴⁷ (ibid.:Preambular para. 8).

²⁴⁸ (ibid.:Article 2(1)).

Major African legal instruments

... strengthen the development of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.

The reference to the private sector is well worth noting. The second objective aims at the promotion, facilitation and regulation of cooperation among states parties in order to ensure the effectiveness of measures and actions to curb corruption,²⁴⁹ while the third focuses on the coordination and harmonisation of policies and legislation.²⁵⁰ The fourth objective derives from Africa's development agenda to promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights,²⁵¹ thus firmly asserting its rights-based approach, with three references to the African Charter²⁵² and two to the African Commission.²⁵³ Finally, to reverse Africa's negative record in terms of governance, the 2003 AU Corruption Convention seeks to establish the necessary conditions to foster transparency and accountability in the management of public affairs.²⁵⁴

Following from the foregoing objectives, the basic principles underpinning the obligations of states parties are expounded in Article 3. These are –

- respect for democratic principles and institutions
- popular participation
- the rule of law and good governance
- respect for human and peoples' rights in accordance with the African Charter and other relevant human rights instruments
- transparency and accountability in the management of public affairs
- promotion of social justice to ensure balanced socio-economic development, and
- condemnation and rejection of acts of corruption, related offences and impunity.

Overview of the 2003 AU Corruption Convention

The 2003 AU Corruption Convention is a relatively short document. Containing 28 articles in all, it deals with the prevention and criminalisation of acts of

²⁴⁹ (ibid.:Article 2(2)).

²⁵⁰ (ibid.:Article 2(3)).

²⁵¹ (ibid.:Article 2(4)).

²⁵² (ibid.:Preambular para. 4, Article 3(2), Article 14).

²⁵³ (ibid.:Preambular para. 11, Article 22).

²⁵⁴ (ibid.:Article 2(5)).

corruption while advocating for international cooperation, mutual legal assistance, extradition, and broad participation in the fight against corruption.

Within the public sector, states parties are obliged to require —²⁵⁵

... all or designated public officials to declare their assets at the time of assumption of office during and after their term of office in the public service.

States parties are also obliged to adopt Codes of Conduct for their public service, as well as to —²⁵⁶

... ensure transparency, equity and efficiency in the management of tendering and hiring procedures in the public service.

States parties also undertake to —²⁵⁷

... adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption and related offences, including school educational programmes and sensitization of the media.

With respect to the private sector, the 2003 AU Corruption Convention requires states parties to —²⁵⁸

... adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector, to establish mechanisms to encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights ...

as well as the adoption of measures “to prevent companies from paying bribes to win tenders”.

The 2003 AU Corruption Convention imposes an obligation on states parties to adopt legislation to criminalise acts of corruption under their domestic law. It covers a broad spectrum of offences, including diversion of public funds and property by public officials, trading in influence, illicit enrichment, money

²⁵⁵ (ibid.:Article 7(1)).

²⁵⁶ (ibid.:Article 7(4)).

²⁵⁷ (ibid.:Article 5(7)).

²⁵⁸ (ibid.:Article 11).

laundering, concealment of property and bribery.²⁵⁹ It addresses both the supply and demand aspects of corruption, that is, the one who solicits and the one who accepts, directly or indirectly, “either through an act or omission in the discharge of his or her duties by a public official or any other person...”.²⁶⁰

Laundering of the proceeds of corruption should also be criminalised.²⁶¹ The 2003 Convention further outlines the legislative measures and mechanisms to be put in place for the confiscation and seizure of the proceeds of corruption,²⁶² while indicating that bank secrecy should not be a bar to investigation and prosecution.²⁶³

At the enforcement level, the 2003 AU Corruption Convention reaffirms the requirement of due process of the law in connection with anyone accused of corruption or related offences. The *ne bis in idem* or double jeopardy principle is specifically mentioned.²⁶⁴ Unequivocal reference is made to a fair trial –²⁶⁵

... in accordance with the minimum guarantees contained in the African Charter on Human and Peoples’ Rights and any other relevant international human rights instruments recognized by the concerned states parties.

Member states undertake to cooperate in combating the plague of corruption in terms of prevention and investigation, as well as the prosecution of offenders. Similarly, member states are bound to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court. Article 15 provides for the extradition of persons accused of corruption offences established in pursuance with obligations under the 2003 Convention and that fall within its jurisdiction. The 2003 Convention assumes the role of an extradition treaty among states parties. States parties undertake to include such offences as extraditable offences in extradition treaties existing between or among them.

The 2003 AU Corruption Convention allows for full participation of the media and civil society at large in the fight against corruption by enjoining states parties to

²⁵⁹ (ibid.:Article 4: Scope of the Convention).

²⁶⁰ (ibid.:Article 4(1)(c)).

²⁶¹ (ibid.:Article 6).

²⁶² (ibid.:Article 16).

²⁶³ (ibid.:Article 17).

²⁶⁴ (ibid.:Article 13(3)).

²⁶⁵ (ibid.:Article 14).

create an environment that enables them to hold governments to the highest levels of transparency and accountability in the management of public affairs.²⁶⁶

A unique feature of the 2003 AU Corruption Convention relates to the funding of political parties.²⁶⁷ States parties are bound to adopt legislative or other measures to proscribe the use of funds acquired through illegal or corrupt practices to finance political parties. Those measures should also incorporate the principle of transparency into funding political parties.

Monitoring of the 2003 AU Corruption Convention and follow-up mechanisms

The 2003 AU Corruption Convention provides for follow-up mechanisms at two levels, namely one at national level through the creation of national authorities,²⁶⁸ and one at supranational level in the form of an Advisory Board on Corruption within the African Union.²⁶⁹

Upon ratification of the 2003 Convention, states parties should create or designate a national authority or agency in application of corruption offences. Several member countries have in fact set up institutional frameworks or agencies, as required by the 2003 Convention. Representatives of 33 such institutions attended the 2nd Pan-African Meeting of National Anti-corruption Bodies, where they recommended, among other things, strengthening the capacities of such institutions.²⁷⁰

At their 12th Ordinary Summit, the AU Heads of State and Government elected 11 members to the Advisory Board, who serve for a period of two years; their terms are renewable only once.²⁷¹ The members – experts of the highest integrity, impartiality and recognised competence in matters relating to preventing and combating corruption and related offences – serve in their personal capacity.

²⁶⁶ (ibid.:Article 12).

²⁶⁷ (ibid.:Article 10).

²⁶⁸ (ibid.:Article 20).

²⁶⁹ (ibid.:Article 22).

²⁷⁰ African Union, Declaration of the 2nd Pan African Meeting of National Anti-Corruption Bodies, 24 February 2007, para. 4.

²⁷¹ African Union, Press Release N.43/2009, “12th AU Summit Decisions Summary”, 4 February 2009.

The Board's functions are quite extensive and specific, ranging from promoting and encouraging the adoption and application of anti-corruption measures, to the development of methodologies for analysing the nature and extent of corruption in Africa, the dissemination of information, and sensitisation of the public on the negative effects of corruption and related offences, and "advising governments on how to deal with the scourge of corruption and related offences in their domestic jurisdictions".²⁷² Interestingly, the Board also collects information and analyses the conduct and behaviour of multinational corporations operating in Africa.

Additional functions involve the development of codes of conduct for public officials and building partnerships, including with the African Commission on Human and Peoples' Rights, and African civil society. The Board receives and examines reports from states parties to the 2003 Convention on their progress in implementing the treaty. Last, but not least, states parties are directed to ensure and provide for civil society's participation in the corruption monitoring process and implementation of the 2003 Convention.²⁷³

While the monitoring and follow-up provisions seem reasonably robust, it remains to be seen what difference the Board can make in the struggle against corruption. Two conditions precedent required for substantive reforms to curb deep-rooted corruption are strong commitment and political will. Additionally, the Board needs to be adequately resourced in order to avoid the 'toothless watchdog' syndrome.

Concluding remarks

The 2003 Convention gives a broad sketch of measures that states parties should put in place to enable the prevention, detection and investigation of corruption offences. It reinforces the legal framework relating to corruption through a detailed listing of offences that should be made punishable by domestic legislation. Furthermore, the 2003 Convention encourages participation, education and the promotion of public awareness in combating corruption.

The adoption and entry into force of the landmark AU Convention on Preventing and Combating Corruption represents a major step indeed, as the

²⁷² (ibid.:Article 22(5)(d)).

²⁷³ (ibid.:Article 12(4)).

continent handles the growing awareness of the damage corruption has caused to the enjoyment of human rights – civil and political, but more particularly, economic and social – by millions of Africans. Its real impact will depend on issues such as ^{—274}

... clarity of the substantive obligations imposed, conformity of the newly adopted norms with existing legal and human rights obligations, proper municipal implementation of these norms ... [and] good governance.

As regards monitoring and implementation, the powers and functions of the Advisory Board on Corruption and national agencies are only part of the reform process in the field of tackling continent-wide corruption. The strongest determining factor remains the willingness of states to change their own legal framework and culture of functioning, and to empower the Advisory Board and national agencies to act in accordance with their mandate – in perfect freedom.

Conclusion

This paper's main objective was to present a short descriptive study of the major legal instruments making up the African human rights system, which is undergoing rapid evolution. New texts whose reach is yet to be tested are adding up to the core ones, namely the African Charter, the 1969 OAU Refugee Convention, and the Children's Charter. The development of 'soft law' to fill the gaps in the African Charter, such as the Declaration of Principles on Freedom of Expression in Africa and the Principles and Guidelines to a Fair Trial and Legal Assistance in Africa, is indeed welcome. The jurisprudence of the African Commission is also growing stronger.

Going by the numerous 'global firsts' noted in its major legal texts, Africa has shown that it can be innovative and progressive, leading the way in setting norms. The major legal texts have been trailblazers in the field of international human rights law:

- The African Charter incorporated the three categories of rights in one document
- The Women's Protocol dared tackled the issue of abortion
- The 1969 Refugee Convention included "voluntary repatriation" well before this became accepted within the UN system, and

²⁷⁴ Snider & Kidane (2007:693).

- The 2003 AU Corruption Convention insists on the principle of a fair trial for corruption-related crimes.

Yet why the nagging thought that all is not for the best? While recognising the African human rights system is wider than the African Charter-based mechanism, the latter remains its most important component. Calls for reform of the African Charter-based system have been made. Heyns contends that –²⁷⁵

... [t]he ideal option for the future would indeed be the reform of the system by means of a protocol, designed to rectify [identified] and other possible defects in a systematic and comprehensive manner.

On the other hand, Odinkalu is of the view that “the mechanism of the African Charter is not the altogether hopeless beast caricatured by the literature.”²⁷⁶ Arguing that the real problem lies in addressing the effectiveness of the system, he would “prefer a reform process or forum that is not so state-centric”.²⁷⁷

The challenges are many. A first one facing the African human rights system is to give true meaning to the principle of indivisibility and universality to all human rights, including collective rights. The Commission’s case work on this issue has progressed. In the SERAC Decision, it holds as follows:²⁷⁸

The uniqueness of the African situation and the special qualities of the African Charter impose upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that **there is no right in the African Charter that cannot be made effective.** [Emphasis added]

Yet, making all rights in the Charter effective is the second stumbling block identified: to turn the rights contained in all the documents into tangibles for all, so that they are roaring – and not the predicted “paper-tigers”.²⁷⁹

²⁷⁵ Heyns (2001:155).

²⁷⁶ Odinkalu (2001:225).

²⁷⁷ (ibid.:246).

²⁷⁸ *155/96 Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria*, 15th Annual Activity Report [in Decisions 2002–2007, IHRDA, Banjul 2008, pp.277–293], para. 68.

²⁷⁹ Anthony (1997).

The third one is for implementation mechanisms to avoid the ‘toothless watchdog’ syndrome. What should their roles be in the new human rights dispensation on the continent? What should they do to avoid the pitfalls encountered by the African Commission in its formative years? These are crucial questions to be answered for the numerous treaty-monitoring mechanisms to succeed in their missions.

And finally, does the system really need these multiple treaty-monitoring mechanisms?

Immense hope has been pitched on the African Court of Human and Peoples’ Rights.²⁸⁰ Conversely, concerns were expressed that, while the setting up of the Court was in itself a significant development, it was doubtful whether this would indeed sufficiently address the normative and structural weaknesses that affected the African human rights system right from the time it was set up.²⁸¹

Right now, before the Court even got started on the business of hearing cases, it is going through a transitional period, phasing out, having been subsumed into the African Court of Justice and Human Rights. Fourteen countries have so far signed the merged protocol and none has ratified it.²⁸² There is no indication regarding the required declaration granting individuals or relevant NGOs access to the Court. From experience, the jurisprudence of the African Commission has been advanced thanks to the individual complaints procedure. Barring individuals and NGOs from access may have a negative impact on the enforcement of human rights on the continent.

Without giving way to pessimism, let us focus on the silver lining in anticipation of a golden era where an African Court of Justice and Human Rights will hand down binding decisions. Given the present ratification status, this is not going to be for the immediate future. It is submitted that the African Charter-based mechanism is functional, notwithstanding its several shortcomings and imperfections. It still offers unexplored potentials to be tapped into.

²⁸⁰ Udombana (2000).

²⁸¹ Wa Mutua (1999).

²⁸² These are Algeria, Benin, Burkina Faso, Chad, Gabon, Guinea, Mali, Nigeria, Senegal, Sierra Leone, Tanzania and Togo; available at <http://www.african-union.org>; last accessed 11 April 2009.

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African courts and the African Commission on Human and Peoples' Rights

Michelo Hansungule

Introduction

Since the adoption of the Constitutive Act of the African Union (AU), Africa has been busy constructing a highly complicated institutional architecture designed to ensure justice for the victims of human and peoples' rights violations, as well as for states within the AU. Prior to the Constitutive Act (*the Act*), the only body that victims of human rights violations could turn to for relief was the African Commission on Human and Peoples' Rights (*the African Commission*). There was no forum on the African continent to handle the numerous conflicts and disputes between states and between individuals and their states. The African Commission has already rendered several decisions on alleged violations of human and peoples' rights – the most notable being *SERAC & Another v Nigeria*¹ regarding alleged violation by Nigeria of development-related rights in the restive region of the Niger Delta. This Communication is historical in a number of ways. After being repeatedly attacked for being toothless, the Commission tried to prove its worth through this Communication. Among other things, it pigeonholed and read some of the missing rights into the Charter before it went on to find the respondent guilty of violating them.²

One of the greatest challenges, however, is the implementation of African Commission decisions or recommendations. Victims of human rights violations that have received redress from the Commission have not really appreciated it. There has been nothing tangible or concrete from the Commission pronouncements in instances where a State is found to have violated a guaranteed right. Though this is a universal concern in that other instruments including United Nations-based human rights instruments are mocked by states, the problem with the

¹ *Communication No. 155/2001 SERAC & Another v Nigeria* (2001), 15th Annual Activity Report: 2000–2002.

² Some of these rights not expressly provided for in the Charter but which the Commission 'read' into the instrument involve rights to food, hunting, etc. With this progressive interpretation, SERAC expanded the scope and range of the rights which States are bound to uphold under the Charter.

African Commission is that the Charter denied it teeth with which to bite those found to have flouted it. This has been an extremely frustrating experience for the victims. Therefore, both the African Court on Human and Peoples' Rights and the African Court of Justice have been welcomed as important additions to the largely timorous Commission. Unfortunately, things move rather too fast in Africa. The two Courts, even before opening their doors to the general public, have already been replaced by the African Union. This has been a breathtaking experience by advocates of human and peoples' rights on the continent. Before a full assessment of the impact of the African human rights Court and of the Court of Justice is possible, the AU has discontinued them and in their place introduced the single African Court of Justice and Human Rights. At this rate, though one must be hopeful, it is not easy to tell whether the new outfit – the African Court of Justice and Human Rights – will last.

Evolution of the justice architecture in the AU

The Lomé (Togo) 2000 Constitutive Act³ of the AU was a major turning point in the quest for development, justice, human rights, the rule of law and good governance. Against the background of the Organisation of the African Unity (OAU) Charter of 1963, which explicitly excluded a court or justice institution in its architecture, the Constitutive Act was a major step forward. Democratisation of the continent towards the late 1990s right to the beginning of the new millennium gave impetus to the idea of continental justice as part of the mechanism for peace, security and stability in Africa. The Constitutive Act made specific provision for the establishment of an African Court of Justice charged with hearing, among other things, all cases relating to interpretation or application of the Act as well as any treaties adopted within the AU framework. A year before the adoption of the Protocol establishing the African human rights Court, Arthur Anthony asked the question on everybody's lips: Why would a judicial organ be anathema to African states?⁴ This was echoed by Yemi Akinseye-George as he welcomed the Protocol after its adoption, describing it as “the missing link in the African human rights mechanism”.⁵ But the African human rights Court is now gone. It is unbelievable that, after all this waiting, the Court disappeared without anyone

³ Available at www.african-union.org; last accessed 12 April 2009. All 53 AU member states have ratified the Constitutive Act repealing the 40-year-old OAU Charter and replacing it with the AU.

⁴ Anthony (1997).

⁵ Akinseye-George [2001/2002].

ever having seen the inside of the judges' chambers. Before any lawyer or non-governmental organisation (NGO) had had the opportunity to do battle in any of the courtrooms, the Court is gone. The Protocol for the new Court has just been posted to the AU website, where it is awaiting signature, ratification and accession by AU member states.⁶ Once the new Protocol has come into force, it will establish an entirely new structure.

The new African Court of Justice and Human Rights has been the subject of discussion within the corridors of the AU for nearly a decade. During deliberations towards the Protocol of the former African Court of Justice, some of the delegates started questioning the wisdom of having so many institutions of justice, given the paucity of resources in the AU. By 2003, when the issue was being discussed, the Protocol establishing the African human rights Court⁷ – although not yet in force – was nevertheless open for signature by AU member states. It was against this background that some of the delegates queried the advisability of having two courts.

Besides the 'resources argument', the equally important point was raised that, although the two courts were different in their make-up – one being for State disputes, the other for human rights disputes – there were potential areas of common jurisdiction; and that they were not in fact totally different from each other. The African Court of Justice, for instance, also enjoyed jurisdiction, albeit limited, in matters of human rights such as the freedom of movement by nationals of a member state in the territory of another member state. Similarly, it enjoyed jurisdiction to enforce the right to property. There are many other examples to illustrate the common jurisdiction that was going to define relations between the two courts. Therefore, there were genuine fears that potential for duplication existed if the AU went ahead with the task of establishing distinct judicial bodies, as was the case. The merger of the two courts was considered at various levels in the AU, therefore. Ordinary Sessions of the Assembly of

⁶ As at the time of going to print, 14 states had signed the Protocol, but none had ratified it yet. The Protocol will enter into force 30 days after the deposit of the instruments of ratification by 15 member states. Of the 14 signatories, Guinea was the first to sign.

⁷ Predictably, the African human rights Court, during its short lifespan, nevertheless managed to attract rich scholarly comment; see e.g. African Society of International and Comparative Law (1999:59–69); Akinyese-George (ibid.); Amnesty International (2002, 2004); Anthony (1997); Badawi (1997, 2002); George (1998); Hansungule (2002, 2006); Murray (2002); Mutua (1999).

Heads of State and Government held in July 2004 and July 2005 in Addis Ababa, Ethiopia, and Sirte, Libya, respectively, considered the issue. In both cases, the authorities were convinced of the necessity of going ahead with the merger.⁸

When the AU made public its intention to merge the two courts, reaction from the international community was not supportive. International human rights bodies including Amnesty International openly castigated the idea and accused the AU of reneging on its commitment to provide a strong human rights court which, it argued, was a desideratum in a continent marred with systematic abuses of human rights.⁹ Amnesty International also raised a number of valid arguments in support of keeping the status quo, including the logistical issues of what to do with the instruments of ratification or accession already in possession of the AU, especially in respect of the Protocol to the African human rights Court. However, the AU ignored all the calls, advice and criticism levelled against it and went ahead with producing the new Protocol and the Statute of the African Court of Justice and Human Rights (the *merger Protocol*) – the subject of this chapter.

At the Summit of the Eleventh Ordinary Session of the AU held in Sharm El-Sheikh, Egypt, in July 2008, the Assembly of Heads of State and Government formally adopted the resolution that provided the political basis for the merger Protocol establishing the new Court.¹⁰ Established in Article 2 of the Protocol, the new Court is governed by two main instruments, i.e. the Protocol and the Statute of the African Court of Justice and Human Rights itself (*the Statute*). This is a distinctive additionality to prevailing practice where an institution is usually established by only one instrument – often a Protocol – rather than two.

As indicated above, the Protocol deals with ‘establishment and transitional matters’. Specifically, it replaces the previous two Courts, establishes the single African Court of Justice and Human Rights in place of the two other Courts, and, for the avoidance of doubt, clarifies that –

[r]eferences made to the “Court of Justice” in the Constitutive Act of the African Union shall be read as references to the “African Court of Justice and Human Rights” established under Article 2 of this Protocol.

⁸ Decisions Assembly/AU/Dec.45 (111) and Assembly/AU/Dec.83 (V), respectively adopted at its Third (6–8 July 2004, Addis Ababa, Ethiopia) and Fifth (4–5 July 2005, Sirte, Libya); see www.african-union.org; last accessed 10 April 2009.

⁹ www.amnesty.org; last accessed 10 April 2009.

¹⁰ www.africa-union.org; last accessed 10 April 2009.

The Protocol also deals with the term of office of incumbent Judges of the African human rights Court, cases pending before the latter Court, the Registrar, and the provisional validity of the 1998 Protocol. Finally, Articles 8 and 9 provide for fresh signatures, ratification, accession, and entry into force of both the Protocol and the Statute.

The African Court of Justice and Human Rights

The Protocol on the Statute of the African Court of Justice and Human Rights

Even before the two continental Courts – the African human rights Court and the AU-Constitutive-Act-based African Court of Justice – had opened their doors to the public, they had been scrapped and their places taken over by the African Court of Justice and Human Rights.

There is now only one Court instead of the two originally anticipated for the African continent. The merged Court is to be known by the double-barrelled name of *African Court of Justice and Human Rights*. This is probably the first time in the international community that a court has been established by states with a two-pronged objective to provide for justice and human rights under one roof, so to speak. There are parallels for this model of justice structure in domestic legal systems, but not in international justice: the latter field is accustomed to operating the two concepts separately. Although the two cross paths once in a while in the course of trying to fix a dispute within the jurisdiction of a Court, this is not an intentional and deliberate procedure set out in Statutes and Protocols, as is the case with the African Court of Justice and Human Rights.

Domestic legal systems in the various jurisdictions often provide for a hierarchical structure by which a High Court will have different Chambers dealing with separate issues such as family matters, commercial matters, and human rights matters. A similar structure may prevail at the level of a Supreme or Apex Court. But this is not familiar in international law – especially in the context in which the African Union is establishing the two court functions of justice and human rights under one law or protocol. Therefore, Africa has scored a first with the double-jurisdiction Court it seeks to establish for the continent once the merger Protocol just unveiled to AU member states for their signature, ratification and accession comes into force.

However, the merger Protocol has only been made available on the AU website. Consequently, it has not yet attracted the attention of many of the 53 AU member states. By 1 April 2009, only 14 countries had signed the Protocol, and none had ratified it.

Article 9(1) of the merger Protocol provides that –

[T]he present protocol and the Statute annexed to it shall enter into force thirty (30) days after the deposit of the instruments of ratification by fifteen (15) Member States.

In basic terms, this means that although the former African Human and Peoples' Rights Court ought to have started hearing cases when its Protocol came into force on 25 January 2004, victims of human rights violations will now have to wait a little longer to allow the new Court to become operational after its Protocol enters into force. The first problem this would have caused has been avoided in a rather ironic way: the now replaced African human rights Court had not actually been seized of any case since its establishment. It is like the Court and potential victims were 'waiting' for the merger of the two courts before invoking the sacred jurisdiction to start entertaining complaints. It would have caused logistical nightmares to process the merger and the replacement this entailed had the Court already started hearing cases.

Article 1 of the merger Protocol, which decrees the replacement of the 1998 and 2003 Protocols, provides as follows:

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted on 10 June 1998 in Ouagadougou, Burkina Faso and which entered into force on 25 January 2004, and the Protocol on the Court of Justice of the African Union, adopted on 11 July 2003 in Maputo, Mozambique, are hereby **replaced** by the present Protocol and Statute annexed as its integral part hereto, subject to the provisions of Article 5, 7 and 9 of this Protocol. [Emphasis added]

Similarly, albeit clumsily, Article 2 on establishment provides the following:

The African Court on Human and Peoples' Rights established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union established by the Constitutive Act of the African Union, are hereby **merged** into a

single Court and established as “The African Court of Justice and Human Rights”.
[Emphasis added]

These provisions raise several difficult questions. For instance, what does “replacement” entail? Do the ratifications and accessions rendered by states to both Protocols suddenly become a nullity and, therefore, of no legal consequence? Could this not have been foreseen and, therefore, avoided? Fortunately, Chapter 11 entitled “Transitional Provisions” in the merger Protocol allows for the continuation of the *modus operandi* till after the coming into force of the new Protocol. This necessitated the saving clause on incumbent Judges spelt out in Article 4, as follows:

The term of office of the Judges of the African Court on Human and Peoples' Rights shall end following the election of the Judges of the African Court of Justice and Human Rights.

Specifically, the Protocol states that –

... the Judges shall remain in office until the newly elected Judges of the African Court of Justice and Human Rights are sworn in.

Similarly, the new Protocol has addressed the issue of pending cases – even though there are none at the moment – in Article 5:

Cases pending before the African Court on Human and Peoples' Rights that have not been concluded before the entry into force of the present Protocol, shall be transferred to the Human Rights Section of the African Court of Justice and Human Rights on the understanding that such cases shall be dealt with in accordance with the protocol to the [African Court on Human and Peoples' Rights] on the establishment of the African Court of Justice and Human Rights.

Therefore, any cases that are pending (of which there are none at the moment) and any that may yet be brought by parties before the new Protocol comes into force “shall be transferred to the Human Rights Section” of the new Court; and because they may have been brought to the African human rights Court based on the 1998 Ouagadougou Protocol, they are to be dealt with not on the basis of the new merger Protocol but its own founding Protocol. Therefore, in spite of Article 1 which provides that the two respective Protocols on the African human rights Court and on the African Court of Justice have been replaced, in respect

of the “cases pending before the African human rights Court, the replacement does not affect ongoing cases even after the new Court has become operational. In fact, Article 7 of the merger Protocol on the provisional validity of the 1998 Ouagadougou Protocol provides that the latter –

... shall remain in force for a transitional period not exceeding one (1) year or any other period determined by the Assembly, after entry into force of the present Protocol, to enable the African Court on Human and Peoples' Rights to take the necessary measures for the transfer of its prerogatives, assets, rights and obligations to the African Court of Justice and Human Rights.

In spite of these elaborations, the word *replaced* itself needs to be elaborated to clarify the situation, otherwise the new Court will be marred by the confusion pursuant to the new Protocol and Statute. The merger of the two previous Courts raises several other issues. For instance, what exactly is the meaning of a *merger* in respect of the two Courts under one Court? Why did the AU not take the route of leaving it open for states that had already ratified the Protocols establishing the two Courts to carry over their instruments and deem them deposited for the new Court, instead of asking them to start the process afresh? It is also interesting that the word *peoples* is missing from some of the provisions of the merger Protocol, which makes it appear that the new Court is interested only in ‘human’ and not ‘peoples’ rights, while the African Charter on Human and Peoples’ Rights upon which the Court will seek to enforce its human rights mandate specifically includes “peoples’ rights”.

Substantive provisions of the Protocol and Statute of the African Court of Justice and Human Rights

Substantive provisions regulating the Court are provided for either in the Statute or in the Annex to the Protocol. The two predecessor Courts were directly regulated by their founding Protocols.

The Statute is a voluminous instrument, comprising 7 long chapters and 60 articles. The chapters seek to regulate matters such as the definition of the Court’s functions, establishing its organisation, and setting out the structure of the governance system regulating the Court. The chapters also set out the issues of the Court’s competences, including its jurisdiction; who is eligible to submit cases to the Court, and what law applies to such cases; the procedure governing Court proceedings; and the relationship with the Assembly.

The composition of the Court

When compared with the structure of Judges' representation in the former two Courts, there have been some modifications on the number and origin of Judges appointed to serve in the new Court. Both the African Commission and the African human rights Court provide for 11 Commissioners and Judges, which is the same number for the Committee on the Rights of the Child. Article 3 of the Statute of the new Court provides for 16 Judges and, since this number may be reviewed by the Assembly, it is subject to change. Of course, the 16 appointed Judges are to be AU states parties; this differs from the European practice of recruiting at least one Judge from outside Europe. The principle of geographical representation is now one of the conditions for composing the Court, as stated in paragraph 3 of Article 3 of the Statute for the new Court:

Each geographical region ... shall ... where possible be represented by three (3) Judges except the Western Region which shall have four (4) Judges.

It is particularly important that, in Article 4, the Statute sets out the specific conditions for election as a Judge to the Court, as follows:

The Court shall be composed of impartial and independent Judges elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognised competence and experience in international law and/or[...] human rights law.

The addition of "or human rights law" is extremely important due to the dual nature of the mandate of the Court both as a 'court of justice' and a 'court of human rights'. If properly interpreted and applied, Article 4 should enable the Court to attract persons with experience from both African judiciaries, as well as from among the finest academic experts on international law and human rights. In respect to the appointments of the Judges to the African Court of Human and Peoples' Rights, clearly other considerations than merely individual competence and qualification were taken into account.¹¹

¹¹ Normally, States would look for, among other things, political correctness of the individuals to pick from the Bench and recommend for international appointment. There are several instances in which Judges, though actually qualified and possessing the necessary experience for appointment to an international position, nevertheless are hand-picked by responsible authorities instead of subjecting them to the internal rigorous identification process the

However, Article 4 does not address one of the most important conditions for identifying capable Judges, particularly if they come from the ranks of practising judges in national jurisdictions. It is crucially important to make sure that Judges on the continental Court, besides subjecting them to the same process in internal law pertaining to their appointment to the judicial office, come from jurisdictions that are noted for jealously safeguarding the rule of law. Both the Protocol and Statute should have been adamant in insisting that only States that are notorious for fiercely upholding the rule of law will be allowed to nominate Judges. Instead, Article 4 emphasises the personality of the person to compete for judgeship on the Court, but not the conditions under which that judge operates in his/her national jurisdiction. In other words, there should be something in the Statute that requires a certain minimum standard to apply to states parties in terms of levels of democracy and the rule of law as a condition for them to qualify for nominating a practising Judge to the new continental Court.

Nonetheless, there are some known shortcomings that the Statute addresses. Article 7(1) of the Statute, for example, has corrected a previous inconsistency: the election of Judges is now the responsibility of the Executive Council and not the Summit of Heads of State and Government, as was the case in the two replaced Courts. Although past treaties provided for the Heads of State and Government to conduct the elections, in practice this was performed by their ministers in the Executive Council. Now, this anomaly has been rectified. The Executive Council will elect the Judges while the Assembly execute the appointments of the successful parties submitted to them by the Executive Council.

As regards the right to vote, it is not enough simply to be a state party to the Protocol and Statute. In addition, the state party concerned must be entitled at the time of the election to 'voting rights'. Based on Article 23 of the Constitutive Act, some member states have lost their voting rights for a number of reasons, including failure to implement decisions of the AU and its organs, and being in default in the payment of their subscriptions. Article 7(4) and (5) enjoin the Assembly to ensure equitable representation of the regions, the principal legal

principles of good governance would require. We could not find any evidence either from fellow judges or law societies in which the internal consultation process was invoked in respect of the identification and nomination of some of the Judges. Normally, this is left to the political authorities on the basis of extraneous grounds to identify and formally nominate the candidates for election by the continental body without prior recourse to the peers of the nominated Judge as to his or her suitability.

traditions of the continent, and gender. Therefore, both the Executive Council and the Assembly (politicians) have a role to play in the appointment and removal of Judges. Though emphasis as regards the removal of Judges has been placed on their peers, at least in the early stages, in the final analysis the decision to remove a Judge has to be sanctioned by the Assembly or Executive Council,¹² which has the potential for political fall-out in cases where the Judge's state does not accept the Court's decision.

Besides reiterating the principle of independence in the Protocols of the replaced Courts, Article 12(2) adds that "[t]he Court shall act impartially, fairly and justly". In paragraph 3 it goes on to insist that, "[i]n the performance of the judicial functions and duties, the Court and its Judges shall not be subject to the direction or control of any person or body". This is an important injunction – given Africa's charades of justice. A recent example of this is the current case of *Prosecutor v Jacob Zuma*¹³ in South Africa, in which charges have been withdrawn due to alleged interference by members of the Executive in the judicial process. It is a routine in many African countries for the Executive branch of government to dictate, direct or control the judiciary in order to have a predictable outcome.

The structure of the new Court

The structure of the new Court is defined in the Statute. Article 16 provides as follows:

The Court shall have two (2) Sections: a General Affairs Section composed of eight (8) Judges and a Human Rights Section composed of eight (8) Judges.

The General Affairs Section has competence to hear all cases brought to it in accordance with Article 28, with the exception of cases dealing with human and peoples' rights issues; conversely, as expected, the Human Rights Section does not deal with general affairs. Besides sitting as a Section, the Court shall have power to empanel as a Full Court, and any Section may refer a case to the Full Court. It is also provided that either of the two Sections may constitute one or several Chambers. In other words, the Court hierarchy is required to comprise a

¹² Articles 9 and 10 of the Statute.

¹³ *Prosecutor v Jacob Zuma* (2005). For more on the case, see the following South African papers: *Business Day*, 17 April 2009; *Mail & Guardian*, 9 April 2009; *Sunday Times*, 5 April 2009; *The Times*, 17 April 2009.

Full Court, the General Affairs Section, the Human Rights Section, and Chambers constituted by either of the Sections.

Article 28 referred to above provides for the competence of the Court, as follows:

The Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present Statute which relate to:

- a) the interpretation and application of the Constitutive Act;
- b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or Organisation of African Unity;
- c) the interpretation and application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned;
- d) any question of international law;
- e) all acts, decisions, regulations and directives of the organs of the Union;
- f) all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court;
- g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;
- h) the nature or extent of the reparation to be made for the breach of an international obligation.

By all accounts, this is a very broad mandate. A unique feature is the inclusion of "All acts, decisions, regulations and directives of the organs of the Union". Another singular facet is the inclusion of "agreements State Parties may conclude among themselves" – as long as they confer jurisdiction on the Court. Bilateral agreements between states parties may probably now be amenable to the Court's jurisdiction. With regard to "or any other legal instrument relating to human rights ratified by the States Parties concerned", the intention is to reach out to those treaties not specifically mentioned in the Statute and to treaties and instruments yet to be adopted.

The Protocol on the Statute of the African Court of Justice and Human Rights

Who can bring cases to the Court? This is set out exhaustively in Articles 29 and 30 of the Statute. States parties to the Protocol, of course, as natural litigants in

international law, have been recognised as being eligible to bring cases to the Court. Others are the Assembly, staff members of the Union, the Pan-African Parliament, and other organs of the African Union. Article 30, in addition to entitling states parties to the Protocol, broadens the eligibility to submit cases to include the following:

- The African Commission on Human and Peoples' Rights
- The African Committee of Experts on the Rights of the Child
- African Intergovernmental Organisations accredited to the Union or its organs
- African national human rights institutions, and
- Individuals or relevant NGOs accredited to the AU or to its organs, subject to the provisions of Article 8 of the Protocol.

Innovations include conferring eligibility on the African Committee of Experts on the Rights of the Child, African national human rights institutions, and individuals. This has expanded the scope of persons and institutions that are eligible to submit cases from those formerly provided for in Article 5 of the Protocol to the African Court on Human and Peoples' Rights.

But the right, pursuant to Article 30(e), of individuals and accredited NGOs to submit cases is limited to compliance with Article 8 of the Statute. Article 8(f) provides as follows:

Any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Article 30 (f) involving a State which has not made such a declaration.

This is similar to the Article 35(6) declaration in the replaced Protocol, relevant parts of which provided the following:

At the time of ratification of this Protocol ... the State shall make a declaration accepting the competence of the Court to receive cases under Article 5 (3) of this Protocol

Article 5(3) of the replaced Protocol granted NGOs with observer status eligibility to bring cases to the Court directly, thereby bypassing the African Commission. It was at the state party's discretion to accept – by way of a declaration – that the Court was possessed of jurisdiction to entertain cases from individuals or NGOs accredited to the AU or to its organs.

Several innovations have penetrated the Statute with regard to procedure. Article 34 provides some guidance in terms of how to institute proceedings before the Human Rights Section. In particular, it is instructed that proceedings are to be brought by way of written application to the Registrar. Article 34 also directs that, if possible, the case should indicate the right or rights alleged to have been violated, as well as the specific provision and instrument the allegation seeks to invoke. Thus, there is a shift towards more formal procedures in comparison with the African Commission; quite frankly, however, unless a continental fund is created to provide for mandatory Africa-wide legal aid, this will turn away illiterate and indigent litigants. Article 52(2) provides for “free legal aid for a person presenting an individual communication”; nonetheless, this may just not be adequate, given that it is limited to being “required in the public interest” and to further conditions to be provided in the Rules of Procedure. If one considers that the majority of Africans who happen to be victims of human rights abuses are chronically poor, the Statute is indulging in academic polemics.

Article 35 provides for the application of provisional measures. However, experience has shown that states parties to the African Charter routinely ignored the provisional measures invoked by the African Commission.¹⁴ The important question here is how such measures will work under the new Court’s supervision, when they clearly did not work under the Commission’s. Merely providing for such measures, therefore, is not enough.

Article 36 introduces some interesting concepts with regard to representation of parties before the Court. In particular, it provides that –

[t]he African Commission, the African Committee of Experts ... [and] African National Human Rights Institutions **shall be represented by any person they choose for that purpose.** [Emphasis added]

This opens the door for the African Commission and other bodies to hire legal counsel or law professors, or to be represented by their own staff members.

¹⁴ See e.g. Communication No.’s 137/94, 139/94, 154/96 and 161/97 *International Pen, Constitutional Rights Project, Interights and Civil Liberties Organisation (On behalf of Ken Saro Wiwa Jnr) v Nigeria*, 12th Annual Activity Report: 1998–1999. In this communication, Nigeria blissfully ignored the call by the Commission to not execute Ken Saro Wiwa as his complaint was still pending before it. Many other states parties have ignored the provisional measures the Commission invoked to prevent rendering the process before it became academic.

Given the fact that the African Commission, for example, has no experience in international litigation, this is a practical solution to the dilemma the Commission faced when the African Court on Human and Peoples' Rights become operational. Thus, besides individuals themselves, relevant NGOs, agents and other representatives of parties before the Court, their counsel or advocates, etc., are entitled to appear before the Court.

With respect to judgements, the Statute provides that decisions are to be taken by a majority of Judges, with a casting vote by the Presiding Judge in the event of "an equality of votes".¹⁵ This provision is made in addition to the right provided to Judges in Article 44 to have dissenting opinions. Other conditions, such as the duty on the Court to render judgement within 90 days of having completed deliberations, the requirement that Judges are to state the reasons on which their judgements are based, and the obligation to notify the parties of the judgement in the case, are a rendition of the 1998 Ouagadougou Protocol. However, there is one particular innovation, namely that Article 43(6) mandates the Executive Council, which is also to be notified of the judgement, "to monitor its execution on behalf of the Assembly". This is a direct response to the frustrations over unimplemented African Commission recommendations or decisions. Article 43(6) is a mutatis mutandis extract of its equivalent in the European Convention on Human Rights.¹⁶

Article 46 provides that "[t]he decision of the Court shall be binding on the parties", and that such decision is final. Furthermore, in an innovative way, the Statute provides that –¹⁷

[t]he parties shall comply with the judgement made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution.

Paragraphs 4 and 5 enjoin the Court to report to the Assembly any party that fails to comply with the judgement, and the Assembly is mandated to punish the defaulting party – including by the imposition of sanctions provided in Article 23(2) of the Constitutive Act.

¹⁵ Article 42 of the Statute.

¹⁶ Ovey & White (2002:420–436).

¹⁷ Article 46(3) of the Statute.

There is also provision for advisory opinion, which the Court may render upon request. This, however, is limited as to who may request it. A request for an advisory opinion may be submitted by –¹⁸

... the Assembly, the Pan-African Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council (ECOSOC), Financial Institutions or any other organ of the Union as may be authorised by the Assembly.

The request is also not permitted to relate to a matter that is pending before the Court.

Finally, Article 57 provides for an “Annual Activity Report” which the Court is obliged to render to the AU Assembly each year. This might appear to be formal process, but it can be a powerful weapon of compliance. Through the Report, the Assembly will get to know the work of the Court; but, more importantly, states parties found to have violated international law and human rights will be exposed – and hopefully shamed – along with any states parties found to have defaulted in implementing the decisions of the Court. Article 57 can be construed as a ‘shaming clause’ meant to bring shame on guilty parties, but also to praise those that are not found to have run foul of the law.

The African Commission on Human and Peoples’ Rights

Introduction

The African Commission on Human and Peoples’ Rights (*African Commission*) was established in terms of Article 30 of the African Charter on Human and Peoples’ Rights. The African Charter came into force in October 1986. Relevant parts of Article 30 provide as follows:

The African Commission ... shall be established **within** the African Union to promote human and peoples’ rights and ensure their protection in Africa. [Original emphasis]

As explained below, the Secretariat of the African Commission complained that the vague status of the Commission was cause for concern.¹⁹ While other

¹⁸ Article 53 of the Statute.

¹⁹ E-mail from the Secretariat, African Commission on Human and Peoples’ Rights, Banjul, The Gambia, 30 January 2009.

AU organs are provided for in the Constitutive Act, the African Commission is not. Consequently, the Commission has no proper status in the structures and institutions of the AU at Addis Ababa. Nevertheless, the table below shows the current Commissioners, their countries of origin, and the countries to which they have been allocated in order to promote the Charter:

Name of Commissioner	Country of origin	Country covered in respect of promoting the Charter
Alapini-Gansou , Ms Reine	Benin	Cameroon, the Democratic Republic of Congo, Mali, Senegal, Togo, and Tunisia
Atoki , Ms Catherine Dupe	Nigeria	Djibouti, Egypt, Ethiopia, Somalia and Sudan
Bitaye , Mr Musa Ngary	Gambia	Ghana, Nigeria, Sierra Leone and Zimbabwe
Kayitesi , Ms Zainabo Sylvie	Rwanda	Algeria, Burkina Faso, Burundi, Côte d'Ivoire and Mauritania
Maïga , Mr Soyata	Mali	Central African Republic, Republic of Congo, Gabon, Guinea, Libya and Niger
Malila , Mr Mumba	Zambia	Kenya, Malawi, Tanzania and Uganda
Melo , Dr Angela	Mozambique	Angola, Cape Verde, Equatorial Guinea, Guinea, Guinea Bissau, and São Tomé and Príncipe
Monageng , Hon. Judge Sanji M	Botswana	Lesotho, Liberia, Mauritius and Mozambique
Mukirya Nyanduga , Mr Bahame Tom	Tanzania	Botswana, Eritrea, Rwanda, the Seychelles and South Africa
Tlakula , Ms Pansy	South Africa	The Gambia, Namibia, Swaziland and Zambia
Yeung Sik Yuen , Chief Justice Yeung Kam John	Mauritius	Benin, Chad, the Comoros, Madagascar, and the Saharan Arab Democratic Republic

Article 45 of the African Charter spells out the African Commission's mandate as follows:

The functions of the Commission shall be:

1. To promote Human and Peoples' Rights; and in particular:
 - (a) to collect documents, undertake studies and research; on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments;
 - (b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations;
 - (c) co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the AU or an African organization recognized by the AU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

The past 20 years have been hectic for the African Commission in its attempts to discharge this rather bloated mandate. In particular, the Commission has been trying to promote the human and peoples' rights provided for in Article 45(1) above through a variety of activities, more especially by organising seminars, symposia, conferences, and the dissemination of information, as well as by encouraging national and local institutions concerned with human and peoples' rights to persevere in their efforts. But it has not been easy. First, the whole idea of promoting human rights is new to Africa. Second, there is no money; everyone knows that African institutions survive on shoestring budgets. It is far worse at the AU. Therefore, it is understandable that the African Commission claims not to have been able to deliver on its mandate to promote the Charter because it was not funded. However, the Commission also bears part of the blame for its poor performance. Most Commissioners are there to promote their personal interests: very few are there to promote rights. Proof of this is in how they are appointed or 'elected' into the Commission, particularly how they are identified as eligible by their governments. Most of them are identified as personal friends of government officials, if they are not themselves employed in government. Even when they know they are not qualified – going by the Charter – because

they come from government, they stay in the Commission anyway. A person with such a background, as most current Commissioners have, cannot promote the Charter excitedly or wholeheartedly because there are other considerations which are more important that s/he has to take into account when discharging Charter functions. A case in point is the former Chairperson of the Commission, who walked straight from that post to become Minister of Human Rights in her home country. How can this be if this person was 'independent', as the Charter would have liked, during her tenure both as Commissioner and later as Chairperson? There are and have been ambassadors, attorney-generals, government legal officers, electoral officers, officers from national human rights institutions in states parties, etc., on the Commission. Even those that are not recruited directly from government usually have close ties with senior politicians and government officials in order to have been identified as potential Commissioners. Therefore, demanding the implementation of such an exacting mandate by persons who are there for interests other than those of the African Commission is being unfair – to say the least.

The African Commission has also given its views and recommendations to states parties on how best they can abide by their obligations under the Charter.²⁰ Similarly, the Commission seeks to protect human and peoples' rights, particularly through decisions or recommendations in the course of processing mostly individual communications. Nonetheless, there have hardly been any requests for the Commission to interpret the provisions of the Charter except by way of communications, and then only by individuals or NGOs and not the bodies contemplated in Article 45(3). The OAU Assembly of Heads of State and Government, mandated the Commission to assume jurisdiction over the state-party reporting procedure after the latter made a request during their Third Ordinary Session held in Libreville, Gabon, in April 1988.²¹

Implementation of the above mandate over the years has proven to be a major challenge to the African Commission. One of these challenges, as indicated, is the perennial lack of funding. The other is the glaring lack of the necessary will

²⁰ These have normally taken the form of 'resolutions' adopted by the Commission, which address specific and general issues related to human and peoples' rights; observations made in the course of examining state party reports, even though the Commission on its website does not keep 'concluding observations' on state initial/periodic reports to the African Commission, which, however, it lists on the page but without actually providing for it.

²¹ Documentation, African Commission on Human and Peoples' Rights, Banjul, The Gambia, Vol. 1 (1991) of the Review.

on the part of all stakeholders, more especially states parties, to push the human rights agenda. The inability of the Commission in spite of these other constraints to deliver on its mandate is another. However, the Secretariat has indicated that the situation was now changing. A case in point was the latest increase in the Commission budget.²² For the past 20 years, the African Commission had been receiving less than US\$1 million annually.²³ However, in 2008, through the efforts of the current Secretariat, it received US\$6 million from the AU. As the Commission observed, “even if we only received half of it this year [2009], it is much more than what we were receiving just two years back”.²⁴

Article 41 has further bearing on this issue:

The Secretary-General ... shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organisation of African Unity shall bear the costs of the staff and services.

However, as explained by the Secretariat, to date this has not been implemented by the AU. It is therefore encouraging that there has been a change of heart by AU authorities at Addis Ababa regarding the provision of necessary funding to the African Commission. Of course, human rights work is not just about money: it is about being strategic on how to conduct human rights-related work. However, money is important when it comes to spreading the word to millions of people around the continent who are deprived of their human rights.

The Secretariat also revealed as a positive development the recent decision by the AU to adopt a new structure for the African Commission, “which will result

²² E-mail, African Commission Secretariat, Banjul, The Gambia, 13 March 2009.

²³ See e.g. Report of the African Commission on Human and Peoples' Rights, Executive Council, Eleventh Ordinary Session, 25 June 2007, Accra, Ghana, EXCL/364 (X). The report states the following: “During the 2006 financial year, the Commission was allocated One million one hundred and forty-two thousand four hundred and thirty six United States Dollars (USD 1,142,436)”. In the 2007 financial year, there was a 5% increase compared to the 2006 budget. “... Out of this amount, only Forty-seven thousand United States Dollars (USD 47,000) has been allocated to programmes, including promotion and protection missions of the Commission. This amount is enough to cover only four missions in any year. No allocation is made for research, training/capacity building, special mechanisms, activities, projects, seminars and conferences ... This amount does not cover a third of the cost of the promotion missions for Commissioners and special mechanisms earmarked for a year ... The work of the Commission thus continues to be severely compromised due to inadequate funding ...”.

²⁴ (ibid.).

in a substantial increase in the number of staff".²⁵ This is important because, over the past two decades, the Secretariat has operated on a skeleton structure, thereby effectively preventing it from fully servicing the Commission in respect of discharging its mandate.²⁶ The AU is clearly not being serious when it assigns 23 individuals the responsibility of overseeing human rights work in 53 different countries boasting over 800 million people.

A much more realistic staff structure with the capacity to discharge the business of the Secretariat and service the Commission at optimum capacity is presented in the diagram on the following page.²⁷

The suggested Business of the Secretariat Model would call for an expanded Secretariat – which, for years, the AU has been unwilling to agree to. Nonetheless, the AU did finally agree to a relatively expanded 'Maputo structure', consisting of a total of 36 staff, including the new posts of Deputy Secretary, Researchers, Resource Mobilisation Officer, and Planner, among others. But given Africa's vast needs in the field of human and peoples' rights, this will amount to a drop in the ocean.

The Secretariat also claimed credit for the establishment of the African Court of Human and Peoples' Rights.²⁸ But with the founding of the African Court of Justice and Human Rights, the former has been replaced.

With regard to some of the developments that tend to affect the work of the Commission, the Secretariat alluded to the fact that the African Commission was not clearly defined within the AU.²⁹ They bemoaned as a negative element

²⁵ E-mail, African Commission Secretariat, Banjul, The Gambia, 13 March 2009.

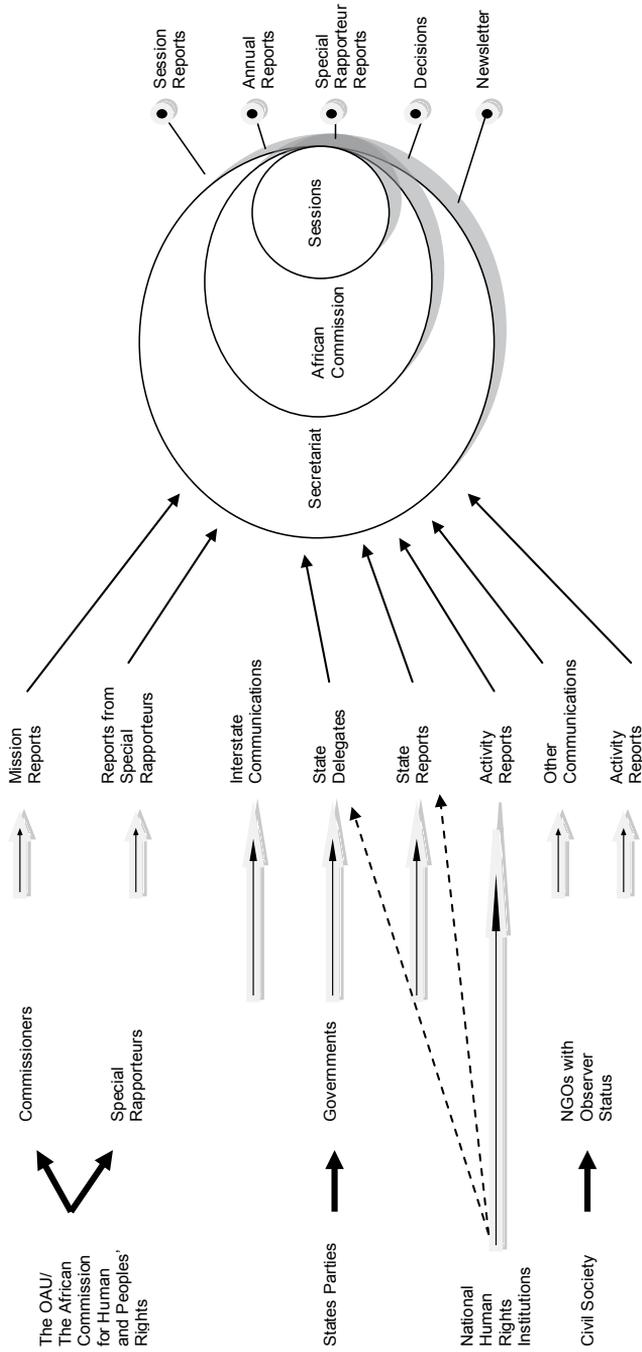
²⁶ As at May 2007, the staff situation at the African Commission Secretariat comprised a total of 23 members, including the post of Executive Secretary vacant at the time. The 23 staff members included 9 legal officers assigned to different offices, 1 documentation officer, 1 receptionist, 1 cleaner, and a number of translators, computer technicians, clerks, drivers, security guards, etc.

²⁷ E-mail (ibid.).

²⁸ In a discussion on 22 June 2003 in Pretoria, South Africa, with one of the Commissioners, who has since retired. The fall-out happened at the 2002 (October) Session of the African Commission held in Pretoria. See also Communication: *DRC v Burundi, Rwanda and Uganda*.

²⁹ When the idea of a Charter was being mooted at the OAU Summit held at Monrovia, Liberia, way back in July 1979, and in the days that followed, few people believed the African

**The business of the Secretariat
of the African Commission for Human and Peoples' Rights**



that the Commission was not mentioned in the AU's Constitutive Act. The Secretariat explained that, until 2008, the African Commission had been placed administratively under the Political Department. This refers to the Commission not being included among the Article 5 Organs in the AU Constitutive Act. A particularly negative aspect was that the Commission did not have its own budget line, but fell under that of the Political Department. The latter Department had to authorise the Commission's expenditures, therefore, i.e. expenditures of its missions, which impacted negatively on the Commission's effectiveness. Furthermore, the Secretariat mentioned that its own status was not very clear in the Charter. For example, it was not immediately apparent whether the Secretariat should receive instructions from the Commission only, or from the AU Commission as well. For the time being, the Secretariat explained, "everything was controlled from Addis Ababa". A case in point was that the Commission did not take part in staff recruitment. This, especially the recruitment of the Secretary, had been a great bone of contention between the Commission and the AU, but more specifically between the Commission and the Executive Secretary.

State party reporting obligation

State party reporting is a complete failure in the African human rights system.³⁰ Many states are in arrears, with several reports due; and when they report, they do so inconsistently and often without due regard to quality. The Commission has compounded this by declaring an amnesty on any state that reports once, 'forgiving' it its past arrears – however many they may be. Besides this not being

leaders meant well and were serious about it. In September that year, the UN organised a symposium – again at Monrovia – to which UN representatives and representatives from regional systems in the Americas and Europe were invited. The idea was to gain insight into the experiences with these three systems. One thing that came out quite clearly was the need to protect the body that would develop out of the process from interference by the OAU and any other states parties. That was when it was suggested that the African Commission would have to be established outside of the OAU Charter: in this way it would be shielded from the political influence that would inevitably follow if it were set up under the auspices of the Charter. To date, therefore, the African Commission stands separately and autonomously from other organs of the AU, precisely in order to protect its independence.

³⁰ The Status on Submission of State Initial/Periodic Reports to the African Commission (March 2008 update). It shows a very high defaulting record, with more than ten states parties not having submitted a single report more than 20 years after the Charter came into force and the reporting obligation became due. See www.achpr.org/english/_info/statereport_considered_en.html; last accessed 18 April 2009.

sanctioned by Article 62, which is specific about when and how states are to report, it discourages those few states that want to comply.

Poor quality reporting has come to characterise the reporting procedure in the sense that guidelines on the preparation of state reports are rarely taken into account. The Commission has also not fully grasped the purpose of the reporting obligation. There are no follow-up mechanisms, comments or observations, as there are in the UN System, to assist states in appreciating where they went wrong and to offer pointers on how to improve in subsequent reports.

Promotion and protection

Owing to a variety of factors, the Commission's mandate to promote the African Charter has not really been implemented – let alone implemented satisfactorily. As indicated above, Article 45 imposes the overarching duty on the Commission to promote the Charter. This huge responsibility effectively means undertaking sustained research in human rights, and then disseminating the research findings to the general public through lectures, workshops, conferences, etc.

In response, the Commission has come up with several instruments and mechanisms with which to implement this part of its mandate. In the table of current Commissioners presented earlier in the paper, the third column shows which countries have been allocated to each Commissioner. It is that incumbent's duty to promote the Charter as well as the work of the Commission itself.

Firstly, due to inadequate funding, however, most of the Commissioners have hardly visited the countries allocated to them for their promotional work. Secondly, in instances where a country or two have been visited, the same constraint – a lack of funding – has meant the official concerned will spend one week at the most to conduct all the promotional work for the entire country. This is reflected in the reports some of the Commissioners have compiled. However, apart from reporting to their peers at sessions about what they accomplished during intersession periods, the majority of Commissioners have not compiled comprehensive reports on their promotion missions. Thirdly, the method Commissioners often use ensures a limited outcome of the promotional mission embarked upon. Because Commissioners are hosted by governments, who arrange the mission and provide all facilities to facilitate it, ownership of the programme is solely in the hands of the host state – which seriously compromises

the Commissioner's work. Fourthly, the fact that the 11 Commissioners are part-time officials with full-time jobs to earn their living, they cannot possibly be expected to cover the entire continent of 53 countries. Obviously, this makes it impossible to even imagine they can implement a fifth of their promotional mandate in their tenure. Therefore, the promotional mandate lacks concrete deliverables of which the Commission can be proud.

Rapporteurs

Based on Article 46 of the Charter, which entitles the Commission to "resort to any appropriate method of investigation", it has tried to be proactive and come up with innovative methods such as appointing rapporteurs with specific mandates to investigate and, in the course of doing so, promote human rights. This has resulted in several mechanisms, including those on the following:

- The right to life and protection from extrajudicial killings
- The rights of prisoners in Africa
- The rights of women in Africa
- Press freedom and the right to information
- Human rights defenders, and
- Refugees and internally displaced persons.

The objective is for the Commissioner concerned, especially during inter-session periods, to go out and investigate his/her mandate in the specific area covered by the mechanism, and to deliver a report to the Commission, which may prompt action to be taken after due consideration of the report findings. There have been positive results in some of the work done by Rapporteurs and Commissioners, more especially those funded by external bodies: as with the rest of the Commission, the main constraint here, too, has been funding. The Rights of Prisoners in Africa as well as the Rights of Women mandates are among those that have attracted funding from outside, resulting in projects being implemented in these fields. In fact, there has sometimes been so much money poured into these mechanisms supported by outside bodies that it has created tension among Commissioners as to how such funding is used. However, those that are not so lucky in respect of attracting outside funding have found their work constrained.

But again, the mechanisms have not achieved much. The first problem is an internal one. Due to the selfishness of some of the Commissioners in previous

years, special procedures were allocated to Commissioners. In the present circumstances, only Commissioners can be Rapporteurs. Even though, as part-time officials with full-time employment elsewhere, Commissioners often complain of a lack of time to attend to Commission work, they nevertheless insist on undertaking the Rapporteur work themselves – mostly due to the monetary benefits this entails. A Commissioner who is lucky enough to land on a lucrative mechanism whose funding is constant is likely to benefit monetarily from undertaking the work of the mechanism and, hence, prefers to keep the mechanism in-house. Outsourcing it to outside experts, such as in the UN Human Rights system,³¹ of course, should result in more positive results than is presently the case at the African system. Part-time Commissioners with so much on their plate practically have no time to conduct the kind of intensive investigations an expert in the field would to produce a quality report.

Also, the lack of a proper focus on the aims and objectives due from the mechanism has led to poor implementation.³² Some of the Rapporteurs simply have no idea what it is the mechanism aims to achieve. For example, one of the Rapporteurs for the Prison Conditions in Africa decided to visit prisons in Europe instead of in Africa; this understandably provoked criticism from her fellow Commissioners during her report-back. Similarly, the Rapporteur on Women's Rights in Africa had such a bloated mandate that she was unable to specific issues to investigate: women's rights are a broad subject. Another case in point is the Rapporteur on Refugees and Internally Displaced Persons, who was caught up in a diplomatic fracas in Zimbabwe when – without a proper mandate either from his colleagues in the African Commission or the host state – rushed to Zimbabwe on a directive from the AU to join a UN Mission investigating the government's programme ("*Murambatsvina*") of demolishing the houses of suspected political opponents, which resulted in widespread displacements. Officials in Zimbabwe's Foreign Ministry expressed ignorance of the Rapporteur's visit and, as a result, the Zimbabwe Government did not clear him as required in the rules governing visits by Rapporteurs or foreign officials. Consequently, he was left stranded in his hotel for days until he decided to return – without having met one official.

³¹ In the UN, Independent Procedures are outsourced to experts outside the treaty bodies, such as the Special Representative on Business and Human Rights, and the Rapporteur on Education. These are independent experts mostly from academia, legal practice, etc.

³² See a handful of the reports submitted from some of the Commissioners that have tried to do something at least; available at www.achpr.org; last accessed 18 April 2009.

The Rapporteur mechanism is currently under review. The Working Group on Specific Issues Relevant to the Work of the Commission alluded to this review in their report.³³ It is hoped that the review will be comprehensive, open to the public, and meant to strengthen the mechanism which, if properly focused, could drive the Commission forward in its efforts to promote human rights effectively in accord with its mandate.

Communication

The procedure

Besides promotion, the other cornerstone of the African Commission's mandate as set out in Article 45 of the Charter is protection. Based on the protection mandate, anyone (not just citizens) within the territory of a state party to the Charter may bring a complaint to the attention of the African Commission where s/he may allege violation of one or more of his or her rights set out in the Charter. Due to the broad nature of the range and class of rights the Charter guarantees, it is not easy to find a complaint of an alleged violation of a right that is *not* guaranteed in the Charter. Indeed, a few rights like privacy and personality are missing from the Charter; but on the whole, the Charter is one of the most comprehensive instruments as far as catering for all categories of human and collective rights is concerned. Nonetheless, the Secretariat has dismissed certain complaints – even without sending them to Commissioners for determination as to whether they establish a *prima facie* case for these complaints to be accepted for investigation, e.g. where the state complained of is not a state party to the Charter.

Individuals and NGOs based in or outside Africa are entitled to submit complaints to the African Commission and, over the years, many have done so. Complaints tend to increase against a state party depending on the political situation in the country. For example, during the era of military rule in Nigeria, it monopolised the communication procedure; more recently it was Zimbabwe that took the lead. Although there has not been a complaint by a legal person like a corporate entity, this is not totally unlikely. The Charter guarantees rights like property which inhere in both natural and legal persons.

³³ For a full discussion on this particular Working Group, see below.

As indicated, the duty to protect the rights and freedoms guaranteed in the Charter is one of the Commission's principal functions. The protection mandate plays a greater part of the Commission's work. This mostly is due more to the circumstances than out of desire of the Commission in that, owing to awareness by NGOs, several victims approached the Commission for protection when the Commission opened its doors to the general public.

The Charter provides for two types of communications. In the first instance, states parties to the Charter are entitled to submit complaints against other states parties. This is provided for in Articles 48–49. In a broad sense, the state brings the complaint in a representative sense on behalf not of its own citizens per se, but of another country's citizens or residents. In practice, states parties have refrained from resorting to this procedure; they fear that, if it uses the procedure against state A, it may be creating a bad precedent for the procedure to be used against itself. States are shy to take on other states – and even more so in human rights issues: each state has some skeletons in the closet. Therefore, there is not much jurisprudence in the Commission in terms of the interstate complaint procedure as it is generally known to justify further comment.

Secondly, the Commission is empowered to receive and consider what in Article 55 are colloquially known as 'other communications'. Here, individual victims of human rights violations or organisations on their behalf are entitled to submit complaints containing allegations of violations of one or more rights guaranteed in the Charter. Though the procedure set out in Rules 102–120 of the Rules of Procedure state that these so-called 'other communications' will be processed in written form, some communications were initially submitted to the African Commission Secretariat by telephone. The general procedure, however, is to submit communications by means of a letter, e-mail, fax, etc. However, it is perfectly in keeping with procedure for the author of a communication to abandon it, in which case the Commission will discontinue any related proceedings.

Conditions governing admissibility of communications

Once a communication has been received and seized, the Secretariat is obliged to bring the development to the attention of the state party concerned.³⁴ But one of the Secretariat's problems has been getting states informed of a complaint

³⁴ Article 57 of the Charter.

lodged against them. Most respondent states usually claim that they did not receive the notification. Of course, some of them take advantage of the poor bureaucracy at the Secretariat to claim they were never informed, but there are others that genuinely do not get the information for the reason stated.

From the reactions by most states parties on the subject of communications, ensuring states take note of the allegations being made against them has been an immense problem.³⁵ States would plead ignorance of any information that may have been sent to them by the Secretariat with regard to complaints against them. Sometimes, States do this in order to buy time to prepare a response, which adds to the delays experienced in the processing of communications. This is one of the main sources of delays in processing communications. States are known to have 'slept' on the requests and pleaded not to have been approached, even where they may have been. It is a common tactic in the African Commission for the state subject of a communication to buy time by claiming it was not informed at all or at least not on time.

However, once the state has responded, the communication in question will be measured against the criteria governing the admissibility of communications. Article 56 of the Charter stipulates the admissibility criteria to be applied to individual communications. There is a list of conditions required to be exhausted by the victim, including –

- disclosing the identity of the communication's author – even where s/he may wish to request anonymity
- that the communication be compatible with OAU/AU instruments
- that the communication should not be written in insulting or disparaging language
- that the communication not be based exclusively on news disseminated through the media
- that the communication be sent to the Commission within a reasonable period after exhausting local remedies, and
- that the communication should not deal with matters that have been settled in accordance with the principles of the Charter, UN instruments, and provisions of the present point.

³⁵ Most states either do not bother to respond to the Secretariat's letters seeking information as to the allegations levelled against them. When the request is sent a second time, they often ask for more information – claiming they did not get the first request.

According to the Commission, all seven conditions have to be met, otherwise the communication will be closed.³⁶ This means, for instance, that a communication which is brought, received and seized and which meets all the conditions except that it was “based exclusively on news disseminated through the news media”, it will be declared inadmissible on this account alone.

Of the seven conditions, the most important is the local remedies rule. Consequently, there is plenty of jurisprudence in which the Commission has repeatedly pronounced itself on the nature and scope of the local remedies rule. This happened, for instance, in the *John Modise* case, where on a submission by Botswana that the complainant had not yet exhausted local remedies, the Commission observed that “[t]he communication has a long history before the Commission”. The Commission declared the communication admissible at its 17th Ordinary Session on the grounds that “local remedies were unduly prolonged and the legal process wilfully obstructed by the government through repeated deportations of the complainant”.³⁷ But rather inconsistently, the Commission declared Motale Sakwe’s complaint inadmissible.³⁸ This is a person who, together with his elderly mother, had gone through a heart-rending experience at the hands of Cameroon police. Sakwe had complained that he and his mother had been abducted by police and, without charge, held in illegal and prolonged detention where the two of them were subjected to torture. But the Commission, despite all this, dismissed the complaint on the grounds that it had not heard from the parties on the question of exhaustion of local remedies. This is extremely distressing. The Commission could easily have approached the Government of Cameroon to confirm this, had it wanted to. Besides, it ought to have been clear to the Commission from the information in the public domain that there were no local remedies in Cameroon. Every NGO that has worked in Cameroon could testify on behalf of Sakwe as to a lack of local remedies in that country in respect of the brutalities for which the police force is so notorious. Instead, the Commission chose to take a passive approach and disappointingly threw the complaint out due to its own failure to establish simple facts around the case.

Nevertheless, the decision on whether local remedies have been exhausted – and, therefore, on the admissibility of the communication – is taken only after the state has been given an opportunity to consider the complaint and respond to

³⁶ Information Sheet No. 3, www.achpr.org; last accessed 20 March 2009.

³⁷ 97/93 *John K Modise v Botswana*, 14th Annual Activity Report: 2000–2001.

³⁸ 230/99 *Motale Zacharia Sakwe v Cameroon*, 14th Annual Activity Report: 2000–2001.

the issue. Based on international law, the burden of proving that local remedies have been exhausted is a question for the state party³⁹ or respondent, and not – as would be expected – for the complainant who brings the case. The reason for this is very simple. An ordinary person may and often does not know what remedies there are in law for him/her in respect of the complaint in question. The state, which also has the necessary resources, is the one which can determine remedies that the law may provide and how to exhaust them. It is important to stress the fact that the Commission has previously stipulated that remedies should be available, effective, sufficient, and not unduly prolonged.⁴⁰ In particular, they must be judicial – and not administrative or discretionary remedies. Therefore, relief from a national human rights institution has not been held to constitute an effective remedy.

If the state does not respond within three months as to where it stands on the issue of admissibility, particularly as regards the exhaustion of local remedies, but also on the other six Article 56 conditions, it is normally given another three months – making it a total of six in which to respond. If it fails to do so within that six-month period, it is deemed to have forfeited its entitlement to respond and, therefore, could be said to have breached the Charter regarding its duty to

³⁹ *Communication No. 71/92 Recontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Zambia*, 10th Annual Activity Report: 1996–1997. In this communication, the Commission held that “[w]hen the Zambian government argues that the communication must be declared inadmissible because the local remedies have not been exhausted, the government then has the burden of demonstrating the existence of such remedies”.

⁴⁰ *147/95 Sir Dawda K Jawara v The Gambia*, 13th Annual Activity Report: 1999–2000. In this Communication, the Commission clarified the rationale of the local remedies rule, which it said was “to ensure that before proceedings are brought before an international body, the state concerned must have had the opportunity to remedy the matter through its own system”. This prevents the Commission from acting as a court of first instance rather than a body of last resort. Three major criteria could be deduced from the practice of the Commission in determining this rule, namely, the remedy needs to be available, effective, sufficient, and not unduly prolonged. The remedy is considered *available* if the petitioner can pursue it without impediment; it is deemed *effective* if it offers a prospect of success; and it is found *sufficient* if it is capable of redressing the complaint (*RADDHO v Zambia*, *ibid.*). The Communication set the tone that “[t]he rule requiring the exhaustion of local remedies as a condition of an international claim is founded upon, amongst other principles, the contention that the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the state”. It went on to say “[t]his does not mean, however, that complainants are required to exhaust local remedy which is found to be, as a practical matter, unavailable or ineffective”.

cooperate. Consequently, the Commission would go ahead and decide the issue. This it normally does by ratifying the position canvassed by the complainant on the issue, although it can also conduct its own investigation and come up with an independent decision.⁴¹ However, this is not automatic, as the Commission is free to seek other sources to rebut or prove the victim's assertions. For example, Article 46 entitles the Commission to "resort to any appropriate method of investigation ... " to enable it to get a better picture or means to decide the matter. Similarly, the complainant will be afforded opportunity to respond to the state's observations on admissibility, and is entitled to the same six months' response time due to the state.

Once the communication has been declared admissible, the parties are informed of the outcome. They would also be informed of the session and date due for determination of the communication on merit. The problem, however, is that the Commission does not decide the communication on its merit during the same session in which it addresses the issue of admissibility. Another date is set for the merit stage – and often after a long time lapse.

However, the decision on merit precedes the same consultation as in admissibility, including three months to the state party to respond to the allegations, only this time on the merit issue; again, the response time allowance is liable to extension by another three months if the state does not answer within the first three. Often, as in international human rights procedure, states choose not to add to what they may already have said in support of their cases at the admissibility stage. Although the admissibility and merit issues are different, states often simply reiterate their positions submitted on admissibility stage when called upon to address the Commission as to the merits of the complainant's case. Specifically with regard to the cited e-mail, long lapses of time are allowed after final

⁴¹ An example in which the state did not bother to respond to the Commission's correspondence is Communication No. 159/96 *Union Inter Africaine des de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Recontre Africaine pour la Defense des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Senegal and Association Malienne des Droits de l'Homme v Angola*, 11th Annual Activity Report: 1997–1998. According to the complainants, between April and September 1996, the Angolan Government rounded up and expelled West African nationals on its territory. These illegal expulsions were preceded by acts of brutality committed against Gambian, Malian, Mauritian, Senegalese and other nationals. The complainants maintained that the Angolan State had violated the provisions of Articles 2, 7(1)(a), and 12(4) and (5) of the African Charter on Human and Peoples' Rights.

submissions by parties before the Commission decides the communication or makes its recommendations. The internal procedure is that the Commissioner serving as the Rapporteur, who was assigned the communication after it was seized, is the one who will prepare the decision or recommendation; the other Commissioners will consider in plenary or by means of e-mail. If they are agreeable, they will approve the decision or recommendation.

Individual Commissioners have on several occasions effectively held the system to ransom by delaying the preparation of decisions or recommendations. There is no system to control Commissioners in respect of a cut-off point by which they must have rendered the decision. Rather, it is left up to NGOs to lobby the Commission and the Secretariat to prepare a decision – which is not right. Delayed decisions have been a major source of frustration by most people – but particularly victims who have interacted with the African human rights system.

Amicable resolution

Though it is not strongly emphasised, the amicable resolution of disputes is an important feature of the African system of human rights. In fact, this was a feature of the African system during the early stages of the gestation of the African Charter before protection came to the fore. The original intention of the drafters of the Charter was to provide a mechanism where disputes would be resolved amicably and not through the rigid dispute settlement procedure by means of adjudication.

Resort to amicable settlement technically starts to run once a communication has been declared admissible. It has not often happened, but the Commission offers its good offices for the parties who need it to try to achieve a friendly settlement of the matter, but this depends on the willingness of parties to do so without resorting to adjudication. If the parties are willing to try the amicable way, the Commission usually appoints one of the Commissioners to facilitate the discussions and possible resolution of the matter. This will often either be the Commissioner who has been handling the case up to that point, the one responsible for promotional activities in the state concerned, or even a group of Commissioners. There is no developed procedure for amicable settlement in the Commission, which is why nothing is fixed in advance as to who among the Commissioners will be expected to assist parties to settle the matter amicably.

If a friendly settlement is struck, the terms are presented to the Commission at its next session. The Commission acts as a kind of underwriter to the settlement and, once it is adopted by the Commission, the communication comes to an end. The above procedure, however, was not followed in *John Modise v Botswana*,⁴² where the Commission simply resolved to close the file on learning that the Botswana head of State had granted the complainant nationality without thorough investigation to determine whether this was the joint effort of the parties concerned. In fact, it was a unilateral decision by the State in order to frustrate the proceedings in the Commission and try to get the case back under its jurisdiction. Consequently, the Commission was forced to reopen the file when the complainant, through his representatives, rejected the finding that the parties had agreed to settle the matter amicably.

Working Groups

One of the mechanisms the African Commission uses to implement its mandate is the system of Working Groups. A number of Working Groups have been established over the years, including Working Groups on Indigenous Populations/Communities; Economic, Social and Cultural Rights; the Death Penalty; and Specific Issues Relevant to the Work of the Commission on Human and Peoples' Rights.

While some of the Working Groups are still new and, therefore, have yet to find their feet in the system, the Working Group of Experts on Indigenous Populations/Communities has mobilised representatives of indigenous groups in Africa and, together with local and foreign experts, has come up with a comprehensive report setting out the indigenous peoples' human rights situation, and the local and international regime and jurisprudence governing these people, besides grappling with the vexing issue of the criteria for identifying indigenous peoples. During its 30th Ordinary Session held in November 2003, the African Commission adopted the Working Group's report as well as its recommendations. One of the recommendations was a call to establish a focal point on indigenous issues within the Commission. It was also recommended that the Commission establish a forum which brought together indigenous participants, experts and other human rights activists regularly in the context of the sessions of the

⁴² Cited in footnote No. 37 above.

African Commission to consider developments in the field of the human rights of indigenous populations/communities in Africa.⁴³

Equally important among these Commission entities is the Working Group on Specific Issues Relevant to the Work of the Commission on Human and Peoples' Rights.⁴⁴ The latter Working Group was established by the Commission during its 37th Ordinary Session in April/May 2005 in Banjul, The Gambia.⁴⁵

In its mandate, the Working Group on Specific Issues focuses on very important features of the African Commission. Among others, the Group is tasked with the following mandate:

- The review of the Rules of Procedure of the African Commission on Human and Peoples' Rights. In its review of the Rules, the Group was instructed to ensure that the specific issues below were included:
 - The relationship between the African Commission Bureau and the Secretariat
 - The relationship between the African Commission and its partners
 - The relationship between the African Commission and the various organs and institutions of the African Union
- The mechanism and procedure for following up on decisions and recommendations of the African Commission
- The structure of different African Commission reports
- The modalities for the establishment of a Voluntary Fund for Human Rights in Africa; and
- The follow-up on the implementation of the Retreat of the African Commission in Addis Ababa of September 2003, the evaluation report on the work of the African Commission, and the Uppsala Consultation of June 2004.

⁴³ African Commission's Working Group of Experts on Indigenous Populations/Communities (2004).

⁴⁴ This Group was found necessary in order to review the way in which the Commission conducted its business, especially in light of the coming into operation of the Court, but also as a general issue to make the Commission more efficient. One of the Commission's concerns has been the power of the AU to appoint the Commission's Secretary and all other Commission staff, without consulting the Commission itself. Commissioners have been demanding a role in this process, but to no avail. The Working Group on Specific Issues is one of the ways to encourage a dialogue on some of these issues between the Commission and the AU, the Commission and the Secretariat, etc.

⁴⁵ African Commission on Human and Peoples' Rights, Res.77 (XXXV11) 05; Session chaired by Dr Angela Melo, currently Vice-Chairperson of the African Commission.

This Working Group is distinct in one particular respect: its open reliance on outside expertise. Besides the Chairperson and another Commissioner, members were drawn from external expertise.⁴⁶ This has created questions from the AU on the Commission's working methods if it appears to be obliged to rely totally on private persons to do its work.

Nevertheless, to execute its work, the Working Group used information extracted from a wealth of sources, including –

- the September 2003 Addis Ababa brainstorming report
- the 2004 report of the Uppsala consultation on the African Commission
- the May 2006 report of the Banjul brainstorming session, and
- the May 2007 brainstorming session held in Maseru, Lesotho, between the African Commission and members of the Permanent Representatives Committee.

The first meeting expanded on the items set out in the mandate. These additional items included a number of other issues relating to –

- the functions and composition of the Commission Bureau and its Secretariat
- the communications submitted to the Commission in accordance with Article 55 of the African Charter
- communications submitted in accordance with Article 47 of the African Charter
- state reporting
- missions
- the speech of the Chairperson before the Executive Council
- the issue of incompatibility
- the integrity and independence of the African Commission
- the establishment of a Voluntary Fund for Human Rights in Africa, and
- potential donors.

Most of these items found themselves in the final draft of the Interim Rules of Procedure which are currently awaiting harmonisation with the Interim Rules of

⁴⁶ Up until November 2007, the Working Group consisted of Commissioner Angela Melo, Commissioner Faith Pansy Tlakula, Mr Ibrahim Kane (Interights), Mr K Maxwell (Open Society Justice Initiative, Nigeria), Mr Alpha Fall (Institut pour les Droits Humains et le Développement en Afrique, IDHDA), and Ms Julia Harrington (Open Society Justice Initiative, New York). After its 42nd Session in Congo-Brazzaville, the Commission elected Commissioner Silvie Zainabo Kayitesi as a new member.

Procedure of the African Court on Human and Peoples' Rights. Though this Court has since been replaced, the Rules were made with it in mind. It seems, however, that there was not much consultation with stakeholders towards the Interim Rules of Procedure. Though the AU Commission Departments – especially the Department of Political Affairs, which oversees the docket on human rights, and the AU's Permanent Representative Committee – were consulted, the process nevertheless was not subjected to public comment until after the Interim Rules had already been adopted. This deprived the Commission of an opportunity to benefit from the public beyond the four organisations that had been selected to join the Working Group. This is compounded by the fact that the procedure used to include the organisations remains unclear. The Secretariat has posted the Interim Rules on the African Commission website and is soliciting comments from the public. But it would appear that it is rather too late to get the cooperation of the public as many believe whatever input they make at this stage cannot change much of what is already in the Interim document.

Conclusion

The advent of the African Union represents an era of significant change. Human rights that played no role during the 40 years of existence of the OAU are finally on the agenda of the African Union. Similarly, most African States are slowly warming up to international justice in the conduct of their internal affairs. Clearly, change is in the air in Africa. On realising that, important as it is, the African Commission on Human and Peoples' Rights is not efficient and effective, a new architecture with far-reaching consequences on individual liberty, peace and justice in Africa is under construction. The chapter has tried to document some of this architecture.

However, because most of what has been discussed in the paper is still developing, it is important to come back to the work again, particularly after the new single Court is in place and victims have started using it this time to document the principles in the light of experiences. The scrapping of both the African Court of Human and Peoples' Rights and the African Court of Justice, as well as their replacement by the single African Court of Justice and Human Rights, may need to be put in context after the latter becomes operational.

The African Commission has recently released its Interim Rules of Procedure, which it hoped to harmonise with the Interim Rules of the African Court of

Human and Peoples' Rights, also released almost simultaneously. However, the two bodies may have to hold on until after the new single Court is in place. As indicated in the chapter, things move rather too quickly in Africa. The Interim Rules of Procedure of both the two bodies now are effectively history. It is expected, however, that the change that is coming will ultimately benefit the African architecture of human rights and, in the final analysis, the individual victim of human rights violation.

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Regional economic communities and human rights in East and southern Africa

Oliver C Ruppel

Introduction

The dawn of regional economic communities (RECs) in Africa can be traced back to the 1960s, when the United Nations Economic Commission for Africa (UNECA) encouraged African states to incorporate single economies into subregional systems with the ultimate objective of creating a single economic union on the African continent. In order to realise this aim, the Organisation of African Unity (OAU, predecessor of the African Union, AU) identified the need to enhance regional integration within the organisation, recognising that each country on its own would have little chance of, inter alia, attracting adequate financial transfers and the technology needed for increased economic development.¹

Africa has, since then, taken various steps towards enhancing the process of economic and political integration on the continent.² The road has been paved by several decisions and declarations relating to regional economic and political integration, especially –

- the 1977 Kinshasa Declaration, which provides for the successive establishment of the African Economic Community (AEC)
- the Monrovia Declaration, providing for guidelines relating to economic and social development
- the 1980 Lagos Plan of Action, and
- the Abuja Treaty, realising the establishment of the AEC, the African Union's economic and umbrella institution for RECs.

¹ For the process of regional integration within SADC, see Hansohm & Shilimela (2006:7).

² On various initiatives by African leaders to carry out the integration process in Africa, cf. Kouassi (2007).

The Abuja Treaty, which was adopted in June 1991, came into force in 1994. Since then, 52 out of the 53 AU member states have signed the Treaty,³ while 49 have ratified it.⁴

Meanwhile, several RECs have been established on the continent.⁵ At the seventh ordinary session of the AU's Assembly of Heads of State and Government in Banjul, The Gambia, in July 2006, the AU officially recognised eight such communities.⁶ Alphabetically listed, these are as follows:

- The Arab Maghreb Union (AMU)
- The Community of Sahel-Saharan States (CEN-SAD)
- The Common Market for Eastern and Southern Africa (COMESA)
- The East African Community (EAC)
- The Economic Community of Central African States (ECCAS)
- The Economic Community of West African States (ECOWAS)
- The Intergovernmental Authority on Development (IGAD), and
- The Southern African Development Community (SADC).

Except for the Sahrawi Arab Democratic Republic,⁷ all AU member states are

³ Eritrea has not yet signed the Abuja Treaty; cf. status list of countries regarding the Abuja Treaty, available at <http://www.africa-union.org/root/au/Documents/Treaties/List/Treaty%20Establishing%20the%20African%20Economic%20Community.pdf>.

⁴ The countries which have signed but not yet ratified the Abuja Treaty are Djibouti, Madagascar and Somalia; cf. status list of countries regarding the Abuja Treaty, available at <http://www.africa-union.org/root/au/Documents/Treaties/List/Treaty%20Establishing%20the%20African%20Economic%20Community.pdf>.

⁵ The number of RECs varies depending on the definition of *REC* and on whether specific subgroups or monetary unions such as the Central African Economic and Monetary Community or certain free trade areas such as the Euro-Mediterranean Free Trade Area (with Egypt, Morocco and Tunisia, and states around the Mediterranean) are counted or not. Viljoen (2007:488) states that at least 14 subregional integration groupings exist in Africa.

⁶ See the decision relating to the recognition of RECs, namely (Assembly/AU/Dec.112 (VII) Doc. EX.CL/278 (IX)); text in French available at http://www.africa-union.org/Official_documents/Assemblee%20fr/ASS06b.pdf; last accessed 22 December 2008.

⁷ Due to the controversies regarding the Sahrawi Arab Democratic Republic, Morocco withdrew from the OAU in protest in 1984 and, since South Africa's admittance in 1994, remains the only African nation not within what is now the African Union (AU). Although the Sahrawi Arab Democratic Republic was a full member of the OAU since 1984 and remains a member of the AU, the republic is not generally recognised as a sovereign state. While most African states have recognised the republic (e.g. Namibia and South Africa), several others have withdrawn their former recognition (e.g. Cape Verde, the Seychelles),

affiliated to one or more of these RECs, as indicated in Table 1 on the following page.

This paper will focus on RECs in East and southern Africa and how each such community incorporates human-rights-related issues into its respective legal setting. However, a few more general considerations regarding RECs and human rights first deserve attention. The relevance of human rights for topics such as regional integration and harmonisation, and the issues of overlapping memberships and concurrent jurisdiction, which usually occur in an economic context, form part of these introductory remarks as well.

RECs, regional integration and human rights

The first question that arises is this: What role do human rights play in RECs and the integration process in general?

In general terms, *regional integration* can be described as a path towards gradually liberalising the trade of developing countries and integrating them into the world economy. At first glance it appears that the promotion and protection of human rights is not within the RECs' focal range. However, as this article will show, human-rights-related matters play a vital role within the RECs' legal framework as well as in their daily practice, as many have implemented certain provisions in their mandate that have an impact on human rights and good governance.

All RECs analysed here have, to some extent, incorporated human rights into their treaties. In most cases, a general tribute to recognising and protecting human rights can be found in the basic legal concepts underpinning RECs. Some even cover specific human rights issues, such as HIV and AIDS, equality and gender issues, humanitarian assistance and refugees, and children's rights, to name but a few.

The reasons for integrating human rights into the structure of RECs are manifold. One reason certainly is that states have committed themselves to respecting human rights by acceding to specific human rights treaties, conventions or

and some have temporarily frozen diplomatic relations (e.g. Costa Rica, Ghana), pending the outcome of a respective UN referendum which would allow the people of Western Sahara to decide the territory's future status. The republic has no representation at the United Nations.

Table 1: State members of RECs officially recognised by the AU

AMU	CEN-SAD	COMESA	EAC	ECCAS	ECOWAS	IGAD	SADC	
Algeria	Benin	Burundi	Burundi	Angola	Benin	Djibouti	Angola	
Libya	Burkina Faso	Comoros	Kenya	Burundi	Burkina Faso	Ethiopia	Botswana	
Mauritania	Central African Republic	DRC	Rwanda	Cameroon	Cape Verde	Kenya	DRC	
Morocco	Chad	Djibouti	Tanzania	Central African Republic	Côte d'Ivoire	Somalia	Lesotho	
Tunisia	Comoros	Egypt	Uganda	Chad	The Gambia	Sudan	Madagascar	
	Côte d'Ivoire	Eritrea		Congo	Ghana	Uganda	Malawi	
	Djibouti	Ethiopia		DRC	Guinea		Mauritius	
	Egypt	Kenya		Gabon	Guinea-Bissau		Mozambique	
	Eritrea	Libya		Guinea	Liberia		Namibia	
	The Gambia	Madagascar		São Tomé and Príncipe	Mali		Seychelles	
	Ghana	Malawi			Niger		South Africa	
	Guinea-Bissau	Mauritius			Nigeria		Swaziland	
	Kenya	Rwanda			Senegal		Tanzania	
	Liberia	Seychelles			Sierra Leone		Zambia	
	Libya	Sudan			Togo		Zimbabwe	
	Mali	Swaziland						
	Mauritania	Uganda						
	Morocco	Zambia						
	Niger	Zimbabwe						
	Nigeria							
	São Tomé and Príncipe							
	Senegal							
	Sierra Leone							
	Somalia							
	Sudan							
Togo								
Tunisia								

declarations on the international, regional and subregional level, including the Universal Declaration of Human Rights; the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights; the Convention on the Elimination of Racial Discrimination; or the African Charter on Human and Peoples' Rights. The obligations and commitments resulting from such human-rights-related legal instruments are also reflected in the conceptualisation of RECs. One further aspect of incorporating human rights into the legal regimes of RECs is that human rights and good governance – the latter being “an effective democratic form of government relying on broad public engagement (participation), accountability (control of power) and transparency (rationality)” – play an essential role in economic development. The extent of good governance can be regarded as the degree to which the promise of civil, cultural, economic, political and social rights is realised.

For example, human rights and good governance have an impact on the investment climate, which contributes to growth, productivity and the creation of jobs, all essential for economic growth and sustainable reductions in poverty. The furtherance of economic development and the promotion of human rights should, thus, go hand in hand. Indeed, there is no need to choose between economic development and respecting human rights: an analysis of the legal structure of RECs with regard to human rights shows that a peaceful environment which recognises and promotes human rights is regarded as a fundamental prerequisite for economic development.

The interrelationship between human rights and economic development has become closer over the past few years due to increasing discussions in the world community on the issue.

This interconnection can be seen as a two-way relationship insofar as economic development is obliged to respect human rights in a democratic society. Conversely, human rights can be given more effect through economic growth, as one outcome of economic growth is the increasing availability of resources, resulting in the reduction of poverty and a higher standard of living.

Therefore, the promotion of human rights plays an important role in the process of regional integration, as envisaged by the Abuja Treaty as well as by REC constitutive legal instruments. However, the integration process faces many obstacles and challenges, which do also touch on human rights. The fear of losing State autonomy, the fear of losing identity, socio-economic disparity among members, historical disagreement, lack of vision, and unwillingness to

share resources are some of the obstacles that present themselves when it comes to regional integration. One specific challenge is the heterogeneity of AEC or REC member states. This heterogeneity is not only reflected by surface area, population figures, the size of domestic markets, per capita income, the natural resource endowment, and the social and political situation, but also by the variety of legal systems applied, and the extent to which human rights are respected by the different member states.⁸

Of increasing significance will be the harmonisation of the law. This can be achieved by the implementation and transformation of legally binding instruments aiming to reduce or eliminate the differences among national legal systems by inducing them to adopt common legal principles. This applies to human rights cases in particular. While a specific action might be classified as a violation of human rights in country A, this may not be the case in country B, although both countries are members of the same REC. This is especially true as regards labour standards, which are generally very sensitive in terms of human rights concepts. In this regard, amending laws to achieve interregional legal conformity is central to reducing normative barriers within RECs, as unified law promotes greater legal predictability as well as legal certainty – both essential for the investment climate and economic development in general.

The Abuja Treaty aims at the coordination, harmonisation and progressive integration of the activities of RECs, which in turn are regarded as the building blocks of the AEC. The integration process covers a prospective period of 34 years, with the possibility of being extended. Human rights protection is specifically laid down in the second chapter of the Treaty, which covers issues of the RECs' establishment, principles, objectives, general undertaking, and modalities. Article 3 provides that the contracting parties –

... in pursuit of the objectives stated in Article 4, [sic] of this Treaty solemnly affirm and declare their adherence to the following principles: ...

- (g) Recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; ...

Besides the promotion of economic, social and cultural development and the integration of African economies, one further objective of the AEC is to –

⁸ On the heterogeneity of SADC member states, see Ruppel & Bangamwabo (2009).

... promote co-operation in all fields of human endeavour in order to raise the standard of living of African peoples, and maintain and enhance economic stability, foster close and peaceful relations among Member States and contribute to the progress, development and the economic integration of the Continent; ...

Therefore, member states are expected to promote the coordination and harmonisation of the integration activities of those RECs to which they belong, within the gambit of their activities on the AEC.

Promoting human rights: A mandate for RECs?

Assuming that the responsibility for upholding human rights and fundamental freedoms rests primarily on the individual states themselves, the question may arise as to the role that RECs play when it comes to the protection of human rights, and whether or not – and if so, how – RECs can function as guardians of human rights. Although states might be primarily responsible for upholding human rights because they are answerable to their citizens, the international community, and the UN if they fail to respect human rights in their countries, the influence of RECs should not be underestimated. It has already been stated that, in some way or another, RECs have incorporated the respect for and/or promotion of human rights into their constitutive instruments. Therefore, RECs do indeed have the duty to translate human rights principles and ideals into practice. This can be realised by several means, all resulting in the enforcement of human rights. Two principal categories can be identified, namely the judicial and extrajudicial promotion and enforcement of human rights.

Enforcing and promoting human rights outside of courts is, in the first place, realised by merely administrative means. The legal instruments of RECs, be they their constitutive acts, protocols, declarations, guidelines, policies or memoranda of understanding, place the onus on member states and institutional organs to act in accordance with specific principles such as the rule of law, democracy or respect for human rights. Therefore, RECs' decision-making processes should always be guided by human rights principles laid down in such legal instruments, or that apply because they are general principles of customary law. Thus, it can be stated that specific principles of human rights are authoritative when it comes to decisions taken by RECs that relate to conflict resolution, peacekeeping, or the drafting of policies or other legal instruments relating to sectors such as trade liberalisation, freedom of movement, anti-corruption, health or any other issues under the REC's competency.

On the judicial side, the enforcement of human rights within RECs works through the activities of regional community courts or similar institutions. Most RECs have judicial bodies that deal with any controversies relating to the interpretation or application of community law. Depending on how human rights are incorporated into the legal frameworks of different RECs, subregional organisations have a number of options open to them in respect of enhancing the protection of human rights. Considering that human rights do, to some extent, form part of the community law of all RECs, their regional community courts can unquestionably contribute towards the promotion and protection of human rights, provided that decisions by regional judicial institutions are properly enforced at a national level. One important question with regard to the enforcement of human rights is whether private persons can approach regional courts in cases of alleged human rights violations. The rules of procedure of the various judicial bodies address this issue within provisions relating to jurisdiction.

The fact that human-rights-related issues are subject to judicial review at REC level is reflected by the jurisprudence of some regional community courts that deal with such issues. With regard to an envisaged process of harmonisation of law and jurisprudence, human-rights-relevant case law at regional level is required because harmonisation can only take place if the application of law by national courts in comparable cases leads to roughly the same results. In light of the above, regional community courts can be considered a motor of integration.⁹

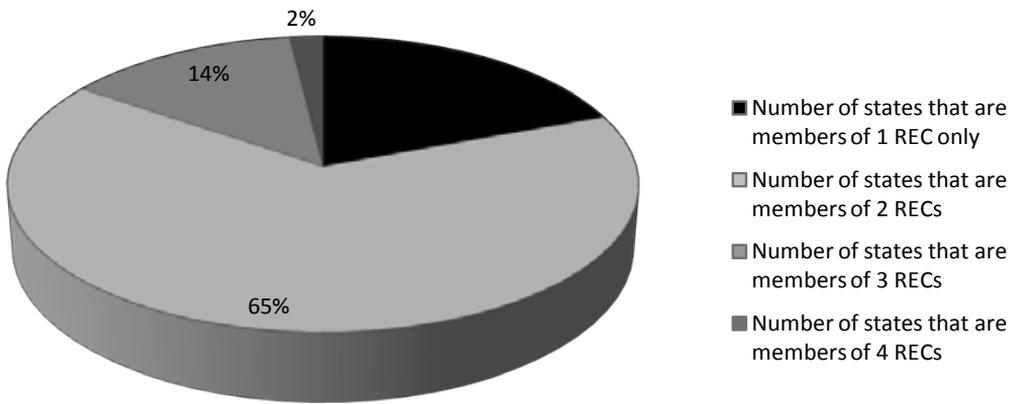
As an interim result, it can be stated that RECs have a clear mandate to promote and protect human rights. However, some critical issues with regard to RECs and the protection of these rights needs to be mentioned here. These issues refer to concurrent jurisdiction and overlapping memberships. It is commonly accepted that, from a long-term perspective and with a view to their merging into a single institution, RECs need to be strengthened and consolidated. However, the fact that many African states are members to various RECs can be regarded as a hurdle in respect of the integration process. Despite multiple costs for membership contributions and negotiation rounds, and technical problems such as the application of different external tariffs in respect of each member country and the eventual lack of identification with one specific REC,

⁹ This term was coined by Schwarze (1988:13ff) with regard to the European Court of Justice.

the question of the concurrent jurisdiction of different judicial organs has to be addressed.

Figure 1 graphically illustrates that the issue of overlapping memberships is highly relevant as most African countries which are parties to one of the RECs recognised by the AU are also members to at least one other REC.

Figure 1: Overlapping memberships among AU-recognised RECs



The issue of the conflicting jurisdiction of regional courts on the African continent will become a prominent one with specific importance in cases involving violations of human rights, as many regional judicial bodies have the jurisdiction over human rights cases. For the time being, the consequence of overlapping jurisdiction is that a claimant may in fact choose to which judicial body a case is submitted,¹⁰ since a competent court may not decline jurisdiction on the grounds that another court may be competent as well. In terms of regional integration, the absence of a judicially integrated Africa is, however, undeniably a problem because different judicial bodies may interpret one normative source differently.¹¹

¹⁰ Referred to as *forum-shopping*; see Viljoen (2007:502).

¹¹ (ibid.).

Regional economic communities in East and southern Africa

The Common Market for Eastern and Southern Africa – COMESA

Background

COMESA¹² was formally established in 1994 as a successor organisation to the Preferential Trade Area for Eastern and Southern Africa (PTA), which had been in existence since 1981. COMESA focuses on and aims at regional integration in all fields of development, with particular emphasis on trade, customs and monetary affairs, transport, communication and information, technology, industry and energy, gender, agriculture, the environment, and natural resources.

According to the UN Statistical Division,¹³ COMESA comprises more than 400 million inhabitants, embraces a land surface area of almost 13 million km², and a total gross domestic product (GDP) of over US\$360 billion. The official languages are English, French and Portuguese. COMESA's basic legal instrument is the COMESA Treaty which established the body. This Treaty provides, *inter alia*, for the organs of COMESA, namely the COMESA Authority, composed of the various Heads of State or Government, the COMESA Council of Ministers, the COMESA Court of Justice, the Committee of Governors of Central Banks, the Intergovernmental Committee, the Technical Committees, the Consultative Committee, and the Secretariat, which has its seat in Lusaka, Zambia.

COMESA currently counts 19 states as its members, namely Burundi, the Comoros, the DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, the Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Former member states are Lesotho, Mozambique, Namibia and Tanzania, which have presumably quit the REC to avoid overlapping memberships within organisations that follow largely the same objectives. Indeed, this is one of the major problems of COMESA: all its members are simultaneously members of at least one other REC. Taking COMESA and SADC as an example, seven countries are members of both RECs.¹⁴ This is not

¹² For detailed information on COMESA, see www.comesa.int.

¹³ <http://unstats.un.org/unsd/default.htm>.

¹⁴ Dual membership is held by the DRC, Madagascar, Malawi, Mauritius, the Seychelles, Zambia and Zimbabwe.

only problematic in terms of duplication of work and costs, but also because a subregional customs union is envisaged by both COMESA and SADC, and it is legally and technically impossible to be a member of more than one such union.¹⁵ Therefore, the Tripartite Summit held in October 2008 in Kampala, Uganda, with the Heads of State and Government of COMESA, the EAC and SADC, focused on the broader objectives of the AU – to accelerate economic integration of the continent with the aim of achieving economic growth, reducing poverty, and attaining sustainable economic development. It was resolved that the three RECs should –¹⁶

... immediately start working towards a merger into a single REC with the objective of fast[-]tracking the attainment of the African Economic Community.

In the area of trade, customs and economic integration, it was approved that a Free Trade Area (FTA) should be established encompassing EAC, COMESA and SADC member states, with the ultimate goal of establishing a single customs union.

Human rights protection within COMESA

Human rights protection is part of the COMESA Treaty, although it might not be at the core of COMESA's activities.¹⁷ The Treaty deals with human-rights-sensitive provisions at various stages, the most important of which will be outlined in the following discussion.

COMESA has several aims and objectives¹⁸ that relate partially to human rights. One of these aims and objectives is the adoption of policies and programmes to raise the standard of living of its peoples.¹⁹ Furthermore, COMESA aims at contributing towards the establishment, progress and realisation of objectives of the AEC, which include human rights – at least indirectly – by making the promotion of economic, social and cultural development and the raising of the standard of living of African peoples major COMESA objectives.²⁰

¹⁵ Jakobeit et al. (2005:X).

¹⁶ See COMESA–EAC–SADC (2008).

¹⁷ Viljoen (1999:206).

¹⁸ Laid down in Article 3, COMESA Treaty.

¹⁹ Article 3b, COMESA Treaty.

²⁰ Article 4.1, Abuja Treaty Establishing the AEC.

The most relevant provision relating to human rights protection within the COMESA Treaty, establishing it as one of COMESA's fundamental principles, is Article 6(e), which describes the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. The recognition and observance of the rule of law as well as the promotion and sustenance of a democratic system of governance, both undoubtedly intertwined with the status of human rights protection, are similarly laid down as fundamental principles of COMESA.²¹ The principles that disputes among member states are to be settled peacefully, and that the recognition of a peaceful environment is a prerequisite for economic development,²² are further factors which are ultimately beneficial for the status quo of human rights. The fact that trade might have a negative impact on human rights is taken into account in the sixth chapter of the COMESA Treaty, which deals with cooperation in trade liberalisation and development. In this context, provision is made to allow states to impose restrictions on trade affecting, inter alia, the protection of human, animal or plant health or life; the protection of public morality; or the maintenance of food security in the event of war and famine.²³ This is a clear indication that the protection of basic human needs and, therefore, the protection of fundamental human rights do indeed outweigh the interests of trade. However, such restrictions to trade are only permissible if the state imposing such restrictions or prohibitions has informed the Secretary-General about its intention prior to taking the respective action. Moreover, the measures taken may not last longer than necessary in respect of achieving security aims or eliminating other risks, and they are obliged to be applied on the basis of non-discrimination.²⁴ The COMESA Treaty also refers to environmental concerns, which, under the notion of *third-generation human rights*,²⁵ play an essential role in protecting human rights. In its sixteenth chapter, the COMESA Treaty deals extensively with cooperation in the development of natural resources, the environment and wildlife. In this regard, it is recognised that a clean and attractive environment is a prerequisite for long-term economic growth,²⁶ and provision is made for any action having an environmental impact to contain the objective to preserve, protect and improve the quality of the environment;

²¹ Articles 6(g) and (h), respectively, COMESA Treaty.

²² Article 6(j), COMESA Treaty.

²³ Article 50(1)(c) and (f), respectively, COMESA Treaty.

²⁴ Article 50(3), COMESA Treaty.

²⁵ With regard to the environment as a third-generation human right, see Ruppel (2008a).

²⁶ Article 122(2), COMESA Treaty.

to contribute towards protecting human health; and to ensure the prudent and rational utilisation of natural resources.²⁷ Furthermore, it is explicitly stated that environmental conservation is to be considered in all the fields of COMESA activity.

Gender issues also play a substantial role within the COMESA legal framework – to the extent that an entire additional chapter²⁸ within the COMESA Treaty deals with women in development and business, and special provisions can also be found at policy level. Recognising that sustainable economic and social development of the region requires the full and equal participation of women, men and youth, COMESA adopted a Gender Policy in 2005.

Within COMESA, a Federation of National Associations of Women in Business (FEMCOM) was established, which functions as a forum for exchanging ideas and experience among women entrepreneurs of the subregion, as well as an instrument for encouraging and facilitating the setting up or expansion of enterprises. Since 1993, FEMCOM has been working towards promoting programmes that integrate women into trade and development. Among these is a programme to create awareness among women of export markets in the COMESA FTA.²⁹ In particular, FEMCOM focuses on sectors such as agriculture, fishing, mining, energy, transport, and communication.

However, despite COMESA policies, its noble vision, and its objectives, gender inequality remains a major problem affecting regional integration efforts as women still tend to have limited access to regional and international markets.³⁰ Inadequate access to trade information and market research, unfamiliar and complicated procedures in export management, low levels of education among the majority of women in COMESA member states, and inadequate access to credit and finance have all been cited by FEMCOM as possible reasons for perpetuating gender inequality. In this sense too, the COMESA Gender Policy states the following:³¹

²⁷ Article 122(5), COMESA Treaty.

²⁸ Chapter 24, COMESA Treaty.

²⁹ The FTA includes Djibouti, Egypt, Kenya, Madagascar, Malawi, Mauritius, Sudan, Zambia and Zimbabwe.

³⁰ This was stated by Mary Malunga, FEMCOM Chairperson and Director of Malawi's National Association of Business Women (NABW); see Semu-Banda (2007).

³¹ See subsection 9, Preamble to the COMESA Gender Policy.

A critical analysis of the socio-economic reality of the region shows that gender gaps exist in terms of poverty, disease, education, employment, governance and many other issues. Many problems also exist with regard to COMESA's effort to integrate women in Trade, Industry, Agriculture, Information and Communications, Science and Technology.

Enforcement mechanisms

As one of its organs, COMESA established a Court of Justice in 1994 to ensure adherence to law in the interpretation and application of the COMESA Treaty. Prior to the establishment of the COMESA Court of Justice, the judicial organs of COMESA's predecessor, the PTA, dealt with disputes in its REC. The functions of these organs, namely the PTA Tribunal, the PTA Administrative Appeals Board, and the PTA Centre for Commercial Arbitration, were taken over by the COMESA Court of Justice. The COMESA Court of Justice has the jurisdiction to hear disputes to which member states, the Secretary-General, or residents of member states (individuals and legal persons) may be parties. The Court has the jurisdiction to adjudicate upon all matters which may be referred to it pursuant to the COMESA Treaty. The Seat of the Court was temporarily hosted within the COMESA Secretariat from 1998. In March 2003, the COMESA Authority decided that the Seat should be in Khartoum, Sudan.³²

References to the Court may be made by member states, the Secretary-General, and legal and natural persons, which is of specific importance with regard to human-rights-related matters. Residents in a member state may approach the Court to determine the legality of any act, regulation, directive, or decision of the Council or of a member state on the grounds that such act, regulation, directive or decision is unlawful or an infringement of the provisions of the COMESA Treaty.³³ However, a person who refers a matter to the Court is obliged to have exhausted local remedies in the national courts or tribunals of the member state concerned prior to referring a matter to the COMESA Court of Justice. Decisions of the Court on the interpretation of the provisions of the COMESA Treaty have precedence over decisions of national courts,³⁴ and national courts can ask the COMESA Court of Justice for a preliminary ruling concerning the application or

³² See http://www.comesa.int/institutions/court_of_justice/Multi-language_content.2003-08-21.2608/view; last accessed 28 July 2008.

³³ Article 26, COMESA Treaty.

³⁴ Article 29(2), COMESA Treaty.

interpretation of the COMESA Treaty if the court of the member state considers that a ruling on the question is necessary to enable it to give judgement.³⁵

Judgements of the COMESA Court of Justice are final and conclusive, and not open to appeal.³⁶ As to the enforcement of judgements delivered by this Court, the COMESA Treaty provides for member states or the Council to take the measures required to implement the judgement. The Court itself has the option to prescribe such sanctions as it considers necessary to be imposed against a party who does not fulfil its obligation to implement the Court's decision.³⁷

In sum, it can be stated that the COMESA Court of Justice has the potential to contribute to the protection and promotion of human rights, as individual actions are subject to the Court's jurisdiction and human rights are anchored within COMESA's legal framework.

Southern African Development Community – SADC

Background

SADC³⁸ was established in Windhoek in 1992 as the successor organisation to the Southern African Development Coordination Conference (SADCC), which was founded in 1980. SADC was established by signature of its constitutive legal instrument, the SADC Treaty. SADC envisages –³⁹

... a common future, a future in a regional community that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice and peace and security for the peoples of Southern Africa. This shared vision is anchored on the common values and principles and the historical and cultural affinities that exist between the peoples of Southern Africa.

To this end, SADC's objectives include the achievement of development and economic growth; the alleviation of poverty; the enhancement of the standard and quality of life; support of the socially disadvantaged through regional integration; the evolution of common political values, systems and institutions;

³⁵ Article 30, COMESA Treaty.

³⁶ Article 31(1), COMESA Treaty.

³⁷ Article 34(3) and (4), COMESA Treaty.

³⁸ For more details on SADC, see <http://www.sadc.int/>.

³⁹ See SADC's Vision, at <http://www.sadc.int/>.

the promotion and defence of peace and security; and achieving the sustainable utilisation of natural resources and effective protection of the environment.⁴⁰

According to the UN Statistical Division,⁴¹ SADC counts a total population of more than 245 million, who inhabit a surface area of almost 10 million km², and a total GDP of over US\$432 billion. SADC's headquarters are in Gaborone, Botswana, and the SADC working languages are English, French and Portuguese. The institutions of SADC, provided for in the SADC Treaty, are the Summit of Heads of State or Government; the Organ on Politics, Defence and Security Co-operation; the Council of Ministers; the Integrated Committee of Ministers; the Standing Committee of Officials; the Secretariat; the Tribunal; and SADC National Committees.

SADC currently counts 15 states among its members, namely Angola, Botswana, the DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles,⁴² South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

The Regional Indicative Strategic Development Plan (RISDP) approved by the SADC Summit in 2003, has defined the following targets for regional integration within SADC:

- An FTA by 2008
- Completion of negotiations of the SADC Customs Union by 2010
- Completion of negotiations of the SADC Common Market by 2015
- SADC Monetary Union and SADC Central Bank by 2016, and
- Launch of a regional currency by 2018.

As a first step towards deeper regional integration, SADC launched the FTA in August 2008 in order to create a larger market, releasing potential for trade, economic development and employment creation.⁴³

As many SADC member states are also parties to other RECs,⁴⁴ COMESA, the EAC and SADC have decided to accelerate economic integration of the

⁴⁰ These are some of the SADC objectives laid down in Article 5 of the SADC Treaty.

⁴¹ <http://unstats.un.org/unsd/default.htm>.

⁴² The Seychelles was a member of SADC from 1997 to 2004; it rejoined SADC in 2008.

⁴³ See Section 14, Final Communiqué of the 28th Summit of SADC Heads of State and Government held in Sandton, South Africa, from 16 to 17 August 2008.

⁴⁴ COMESA members that are simultaneously SADC members are the DRC, Madagascar, Malawi, Mauritius, the Seychelles, Zambia and Zimbabwe. Burundi, Kenya, Rwanda and Uganda are simultaneously members of EAC and COMESA, while Tanzania is a

continent, with the aim of achieving economic growth, reducing poverty and attaining sustainable economic development. To this end, it was resolved that the three RECs should –⁴⁵

... immediately start working towards a merger into a single REC with the objective of fast[-]tracking the attainment of the African Economic Community.

In the area of trade, customs and economic integration, it was approved that an FTA be established, encompassing the three RECs' member states with the ultimate goal of establishing a single customs union.

Human rights protection within SADC

It might appear that the promotion and protection of human rights are not SADC top priority as an organisation that furthers socio-economic cooperation and integration as well as political and security cooperation among its 15 southern African member states. However, the protection of human rights plays an essential role in economic development as it has an impact on the investment climate, which in turn contributes to growth, productivity and employment creation, all being essential for sustainable reductions in poverty.

A ministerial workshop in 1994 called for the adoption of a SADC Human Rights Commission as well as for a SADC Bill of Rights. In 1996, a SADC Human Rights Charter was drafted, albeit by NGOs of several SADC member states.

In the course of establishing the SADC Tribunal in 1997, a panel of legal experts⁴⁶ considered the possibility of separate human rights instruments such as a Protocol of Human Rights or a separate Southern African Convention on Human Rights. None of these proposals was realised, however.⁴⁷

member of the EAC as well as of SADC. See the respective explanations on overlapping memberships and in the section on the history and facts of COMESA. On the specific issue of overlapping memberships, see Jakobeit et al. (2005).

⁴⁵ See COMESA–EAC–SADC (2008).

⁴⁶ This panel consisted of the late Professor Kamba (founding Dean of the Faculty of Law at the University of Namibia) and Justice Jacobs (judge at the Court of Justice of the European Communities). Cf. Viljoen (1999:200).

⁴⁷ For more details on these historical developments, see Viljoen (ibid.:200f).

Nonetheless, many human-rights-related provisions can be found within SADC's legal framework. The SADC Treaty itself refers to regional integration and to human rights directly or indirectly at several stages. In its Preamble, the Treaty determines, *inter alia*, to ensure, through common action, the progress and well-being of the people of southern Africa, and recognises the need to involve the people of the SADC region centrally in the process of development and integration, particularly through guaranteeing democratic rights, and observing human rights and the rule of law. The Preamble's contents are given effect within the subsequent provisions of the SADC Treaty. Chapter 3, for example, which deals with principles, objectives, the common agenda and general undertakings, provides that SADC and its member states are to act in accordance with the principles of human rights, democracy and the rule of law.⁴⁸ Moreover, the objectives of SADC⁴⁹ relate to human rights issues in one way or another. For instance, the objective of alleviating and eventually eradicating poverty contributes towards ensuring, *inter alia*, a decent standard of living, adequate nutrition, health care and education – all these being human rights.⁵⁰ Other SADC objectives such as the maintenance of democracy, peace, security and stability refer to human rights, as do the sustainable utilisation of natural resources and effective protection of the environment – known as third-generation human rights.⁵¹

Besides the aforementioned provisions and objectives, the SADC legal system offers human rights protection in many legal instruments other than the SADC Treaty. One category of legal documents constitutes the SADC Protocols. The Protocols are instruments by means of which the SADC Treaty is implemented; they have the same legal force as the Treaty itself. A Protocol comes into force after two thirds of SADC member states have ratified it. A Protocol legally binds its signatories after ratification.

Table 2 outlines all SADC Protocols, as most SADC Protocols are either directly or indirectly relevant to human rights.

⁴⁸ Article 4(c), SADC Treaty.

⁴⁹ Article 5, SADC Treaty.

⁵⁰ UNDP (2000:8).

⁵¹ Ruppel (2008a).

Table 2: SADC Protocols

Protocol Against Corruption
Protocol on Culture, Information and Sports
Protocol on Combating Illicit Drugs
Protocol on Education and Training
Protocol on Energy
Protocol on Extradition
Protocol on Control of Firearms, Ammunition and Other Related Materials
Protocol on Fisheries
Protocol on Forestry
Protocol on Gender and Development
Protocol on Immunities and Privileges
Protocol on Legal Affairs
Protocol on Mutual Legal Assistance in Criminal Matters
Protocol on Mining
Protocol on the Facilitation of Movement of Persons
Protocol on Politics, Defence and Security Co-operation
Protocol on the Development of Tourism
Protocol on Trade
Amended Protocol on Trade
Protocol on Transport, Communications and Meteorology
Protocol on the Tribunal and the Rules of Procedure Thereof

Of specific relevance in terms of human rights are the gender-related instruments within the SADC legal framework.⁵² For example, the Protocol on Gender and Development was signed during the 28th SADC Summit in August 2008.⁵³ Recognising that the integration and mainstreaming of gender issues into the SADC legal framework is key to the sustainable development of the SADC region, and taking into account globalisation, human trafficking of women and children, the feminisation of poverty, and violence against women, amongst other things, the Protocol in its 25 Articles expressively address issues such as affirmative action, access to justice, marriage and family rights, gender-based

⁵² Visser & Ruppel-Schlichting (2008:157).

⁵³ See Section 16, Final Communiqué of the 28th Summit of SADC Heads of State and Government held in Sandton, South Africa, 16 to 17 August 2008.

violence, health, HIV and AIDS, and peace-building and conflict resolution. The Protocol provides that, by 2015, member states are obliged to enshrine gender equality in their respective constitutions, and that their constitutions state that the provisions enshrining gender equality take precedence over their customary, religious and other laws.⁵⁴

The implementation of the Protocol's provisions is the responsibility of the various SADC member states,⁵⁵ and specific provisions as to monitoring and evaluation are laid down in the Protocol.⁵⁶ The SADC Tribunal is the judicial body that has jurisdiction over disputes relating to this Protocol.⁵⁷

Apart from the SADC Treaty and the SADC Protocols, the REC has other instruments at different levels. The latter are not binding, and do not require ratification by SADC members. With respect to their human rights relevance, such instruments include the Principles and Guidelines Governing Democratic Elections; the Charter of Fundamental and Social Rights in SADC; the Declaration on Agriculture and Food Security; and the Declaration on HIV and AIDS.

The Principles and Guidelines Governing Democratic Elections⁵⁸ are of specific importance for first-generation human rights, which comprise civil and political rights. The Guidelines focus on citizens' participation in the decision-making processes and the consolidation of democratic practice and institutions. Besides the basic principles for conducting democratic elections, the Guidelines *inter alia* provide for SADC Electoral Observation Missions that member states can invite to observe their elections; guidelines on the observation of elections; a code of conduct for election observers; and the rights and duties of a member state holding elections.

The 2003 Charter of Fundamental and Social Rights in SADC – although not legally binding – is an important human rights document that specifies the objectives laid down in Article 5 of the SADC Treaty for the employment and labour sector. Rights such as the right to freedom of association; the right to equality; the right to a safe and healthy environment; the right to remuneration;

⁵⁴ Article 4, SADC Protocol on Gender and Development.

⁵⁵ Article 14, SADC Protocol.

⁵⁶ Article 17, SADC Protocol.

⁵⁷ Article 18, SADC Protocol.

⁵⁸ Referred to hereafter as *the Guidelines*.

and the right to the protection of specific groups in society, such as children, the youth, the elderly, and persons with disabilities, are enshrined in the Charter of Fundamental and Social Rights in SADC.

With the 2003 Declaration on Agriculture and Food Security, the Heads of State or Government have given substantial means to some specific objectives laid down in Article 5 of the SADC Treaty, namely the promotion of sustainable and equitable economic growth and socio-economic development to ensure poverty alleviation with the ultimate objective of its eradication; the achievement of sustainable utilisation of natural resources and effective protection of the environment; and mainstreaming of gender perspectives in the process of community and nation building. By this Declaration, SADC States have committed themselves to promote agriculture as a pillar in national and regional development strategies and programmes in order to attain our short, medium, and long-term objectives, on agriculture and food security. The Declaration of Agriculture and Food Security is of specific importance for the human right to food and covers a broad range of human rights relevant issues like the increase of production of crops, livestock and fisheries, the sustainable use and management of natural resources as well as the enhancement of gender equality and human health and the mitigation of chronic diseases such as AIDS.

The 2003 Declaration on HIV and AIDS similarly strives to realise the objectives set forth in the SADC Treaty to promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation; to combat HIV and AIDS and other deadly and communicable diseases; and to mainstream gender in the process of community and nation-building. The Declaration describes specific areas as urgent priorities in terms of attention and action. These areas include prevention and social mobilisation; improving care, access to counselling and testing services, treatment and support; accelerating development and mitigating the impact of HIV and AIDS; intensifying resource mobilisation; and strengthening institutional, monitoring and evaluation mechanisms.

Enforcement mechanisms

Having briefly introduced the most important instruments within the SADC legal environment, the next paragraphs will deal with the question of how human

rights contained in the aforementioned instruments can be enforced. Notably, each of these instruments give guidance to the various SADC institutions within the manifold decision-making processes. In the legal sense, however, only provisions of a binding nature can be enforced. Therefore, the SADC Treaty and its Protocols are pivotal to enforcing human rights within SADC.

The SADC Tribunal is the judicial institution within SADC. The establishment of the Tribunal is a major event in SADC's history as an organisation and in the development of its law and jurisprudence. The Tribunal was established in 1992 by Article 9 of the SADC Treaty as one of the institutions of SADC. The Summit of Heads of State or Government, which is the Supreme Policy Institution of SADC pursuant to Article 4(4) of the Protocol on the Tribunal, appointed the members of the Tribunal during its Summit in Gaborone, Botswana, on 18 August 2005. The inauguration of the Tribunal and the swearing in of its members took place on 18 November 2005 in Windhoek, Namibia, in which city Council also designated the Seat of the Tribunal to be. Article 22 of the Protocol on the Tribunal provides that for working languages of the Tribunal to be English, French and Portuguese.⁵⁹ The Tribunal began hearing cases in 2007, and has seen 17 cases filed with it to date.

The SADC Protocol on the Tribunal and the Rules of Procedure thereof circumscribe the Tribunal's jurisdiction. Article 16(1) of the SADC Treaty provides for the following primary mandate:

The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.

The SADC Tribunal was set up to protect the interests and rights of SADC member states and their citizens, and to develop community jurisprudence, also with regard to applicable treaties, general principles, and rules of public international law.⁶⁰ Subject to the principle that local remedies first be exhausted before the Tribunal is approached, the Tribunal has the mandate to adjudicate disputes between states, and between natural and legal persons in SADC.⁶¹ Further, the Protocol states that the Tribunal has jurisdiction over all matters provided for

⁵⁹ See <http://www.sadc.int/tribunal/>; last accessed 20 July 2008.

⁶⁰ Chidi (2003).

⁶¹ Article 15(2), Protocol on the Tribunal and Rules of Procedure thereof.

in any other agreements that member states may conclude among themselves or within the community, and that confer jurisdiction to the Tribunal.⁶² In this context, the SADC Tribunal also has jurisdiction over any dispute arising from the interpretation or application of the Protocol on Gender and Development that cannot be settled amicably.⁶³

The Tribunal was primarily set up to resolve disputes arising from closer economic and political union, rather than human rights.⁶⁴ However, a recent judgement by the Tribunal commonly known as the *Campbell* case,⁶⁵ impressively demonstrates that the Tribunal can also be called upon to consider human rights implications of economic policies and programmes.

On 11 October 2007, Mike Campbell (PVT) Limited, a Zimbabwean-registered company, instituted a case with the Tribunal to challenge the expropriation of agricultural land in Zimbabwe by that country's government. At the time, the matter was also pending in the Supreme Court of Zimbabwe.⁶⁶ As a result, an application was brought in terms of Article 28 of the SADC Protocol for an interim measure to interdict the Zimbabwean Government from evicting Mike Campbell (PVT) Limited and others from the land in question until the main case had been finalised.

The claimant argued that the Zimbabwean land acquisition process was racist and illegal by virtue of Article 6 of the SADC Treaty and the African Union Charter, which both outlaw arbitrary and racially motivated government action. Article 4 of the SADC Treaty stipulates that SADC and its member states are obliged, inter alia, to act in accordance with the principles of human rights, democracy and the rule of law, as well as in line with the principles of equity, balance and mutual benefit, and the peaceful settlement of disputes. According to Article 6(2) of the Treaty, –

⁶² Hugo (2007).

⁶³ Article 18, SADC Protocol on Gender and Development.

⁶⁴ Viljoen (2007:503).

⁶⁵ *Mike Campbell & Another (PVT) Limited v The Republic of Zimbabwe* SADC (T) 2/2007.

⁶⁶ See *Mike Campbell (PVT) Ltd et al. v The Minister of National Security responsible for Land, Land Reform and Resettlement and the Attorney-General*. Constitutional Application No. 124/06 (unreported case: Supreme Court of Zimbabwe).

SADC and member states shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability.

It was put forward that the constitutional amendments behind the farm seizures were contrary to SADC statutes, and that the Supreme Court of Zimbabwe had failed to rule on an application by Campbell and 74 other Zimbabwean white commercial farmers to have the race-based acquisition declared unlawful.⁶⁷ The claimant alleged that he had suffered a series of invasions on his farm. The defendant state in turn argued that the land had to be given back to even out a colonial imbalance in land distribution, and that Campbell had not exhausted local remedies. The relationship between the legal regime of SADC on the one hand and Zimbabwe's national law on the other is at the core of this case.

Section 23 of the Constitution of the Republic of Zimbabwe states the following:

No law shall make any provision that is discriminatory either of itself or in its effect; and no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

In 2005, however, the Zimbabwean Constitution was amended. The Constitutional Amendment Act No. 17 of 2005 allows the Zimbabwean Government to seize or expropriate farmland without compensation, and bars courts from adjudicating over legal challenges filed by dispossessed and aggrieved white farmers. Section 2(2) of the Constitutional Amendment Act provides that –

... all agricultural land – [a description of such agricultural land identified by the Government is given here] ... is acquired by and vested in the State with full title therein ...; and ... no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

The practical implications of the Constitutional Amendment Act resulted in farm seizures, where most of the approximately 4,000 white farmers were forcibly ejected from their properties with no compensation being paid for the land, since, according to Harare, it was stolen in the first place. The Zimbabwe Government

⁶⁷ Grebe (2008a).

has compensated some farmers only for developments on the land such as dams, farm buildings and other so-called improvements.⁶⁸

After an interim order was issued by the Tribunal⁶⁹ that Campbell should remain on his expropriated farm until the dispute in the main case had been resolved by it, the Zimbabwean Supreme Court⁷⁰ (sitting as a Constitutional Court) dismissed the application by the white commercial farmers challenging the forcible seizure and expropriation of their lands without compensation. The Court ruled that –⁷¹

... by a fundamental law, the legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded.

The main hearing before the SADC Tribunal was scheduled for 28 May 2008, but was postponed until 16 July 2008. In the meantime, Campbell and members of his family were brutally beaten up on their farm in Zimbabwe and allegedly forced to sign a paper declaring that they would withdraw the case from the SADC Tribunal.⁷² Subsequently, the applicants and other interveners in the *Campbell* case made an urgent application for non-compliance to the Tribunal, seeking a declaration to the effect that the respondent state was in breach and contempt of the Tribunal's orders. After hearing the urgent application, the Tribunal found that the respondent state was indeed in contempt of its orders. Consequently, and in terms of Article 32(5) of the Protocol, the Tribunal decided to report the matter to the Summit for the latter to take appropriate action.⁷³

The hearing of the *Campbell* case was finalised on 28 November 2008. In its final decision, the SADC Tribunal ruled in favour of the applicants Mike and William Campbell and 77 other white commercial farmers.⁷⁴

⁶⁸ Incidentally, these land reform measures have plunged Zimbabwe into severe food shortages.

⁶⁹ On 13 December 2007.

⁷⁰ On 22 January 2008.

⁷¹ See http://www.thezimbabwean.co.uk/index.php?option=com_content&view=article&id=13001:campbell-case-heads-of-argument-summary&catid=31:top%20zimbabwe%20stories&Itemid=66; last accessed 18 June 2008.

⁷² Grebe (2008b).

⁷³ So far, no official measures have been taken by the SADC Summit in the *Campbell* case.

⁷⁴ *Mike Campbell (PVT) Limited & Another v The Republic of Zimbabwe* SADC (T) 2/2007.

In conclusion, the Tribunal held that the Republic of Zimbabwe was in breach of its obligations under Articles 4(c) and 6(2) of the SADC Treaty, and that –⁷⁵

- the applicants had been denied access to the courts in Zimbabwe
- the applicants had been discriminated against on the ground of race, and⁷⁶
- fair compensation was payable to the applicants for their lands compulsorily acquired by the Republic of Zimbabwe.

Furthermore, the Tribunal directed the Republic of Zimbabwe to take all necessary measures to protect the possession, occupation and ownership of the lands of applicants who had not yet been evicted from their lands, and to pay fair compensation to those three applicants who had already been evicted from their farms. The ruling is considered to be a landmark decision which will no doubt influence the legal landscape in the SADC region. Meanwhile, the Zimbabwean Government has announced that it will not accept the judgement, which raises the question of how the SADC Tribunal's judgements are to be enforced.

The Tribunal's decisions are final and binding.⁷⁷ Sanctions for non-compliance may be imposed by the Summit according to Article 33 of the SADC Treaty, and are determined on a case-by-case basis. However, no specific sanction is outlined for non-compliance with judgements issued by the SADC Tribunal.⁷⁸ The Tribunal itself can only refer cases of non-compliance to the SADC Summit for the latter to take appropriate steps. Therefore, the future will show to what extent the Tribunal's judgements are taken seriously by SADC member states and by SADC itself. Even if the Tribunal is unable to heal all domestic failures

⁷⁵ *Mike Campbell (PVT) Limited & Another v The Republic of Zimbabwe* SADC (T) 2/2007, at page 57f.

⁷⁶ The issue of racial discrimination was decided by a majority of four to one. Judge Tshosa, in his dissenting opinion, concluded that "Amendment 17 does not discriminate against the applicants on the basis of race and therefore does not violate the respondent's obligation under Article 6(2) of the Treaty". He argued that "the target of Amendment 17 is agricultural land and not people of a particular racial group" and that – although few in number – not only white Zimbabweans had been affected by the amendment. See *Mike Campbell (PVT) Limited & Another v The Republic of Zimbabwe* SADC (T) 2/2007, dissenting opinion of Hon. Justice Dr Onkemetse B Tshosa.

⁷⁷ Article 16 (5) of the SADC Treaty.

⁷⁸ Interestingly, a draft SADC Human Rights Charter drawn up by NGOs of SADC member states in 1996 contained a provision according to which any state "which does not comply with an order of the Court interpreting this Charter shall be suspended from SADC for the duration of its non-compliance with such order". This proposal, although it appears very effective, has, however, not been realised. See Viljoen (1999:201f).

in human rights matters, since such matters are not in the focus of the institution or its mandate for regional integration, it remains to be seen whether SADC is politically and legally mature enough to apply the necessary lessons.

Of significance is the fact that none of the cases heard by the Tribunal so far have dealt with disputes among member states, whereas 15 cases relate to disputes between natural/legal persons and member states, and 2 to disputes between SADC employees and SADC institutions. This interim balance shows that there is indeed a need for a supranational judicial body to decide on matters that relate to cases of imbalances between national law on the one hand and community law on the other. The Tribunal can, therefore, significantly contribute not only towards a deeper harmonisation of law and jurisprudence, but also towards a better protection of human rights at community level – provided that SADC and its institutions put the necessary emphasis on the enforcement of the Tribunal’s judgements.

The Eastern African Community – EAC

Background

The history of the EAC⁷⁹ goes back to 1967, the year in which it was originally founded. In 1977, after ten years of operation, the EAC was dissolved⁸⁰ and was defunct until 2000, when it was revived. Today, the EAC has been officially recognised by the AU as one of the pillars of the AEC.

According to the UN Statistical Division,⁸¹ the EAC covers a land surface area of almost 2 million km², which a total of almost 125 million inhabitants call home. The REC has a total GDP of over US\$149 billion. The official languages are English, French and Kiswahili. The basic legal instrument of the EAC is the Treaty Establishing the East African Community.⁸² The Treaty was signed in

⁷⁹ For more details on the EAC, see www.eac.int.

⁸⁰ Many reasons have been cited for the stranding of the EAC in 1977. Viljoen (2007:490f) states that “Businessmen in Kenya pressurized government to withdraw, because the Court’s appellate jurisdiction had affected their financial and commercial interests, even though Kenya benefited from an inequitable distribution of benefits. Differences in economic policies and political approaches also constituted important reasons for failure”.

⁸¹ <http://unstats.un.org/unsd/default.htm>.

⁸² In the following referred to as the *EAC Treaty*.

1999 and came into force in 2000, allowing the EAC to be officially launched in January 2001.

The EAC focuses on and aims at widening and deepening cooperation among its member states in political, economic, social and cultural fields; and in research and technology, defence, security, and legal and judicial affairs, for their mutual benefit.⁸³ Furthermore, the EAC Treaty provides for, inter alia, the organs of the EAC, namely the Summit, the Council of Ministers, the Co-ordination Committee, the Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly, and the Secretariat, which has its seat in Arusha, Tanzania.

The EAC currently counts five states as its members, namely Burundi, Kenya, Rwanda, Tanzania, and Uganda. All EAC members are at the same time states parties to other organisations in the region.⁸⁴ The EAC has just recently concluded an agreement with SADC and COMESA to form an expanded FTA to include all their member states, with the ultimate goal of establishing a single customs union. The Tripartite Summit held with the Heads of State and Government of the three RECs in October 2008 in Kampala, Uganda, focused on the broader objectives of the AU to accelerate the economic integration of the continent, with the aim of achieving economic growth, reducing poverty and attaining sustainable economic development. It was resolved that the three RECs should –⁸⁵

... immediately start working towards a merger into a single REC with the objective of fast[-]tracking the attainment of the African Economic Community.

Human rights protection within the EAC

Although the EAC's focus has primarily been on economic integration, good governance and human rights issues are coming to the fore as the EAC moves deeper into regional integration.⁸⁶ Among the fundamental principles of the

⁸³ See Article 5, EAC Treaty.

⁸⁴ Tanzania, for example, is a member of the EAC and simultaneously of SADC. Members of the EAC that are simultaneously members of COMESA are Burundi, Kenya, Rwanda and Uganda.

⁸⁵ See COMESA–EAC–SADC (2008).

⁸⁶ As stated by the Secretary-General of the EAC, Juma V Mwapachu, on 3 September 2007, at a meeting held with a delegation of the Kituo Cha Katiba, a regional civil society

EAC are many which relate to the protection of human rights. The most relevant provision is Article 6(d), which reads as follows, and governs the achievement of EAC objectives by its member states:

... good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples['] rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; ...

The governing principles for the practical achievement of the objectives of the EAC – referred to as *operational principles* – also contain provisions relevant to human rights. Thus, Article 7(2) urges member states to –

... undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

Furthermore, the protection of human rights is a governing principle in respect of common foreign and security policies as the objectives of such policies are designed to develop and consolidate democracy and the rule of law as well as the respect for human rights and fundamental freedoms.

The aforementioned provisions cover human rights protection in general, whereas the EAC Treaty and other legal instruments and programmes focus on specific human-rights-related issues. The role of women and men in society is one such issue. To this end, the mainstreaming of gender in all its endeavours and the enhancement of the role of women in cultural, social, political, economic and technological development is laid down as one specific objective of the community.⁸⁷ The fact that gender equality is recognised as one of the fundamental principles of the EAC⁸⁸ is reflected in the provisions relating to the appointment of staff,⁸⁹ which provides that gender balance is to be taken into account within the appointment and composition of staff in EAC organs and institutions. Besides these more general provisions, in recognition of women making a

organisation with observer status in the EAC. The delegation had called on him in Arusha to discuss a draft East African Bill of Rights; cf. EAC (2008a).

⁸⁷ Article 5(3)(e), EAC Treaty.

⁸⁸ Article 6(d), EAC Treaty.

⁸⁹ Article 9(5), EAC Treaty.

significant contribution towards the process of socio-economic transformation and sustainable growth, the Treaty has dedicated an entire chapter, Chapter 22, to enhancing the role of women in socio-economic development. Chapter 22 comprises a broad range of progressive provisions aimed at improving the situation of women within EAC member states. Chapter 22 urges states to, amongst other things, take appropriate legislative and other measures to –⁹⁰

- abolish legislation and discourage customs that discriminate against women
- promote effective education awareness programmes aimed at changing negative attitudes towards women, and
- take measures to eliminate prejudices against women and promote gender equality in every respect.

The preservation of peace and security are other features contained in the EAC Treaty that are closely related to human rights protection, since a state of war substantially affects human rights. By signing the Treaty, member states acknowledge that peace and security are prerequisites to social and economic development within the EAC, and that they are vital to achieving EAC objectives. In this regard, the Treaty envisages fostering and maintaining an atmosphere conducive to peace and security by means of cooperation and consultation with a view to the prevention, resolution and management of disputes and conflicts between member states.⁹¹ Moreover, member states have agreed to establish common mechanisms for the management of refugees.⁹²

Further human-rights-related provisions have been included in the EAC Treaty with regard to the free movement of persons; labour services; the right of establishment and residence;⁹³ agriculture and food security;⁹⁴ health, cultural and social activities;⁹⁵ and management of the environment and natural resources.⁹⁶

On the sub-Treaty level, other EAC instruments that enhance the protection of human rights more specifically need to be mentioned as well. In 2008, the EAC

⁹⁰ Articles 121 and 122, EAC Treaty.

⁹¹ Article 124(1), EAC Treaty.

⁹² Article 124(5)(a), EAC Treaty.

⁹³ Chapter 17, EAC Treaty.

⁹⁴ Chapter 18, EAC Treaty.

⁹⁵ Chapter 21, EAC Treaty.

⁹⁶ Chapter 19, EAC Treaty.

Council of Ministers adopted the EAC Plan of Action on the Promotion and Protection of Human Rights in East Africa.⁹⁷ The Plan of Action envisages the following, inter alia, within a three-year period:

- The establishment of new and the strengthening of existing national human rights institutions
- The development of training manuals or guidelines for human rights actors and agencies, and
- The training of actors involved in the promotion and protection of human rights, including judges/judicial officers, Electoral Commissions, policymakers and implementers, legislators, and civil society.

The preservation of environmental goods and the prevention of environmental threats are essential for human life; in this sense, they are vital for maintaining a healthy standard of human rights. Thus, the EAC adopted a Protocol on Environment and Natural Resources, which was ratified by EAC member states in 2008.⁹⁸ The Protocol was adopted in recognition of the fact that a clean and healthy environment is a prerequisite for sustainable development, and beneficial to present and future generations.⁹⁹ To this end, the Protocol makes provision for cooperation in environmental and natural resource management, covering a broad variety of sectors such as biodiversity, forests, wildlife, water, genetic resources, mining and energy resources, drought, climate change and the ozone layer.¹⁰⁰ Provisions are also made for environmental impact assessments and audits, as well as for the establishment of a Sectoral Committee on Environment and Natural Resources. Disputes between states as regards the Protocol are referred to the East African Court of Justice (EACJ) where all other attempts to resolve the situation have failed.

Unquestionably, the EAC Treaty and other EAC instruments serving as guidelines for cooperation and decision-making processes provide for an in-depth protection of human rights. Considering that the EAC is still in its infancy, the question of whether and to what degree human-rights-related provisions are put into practice cannot be answered at this stage. What is clear, however, is that a treaty such as the EAC's formulates many provisions as visions and guidelines to be realised 'on the way'. One prerequisite for the realisation of such laudable

⁹⁷ (EAC/CM 15/Decision 36). See EAC (2008c:20).

⁹⁸ See EAC (2008c:15).

⁹⁹ Cf. Preamble to the EAC Protocol on Environment and Natural Resource Management.

¹⁰⁰ Cf. Chapter 3, EAC Protocol.

vision, however, is that proper mechanisms are put in place to give effect to the rights contained in the legal instruments concerned.

Enforcement mechanisms

The East African Court of Justice (EACJ) is the judicial body of the East African Community. It is temporarily seated in Arusha, Tanzania, until the Summit determines the Court's permanent Seat. The Court was established in 1999 under Article 9 of the EAC Treaty, and became operational in 2001.¹⁰¹ Although a successor to the East African Court of Appeal, which was the judicial organ of the EAC until it became defunct in 1977, the EACJ is different in composition and jurisdiction.¹⁰² Procedural provisions relevant to the EACJ are the Rules of the Court and the EACJ Arbitration Rules.

The Court has jurisdiction over the interpretation and application of the EAC Treaty. Therefore, it plays an important role in embodying the fundamental principles of the EAC, such as adherence to the rule of law and good governance.¹⁰³ Reference to the Court may be by legal and natural persons, member states, and the EAC Secretary-General. The decisions of the EACJ are binding on the parties to the dispute.¹⁰⁴ Recently, the structure of the EACJ was extended from a single instance court to a first instance division and an appellate division.¹⁰⁵

Although the EAC Treaty provides for broad protection with regard to human rights, notably the East African Court of Justice has to date had no jurisdiction in human rights cases. This is because Article 27(2) of the EAC Treaty provides that jurisdiction on human-rights-related matters is subject to a respective Protocol, which has not yet been concluded. This is an indication that the Court may not rule on issues relating to human rights. However, the Court itself has stated that

¹⁰¹ For some recent decisions of the Court, see Mutai (2007:177–203).

¹⁰² The defunct East African Court of Appeal was designed as an appeal court for national court decisions on civil and criminal matters, but with the exception of constitutional matters and the offence of treason in Tanzania. See <http://www.eac.int/index.php/organs/eacj.html?start=1>.

¹⁰³ As stated by the EAC's Secretary-General, Juma V Mwapachu, at the Induction Workshop for EACJ Judges held in Arusha on 30 July 2008; cf. EAC (2008b:14).

¹⁰⁴ Article 35, EAC Treaty.

¹⁰⁵ See EAC (2008b:14).

it does not abdicate from exercising its jurisdiction of interpretation of the Treaty –¹⁰⁶

... merely because the Reference includes allegation of human rights violation.

It is hoped that a Protocol enabling the court to exercise jurisdiction in cases dealing with human rights is currently under debate. The so-called Zero Draft (Draft Protocol on extending the jurisdiction of the EACJ)¹⁰⁷ was drafted by the EAC's Secretariat in 2005, but has not yet been approved by the Meeting of the EAC Council of Ministers.¹⁰⁸ The fact that the 2005 version of the Draft Protocol was criticised in the past¹⁰⁹ is one of the reasons why the Court does not yet have explicit jurisdiction for human rights cases. The criticism is based on, inter alia, the envisaged combined jurisdiction of the EACJ as a Court of Justice and a Human Rights Court, and on the lack of clarity on the issue of applicable law.¹¹⁰

It is hoped that the EACJ will soon have at hand a legal instrument providing explicit jurisdiction in human rights cases. For the time being, cases involving human rights violations can either be brought before other subregional courts¹¹¹ or be referred to the respective judicial institution at regional level.¹¹² The only other option for the EACJ is to still accept human-rights-related cases on the basis of implicit jurisdiction, as it has done in the past.¹¹³

¹⁰⁶ Cf. *Katabazi & 21 Others v Secretary General of the East African Community & Another* (Ref. No. 1 of 2007) [2007] EACJ 3 (1 November 2007).

¹⁰⁷ Text available at http://ealawsociety.org/Joomla/UserFiles/File/draft_protocol_eacj.pdf.

¹⁰⁸ As stated by the Secretary-General of the EAC, Juma V Mwapachu, on 3 September 2007 at a meeting held with a delegation of the Kituo Cha Katiba, a regional civil society organisation with observer status in the EAC. The latter delegation called on the Secretary-General in Arusha to discuss a draft East African Bill of Rights; cf. EAC (2008a:21f).

¹⁰⁹ Bossa (2006); see also Bossa (2005).

¹¹⁰ Bossa (2006:12,15).

¹¹¹ Parties could opt to bring a case before the COMESA Court of Justice.

¹¹² This would be the African Commission for Human Rights, considering that the African Court on Human and Peoples' Rights is not yet operational, although judges were elected in 2006.

¹¹³ Cf. *Katabazi & 21 Others v Secretary General of the East African Community & Another* (Ref. No. 1 of 2007) [2007] EACJ 3 (1 November 2007).

Economic Community of Central African States – ECCAS

Background

ECCAS¹¹⁴ was formally established in 1983 by Cameroon, the Central African Republic, Chad, the DRC, Equatorial Guinea and Gabon, all members of the *Union Douanière e Économique de l’Afrique Centrale*¹¹⁵ (UDEAC, Customs and Economic Union of Central Africa, members of the *Communauté Économique des Pays des Grands Lacs*¹¹⁶ (CEPGL, Economic Community of the Great Lakes States, namely Burundi, Rwanda and the then Zaire), and by São Tomé and Príncipe. Due to financial¹¹⁷ and political¹¹⁸ difficulties, ECCAS ceased to exist in 1992, but was revived in 1998.

According to the UN Statistical Division,¹¹⁹ ECCAS counts a total population of 121 million inhabitants. The Community spans a surface area of 6.5 million km², and its members produce a combined GDP of over US\$175 billion. The working languages are English, French, Portuguese and Spanish. The primary objective of ECCAS is to pave a way for deeper regional integration, with the ultimate goal of establishing a central African common market. The basic legal instrument of ECCAS is the Treaty Establishing the Economic Community of Central African States. This Treaty provides, inter alia, for the institutions of ECCAS, namely the Conference of Heads of State and Government; the Council of Ministers; the Court of Justice; the Consultative Commission; specialised technical committees or organs as set up or provided for by the ECCAS Treaty; and the General Secretariat, which has its seat in Libreville, Gabon.

ECCAS currently counts ten states as members, namely Angola, Burundi, Cameroon, the Central African Republic, Chad, the Republic of Congo, the DRC, Gabon, Guinea, and São Tomé and Príncipe.¹²⁰

¹¹⁴ For detailed information on ECCAS, see <http://www.ceeac-eccas.org/>.

¹¹⁵ The UDEAC was established by the Brazzaville Treaty in 1966.

¹¹⁶ The CEPGL was established in 1976.

¹¹⁷ Financial difficulties arose due to non-payment of member fees.

¹¹⁸ The war in the DRC was a central problematic issue.

¹¹⁹ <http://unstats.un.org/unsd/default.htm>.

¹²⁰ Rwanda withdrew its membership from ECCAS in June 2007 in order to reduce its integration engagements to fewer regional blocs. The country remains a member of the CEPGL (Economic Community of the Great Lakes States), COMESA and the

Human rights protection within ECCAS

The ECCAS Treaty does not explicitly refer to human rights protection as an objective or principle of the Community. Although the Treaty clearly indicates that aspects of economic development stand at the core of ECCAS, individual statements indicate that, at least implicitly, human rights do play a role within the ECCAS system. The envisaged cooperation between member states in the fields of economic and social activity such as agriculture, natural resources, trade, education, culture, and the movement of persons, aim at raising the standard of living of its peoples, increasing and maintaining economic stability, fostering close and peaceful relations between member states, and contributing to the progress and development of the African continent.¹²¹ The observance of international law is mentioned in the Treaty as one of its founding principles. Therefore, international human rights standards in the sense of international human rights conventions or of customary law principles of international law can be regarded as forming part of the ECCAS legal regime, as the list to which Article 3 of the Treaty refers contains examples only, and includes general principles that are relevant to human rights, such as respect for the rule of law.¹²²

Chapter 8 of the ECCAS Treaty probably contains the most relevant provisions within the Treaty framework as regards human rights, since it covers the group of second-generation human rights, which are founded on the status of the individual as a member of society. Chapter 8 refers specifically to culture and education. The peculiarities of these social, economic and cultural rights have found a more profound regulation within one of the Annexes to the Treaty, namely the Protocol on Cooperation in the Development of Human Resources, Education, Training and Culture Between Member States of the ECCAS.¹²³

EAC. See http://www.iss.co.za/static/templates/tmpl_html.php?node_id=1435&slink_id=3067&slink_type=12&link_id=3893.

¹²¹ Article 4, ECCAS Treaty.

¹²² Article 3 of the ECCAS Treaty reads as follows: “By this Treaty, the HIGH CONTRACTIVE PARTIES undertake to observe the principles of international law governing relations between States, in particular the principles of sovereignty, equality and independence of all States, good neighbourliness, non-interference in their internal affairs, non-use of force to settle disputes and the respect of the rule of law in their mutual relations”.

¹²³ Several Protocols form part of the ECCAS legal framework, which are annexed to the Treaty. These are as follows: Protocol on the Rules of Origin, which deals with products to be traded between ECCAS member states; Protocol on Non-Tariff Trade Barriers; Protocol

At sub-Treaty level, further activities can be regarded as contributing towards enhancing human rights – at least indirectly. Some of the core activities of ECCAS relate to peace and security, which is of specific importance as the political situation in the ECCAS region is still very unstable and issues that have an impact on the humanitarian situation in that region need special attention. To this end, in 1999 member states decided to create the Council for Peace and Security in Central Africa (COPAX), for the promotion, maintenance and consolidation of peace and security. The respective Protocol¹²⁴ which establishes the technical organs of COPAX¹²⁵ has meanwhile entered into force.

Moreover, ECCAS member states have adopted a Strategic Framework for the Fight against HIV/AIDS in Central Africa, and a Declaration on the Fight against AIDS/HIV in 2004.¹²⁶ Of further specific importance with regard to ECCAS and human rights is the fact that the 11th Ordinary Session of Heads of State and

on the Re-export of Goods within ECCAS; Protocol on Transit and Transit Facilities; Protocol on Customs Cooperation within ECCAS; Protocol on the Fund for Compensation for Loss of Revenue; Protocol on Freedom of Movement and Rights of Establishment of Nationals of Member States within ECCAS; Protocol on the Clearing House for ECCAS; Protocol on Cooperation in Agricultural Development Between Member States of ECCAS; Protocol on Cooperation in Industrial Development Between Member States of ECCAS; Protocol on Cooperation in Transport and Communications Between Member States of ECCAS; Protocol on Cooperation in Science and Technology Between Member States of ECCAS; Protocol on Energy Cooperation Between Member States of ECCAS; Protocol on Cooperation in Natural Resources Between Member States of ECCAS; Protocol on Cooperation in the Development of Human Resources, Education, Training and Culture Between Member States of ECCAS; Protocol on Cooperation in Tourism Between Member States of ECCAS; Protocol on the Simplification and Harmonization of Trade Documents and Procedures within ECCAS; and the Protocol on the Situation of Landlocked, Semi-Landlocked, Island, Part-Island and/or Least Advanced Countries.

¹²⁴ Protocol Relating to the Establishment of a Mutual Security Pact in Central Africa.

¹²⁵ The technical organs of COPEX include the Central African Early Warning System (MARAC, *Mécanisme d'Alerte Rapide de l'Afrique Centrale*), which is responsible for the collection and analysis of data for the early detection and prevention of crises; the Defence and Security Commission (CDS, *Commission de Défense et de Sécurité*), being a meeting of chiefs of staff of national armies and commanders-in-chief of police and gendarmerie forces from the various member states, and which is responsible for planning, organising and providing advice to the decision-making bodies of COPAX in order to initiate military operations if needed; and the Multinational Force of Central Africa (FOMAC, *Force multinationale de l'Afrique Centrale*), a non-permanent force consisting of military contingents from member states, which is responsible for accomplishing missions of peace, security and humanitarian relief.

¹²⁶ See UNDP (2008:116ff).

Government in Brazzaville in 2004 adopted a declaration on gender equality as well as an Action Plan for the Implementation of the ECCAS Gender Policy.

Enforcement mechanisms

The ECCAS Treaty generally provides that disputes on the implementation of the provisions of the Treaty are primarily to be settled amicably by direct agreement between the parties concerned. However, in its Article 16, the Treaty provides for the establishment of a Court of Justice, which has the function of ensuring that the law is observed in the interpretation and application of the Treaty, and that the Court also decides in cases where an amicable solution cannot be reached for the dispute.¹²⁷ The decisions of the Court of Justice are binding on ECCAS member states and its institutions.¹²⁸ However, the judicial body of ECCAS exists solely on paper, as it is not yet operational.¹²⁹ Furthermore, the ECCAS Treaty does not address the question of who will have the power to question the legality of ECCAS laws; nor does the Treaty refer to the sources of applicable law. It is expected that, once the procedures for operationalisation of the Court begin, a special Protocol will be drafted on the Court's rules of procedure.

At this stage though, the potential for claiming human rights violations on the sub-regional level of ECCAS is very low. This relates to both components of enforcing human rights, namely statutory and enforcement. On the statutory level, only a few provisions indirectly grant human rights protection; on the level of enforcement, no judicial institution has yet been empowered to deal with human rights cases.

Intergovernmental Authority on Development – IGAD

Background

IGAD¹³⁰ was formally established in 1996 to succeed the Intergovernmental Authority on Drought and Development (IGADD), which had existed since 1986.

¹²⁷ For more detail on the various techniques of alternative dispute resolution, see Ruppel (2007:3ff).

¹²⁸ Article 17, ECCAS Treaty.

¹²⁹ See <http://www.ceeac-eccas.org/index.php?rubrique=presentation&id=2>.

¹³⁰ For more details on IGAD, see <http://www.igad.org/>.

According to the UN Statistical Division,¹³¹ IGAD has jurisdiction over some 188 million inhabitants, a surface area of more than 5 million square kilometres, and a total GDP of over US\$225 billion. IGAD currently counts six states as members, namely Djibouti, Ethiopia, Kenya, Somalia, Sudan, and Uganda.¹³² By way of increased cooperation, IGAD strives to assist and complement its member states' efforts to achieve food security and environmental protection; promote humanitarian affairs and maintain peace and security; and enable economic cooperation and integration.¹³³

IGAD's basic legal instrument is the Agreement Establishing IGAD.¹³⁴ The Agreement provides for, inter alia, the organs of IGAD, namely the Assembly of Heads of State and Government; the Council of Ministers; the Committee of Ambassadors; and the Secretariat, which has its seat in Djibouti City, Djibouti.

Human rights protection within IGAD

IGAD pursues several principles and objectives, some of which relate to human rights. IGAD has incorporated into its principles the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;¹³⁵ the promotion of regional food security and the free movement of goods, services, and people within the region; the combating of drought; the initiation and promotion of programmes and projects for the sustainable development of natural resources and environmental protection; and the promotion of peace and stability in the subregion.¹³⁶

Humanitarian aspects also play an essential role within the IGAD legal regime. One of the functions of the Council of Ministers, for example, is to monitor and enhance humanitarian activities;¹³⁷ the Secretariat assists policy organs in their work relating to political and humanitarian affairs;¹³⁸ and member states are urged to develop and enhance cooperation in respect of the fundamental and basic rights of

¹³¹ <http://unstats.un.org/unsd/default.htm>.

¹³² Eritrea unilaterally declared its suspension in 2007.

¹³³ This is IGAD's vision; cf. http://www.igad.org/index.php?option=com_content&task=view&id=43&Itemid=53&limit=1&limitstart=1.

¹³⁴ Referred to as the *IGAD Agreement*.

¹³⁵ Article 6A, IGAD Agreement.

¹³⁶ Article 7, IGAD Agreement.

¹³⁷ Article 10.2.j, IGAD Agreement.

¹³⁸ Article 12.2.f, IGAD Agreement.

the peoples of the subregion, so that they can benefit from emergency and other forms of humanitarian assistance.¹³⁹ Furthermore, the IGAD Agreement states that, at the national level and in their relations with one another, member states should be guided by the objectives of saving lives, of delivering timely assistance to people in distress, and of alleviating human suffering.¹⁴⁰ Specific provision is made to facilitate the repatriation and reintegration of refugees, returnees and displaced persons, and demobilised soldiers.¹⁴¹ All these provisions reflect that, due to the current political situation, there is an obligation at supranational level to offer guidance and to cope with the humanitarian disasters that arise from armed conflicts in the subregion.¹⁴²

According to the IGAD Executive Secretary, gender issues are high on the IGAD agenda, and gender-related programmes are among the organisation's top priorities.¹⁴³ In 2006, IGAD drafted the IGAD Sexual and Reproductive Health and Rights Plan of Action 2007–2010. The Plan focuses on the principal components of sexual and reproductive health, such as family planning, and maternal and newborn health. The Plan also addresses the issues of HIV and AIDS, harmful traditional practices such as female genital mutilation, and gender-based violence.

In 2007, the IGAD Ministers of Health adopted a Declaration on HIV and AIDS to, inter alia, support the realisation of the IGAD Regional HIV and AIDS Partnership Programme (IRHAPP) objectives, and to improve access to basic HIV and AIDS prevention, treatment, care and support, as well as to other health-related services to those most at risk.¹⁴⁴

Enforcement mechanisms

The IGAD Agreement does not make provision for a judicial body within the IGAD regime. Recognising that security and stability are prerequisites for

¹³⁹ Article 13A.q, IGAD Agreement.

¹⁴⁰ Article 13A.r, IGAD Agreement.

¹⁴¹ Article 13A.s, IGAD Agreement.

¹⁴² This is specifically relevant in respect of the situation in Somalia.

¹⁴³ Statement by IGAD Executive Secretary, Mabhouh Maalim, during a working visit to the Djibouti Minister for the Advancement of Women, Family Welfare and Social Affairs, Nimo Boulhan Hussein. See http://www.igad.org/index.php?option=com_content&task=view&id=203&Itemid=92.

¹⁴⁴ See UNDP (2008:104f).

economic development and social progress, Article 18A of the Agreement, dealing with the resolution of conflicts, urges member states to act collectively to preserve peace, security and stability. To this end, member states are to take effective collective measures to eliminate threats to regional cooperation, and establish an effective mechanism of consultation and cooperation for the pacific settlement of differences and disputes. By signing the IGAD Agreement, member states commit themselves to dealing with disputes among themselves before they are referred to other regional or international organisations.¹⁴⁵

Individual human rights violations cannot be enforced at IGAD level. However, given that all state members except Somalia are also parties to COMESA, human rights violations could theoretically be brought to the COMESA judicial body, provided that national remedies have first been exhausted. The enforcement of human rights at AU level would be another option.

Concluding remarks

RECs have taken into account that human rights are important on the way to realise their main objectives, commonly defined to consist in deeper regional integration aimed at enhancing economic development. The harmonisation of laws and jurisprudence is considered to be one step towards deeper regional integration. To this end, one objective must be to develop a uniform human rights standard, applicable for all member States of the single REC.

At this stage, it can be concluded, that altogether, human rights protection does indeed play a vital role at sub-regional level in East and Southern Africa. While ECCAS and IGAD have a less developed system of human rights protection, COMESA, SADC and the EAC have integrated human rights to a more elaborated extent into their respective legal frameworks. Only two judicial bodies are currently able to accept human-rights-related matters, namely the COMESA Court of Justice and the SADC Tribunal. States or individuals who do not have access to sub-regional courts can still opt to bring a case to the African Commission of Human Rights, as long as the judicial organ of the African Union, the African Court of Justice or the African Court of Human and Peoples' Rights is not yet operational. The relationship between the African Court of Human and Peoples' Rights and the sub-regional judicial bodies in respect to human rights

¹⁴⁵ Article 18.c, IGAD Agreement.

cases that have undergone the national legal process will be one of the issues that need to be clarified in the near future.

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Regional economic communities and human rights in West Africa and the African Arabic countries

Enyinna S Nwauche

Introduction

Regional human rights protection is often a reaction against the failings of nation states operating on the assumption that the pooled resources of a regional understanding will overcome the weakness of national human rights systems. It is often thought that states with a weak human rights system will change their systems to accord with higher regional normative standards.

Since regional economic integration is about the development of the people of the region concerned, it is about human rights in the process of integration and in the potential results of integration. It is, therefore, not completely true that human rights is a subject that regional integration must address before it becomes part of the process. From the outset, human rights are part of the integration process, since integration is likely to be aimed at satisfying at least the socio-economic rights of the people of the region. Furthermore, the abolition of national restrictions on the movement of people, goods, services and capital, in whatever stage of integration, is about the rights of the people. If the people of a region have a regional right of residence instead of a national right of residence, their freedom of movement, assembly and association are enhanced. Every decision taken towards enhancing the integrative process is likely to impact the human rights of the people of the region. This includes the interpretative jurisdiction of the regional courts of justice and even those whose mandate is restricted to an interpretation of the regional constitutive treaty. Even when there is no court of justice, the organs of a regional economic community are involved in the protection of the human rights of their people, since it is trite that not only the judiciary can promote and protect human rights. Notably in this regard, regional economic integration is about human rights – even if this is not overtly stated or recognised. Of course when human rights are recognised, this factor is more likely to play a central role in the developmental efforts of the regional economic community.

Since human rights are about people, their involvement in an adjudicatory process at a regional body is often a credible yardstick in assessing the nature and quality of regional human rights protection. Ideally, the people of a regional economic initiative or a regional human rights initiative should have an independent body to examine complaints of human rights abuses. While an administrative body whose decisions are not binding is often the first stage of a human rights enforcement mechanism, it is an adjudicatory body with binding powers that is regarded as adequate for credible human rights enforcement. Beyond this point a number of questions arise. Should the regional human rights system be an avenue of appeal from national judicial authorities, or should they be concurrent? And if the regional system is superior even when its competence is concurrent with national judicial authorities, how do we ensure that the decisions of the regional judicial authority are obeyed? Further questions arise regarding the status of the norms of a regional human rights system when those of a national human rights system belong to different legal traditions.

These and other questions will be examined in this paper, which focuses on the human rights protection systems in West Africa and in African Arabic countries. In the second part of the paper, I examine the regional protection of human rights in West Africa through examining the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (WAEMU). In the third part, the paper turns its attention to African Arabic countries by examining human rights protection in the Arab Maghreb Union, the League of Arab States, and the Community of Sahel Saharan States (CEN-SAD). In part four I make some concluding remarks.

West African countries

Human rights protection in the Economic Community of West African States – ECOWAS

On 28 May 1975, in Lagos, Nigeria, 16 West African countries – Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania,¹ Niger, Nigeria, Senegal, Sierra Leone and Togo – created ECOWAS² as a regional body with the aim of the economic integration

¹ Mauritania ceased to be a member state in 2002.

² See the text of the Treaty of the Economic Community of West African States (hereafter

of its member states. Indeed, Article 2 of the ECOWAS Treaty provides that the Community's aim is to promote cooperation and development in all fields of economic activity. To achieve this, the Community was to ensure the following in stages:

- The elimination between member states of customs duties
- The abolition of quantitative and administrative restrictions
- The establishment of a common customs tariff and a common commercial policy towards third parties
- The abolition of obstacles to the free movement of persons, services and capital
- The harmonisation of agricultural policies
- The implementation of schemes of joint development
- The harmonisation of the economic and industrial policies of member states, and
- The establishment of a Fund for Cooperation Compensation and Development.

The ECOWAS Treaty envisioned a free trade area as a step towards an economically integrated West Africa. In 1993, ECOWAS member states revised the ECOWAS Treaty,³ essentially to move towards deeper integration and to recognise, promote and protect a political dimension to its economic objectives. The incorporation of political objectives to the ECOWAS mandate can be traced specifically to the Liberian crisis⁴ and to 1990, when a Standing Mediating Committee was set up by the Authority of Heads of State and Government⁵ and charged with the task of finding a lasting solution to the crisis. A ceasefire agreement was signed and a civilian regime established. To monitor the ceasefire, a military force – the ECOWAS Ceasefire Monitoring Group (ECOMOG) – was established. In 1991, the Authority met in Abuja and adopted the Declaration of Political Principles of the Economic Community of West African States.⁶

ECOWAS Treaty) reproduced in 1975 United Nations Treaty Series 1010, 17.

³ Hereafter *the Revised Treaty*. The Revised Treaty, which is the current Treaty, was accepted in July 1993 in Cotonou, Benin, and entered into force in 1993. Text available at www.ecowas.int; last accessed 7 April 2009.

⁴ See ECOWAS (1992:57–58).

⁵ Hereafter *the Authority*.

⁶ Declaration A/DCL 1/1/7/91; hereafter *Declaration of Political Principles*. Text available at www.iss.co.za/AF/Reg_Org/unity_to_union/pdfs/ecowas/7DecPolPrin.pdf; last accessed 9 September 2008.

Paragraph 4 of the Declaration of Political Principles provides that ECOWAS states –

... respect human rights and fundamental freedoms in all their plenitude

Paragraph 5 is even more emphatic, and states that ECOWAS States –

... will promote and encourage the full enjoyment by all our peoples of their fundamental human rights, especially their political, economic, social, cultural and other rights inherent in the dignity of the human person and essential to his free and progressive development.

In paragraph 6, the need to encourage and promote political pluralism, representative institutions and guarantees for personal safety and freedom was stressed. ECOWAS was formed at a time when the region was predominantly under military dictatorships. The benefit of hindsight enables us to wonder how naive it was to imagine that economic integration was feasible in such an environment. The Liberian crisis exposed the weakness of the integration process and brought home the reality that a politically plural and democratic society should be one of the ends and means of integration.⁷

It is not surprising, therefore, that, unlike the ECOWAS Treaty, the Revised Treaty elaborates on the Declaration of Political Principles, provides for the protection and promotion of human rights, and provides the context for the enhancement of human rights. The resolve of ECOWAS states is evident in the preamble, which recites the African Charter on Human and Peoples' Rights and the Declaration of Political Principles. While the aims of the Revised Treaty are similar to those of the ECOWAS Treaty, a number of differences exist. Article 2 of the Revised Treaty is dedicated to achieving a common market through the establishment of free trade area, the adoption of a common external tariff and common trade policy, and the removal of obstacles to the free movement of persons, goods, services and capital as well as to the right of residence and establishment. Furthermore, the principles to be adopted in achieving the aims of ECOWAS are spelt out in Article 3. These include equality; solidarity; non-aggression; maintenance of regional peace, stability and security; peaceful settlement of disputes; recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples'

⁷ Generally, see Sen (1999).

Rights; accountability, economic and social justice, and popular participation; and promotion and consolidation of a democratic system of governance in each member state.

The organs of ECOWAS are set out in Article 6 of the Revised Treaty to be the Authority; the Council of Ministers; the Community Parliament; the Economic and Social Council; the Community Court of Justice; the Executive Secretariat; the Fund for Co-operation, Compensation and Development; Specialised Technical Commissions; and any other institution established by the Authority. Article 6(2) of the Revised Treaty provides that these institutions are to perform their functions and act within the limits of the powers conferred on them by the Treaty and relevant protocols. In this regard, the principles for realising the objectives of ECOWAS as set out in Article 4 bind all organs of the Community and ensure that, as they discharge their duties, they will, amongst other things, seek to promote and protect the rights and freedoms contained in the African Charter on Human and Peoples' Rights. To understand how they may be able to do this, an overview of all the institutions will now be undertaken. However, the paper will later dwell more on the Community Court of Justice, as it is a veritable tool in the enforcement of human rights.

Non-judicial promotion and enforcement of human rights in ECOWAS

The Authority of Heads of State and Government

Article 7 of the Revised Treaty provides that the Authority is the supreme organ of ECOWAS, and is responsible for the general direction and control of Community, and will take all measures necessary to ensure its progressive development and the realisation of its objectives. Specifically, the Authority will –

- determine the general policy and major guidelines of the Community
- give directives
- harmonise and coordinate the economic, scientific, technical, cultural and social policies of member states
- oversee the functioning of Community institutions
- follow up the implementation of Community objectives
- refer, where it deems it necessary, any matter to the Community Court of Justice over the interpretation and application of the Revised Treaty, and
- request the Community Court of Justice to give an advisory opinion on any legal question.

Its decisions are binding on all community institutions except the Community Court of Justice. The Authority is, therefore, a critical pivot in the protection and promotion of human rights in ECOWAS. If its decisions are guided by the African Charter on Human and Peoples' Rights, it can be said that its role is important and decisive. First, it is imperative that the Authority elaborates the aims and objectives of ECOWAS found in Article 3 of the Revised Treaty. If the Authority is unable or lacks the political will to do so, the integration objectives of ECOWAS will not be achieved – just as the rights and freedoms guaranteed by the African Charter will not be enhanced. In this regard, the Authority has made many protocols⁸ seemingly designed to achieve the objectives of the Revised Treaty.⁹

A very important function of the Authority in the protection and promotion of human rights is to act as the highest decision-making body of the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, established by the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security. One of the grounds for the triggering of the Mechanism is stated in Article 25 of its associated Protocol to be –

... in event of serious and massive violation of human rights and the rule of law.

⁸ Article 1 of the Revised Treaty defines a *Protocol* as an instrument for the implementation of the Revised Treaty, having the same force as the Revised Treaty.

⁹ The Protocols include the following: Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security; Protocol and Supplementary Protocol Relating to the Definition of the Concept of Products Originating from Member States of the ECOWAS; Protocol Relating to the Application of Compensation Procedures for Loss of Revenue Incurred by ECOWAS Member States as a Result of the Trade Liberalisation Scheme; Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security; Protocol and Supplementary Protocols on the Free movement of Persons, Right of Residence and Establishment; Convention and Supplementary Convention on a Community Guarantee Mechanism for Inter-State Road Transit of Goods; Protocol Relating to Community Enterprises; Protocol Relating to Mutual Administrative Assistance in Customs Matters; Protocol Relating to the Definition of Community Citizens; Protocol Relating to the Fund for Cooperation Compensation and Development of the Economic Community of West African States; Protocol Relating to the Re-exportation Within the Economic Community of West African States of Goods Imported from Third Countries; Protocol on the Assessment of Loss of Revenue by Member States; and ECOWAS Energy Protocol. The texts of these Protocols are available at www.ecowas.int; last accessed 9 September 2008.

Other triggers include aggression and conflict in any member state; internal conflict that threatens to set off a humanitarian disaster or poses a serious threat to peace and security in the region; and the overthrow of a democratically elected government.

The objectives of the Mechanism, set out in paragraph 3 of the associated Protocol, are to –

- prevent, manage and resolve internal and interstate conflicts
- implement the provisions of Article 58 of the Revised Treaty
- implement the relevant provisions of the Protocols on Non-Aggression, Mutual Assistance in Defence, Free Movement of Persons, and the Right to Residence and Establishment
- strengthen cooperation in the areas of conflict prevention, early-warning systems, peace-keeping operations, the control of cross-border crime, international terrorism and the proliferation of small arms and anti-personnel mines
- maintain and consolidate peace, security and stability within the Community
- formulate and implement policies on anti-corruption, money laundering and illegal circulation of small arms
- set up an appropriate framework for the rational and equitable management of natural resources shared by neighbouring member states which may be causes of frequent interstate conflicts
- protect the environment and take steps to restore degraded environment to its natural state, and
- safeguard the cultural heritage of member states.

Article 2 of the associated Protocol states that the principles of the Mechanism are those of the Charters of the UN, the OAU, the Universal Declaration of Human Rights, as well as the African Charter on Human and Peoples' Rights. In the event of a trigger of the Mechanism, a number of institutions can be established to assist the Mediation and Security Council which is mandated by Article 7 to act on behalf of the Authority. These institutions include the Defence and Security Commission, the Council of Elders, and ECOMOG. In Section 1 of the Supplementary Protocol on Democracy and Good Governance¹⁰ complements

¹⁰ Protocol A/SP/12/01.

and clarifies the principles of the Mechanism. These principles are declared to be constitutional principles shared by all member states, namely –

- separation of powers
- empowerment, strengthening and immunity of parliaments
- independence of the judiciary
- freedom of members of the Bar
- free, fair and transparent elections
- zero tolerance for power obtained and maintained by unconstitutional means
- popular participation in decision-making
- apolitical armed forces
- secularism and neutrality of the State in all matters relating to religion
- non-discrimination on ethnic, racial, religion or regional bias
- guarantee and enforcement of the rights set out in the African Charter on Human and Peoples’ Rights and other international instruments
- the formation and free operation and State financing of political parties
- freedom of association, and
- freedom of the press.

The principles of the Mechanism and the Supplementary Protocol on Democracy and Good Governance¹¹ are geared towards an enhanced human rights protection system by ensuring individual rights are protected and by providing a democratic context for human rights. As pointed out above, ECOWAS countries are determined to put behind them decades of military rule and enthrone a democratic culture where human rights are potentially capable of better protection. In this regard, the Supplementary Protocol on Democracy and Good Governance provides democratic standards that complement the Mechanism by pointing to conditions which can prevent triggering it. These standards are in the area of –

- elections
- election monitoring and ECOWAS assistance
- the role of the Armed Forces, the Police and security forces in a democracy
- poverty alleviation and promotion of social dialogue
- education, culture and religion
- the rule of law, human rights and good governance, and
- women, children and the youth.

¹¹ Hereafter *Supplementary Protocol*.

With respect to human rights protection, a number of provisions in the Supplementary Protocol are worth highlighting. In Section 5, member states agree that poverty alleviation and promotion of social dialogue are important factors of peace. In this regard, they undertake to –

- provide for the basic needs of their populations
- fight poverty by encouraging the private sector, and provide the instruments necessary for the enhancement of job creation and the development of the social sector as a matter of priority
- ensure equitable distribution of resources and income, and
- enhance the integration of economic, financial and banking activities through the harmonisation of commercial and financial laws, and the establishment of Community multinational corporations.

In addition, employers' associations and labour unions are to be strengthened in each member state and at the ECOWAS level, while member states are to promote social dialogue amongst them. For the education, culture and religion sector, women are to be guaranteed equal rights with men in the field of education, while the culture of every group of people is obliged to be respected and developed. To enhance religious stability and tolerance, the establishment of permanent structures for consultations amongst different religions and between different religions and the State¹² are provided for at national level.

To ensure social justice, prevent conflict, guarantee political stability and peace, and strengthen democracy, Article 34 of the Supplementary Protocol states the resolve of member states to adopt practical modalities for the enforcement of the rule of law, human rights, and good governance. These modalities include ensuring accountability, professionalism, transparency, and expertise in the public and private sectors; establishing independent national institutions to promote and protect human rights,¹³ which are to systematically submit to the Executive Secretariat any report of human rights violations in its territory, which reports

¹² One such institution is the Advisory Council of Religious Affairs in Nigeria. This was established in 2004 by the Advisory Council of Religious Affairs Act, Chapter A8, Laws of the Federation of Nigeria.

¹³ A number of these institutions are already in existence, e.g. the National Human Rights Commission of Nigeria; the Commission on Human Rights and Administrative Justice of Ghana; the Commission Beninoise des Droits Hommes; and the Human Rights Commission of Liberia.

will be widely disseminated;¹⁴ institutionalise a national mediation system;¹⁵ ensure pluralism in the information sector and the development of the media, including giving financial assistance to privately-owned media;¹⁶ establish an appropriate mechanism to address issues of corruption in member states and at the Community level; and ensure that the Community Court of Justice is able to hear violations of human rights. In addition, the member states agree to eliminate all forms of discrimination and harmful practices against women;¹⁷ guarantee children's rights, including giving them basic education;¹⁸ enact special laws in member states and at Community level against child trafficking and child prostitution; and adopt laws and regulations on child labour in line with the provisions of the International Labour Organisation.¹⁹ To ensure compliance with the provisions of the Supplementary Protocol, Article 45 provides that, where democracy is brought to abrupt end and where there is a massive human rights violation, sanctions may be imposed on the member state concerned, including its suspension from ECOWAS decision-making bodies, and the restoration of political authority by organising elections with the assistance of relevant regional and international organisations.

The Council of Ministers

Article 8 of the Revised Treaty establishes a Council of Ministers for the Community. The functions of this Council are to make recommendations to the Authority on any action aimed at attaining ECOWAS objectives and, by the powers delegated to it by the Authority, issue directives on matters concerning coordination and harmonisation of economic integration policies. As part of the ECOWAS executive authority, the Council is also an important body that is obliged to act in accordance with the African Charter on Human and Peoples' rights, as well as all ECOWAS Treaties and Protocols.

The Community Parliament

Article 13 of the Revised Treaty establishes a Community Parliament and envisages a Protocol to spell out its composition, functions, powers and

¹⁴ Article 35, Protocol on Democracy and Good Governance.

¹⁵ Article 36, Protocol on Democracy and Good Governance.

¹⁶ Article 37, Protocol on Democracy and Good Governance.

¹⁷ Article 40, Protocol on Democracy and Good Governance.

¹⁸ Article 41, Protocol on Democracy and Good Governance.

¹⁹ (ibid.).

organisation. A Protocol to this effect was signed in 1994 and came into force in 2002. By this Protocol, the 120-member Parliament is empowered to consider issues concerning –

- human rights and fundamental freedoms of citizens
- the interconnection of energy networks
- the interconnection of communication links between member states
- the interconnection of telecommunications systems
- increased cooperation in the area of radio, television and other intra- and inter-Community media links, as well as the development of national communication systems
- public health policies for the Community
- a common educational policy through harmonisation of existing systems and specialisation of existing universities
- the adjustment of education within the Community to international standards
- the youth and sports
- scientific and technological research
- the Community policy on the environment
- the review of the ECOWAS Treaty
- citizenship, and
- social integration.

Although the Parliament cannot make laws, it can make recommendations to the appropriate Community institutions and/or organs. The impact of this Parliament in enforcing human rights seems limited, therefore: it cannot make legislation, and the Community organs and institutions are not legally bound to comply with the Parliament's recommendations.

The Executive Secretariat

The Executive Secretariat is headed by the Executive Secretary, who is assisted by Deputy Executive Secretaries and such other staff as may be required for the smooth functioning of the Secretariat.²⁰ The functions of the Executive Secretariat are to execute decisions taken by the Authority and apply regulations made by the Council of Ministers; promote Community development programmes and projects, as well as multinational enterprises of the region; and convene

²⁰ See Article 17 of the Revised Treaty.

sectoral Ministers, where necessary, to examine sectoral issues that promote the achievement of Community objectives.

Technical Commissions

Article 22 of the Revised Treaty establishes Technical Commissions for Food and Agriculture; Industry, Science and Technology, and Energy; Environment and Natural Resources; Transport, Communications and Tourism; Trade, Customs, Taxation, Statistics, Money and Payments; Political, Judicial and Legal Affairs, Regional Security and Immigration; Human Resources, Information, Social and Cultural Affairs; and Administration and Finance. Each Commission is tasked with –

- preparing Community projects and programmes, and is required to submit these for the ECOWAS Council of Minister’s consideration
- ensuring harmonisation and coordination of Community projects and programmes, and
- monitoring and facilitating the application of the provisions of the Revised Treaty and related Protocols pertaining to its area of responsibility.

The nature of the functions of each specialised Technical Commission is found in the Revised Treaty, which sets the contexts of cooperation in the areas concerned. In Article 56 of the Revised Treaty, member states agree to cooperate to realise the objectives of the African Charter on Human and Peoples’ Rights, the Protocol on Non-aggression; the Protocol on Mutual Assistance on Defence; and the Declaration of Political Principles.

More often than not, the importance of the non-judicial enforcement of human rights is not very well appreciated. In fact, in the context of ECOWAS it may be asserted that the activities of ECOWAS organs seem potentially capable of positively impacting the protection and promotion of human rights.

Judicial enforcement of human rights in ECOWAS

The judicial enforcement of human rights enables a normative challenge of the extent of the non-judicial promotion and enforcement of human rights. For example, the extent of the free movement of persons as facilitated by ECOWAS organs can be tested by a complaint by an ECOWAS citizen before Community

judicial bodies that the corrupt practices of security agencies at national borders leads to intolerable obstacles to the free movement of citizens and goods.

The Community Court of Justice

The Community Court of Justice²¹ is established by Article 25 of the Revised Treaty. Article 15(4) declares that the judgements of the Court are binding on all member states, Community institutions, and on individuals and corporate bodies. In 1991, a Protocol on the status, composition, powers, procedure and other issues concerning the Community Court of Justice was established in accordance with Article 15(2) of the Revised Treaty. This Protocol was amended by a Supplementary Protocol in 2005. It can be asserted that the Court has both a Community and a national jurisdiction over human rights issues.

Jurisdiction over Community issues

The jurisdiction of the Court is to be found in Article 9 of the 1991 Protocol (as amended). The Court is competent to adjudicate on any dispute relating to the following:

- The interpretation and application of the Treaty, Conventions and Protocols of the Community
- The interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS
- The legality of regulations, directives, decisions and other legal instruments adopted by ECOWAS
- The failure by member states to honour their obligations under the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS
- The provisions of the Treaty, Conventions and Protocols, regulations, directives or decisions of ECOWAS member states, the Community and its officials
- Action for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions
- Determination of any non-contractual liability of the Community and the power to order the Community to pay damages or make reparation for official acts or omissions of any Community institution or Community officials in the performance of official duties or functions

²¹ Hereafter *the Court*.

- Jurisdiction over any matter provided for in an agreement where the parties provide that the Court is to settle disputes arising from the agreement, and
- Any specific dispute other than those specified above that is referred by the Authority of Heads of State and Government.

The Court is also competent to act as arbitrator for the purpose of Article 16 of the Treaty.

Examining these heads of jurisdiction it may be asserted that the following human rights issues will be cognisable before the Court. Firstly, there are the so-called Community rights endowed on ECOWAS citizens. As correctly identified by Ajulo, –²²

ECOWAS Treaties have created rights and obligations for Member States of ECOWAS on the one hand and ECOWAS citizens on the other. For instance, the ECOWAS Protocol relating to the free movement of persons and right of residence and establishment creates obligations for every Member State and rights for every ECOWAS citizen.

Secondly, ECOWAS member states may bring complaints by its citizens of human rights – as protected by the African Charter on Human and Peoples’ Rights – being breached.²³ This would be in furtherance of the mandate of the Court to ensure observance of the Revised Treaty, the Mechanism, and the Supplementary Protocol on Democracy and Good Governance.

Jurisdiction over national issues

Article 9 of the 1991 Protocol of the Court provides that the latter has the jurisdiction to determine cases of human rights violations that occur in any ECOWAS member state. To complement this jurisdiction, the 2005 Supplementary Protocol grants access individuals to the Court to apply for relief for violations of their human rights; the submission of application for which should not be anonymous, or be made if the same matter has already been instituted for adjudication before another international court.²⁴

²² See Ajulo (2001:73,82); Onwuka (1982:193,195).

²³ Ghana recently brought a complaint against the Gambia for human rights abuses of its citizens; see “Gambia in ECOWAS Court again?”; available at www.africanews.com/site/list_messages/18220; last accessed 6 October 2008.

²⁴ See Banjo (2007); see also *The Guardian*, 16 February 2005: “The amendment of the Protocol to allow individual direct access to the Court is regarded as the major achievement of the Court since its inception about four years ago”. Records from the Court show that

The jurisdiction over human rights is with respect to actions or inactions that have occurred in ECOWAS member states. Since the jurisdiction is with respect to human rights, it is important to examine what is meant by this term: does it mean *human rights* as recognised by member states' legal systems, or does it mean *human rights* as defined in the African Charter on Human and Peoples' Rights? This is not an academic question because the rights recognised in member states' constitutions often differ from those provided for in the African Charter. For example, in Nigeria, while the African Charter recognises socio-economic and cultural rights, Chapter 2 of the Nigerian Constitution of 1999 provides for non-justiciable socio-economic human rights. Happily, the Community Court of Justice in *Leo Keita v Mali*²⁵ indicated that it was the African Charter on Human and Peoples' Rights that should determine whether or not there had been a human rights violation. The Court referred to Article 4(g) of the Revised Treaty, which declares that one of the principles of ECOWAS is the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. This point was reaffirmed in *Moses Essien v The Gambia*,²⁶ where the Court stated that it had the jurisdiction to entertain a case brought on the grounds of a violation of Article 5 of the African Charter and Article 23(2) of the Universal Declaration of Human Rights. It is significant, therefore, that the Court decided to use the African Charter on Human and Peoples' Rights, which is a normative standard and common to all member states. Using a national bill of rights would admit variations that would ultimately weaken the jurisprudence of the Court.

the number of cases filed at the Court increased tremendously. According to the Registrar of the Court at an address at the opening of the 2007–2008 Legal Year of the ECOWAS Community Court of Justice Court on 18 September 2007, “Six new applications were lodged in 2005, one of which sought for an advisory opinion. The Court held 26 public sittings and examined one request for Advisory Opinion in camera. It is our contention that this was a remarkable improvement, especially when compared with the fact that only two (2) cases were filed before the Court between 2001 and January 2005. This new trend continued in 2006, when twenty-one (21) new cases were filed. So far, eight new cases have been filed in 2007. The Court held 64 Court sessions between January 2006 and July 2007. Thirty-two (32) interlocutory applications were lodged in respect of these cases as at 14th September 2007”. Address available at www.ecowascourt.org/reports1.html; last accessed 9 September 2008.

²⁵ Suit No. ECW/CCJ/APP/05/06; Judgement No. ECW/CCJ/APP/03/07 of 22 March 2007; hereafter *Leo Kaita*.

²⁶ Suit No. ECW/CCJ/APP/05/05; Judgement No. ECW/APP/05/07 of 29 October 2007.

A related question is whether other treaties such as the African Charter on the Rights and Welfare of the Child,²⁷ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women; the Convention on the Elimination of All Discrimination Against Women; and other international human rights treaties ratified by ECOWAS member states will be applied by the Court. It is submitted that the Court should interpret and apply these treaties.

Another important question is the relationship between the national human rights protection system and the ECOWAS human rights system. In *Leo Kaita*, the Community Court of Justice declared that it was not a Court of Appeal for decisions of national courts like the European Court of Human Rights.²⁸ From this decision it is possible to assert that there is no requirement of the exhaustion of local remedies before an action can be brought before the Court. Thus, every individual who alleges that his or her human right protected by the African Charter has been violated can approach the Court. Arguably, this means that even when a national court has ruled against it, an ECOWAS citizen can approach the Community Court of Justice. Assuming the decision is different from that of the highest domestic court of the land, it is clear that the decision of the Community Court of Justice may be held to supersede the decision of national court, given the supranational status of the Community Court of Justice and the fact that its decision is declared by Article 15(4) of the Revised Charter to be binding on member states, ECOWAS institutions, individuals and corporate bodies. The Community Court of Justice, therefore, is *sui generis*.

Yet another question is whether individuals can bring actions against other individuals before the Community Court of Justice. The answer is in the affirmative. It is to the African Charter that we must look for the answer; and since the Charter in no way restricts its provisions to African states, it may be asserted that there can be horizontal application of the African Charter before the Community Court of Justice. It is acknowledged that this is an issue that will occupy the Court in due course.

The ramifications of the monumental change brought about by the direct access of individuals to the Court needs to be examined closely. Substantive access is greatly affected by the geographical location of the Court and the cost of access

²⁷ OAU Doc. CAB/LEG/24.9/49 (1990). Entered into force Nov 29 1999.

²⁸ Para 22, note 19.

to it for Community citizens. At present, it is a fact that the Court is largely inaccessible to ECOWAS citizens. To contain this obstacle, the Court moves its sessions to different parts of the Community to enable easier access for citizens. For example, the *Leo Kaita* case was heard in Mali. Just recently, the Court heard a case on an allegation of slavery against Niger.²⁹ It is also necessary that a transformation occurs in the physical resources of the Court. The Court is presently structured for a pre-access environment. To handle the deluge of cases that will come with individual access, the Court needs to be greatly expanded; in addition, an appellate division needs to be established.

The Court also needs to grapple with the effectiveness of its decisions. Even though the Court's decisions are declared to be binding on all member countries, Community institutions, individuals and corporate entities, the contempt shown by The Gambia to the Court's proceedings and decision in the case of a Gambian journalist, Mr Ebrima Manneh,³⁰ demand more practical measures to contain this type of impunity that corrodes the Court's authority. One measure that comes to mind is to regard disobedience of a Court decision as a trigger of the Conflict Prevention Mechanism discussed above.

Human rights protection in the West African Economic and Monetary Union – WAEMU

In the West African subregion, a regional economic institution exists that is principally organised around the former French colonies. The devaluation of the CFA Franc³¹ in 1994 led to WAEMU's creation on 10 January 1994 in order to ensure stable economic and monetary policies in CFA states. The WEAMU Treaty was ratified by all member states in July 1994. The member states are Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo. WAEMU aims include the creation of a common market among member states, based on the free circulation of people, goods, services and capital, and on the right of people exercising an independent remunerated activity to establish a common external tariff as well as a common commercial policy; the coordination of sectoral policies; and the harmonisation of the fiscal system of member states.

²⁹ See *Hadijatou Mani Koraou v Niger*, filed on 7 April 2008.

³⁰ The case was filed by the Media Foundation of West Africa (MFWA) on 20 June 2006.

³¹ The CFA Franc was created in 1945 and operated at fixed parities with the French Franc in French colonial economies.

A number of institutions are established to operate the Union. The Authority of Heads of State and Government is the supreme organ of the Union. It is saddled with defining the overall guidelines of Union policy and can introduce amendments to the Treaty. A Council of Ministers is responsible for the implementation of the general policies defined by the Authority. The Commission established by the Union is empowered to make recommendations and give opinions which it deems useful for Union preservation and development. It is also responsible for executing the Union's budget, and can petition the WAEMU Court of Justice when member states fail to meet their obligations arising from WAEMU membership.

The WAEMU Court of Justice³² is responsible for the interpretation and enforcement of WAEMU-based laws. The WAEMU Court was established on 27 January 1985, and has competence over cases of the legality of a piece of Union legislation brought by the Council of Ministers, the Commission, member states, their citizens, and corporate entities. Furthermore the WAEMU Court may issue a preliminary ruling from a national juridical authority adjudicating an issue in which a question arises as to the interpretation of the WAEMU Treaty or the legality and interpretation of acts committed by a Union organ. The WAEMU Court is given exclusive jurisdiction –

- where, upon complaint by the Commission or a member state, another member state fails to fulfil its obligations under the Treaty
- to review non-contractual damages caused by Union organs or their agents
- over the amendment of decisions and sanctions taken by the Commission against an entity for competition abuses, and
- over the adjudication of disputes between the organs of the Union and their agents in personnel matters.

If the Commission suspects that a member state is interpreting the Union law incorrectly, it may bring an action to review the situation. The WAEMU Court of Justice will then give a correct interpretation which is notified to the Supreme Court. Such interpretation is binding on all authorities in that member state. In this way the WAEMU Court is given powers to control determine and ensure the correct interpretation of Union law.

³² Hereafter *WEAMU Court*.

The fact that individuals have direct access to the WAEMU Court is to be commended. However this does not mean much for the judicial protection of human rights due to the limited mandate of the WAEMU Court. Issues of human rights must be related to the integration process as individuals are not permitted to bring actions for violation of human rights to the WAEMU Court.

As noted in respect of ECOWAS, the activities of organs of a regional economic community such as WAEMU are critical in developing the region and enhancing the human rights of its citizens. WAEMU has put in place a number of common sectoral policies aimed at harmonising indirect taxation and investment regulation, adopted a common external tariff, and largely dismantled internal customs barriers. To a large extent, therefore, WAEMU is a relatively more integrated regional economic community than any other in Africa,³³ including ECOWAS.

Regional protection of human rights in West Africa

One unique fact about human rights protection in West Africa is the fact that it is located within regional economic communities. However, it is ironic that, while ECOWAS has a more comprehensive judicial protection of human rights, the WAEMU community is more effectively integrated, and is therefore potentially more able to offer its citizens the development that may ultimately enhance their human rights. Given the binary dimension of regional integration in West Africa with the coexistence of ECOWAS and WAEMU, it is plausible that ECOWAS will benefit from WAEMU's enhanced integration of activities. Even though both communities cooperate at various levels – ECOWAS and WAEMU have agreed to common rules of origin to enhance trade – it remains a fact that there are tensions in the region due to the colonial rivalry between francophone and anglophone countries, given that WAEMU is largely francophone.

It may well be that any deficiency that exists in WAEMU in respect of the judicial protection of human rights may be potentially remedied by a WAEMU citizen seeking redress before the (ECOWAS) Community Court of Justice. Accordingly, serious questions of duplication and clash of interests are bound to arise with the existence of two Courts of Justice in West Africa with mandates making their decisions binding in their area of competence. How will the situation be resolved

³³ See Foreign and Commonwealth Office Africa Research Group (2001).

when a citizen of a WAEMU state, dissatisfied with the decision of the WAEMU Court, files a complaint before the ECOWAS Court?

African Arabic countries

League of Arab States

The League of Arab States was established in 1945 by Egypt, Iraq, Jordan, Lebanon, Saudi Arabia, Syria and Yemen. There are now 22 League members, the rest of whom are Algeria, Bahrain, the Comoros, Djibouti, Kuwait, Libya, Mauritania, Morocco, Oman, Qatar, Somalia, Southern Yemen, Sudan, Tunisia and the United Arab Emirates. Of the 22 members, the following are African states: Egypt, Algeria, Djibouti, the Comoros, Libya, Mauritania, Morocco, Somalia, Sudan, and Tunisia.

The League is set up to strengthen the close relations and numerous ties which bind Arab countries. Article 2 of the Pact of the Arab League³⁴ provides that the League is obliged to strengthen relations among member states; coordinate their policies; and safeguard their independence and sovereignty. It is also tasked with ensuring close cooperation in economic and financial affairs; communication; cultural affairs; nationality, passports, visas, the execution of judgements and the extradition of criminals; social welfare affairs; and health problems. At its inception, the Arab League was neither a union nor a federation. The League has the following organs: the Council, the Secretariat General, and Permanent Committees.

There is no mention of human rights in its constitutive treaty. In 1968, the Council of the League of Arab States established the Arabic Commission of Human Rights, which has the promotion of human rights as its main purpose.³⁵ In the main, the human rights framework of the League of Arab States is found in the Revised Arab Charter on Human Rights.³⁶

³⁴ English translation available in *American Journal of International Law Supplement: Official Documents* (Oct. 1945), 39(1940):266–272.

³⁵ See Al-Midani (2005).

³⁶ The Revised Arab Charter on Human Rights (hereafter *Revised Arab Charter*) succeeds the Arab Charter on Human Rights adopted in 1994 during the Silver Jubilee of the League of Arab States; text available in *Human Rights Law Journal*, 18(2007):151. The Revised Arab Charter entered into force on 15 March 2008, two months after the deposit of the

The Revised Arab Charter on Human Rights

The preamble of the Revised Arab Charter states that Arab nations –

- recognise the dignity of the human person
- assert the principles of fraternity, equality and tolerance among human beings consecrated by Islam
- believe in Arab unity
- reject all forms of racism and Zionism³⁷ as constituting a violation of human rights and a threat to international security, and
- reaffirm the principles of the Charter of the United Nations; the Universal Declaration of Human Rights; the provisions of the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights; as well as having regard to the Cairo Declaration on Human Rights in Islam.

In Article 1 of the Revised Arab Charter, states parties assert that their aim is to –

- place human rights at the centre of key national concerns of Arab states
- teach the Arab person pride in his/her identity, loyalty to his/her country, attachment to his/her land, history and common interests and to instil in him/her a culture of human brotherhood/sisterhood, tolerance and openness towards others, in accordance with universal principles and values and with those proclaimed in international human rights instruments
- inculcate the values of equality, tolerance and moderation, and
- entrench the principle that all human rights are universal, indivisible, interdependent and interrelated.

A number of civil and political rights are recognised by the Revised Arab Charter. Citizens of Arab states are entitled to enjoy the right to equality, for example,³⁸ and of note is the fact that men and women are declared equal³⁹ and that the following rights are respected:

seventh instrument of ratification with the Secretary General of the League of Arab States in accordance with Article 49 of the Revised Arab Charter. For a detailed analysis, see Rishmawi (2005:361).

³⁷ The reference to Zionism in the preamble caused quite a stir.

³⁸ Articles 3, 4, 11, and 12, Revised Arab Charter.

³⁹ Article 3(3), Revised Arab Charter.

- The right to life⁴⁰
- The right not to be subjected to torture or cruel, degrading, humiliating or inhuman treatment⁴¹
- The right not to be subjected to slavery or trafficking in human beings⁴²
- The right to a fair hearing⁴³
- The right to liberty and security of person⁴⁴
- The right to privacy⁴⁵
- The right to freedom of association⁴⁶
- The right to protection as a minority⁴⁷
- The right to freedom of movement⁴⁸
- The right to freedom of thought, conscience and religion⁴⁹
- The right to property,⁵⁰ and
- The right to freedom of expression.⁵¹

Two peoples' rights are also recognised. This includes Article 1, which provides that all peoples have the right to self-determination, to control their natural resources, to freely choose their political system, and freely pursue their economic social and cultural development. In addition, Article 1 condemns all practices of racism, Zionism, foreign occupation and domination as an impediment of human dignity and a major barrier to the exercise of the fundamental rights of peoples. Article 37 provides for the right to development.

A number of socio-economic and cultural rights are also recognised by the Revised Arab Charter. They are –

⁴⁰ Articles 5, 6 and 7, Revised Arab Charter.

⁴¹ Articles 8 and 9, Revised Arab Charter.

⁴² Article 10, Revised Arab Charter.

⁴³ Articles 13, 15, 16, 17, 18, 19 and 20, Revised Arab Charter.

⁴⁴ Article 14, Revised Arab Charter.

⁴⁵ Article 21, Revised Arab Charter.

⁴⁶ Article 24, Revised Arab Charter.

⁴⁷ Article 25, Revised Arab Charter.

⁴⁸ Articles 25 and 27, Revised Arab Charter.

⁴⁹ Article 30, Revised Arab Charter.

⁵⁰ Article 31, Revised Arab Charter.

⁵¹ Article 32, Revised Arab Charter.

- The right to work⁵²
- The right to form or join a trade union⁵³
- The right to social security⁵⁴
- The right to participate in the realisation of development⁵⁵
- The right to an adequate standard of living commensurate with the member states' resources⁵⁶
- The right to enjoy the highest attainable standard of physical and mental health, including free basic health-care services⁵⁷
- The right to education,⁵⁸ and
- The right to take part in cultural life, enjoy the benefits of scientific progress and its application, respect the freedom of scientific research and creative activity, and ensure protection of moral and material interests resulting from scientific, literary and artistic production.⁵⁹

One provision of the Revised Arab Charter that is especially important in the manner in which states parties are to implement obligations imposed by the Charter is found in Article 43. The Article declares that the Charter is not to be construed to impair the rights or freedoms protected in states parties' domestic laws or those in force in international and regional human rights instruments, including the right of women, children, and persons belonging to minorities. This is ambivalent: on the one hand it can be interpreted to mean that the Revised Arab Charter is to be the minimum yardstick, but where domestic or international human rights instruments provide for more, the latter will prevail; on the other hand, it may also be construed as preserving the manner in which rights and freedoms are cast in domestic protective instruments. Indeed, the latter interpretation seems at odds with the notion of a regional human rights instrument having a minimum normative content to guide states parties in elaborating their domestic human rights regimes.

⁵² Article 34, Revised Arab Charter.

⁵³ Article 35, Revised Arab Charter.

⁵⁴ Article 36, Revised Arab Charter.

⁵⁵ Article 37, Revised Arab Charter.

⁵⁶ Article 38, Revised Arab Charter.

⁵⁷ Article 39, Revised Arab Charter.

⁵⁸ Article 41, Revised Arab Charter.

⁵⁹ Article 42, Revised Arab Charter.

The context of the implementation of the Revised Arab Charter is set by Article 44. In terms of this Article, states parties undertake to adopt, in accordance with their constitutional procedures, whatever legislative and non-legislative measures are required to give effect to the rights in the Charter. The Charter also establishes the seven-person Arab Human Rights Committee, whose members serve in their personal capacity as opposed to some national capacity⁶⁰ to receive reports submitted by states parties to the Secretary-General of the League of Arab States of measures that they have taken to give effect to the rights and freedoms espoused in the Revised Arab Charter and the progress made towards their enjoyment.⁶¹ After an initial report to be submitted within one year of the coming into effect of the Charter, subsequent state reports are to be submitted in three-year intervals. On receipt of a report, the Committee discusses it in the presence of a representative of the state party whose report it is.⁶² The Committee then comments on the report and makes the necessary recommendations to the Council of the League. It may also disseminate the report's concluding observations and recommendations.

It is important to note that there is no right of petition by individuals or states to the Arab Human Rights Committee in respect of human rights violations. Therefore, it is difficult to argue that the League of Arab States seriously protects human rights: the Revised Arab Charter seems only to be an instrument for the general promotion of human rights in the Arab world without providing a mechanism for individual protection of human rights. Since state reports only seem to require general conclusions by each state of its national human rights regime, individuals who have suffered human rights abuses under such regimes cannot be protected by the Committee. Nonetheless, it ought to be realised that much can be achieved through the periodic state reports, because states parties may be pressured by the report delivery time frame to take concrete steps to improve their human rights record.

The Arab Maghreb Union – AMU

The AMU was established in 1989 by the Treaty of Marrakech,⁶³ signed by Algeria, Libya, Morocco, and Tunisia. Article 2 of Treaty states the AMU's aim

⁶⁰ Article 46, Revised Arab Charter.

⁶¹ Article 48(1), Revised Arab Charter.

⁶² Article 48(2), Revised Arab Charter.

⁶³ Treaty Establishing the Arab Maghreb Union; translated text reproduced in Heyns (2002:352).

as being to reinforce the bonds between its member states; realise the progress and prosperity for member states and defend their rights; contribute to the maintenance of peace work towards a free movement of persons, service and goods; and pursue a common policy in a number of fronts. Article 3 of the Treaty lists these common fronts as close diplomatic cooperation based on dialogue; defence – to safeguard the independence of member states; the economy – to realise the industrial, agricultural, commercial and social development of member states through common projects and the elaboration of global and sector-based programmes; and culture – to establish cooperation aimed at promoting education at all levels, preserving the spiritual and moral values of Islam, and safeguarding the Arab national identity by way of the exchange of teachers and students, the creation of academic and cultural institutions, and the establishment of Maghreb institutes of research.

Since 1990, 30 multilateral agreements have been signed and ratified by all AMU members. These include agreements on trade and tariffs (covering all industrial products); trade in agricultural products; investment guarantees; avoidance of double taxation; and phyto-sanitary standards.⁶⁴ Since 1989, the Governors and technical staff of the five central banks of the AMU have been meeting regularly. In December 1991, the five banks signed a multilateral agreement to help facilitate interbank payments within the AMU. The agreement sets unified modalities of payments between the five central banks, and provides for the monthly settlement of balances between any two countries without interest being charged on interim balances.

A number of institutions are established by the Treaty. Article 4 establishes the Presidential Council, which is composed of the Heads of State and Government and is the supreme body of the AMU. Article 6 provides that only the Presidential Council has the right to make decisions. Other bodies include a Council of Foreign Ministers, a Secretary-General, a Consultative Council, and a Judicial Authority⁶⁵ comprised of two judges from each member state.

Three jurisdictional competencies of the Judicial Authority are spelt out in Article 13 of the Treaty. The first of these entails disputes related to the interpretation and application of the Treaty, and Agreements concluded within the framework

⁶⁴ See www.africa-union.org/Recs/AMUoverview.pdf; last accessed 8 April 2009.

⁶⁵ The Judicial Authority was established on 30 November 1989, and became operational on 30 November 2001. It is located at Nouakchott, Mauritania.

of the AMU if the dispute is submitted to the Authority by the Presidential Council or one of the parties to the dispute.⁶⁶ Thus, individuals and organisations do not have direct access to the Authority. Secondly, the Authority may deliver advisory opinions on any legal question submitted to it by the Presidential Council. Thirdly, the Statute of the Judicial Authority provides that it can also issue advisory opinions between the AMU and its employees.⁶⁷

Since the Judicial Authority specifically cannot be accessed by private individuals, and since its mandate does not mention human rights, the protection of human rights in the AMU can only be indirect if it arises in the course of disputes on the interpretation and application of the Treaty and subsidiary agreements. If the Judicial Authority were to deal with a human rights issue, it may be guided by general principles of international law as long as these are compatible with the Treaty provisions. Furthermore, if any of the subsidiary agreements reached by member states creates a right for AMU citizens, then they can enforce these rights if their states agree to place the dispute before the Union. One positive point that can generally enhance human rights protection is that, by the terms of Article 13 of the Treaty, the decision of the Authority has supranational effect, and applies directly in member states without need for any domestication.

The Community of Sahel-Saharan States (CEN-SAD)

The CEN-SAD was established on 4 February 1998 in Tripoli. It is presently made up of the following 28 states: Benin, Burkina Faso, the Central African Republic, Chad, Côte d'Ivoire, the Comoros, Djibouti, Egypt, Eritrea, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Libya, Kenya, Mali, Mauritania, Morocco, Niger, Nigeria, São Tomé and Príncipe, Senegal, Sierra Leone, Somali, Sudan, Togo and Tunisia.

The objectives of CEN-SAD⁶⁸ are as follows:

- The establishment of a global economic union based on the implementation of a Community development plan that complements the local development plans of member states, and which comprises the various fields of a sustained socio-economic development: agriculture, industry, energy, social, culture, and health

⁶⁶ Article 13, AMU Treaty.

⁶⁷ For more on the Statute, see www.aict-ctia.org; last accessed 8 September 2008.

⁶⁸ The objectives of CEN-SAD can be found at www.cen-sad.org/new/index.php?option=com_content&task=view&id=33&Itemid=76; last accessed 23 January 2009.

- The removal of all restrictions hampering the integration of the member countries through the adoption of necessary measures to ensure (a) free movement of persons, capital and interests of the nationals of member states; (b) the right of establishment, ownership and exercise of economic activity; and (c) free trade and movement of goods, commodities and services among member states
- The promotion of external trade through an investment policy in member states
- The increase of land, air and maritime transport and communications facilities among member states and the execution of common projects in these fields
- The same rights, advantages and obligations granted to their own citizens to nationals of the signatory countries in conformity with the provisions of their respective constitutions, and
- The harmonisation of educational, pedagogical, scientific and cultural systems.

The objectives of CEN-SAD qualify it as a regional economic community, and it is so recognised by the African Union.

The organs established for the CEN-SAD are a Conference of Heads of State and Government; an Executive Council; a General Secretariat; the Sahel-Saharan Investment and Trade Bank; and the Economic, Social and Cultural Council. There is neither an administrative tribunal nor a court of justice. It is difficult to imagine how disputes within the CEN-SAD will be settled.

Furthermore, it is clear that the protection of human rights can proceed – albeit indirectly – with the realisation of the CEN-SAD’s objectives. This protection is weak, however, as CEN-SAD member states and citizens have no clear channel through which to resolve their grievances. It may well be that the CEN-SAD is still at an embryonic stage, and that dispute resolution will be tackled as one of capacity-building measures to strengthen it.

Regional protection of human rights in African Arabic countries

Unlike the West African region, the regional protection of human rights in the African Arabic region is not completely woven around regional economic

institutions. While the AMU and CEN-SAD are regional economic communities, the League of Arab States is not: it comprises a coordinating body of member states. Even though the recent addition of a human rights competence is evidence of a deeper commitment to this functionality, such competence is more of a promotional than a protective mandate. It is, however, a welcome step, and it is likely that the normative standard in the Revised Arab Charter will guide member states in their national human rights system.

The AMU human rights system is similar to that of the WAEMU, where the protection of human rights is not mentioned indirectly but is implicated in the integrative process. Since the AMU states are also members of the Arab League, it is plausible that the normative standards set out in the Revised Arab Charter will guide the AMU Court of Justice in its interpretation of the AMU Treaty.

It is also clear that the protection of human rights in the CEN-SAD is indirectly tied to the integrative process. On a comparative basis, the CEN-SAD seems to be the weakest, since there are no possibilities for a judicial enforcement of human rights.

Concluding remarks

The state of human rights protection in the West African and African Arabic regions is at best fledgling. There is not much evidence that regional integration has brought remarkable development in human rights protection to these regions. Even though individuals have access to the regional courts of justice in these two regions, the human rights mandate of these courts – except in the case of the ECOWAS Court of Justice – are tied to the integration process. It is commendable that the ECOWAS Court of Justice is building a normative regime around the African Charter on Human and Peoples' Rights, even though the ramifications of its human rights mandate need to be clearly understood. The fact that ECOWAS citizens can approach the Court for human rights violations without exhausting local judicial and administrative remedies should indicate a scenario where the Court could be swarmed with cases. Its infrastructure needs to be radically overhauled to contain this expected increase. Care also needs to be taken to ensure that the human rights mandate of the ECOWAS Court does not draw attention away from the urgent need to improve the human rights system in all West African states. In a sense, the emerging jurisprudence of the ECOWAS

Court will serve as an example for other regional courts. It is also hoped that the Revised Arab Charter on Human Rights will go a long way towards building the foundation for an improved protection of human rights in African Arabic countries.

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Human Rights Commissions in Africa – Lessons and challenges

Chris Maina Peter

Some have argued that there is no reason for establishing special machinery devoted to the promotion and protection of human rights like Human Rights Commissions ... such bodies are not a wise use of scarce resources and that an independent judiciary, democratically elected president and parliament[,] and a vibrant civil society are sufficient to ensure that human rights abuses do not occur. However, where Human Rights Commissions fulfil the prerequisites to effective functioning, there is no doubt that they play an important role in the promotion and protection of human rights. They are complementary to already established institutions and by the nature of their work are in [a] position to make unique contribution[s] to a country's efforts to protect its citizens and to develop a culture that is respectful of human rights and fundamental freedoms.

Margaret Sekaggya¹

Introduction – Implementing human rights

To provide for human rights in international, regional and municipal legal documents is one thing; to ensure the implementation of what is provided is something else. Experience has indicated that it is easier to provide for human rights than it is to implement them. At present, following long and protracted struggles, human rights are provided elaborately at all the three levels: global, regional and municipal. Also, promotion of these rights is equally taken up with ease, mainly by civil society. However, enforcement of rights remains a headache at all levels. This is due to three main reasons: technical blockades; a lack of effective institutions or the existence of weak institutions only; and the lack of political will to implement human rights with differing degrees at all three levels.

One of the methods devised for enforcing human rights at national level is through the establishment of human rights institutions. These institutions go by different names. They are referred to as *Commissions*, *Institutions*, *Ombudsmen*, *Ombudspersons*, etc. in various jurisdictions.

¹ Sekaggya (2004). Margaret Sekaggya is the immediate former Chair of the Uganda Human Rights Commission and is currently a United Nations Special Rapporteur on the Situation of Human Rights Defenders.

These are institutions which, although established by the State, are supposed to be independent of it. Guiding the establishment and operation of these institutions are the Paris Principles of 1993. These principles inter alia urge these institutions to maintain their independence notwithstanding their legal status as statutory bodies. Also, States are urged to respect and ensure the independence of these institutions and to fully fund them. This is a rather tricky relationship, which requires both political maturity and tolerance on both sides.

National human rights institutions in Africa

Several African countries have established human rights institutions. These vary considerably in terms of mandate and mode of establishment, and also in terms of the willingness of the State concerned to be subjected to human rights standards. There are currently human rights institutions in about 31 countries, including Algeria,² Angola,³ Benin,⁴ Burkina Faso,⁵ Cameroon,⁶ Chad,⁷ the Democratic Republic of Congo,⁸ Egypt,⁹ Ethiopia,¹⁰ Gabon,¹¹ Ghana,¹² Kenya,¹³ Madagascar,¹⁴ Malawi,¹⁵ Mali,¹⁶ Mauritania,¹⁷ Mauritius,¹⁸ Morocco,¹⁹ Namibia,²⁰

² The National Human Rights Commission of Algeria.

³ Provedor di Justica de Direitos.

⁴ The Benin Human Rights Commission.

⁵ The National Human Rights Commission of Burkina Faso.

⁶ The National Commission on Human Rights and Freedoms.

⁷ The Chad National Human Rights Commission.

⁸ The National Human Rights Observatory.

⁹ The National Council for Human Rights.

¹⁰ The Ethiopia Human Rights Commission.

¹¹ The National Human Rights Commission.

¹² The Commission on Human Rights and Administrative Justice.

¹³ The Kenya National Commission on Human Rights.

¹⁴ The National Human Rights Commission.

¹⁵ The Malawi Human Rights Commission.

¹⁶ Commission nationale consultative des droits de l'homme.

¹⁷ Commissariat aux Droits de l'Homme, a la Lutte contre la Pauvrete et l'Insertion.

¹⁸ The National Human Rights Commission.

¹⁹ The Human Rights Advisory Council.

²⁰ The Office of the Ombudsman.

Niger,²¹ Nigeria,²² Rwanda,²³ Senegal,²⁴ South Africa,²⁵ Tanzania,²⁶ Togo,²⁷ Tunisia,²⁸ Uganda²⁹ and Zambia.³⁰

These institutions are diverse, but all adhere to the Paris Principles of 1993 as their main guidance. Although they are established by the State, they are independent of it, and have two main aims: to promote and to protect human rights.

National human rights institutions (NHRIs) on the continent are loosely organised into a network that has a permanent Secretariat, and that meets from time to time to discuss issues of common interest and to exchange experiences.³¹ These NHRIs have also been meeting in large conferences and issuing documents with far-reaching impact on the continent. Their last meeting was in Nairobi, Kenya, in October 2008, where the Nairobi Declaration was issued.³² The NHRIs in the East African region have been convening since 2004, under the coordination of Kituo Cha Katiba, an East African civil society organisation based in Kampala, Uganda.³³

A sample of NHRIs on the continent

Due to their number and diversity, it is not possible to elaborate on all these institutions. Three have therefore been chosen, and these will be elaborated on at length as samples that can represent others to some extent. The choice has been

²¹ The National Commission on Human Rights and Fundamental Freedoms.

²² The Nigerian Human Rights Commission.

²³ The National Commission for Human Rights.

²⁴ The Senegalese Committee for Human Rights.

²⁵ The South African Human Rights Commission.

²⁶ The Commission for Human Rights and Good Governance.

²⁷ The National Human Rights Commission.

²⁸ The Higher Committee on Human Rights and Fundamental Freedoms.

²⁹ The Uganda Human Rights Commission.

³⁰ The Permanent Human Rights Commission.

³¹ The Danish Institute of Human Rights of Copenhagen, Denmark, has been instrumental in organising and bringing these institutions together.

³² This was the Ninth International Conference of the National Institutions for the Promotion and Protection of Human Rights, held in Nairobi, Kenya, from 21 to 24 October 2008.

³³ Among the issues they have been discussing are the justiciability of economic and social rights in the region, and the preparation of an East African Bill of Rights for use by the East African Court of Justice on the extension of its mandate. On these meetings, see Peter (2008).

deliberate and based purely on availability of information on the institutions chosen. They are the South African Human Rights Commission (SAHRC), the Uganda Human Rights Commission (UHRC), and the Commission on Human Rights and Good Governance of the United Republic of Tanzania (CHRGG).

South Africa: The South African Human Rights Commission

The SAHRC is one of the most respected NHRIs in Africa. It is well-funded by the State, enjoys considerable independence, and commands a lot of respect from the population in the country. It is one of the many institutions established in post-apartheid South Africa to address the ills associated by years of racial discrimination in the country.

The SAHRC was established in 1995, following the coming into force of the Human Rights Act, 1994.³⁴ Also relevant to this institution is Article 184 of the South African Constitution of 1996,³⁵ which partially provides for its functions.

The set-up and structure of the SAHRC

The SAHRC has headquarters in Johannesburg as well as regional offices. The main offices at the headquarters are those of the Chairperson, the Chief Executive Officer, Media Relations, Communications and Publications, Complaints Registration, Human Resources, Legal Services, Education and Training, Research and Documentation, and the Promotion of Access to Information Act Office.³⁶

The regional offices are situated in the Eastern Cape Province (in East London); the Free State Province (in Bloemfontein); the Gauteng Province (in Houghton); the KwaZulu-Natal Province (in Durban); the Limpopo Province (in Polokwane); the Mpumalanga Province (in Nelspruit); the Northern Cape Province (in Upington); the North West province (in Rustenburg); and the Western Cape Province (in Cape Town). Therefore, the country is relatively well covered by the Commission.

³⁴ Act No. 54 of 1994.

³⁵ See the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) adopted on 8 May 1996.

³⁶ This office within the Commission is supposed to promote the operation of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

Composition of the SAHRC

While taking into account the requirements of the Paris Principles in the process of making appointments to the SAHRC, the leadership in South Africa also gave due regard to the history and social set-up of the country. Therefore, in appointing Commissioners, a candidate's colour, ethnic origin, professional background and history played a central role. For instance, it would do more harm than good to the Commission and the country to appoint a person who had been a very active supporter of the apartheid regime.

In order to make the Commission self-sustaining in handling the issues submitted to it, it was necessary to mix disciplines among the Commissioners appointed. This also assisted the Commissioners themselves in respect of allotting themselves Commission work, by taking their respective specialisations into account.

The current Commission is chaired by Mr Jody Kollapen, while Ms Zonke Majodina is his Deputy. Other members include Mr Leon Wessels and Mr Tom Manthata, who are full-time Commissioners, while Mr Karthy Govender is a part-time Commissioner. The Chief Executive Officer of the Commission is Adv. Tseliso Thipanyane.

Mandate of the SAHRC

The SAHRC has three main functions. These are, firstly, to promote respect for human rights and a culture of human rights; secondly, to promote the protection, development and attainment of human rights; and thirdly, to monitor and assess the observance of human rights in the country.³⁷

In order to be able to carry its mandate, the Commission has been granted wide powers under the law. These include the power to investigate and report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research; and to educate.³⁸

At the same time, the Commission has a duty to various relevant organs of State to provide itself with information on the measures that these State organs

³⁷ See Article 184(1) of the Constitution of the Republic of South Africa. On this see Van Zyl (2004:30).

³⁸ Article 184(2), Constitution of the Republic of South Africa.

have taken each year towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment. Other powers and functions of the Commission are stipulated in the Human Rights Commission Act, 1994.³⁹

Inquiries by the SAHRC

The SAHRC has one of the most active tribunals. It has handled almost all issues listed in the South African Bill of Rights and has made substantial decisions on the matters presented to it for consideration. Within its very busy schedule, the Commission Tribunal has had the opportunity to address issues relating to access to information;⁴⁰ children;⁴¹ culture;⁴² education;⁴³ equality;⁴⁴ freedom

³⁹ Act No. 54 of 1994.

⁴⁰ See the case of *Brian Williams v Department of Labour* (1999), in which the complainant had alleged denial of access to certain reports which were important to his defence in disciplinary proceedings against him.

⁴¹ See the case of *Crawford College* (2000), which involved the question of suspension from school of a Muslim student in a predominantly white college who had placed an article on the Notice Board on the Palestinian/Israel issue which differed from another article on the same Notice Board.

⁴² See the case of *Customary Law v Bill of Rights* (2000) which relates to a 'husband' charged with rape, abduction and assault of his 14-year old 'wife' whom he 'married' under Twala customary law. Also relevant is the case of *Re: Constitutionality of the Practice of Mogaga* (1999), which dealt with the issue of a widow who was being forced to perform certain traditional practices as a result of the death of her husband. These practices were against her religion.

⁴³ See the case of *Rastafarian Learners* (2000) involving a seven-year-old Rastafarian boy who was refused admittance to four schools because of his parents' religion. Relevant to this case is De Vos (2001a:305). Also important to the right to education is the case of *Right to Education* (2000) relating to the failure by the Eastern Cape Provincial Government to pay the necessary hostel, transport and boarding subsidies which would enable children who live far from school to attend as their parents could not afford to pay these prohibitive costs without financial support.

⁴⁴ A considerable number of cases on the theme of equality have been handled by the Commission. These include *Foreign Doctors Association* (1997) on allegations of discrimination on registration; *Blood Transfusion and Sexual Orientation* (1999) on the refusal to donate blood by a person who admitted to having had sex with a person of the same gender; *Discrimination on the Basis of Age* (1999) on the denial of a bursary to pursue studies due to age; *South African Airways* (1998) on the refusal by the airline to transport a quadriplegic passenger without an attendant; *St. Lucia and the Equality Covenant* (2000) on media reports of racism in the St Lucia area; *An Investigation Into the Conditions at Ambulance and Rescue Services* (1997) which related to allegations of discrimination in

of association;⁴⁵ freedom and security of the person;⁴⁶ freedom of expression;⁴⁷ freedom of religion, belief and opinion;⁴⁸ housing, and human dignity;⁴⁹ language and culture; and property⁵⁰ – just to mention some of the areas addressed. It is common to find an individual case addressing several human rights issues. For instance, a case on labour relations may also be dealing with discrimination, and so on.

Some of the decisions of the Commission have been quite instructive – not only to the community, but to other institutions and authorities dealing with human rights issues in the country as well.⁵¹

Evaluation of the work of the SAHRC

It has been observed that due to the very nature of the South African society and its history, there were wide expectations on the Commission from the population. Therefore, there is a likelihood of passing an unjustifiably harsh judgement on the performance of the Commission.

Over the years, the Commission has been overwhelmed by the many complaints filled by the citizens. It has therefore tended to spend most of its time and

the provision of ambulances in the Western Cape Province; and *Saldahna Bay Real Estate Proprietor* (1998) on a complaint about direct racial discrimination against blacks by a proprietor of a block of apartments. On this theme, see also De Vos (2001b:139).

⁴⁵ See the case of *Initiation Ceremonies* (2001), relating to subjecting a student to school initiation practices done by students with tacit approval by school authorities.

⁴⁶ See the case of *Sr. Nthadi Kotsi and the Mental Health Act* (2001) on an employee who was being detained in a mental hospital against her will.

⁴⁷ See the case of *Federal Council of the National Party v Maharaj Kasrils and Mokaba* (1997) on utterances alleged to constitute hate speech; *General Constand Viljoen v Dunisani Makhaye* (1999), also on statements alleged to amount to hate speech; and *Portfolio Committee Testimony* (1999) on allegations of the use of inappropriate language in a parliamentary committee.

⁴⁸ See the case of *Goudin Spa Membership* (2000) on allegations of being denied membership to a holiday resort on religious grounds.

⁴⁹ See the case of *International School* (1999), involving parents of a high school student who had committed suicide due to repetitive questioning by the school authorities regarding alleged misconduct.

⁵⁰ See the case of *Unfair Traditions Overruled* (1998) on a tradition which denied a woman the inheritance of her parents' property on the grounds of gender.

⁵¹ This can easily be detected in the decisions made by the courts of law on fundamental rights. See Davis et al. (1997).

resources addressing these with very little time spared for its strategic thinking. With the economic gap widening at a high speed between the various classes in the country and with poor being driven deeper into poverty, the work and focus of the Commission is not likely to change soon.

Uganda: The Uganda Human Rights Commission (UHRC)

The UHRC was established vide the Constitution of Uganda of 1995.⁵² This Constitution was the first in the country to have been prepared through the genuine consultation of Ugandans in all walks of life.⁵³ Thus, the population felt proud to be associated with it.

Having suffered many years of military and other forms of dictatorships, the people of Uganda wanted a new chapter in their lives. Therefore, the decision to establish a permanent body to monitor the human rights situation in the country served to recognise a violent and turbulent history characterised by arbitrary arrest, detention without trial, torture, and brutal repression with impunity on the part of security organs. Therefore, to Ugandans, human rights were central – hence the entrenchment of an institution to deal with human rights. It is understandable, therefore, that a substantive part of the Constitution addressed fundamental rights and freedoms as well as the Commission to oversee their implementation.

The set-up and structure of the UHRC

The UHRC has put in place various Departments and Committees to carry out its work. At the headquarters in Kampala are five Directorates. These are as follows:

- The Directorate of Research, Education and Documentation, whose overall goal is to carry out human rights research, design human rights programmes, and create human rights awareness among the people of Uganda

⁵² The Uganda Human Rights Commission is provided for in the Bill of Rights of Uganda, constituting Chapter 4 of the Constitution, and running from Articles 20 to 58. The Commission is specifically dealt with in Articles 48 to 58. This part of the Constitution has to be read together with the Uganda Human Rights Commission Act, 1997 (No. 4 of 1997), and the Operational Guidelines of the Uganda Human Rights Commission of 1998.

⁵³ On the history and process that led to the Uganda Constitution as documented by the Chair of that process, see Odoki (2005).

- The Directorate of Finance and Administration, which is tasked with coordinating the functioning of the Commission as a whole, particularly in respect of organising support services, managing human resources and the human resource needs of the Commission. and monitoring the implementation of the corporate plan of the Commission
- The Directorate of Complaints, Investigation and Legal Services, which has the objective of providing legal redress to victims of human rights violations and abuse, and providing legal advice to the Commission
- The Directorate of Monitoring and Inspections, whose duty is to monitor the country's compliance with its international obligations, visit detention facilities, and prepare Commission reports, and
- The Directorate of Regional Services, which is responsible for taking the Commission's services to the people at grass-roots level in the regions.

The Commission also has regional offices in Arua, Fort Portal, Gulu, Jinja, Mbarara, Moroto and Soroti.⁵⁴

Composition of the UHRC

The Commission is chaired by the Hon. Margaret Sekaggya. Hon. Sekaggya, who has been with the Commission since its inception in 1996, is a lawyer of long standing, with extensive experience in teaching and the judiciary both within and beyond Uganda. She also currently serves as the Chairperson of the African National Human Rights Institutions Coordination Committee. Other Commissioners include Hon. Aliro Omara Joel, also a lawyer, whose interests lie not only in human rights, but also in international humanitarian law. Hon. Joel has worked in government and private practice. Hon. Veronica Eragu Bichetero is also a lawyer, but her interest lies in commercial law. Hon. Constantine Kahwa Karusoke, an educationist, taught and headed various schools before joining politics and government, in which arenas she has served for some time. Hon. Sir Adrian Sibbo, a seasoned civil servant with a long career in government and politics, has served as a board member of many national and regional institutions. Hon. Mariam Fauzat Wangadya, a lawyer with a special interest in the rights of children as well as civil and political rights. In the first part of 2008 the Commission lost one of its original members, the Hon. Rev. Dr

⁵⁴ Arua was the latest regional office to be added to the list as part of the Commission's efforts to take services to the people of Uganda. It was officially opened on 18 November 2008.

Fr John Mary Waliggo, a priest and academic whose interests lay in African history, African theology, justice and peace, conflict resolution, constitutions and constitutionalism, and ecumenism. It is obvious from the above that this is a very solid team.

However, most of the Commissioners in the current Commission are on their way out, having completed their tenure. Therefore, in early 2009, the UHRC will have many new members.

The Secretary to the Commission is Gordon T Mwesigye, an economist who is the Chief Accounting Officer and Executive Administrator of the Commission's day-to-day work. Mr Mwesigye has extensive experience as a local government and management consultant with various institutions, including the World Bank in Uganda and Sierra Leone.

Mandate of the UHRC

Under the Constitution of Uganda of 1995, the functions of the UHRC are to –

- investigate, at its own initiative or on a complaint made by any person or group of persons, the violation of any human right
- visit jails, prisons, and places of detention or related facilities with a view to assessing and inspecting the inmates' conditions and make appropriate recommendations
- establish a continuing programme of research, education and information to enhance the respect of human rights
- recommend to Parliament effective measures to promote human rights, including the provision of compensation to victims of violations of human rights, or their families
- create and sustain within society an awareness of the provisions of the Constitution as the fundamental law of the people of Uganda
- educate and encourage the public to defend this Constitution at all times against all forms of abuse and violation
- formulate, implement, and oversee programmes intended to inculcate in the citizens of Uganda an awareness of their civic responsibilities and an appreciation of their rights and obligations as free people, and
- monitor the government's compliance with its obligations under international treaties and conventions on human rights.⁵⁵

⁵⁵ Article 52(1), Ugandan Constitution.

Under Article 52(2) of the Ugandan Constitution, the Commission is required to publish periodic reports and submit annual reports to the Ugandan Parliament on the state of human rights and freedoms in the country. The Commission has adhered to its commitment without fail over the years.

Unlike many other similar institutions, the UHRC has been given teeth by the Constitution. It can, therefore, like a court of law, —⁵⁶

- summon or order any person to attend before it and produce any document or record relevant to any investigation by the Commission
- question any person in respect of any subject matter under its investigation
- direct any person to disclose any information within his or her knowledge relevant to any investigation by the Commission, and
- commit persons for contempt of its orders.

In addition, the Commission, if satisfied that there has been a violation of human rights or freedoms, may order the release of a detained or restricted person, and payment of compensation or any other legal remedy or redress. Any person or authority dissatisfied with an order made by the Commission has the right to appeal to the High Court.

There are also limitations to what the Commission can do. For example, the UHRC is barred from investigating any matter pending before a court or judicial tribunal, or a matter involving the relations or dealings between the Ugandan Government and the government of any foreign state or any international organisation, or a matter relating to the exercise of the prerogative of mercy.

Inquiries by the UHRC

The Commission holds inquiries on an almost daily basis in its various offices in the country.⁵⁷ Its cause list reads like that of a court of law. The majority of inquiries are heard by a single Commissioner.

In these inquiries, the UHRC has been meting out penalties to those found in fault. In 2007, for example, the Commission ordered payment of Ugandan Shs

⁵⁶ Article 53(1), Ugandan Constitution.

⁵⁷ In November 2008 alone, there were 55 inquiries held the Commission in Gulu, Fort Portal, Kampala and Soroti.

445,440,000⁵⁸ as compensation to victims of human rights violations. The order of compensation to torture victims alone attracted Ugandan Shs 322,790,000,⁵⁹ representing 72.5% of the total compensation awarded in 2007. By the time of publication of the Commission's 2007 Report, there was no clear indication from the Ministry of Justice and Constitutional Affairs as regards how many complainants had been compensated and/or paid damages as ordered by UHRC Tribunals during 2007.

In order of frequency, major respondents before the Tribunal were the Uganda Police Force; the Uganda Peoples' Defence Forces; private individuals; the Uganda Prisons Services; the Chieftaincy of Military Intelligence; the Local Administration; and the Wildlife Authority. These are institutions with immense capacity to do harm because they employ a considerable number of people and the activities they perform involve some use of force.

Among the challenges faced by Tribunals are insecurity in places such as Karamoja in the north of the country, the human resource gap in respect of Hearing Commissioners, and the payment of compensation to victims of human rights violations is very slow.⁶⁰

Evaluation of the work of the UHRC

The UHRC has been doing very well so far. It has managed to carve for itself a specific niche in its bravery in promotion and protection of human rights in Uganda. Without fear, it has confronted government departments against which complaints have been made and demanded for explanation and commitment to reform. Top notch politicians have been summoned to its inquiries and have responded.

The Commission's main challenge has been the finances to enable it to function optimally. The government has not been happy with the hard work being done by the Commission and has thus been curtailing its funding. This has forced the Commission to rely to a very large extent on funding from development partners. This attitude of the government of Uganda casts doubt as to its sincerity

⁵⁸ About US\$207,181 (US\$1 = Ugandan Shs 2,150).

⁵⁹ About US\$150,134 (US\$1 = Ugandan Shs 2,150).

⁶⁰ See the Commission's Annual Report for 2007.

in upholding human rights, fundamental rights and freedoms and rule of law in general.

Tanzania: The Commission for Human Rights and Good Governance of the United Republic of Tanzania – CHRGG

The CHRGG was established in 2000 when it was incorporated into the Constitution of the United Republic of Tanzania. It became operational in 2001 when specific legislation was enacted to provide for its various functions.⁶¹

However, the CHRGG was not the first human rights institution in the country. It replaced the Permanent Commission of Enquiry, whose history is linked to the history of the Bill of Rights in Tanzania. To appreciate this important historical development, we briefly examine the history of the Bill of Rights in Tanzania. The Bill of Rights came to Tanzania rather late. It was incorporated into the 1977 Tanzanian Constitution 1977 in 1984, that is 23 years after independence. As if that was not worrying enough, the Bill of Rights was suspended for a period of three years, allegedly to give the government of the day time to put its house in order. Thus, the Bill of Rights only became judiciable in Tanzania in 1988. The history of the Bill of Rights in Tanzania is pertinent to an appreciation of the value of the human rights institutions in the country.

During the struggle for independence and the negotiations that ensued between the colonial government and the nationalist leaders, there was a tug of war for political control. The British, who were in control of the then Tanganyika, insisted the independence Constitution should contain a Bill of Rights in order to secure the rights of the individual. The nationalist leaders, on the other hand, led by the Tanganyika African National Union (TANU), refused to incorporate such a Bill of Rights, that it would block their initiatives to develop the new country economically. The nationalists had their way and, thus, the Constitution of 1961 did not have a Bill of Rights.

Following the Union between Tanganyika and Zanzibar in 1964, which gave birth to Tanzania, the Interim Constitution of 1965 was prepared. The demand to incorporate a Bill of Rights into this Constitution was met by, among

⁶¹ See Commission for Human Rights and Good Governance Act, 2001 (Government Notice No. 67 of 4 May 2001).

other things, the introduction of an Ombudsman function – the Permanent Commission of Enquiry – which was the first human rights institution in the country. This institution had a limited mandate as it confined itself to bureaucratic maladministration.

Since the Universal Declaration of Human Rights of 1948 was reaching a 50-year milestone in 1998, civil society in Tanzania pressurised the government to establish a proper human rights institution to ensure both the promotion and protection of human rights in the country. It is this pressure which resulted in the establishment of the CHRGG.

The set-up and structure of the CHRGG

The CHRGG is not adequately spread in the country. It currently has two offices in Dar es Salaam: the headquarters and an office at Tancot House; but there is only one office for the whole of Zanzibar. The Zanzibar Office was inaugurated in 2007 after the Revolutionary Government of Zanzibar had accepted that the CHRGG could also operate on the isles.⁶² The latter is led by a Commissioner.

Two additional offices were recently established: one was set up at Mwanza in the Lake Zone, while another was set up at Lindi in the Southern Zone. These two offices are headed by Assistant Commissioners.

Composition of the CHRGG

At the time of the Commission's establishment, civil society insisted – and the government conceded – that they should have some say in the choice of Commissioners. Therefore, a very transparent method of appointing Commissioners emerged, and conforms with the Paris Principles.⁶³ The appointment process is aimed at ensuring that the Commissioners are not only independent, but also competent and qualified. Under this arrangement, once applications are received, a small group comprising members of civil society and some specialists sits to screen the applicants and shortlist the best potential candidates.⁶⁴ The names

⁶² See CHRGG (2008a:5).

⁶³ This procedure is provided for in the Commission for Human Rights and Good Governance (Appointment Procedure for Commissioners) Regulations, 2001 (Government Notice No. 89 of 11 May 2001).

⁶⁴ According to Regulation 6(2), among the civil society organisations included in the

of those identified by this group as qualifying for consideration are advertised in the media for members of the public to give their views on their suitability. The views of the public and other comments are taken to a selection committee, which in turn advises the President of the United Republic of Tanzania. The President is obliged to make the final appointments from among the shortlisted candidates, taking into account the public's input.

Following this arrangement, very competent personalities were appointed to grace the first team of Commissioners.⁶⁵ They have since completed two terms in office. A new Chair and Commissioners have already been appointed via the same method to replace them.⁶⁶ Currently, the Commission is without a substantive Secretary as the former incumbent was appointed as a High Court Judge in July 2008.⁶⁷

The same care was not applied in setting up the Commission Secretariat. For example, civil society did not ensure that qualified staff were recruited to assist the Commissioners. As a result, the Secretariat of the former Permanent Commission of Enquiry was simply transferred to the CHRGG. The consequences have been devastating because the mixture of good Commissioners and a wanting Secretariat has not been producing the desired results. The very first Secretariat did not have a single lawyer besides the Executive Secretary serving on it. Now, with the recruitment of many new lawyers to the Secretariat, things are expected to improve.

screening team are the Tanzania Women Lawyers Association, the Tanganyika Law Society, the Zanzibar Legal Services Centre, the United Nations Association, and the Legal and Human Rights Centre.

⁶⁵ The first team of Commissioners was chaired by Hon. Justice Robert Kisanga, assisted by HE Ambassador Mohamed Ramia Abdiwawa as Vice Chairman. The Commissioners were Hon. Catherine Harriet Mbelwa Kivanda, Hon. Stephen Zachariah Mwaduma, Hon. Jecha Salim Jecha, and Hon. Safia Masoud Khamis.

⁶⁶ The new team is made up of Hon. Justice Amiri Ramadhani Manento (a retired Principal Judge of the High Court of Tanzania) as Chairman, and Hon. Mahfoudha Alley Hamid as Vice Chair. The new Commissioners are Hon. George Francis Mlawa, Hon. Joaquine Antoinette De-Mello, Hon. Zahor Juma Khamis, and Hon. Bernadette Gambishi. They are assisted by two Assistant Commissioners, namely Hon. BL Mugusi in Lindi, and Hon. Fahamu Hamidu Mtulya in Mwanza.

⁶⁷ The Director of the Department of Legal Services in the Commission, Ms Mary Massay, is now acting as the Secretary to the Commission. See CHRGG (2008b:4).

Mandate of the CHRGG

The main function of the CHRGG is to investigate any human rights abuses or maladministration.⁶⁸ It can do this on its own initiative or upon receipt of a complaint or allegation to this effect. Complaints can be lodged by the aggrieved person or any other person acting on behalf of such person, or it can be a person acting in the interest of a group or class of persons.⁶⁹

Following a Commission investigation, where appropriate, it can –

- promote negotiations and compromise between the parties
- report to the appropriate authority or person having control over the person in respect of whose act or conduct an investigation has been carried out, or
- make recommendations to the relevant person or authority on measures to be taken so as to provide an effective settlement, remedy or redress.⁷⁰

There are, however, limitations to what the Commission can do.⁷¹ For instance, it cannot investigate the President of the United Republic of Tanzania or the President of Zanzibar,⁷² or a matter –

- which is pending before a court of law or other judicial tribunal
- involving relations between the United Republic of Tanzania and another foreign state or an international organisation
- relating to the exercise of the prerogative of mercy by the President in which the President has directed otherwise.⁷³

The decisions of the Commission have the status of a recommendation to the appropriate authority or person having control over the person in respect of whose act or conduct an investigation has been carried out.⁷⁴ Therefore, unlike a decision of a court of law which is binding on the person on whom it is directed, this is not the case with the decisions of the Commission.

⁶⁸ Section 15(1), Commission of Human Rights and Good Governance Act, 2001 (Act No. 7 of 2001).

⁶⁹ Section 15(1)(a) and (b), Commission of Human Rights and Good Governance Act, 2001

⁷⁰ Section 15(2), Commission of Human Rights and Good Governance Act, 2001.

⁷¹ The limitations and restrictions on investigations by the Commission are provided at length in Section 16, Commission of Human Rights and Good Governance Act, 2001.

⁷² Section 16(1), Commission of Human Rights and Good Governance Act, 2001.

⁷³ Section 16(2), Commission of Human Rights and Good Governance Act, 2001.

⁷⁴ Section 17(1), Commission of Human Rights and Good Governance Act, 2001.

Inquiries by the CHRGG

Among the CHRGG's investigations to date, it has only conducted one major inquiry. This is the case involving the burning of houses in the Nyamuma village in Serengeti.⁷⁵ The Commission conducted a long and protracted inquiry in Musoma, in which all parties – including the Office of the Attorney-General – were fully involved. The Commission found the District Commissioner and the District Police Chief at fault and recommended that compensation be paid to the villagers. Interestingly, however, on receipt of the CHRGG's decision, the then Attorney-General of Tanzania, Hon. Andrew Chenge, wrote to the then Chairman of the Commission, Hon. Justice Robert Kisanga, informing him that the government was not going to respect or implement the decision. The Commission felt helpless and asked the parties to proceed to the judiciary and seek remedy there.⁷⁶

This is one extreme case, but there are many occasions where the CHRGG's work is completely frustrated by government functionaries who do not care to reply to its letters or hinder its investigative activities. This has led the Commission itself to concede that it is toothless. The net result has been loss of confidence and faith in this important institution by the public.⁷⁷

Evaluation of the work of the CHRGG

In the first phase of its operation, the CHRGG instilled hope in the people of the United Republic of Tanzania. Save for the Secretary to the Commission, who was very slow and highly bureaucratic, the rest of the Commissioners were very active and dynamic. The Chair had a good track record in human rights, for example. He was not only a judge in the highest court in the country – the Court of Appeal of Tanzania – but also a Commissioner in the African Commission on Human and Peoples' Rights, established by the then Organisation of African Unity (OAU) under the African Charter on Human and Peoples' Rights of 1981. Thus, he was an inspirational figure who enjoyed a lot of confidence, not only within the Commission, but in the country at large.

⁷⁵ See the case of *Ibrahimu Korosso & 134 Others together with the Legal and Human Rights Centre v District Commissioner and the Police Officer in Command of Serengeti District together with the Attorney General* (HBUB/S/1032/2002/2003/MARA).

⁷⁶ On this case, see Mashamba (2007); LHRC (2003, 2006a, 2006b).

⁷⁷ See Mkinga (2005).

Unfortunately, the founding legislation did not provide for the staggering tenure procedure for Commissioners so that they could retire at different dates and, in so doing, maintain the institutional memory of the Commission. After the first three years, almost all Commissioners had had their tenures renewed in accordance with the law. In 2008, following the completion of their tenure, all of them left. A brand new Commission exists now, effectively with no institutional memory. In addition, all the new members – save for one Assistant Commissioner⁷⁸ – have no human rights background; they are therefore trying to learn human rights in the office. This in itself is not a bad thing, as long as there is determination. However, it delays the protection of human rights.

At the same time, it is emerging that the Commission is very protective of the government in power. In situations where one would expect the government spokesperson to make a statement, it is the Commission that does so – even in issues which might in future be litigated or brought before it for action. The most disturbing among the issues on which the Commission has indicated its position of late is on the citizens' right to strike. The CHRGG has been urging workers to negotiate with the government instead of going on strike. In this position it is obviously taking sides.

Yet another problem is funding the Commission. Since its inception, the CHRGG has been funded mainly by donors, particularly the Royal Danish Embassy. The latter even funded the building of the premises where the Commission and the Law Reform Commission of Tanzania are based. With donor funds coming to an end, however, the Commission is almost at a standstill, with little if any finances apart from being able to cover normal operational costs. It can hardly function effectively. With that attitude from the government, one cannot sincerely say that human rights in Tanzania are protected. All these hardships notwithstanding, it is important for the members and staff of the Commission to remember what is provided in the Paris Principles, namely that, although they are established by governments, human rights institutions are not part of the government and should be independent of the government.⁷⁹ This is important because, if the

⁷⁸ Assistant Commissioner Fahamu Hamidu Mtulya, who is based at the Commission's Mwanza office, holds two Master of Laws (LLM) degrees in human rights from the Universities of Pretoria, South Africa, and Oslo, Norway, respectively.

⁷⁹ See the Principles relating to the Status of National Institutions adopted as United Nations General Assembly Resolution No. 48/134 of 20 December 1993. These Principles are

people cannot differentiate between the government and the Commission, then they, i.e. the people, have lost the war against human rights abuse. Nobody will take the Commission seriously anymore and that will have effectively sealed its fate. Taking all these issues together, there is no doubt that despite the new Commissioners' enthusiasm, the future of this human rights protection body is not very bright.

Lessons and opportunities from human rights institutions in Africa

Human rights institutions can be very effective instruments in promoting and protecting human rights in Africa. This is because they are flexible, less bureaucratic, and accessible to the common person. Unlike courts of law, which are very technical and procedural, human rights institutions are more relaxed and process matters more quickly.

Also, these institutions offer opportunities for the parties to discuss and negotiate, and thus reach amicable solutions to problems. They are avenues for the peaceful settlement of disputes because, at the end of the day, there are no losers and winners before such institutions. This is what makes the difference between institutions of this nature and courts of law which must pronounce on each every issue that comes before them and say who is wrong and who is right. This is not necessary in the process of the peaceful and amicable settlement of disputes.

Challenges faced by human rights institutions in Africa

Human rights institutions in Africa are confronted by various challenges. First among these is the low level of education of the majority of the people on the continent. This makes the promotion of human rights a mammoth task. These institutions have to prepare very simplified materials and radio and television programmes in order to effectively communicate with the people. This task requires a considerable amount of resources, which most of these institutions do not have.

reproduced in Peter (2008:332). For how national human rights institutions in Africa have been performing in general, see Human Rights Watch (2001).

Secondly, and connected with the first, is funding. Human rights and their promotion and protection are not a priority in most African countries. Therefore, the majority of human rights institutions do not get the levels of funding which will allow them to operate optimally. In most cases, the main projects of these institutions are funded by development partners, the donors, who are at times also forced to meet the administrative and operational costs of these institutions. Thus, when the projects end and the donors leave, the institutions are stranded.

The third major challenge is the lack of political will by the politicians to promote and protect human rights. In most African countries, it is the politicians in power who are at the forefront when it comes to supporting violations of human rights. They are not in a position, therefore, to support any initiatives to sensitise people about their rights. They seem able to find a multitude of ways to block the funding of human rights institutions. Thus, politicians are in most cases the spoilers of many initiatives to promote and protect human rights on the continent.

Fourthly, bad legislation can be a hindrance to the promotion and protection of human rights. The existence of ambiguous law on the powers and functions of human rights institutions is likely to demoralise even the most spirited team of Commissioners and other functionaries of such institutions. Therefore, for a human rights institution to function well, facilitative legislation is essential.

Fifthly, incompetent, biased and politically aligned Commissioners can be a serious problem to the promotion and protection of human rights in a country. Therefore, the system of appointing Commissioners should assist with ensuring these institutions get the best staff possible if human rights are to be properly promoted and protected. These are members of staff who will be able to maintain their neutrality and independence even in the toughest situations and under intense pressure to do otherwise.

Conclusion

A number of people have underplayed the role of national human rights institutions. Others have gone to the extent of trashing them and writing them off as State organs aimed at frustrating the struggle for human rights and fundamental rights and freedoms by civil society.

However, experience has indicated that this is not always the case. Some of these accusations are rarely founded – although the tendency to become government-aligned is definitely rearing its head. If established properly and in accordance with the Paris Principles, and if managed by honest and upright persons with integrity, these institutions can make an immense difference in the struggle to promote and protect human rights at municipal level.

The majority of States are wary of national human rights institutions because of what they do in practice. It is common, therefore, to find such institutions starved of the finances they need to carry out their duties. Lifelines have tended to be thrown to them by the various offices of development partners. However, this should not be allowed to become the tradition. The nation should take ownership of these institutions, and hence, have them funded by the local taxpayer. This requires intense lobbying and sensitisation on the part of the State as well as by the people at all levels.

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Can Truth Commissions in Africa deliver justice?

Dumisa Buhle Ntsebeza

Introduction

Uganda was the first African country to institute a ‘truth commission’. In 1994, a report was published which had looked into the disappearance of people in Uganda since 25 January 1971. This Commission, the first Truth Commission in Africa, also had a mandate to inquire into violations of human rights in Uganda. The dates that the Commission had to cover in its investigations were the years stretching from 1962 to 1986, during which there had been a number of gross violations of human rights, particularly during the murderous regime of General Idi Amin.¹

Like truth commissions elsewhere, the endeavour by the Ugandan Commission was arguably to address a perennial question which societies have to confront, and which, I would argue, they have had to confront since the beginning of modern democracy. Societies that have emerged from repression and which commit themselves to democracy always have to confront the thorny issue of what justice demands are during the repression–democracy transition, and thereafter, particularly in the normalisation process. For example, what causes the remarkable reluctance in incoming regimes, including that of South Africa, to prosecute violators and violations of human rights such as war crimes, crimes against humanity, and other serious and egregious crimes committed during the period of conflict?

There is usually much debate about whether prosecutions are worth the while of a society that might want to concentrate on other priorities. Failure to prosecute is sometimes justified by pretexts that the costs involved are not worth the exercise. Sometimes, it is a lack of political will to do it. Other popular views are that prosecutions may eliminate all chances of reconciliation; that perpetrators may well believe that, in a post-conflict situation, they no longer have a debt to pay to society; and that the most important national concern should be to reconcile the perpetrators with their victims – and in order to do so, the wrongs of the past must be forgiven, buried and forgotten.

¹ See Villa-Vicencio & Doxtader (2004:123–124).

On the other hand, the victims might – and very often do – become outraged at this ‘horse trading’ of the justice they sorely need because of the suffering they went through at the hands of perpetrators of gross violations of human rights. Victims do indeed sometimes understand that there may be constraints that would accompany a decision not to prosecute: costs, the ineptitude of the prosecuting authorities, evidence that has either been destroyed or lost, the fading memories of potential witnesses, the slow pace of prosecutions, corruption, ethnoracism, no real infrastructure, and so on. However, they believe a commitment by a post-repression democracy to prosecute perpetrators not only strengthens the emerging democracy’s intention to uphold the rule of law concept and its values, but also serves a real symbolic purpose: it assures law-abiding citizens that, however long it may take, crime will be punished, and a culture of impunity will not be tolerated, rewarded or promoted.¹ Put differently, what post-repression societies grapple with is aptly summarised by Ivan Simonovic, Professor of Jurisprudence in the University of Zagreb Law School, Republic of Croatia.² The post-conflict dilemma of transitional justice usually has to answer two questions:

- (1) To what extent should the truth about war crimes and human rights abuses be forgotten or established?
- (2) To what extent should the perpetrators be pardoned or punished?

In the context of Uganda, for example, these vexing (and vexed) questions have currently resulted in a stalemate. Since the establishment and publication of the Uganda Truth Commission’s Report,³ peace has not returned to the country. New conflicts arose, most notably that between the current regime headed by President Yoweri Museveni and a ferocious rebel army group called the Lord Resistance Army (the LRA), led by Joseph Kony, which operates in the northern parts of Uganda and from bases in southern Sudan. There is a universal consensus today that the LRA has committed numerous abuses and atrocities, including abduction, rape, and killing and maiming of civilians – including children. The LRA are reportedly maintaining that they are fighting for the establishment of a government based on the biblical Ten Commandments. The crimes are so egregious that the Chief Prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, indicted Joseph Kony and his other commanders. He insisted that President Museveni had a legal duty to arrest Kony or assist in his arrest, and to hand him and his indicted officials over to the ICC for trial in The Hague.

¹ Ntsebeza (2006:95–96).

² Simonovic (2004:701).

³ 1975; available at http://www.beyondintractability.org/essay/truth_commissions/; last accessed 09 December 2008.

However, and despite the Ugandan Government itself having requested the ICC to investigate the atrocities in Uganda and prosecute them, it was the Ugandan President himself who was later reported to have stated that he could not betray Kony. The President stated that, in the interest of peace, once a comprehensive peace agreement had been signed, he would not turn around – like the Nigerian authorities had done to former Liberian leader, Charles Taylor – and hand Kony and four of his commanders indicted for war crimes to The Hague-based ICC. This was largely seen as an attempt by Museveni to dispel any fears within the rebel ranks that Kony or his deputy, Vincent Otti, would be arrested once they set foot in Juba, the capital of southern Sudan, for peace talks.⁴

This whole exercise by Museveni may have been intended to appease the rebels and secure their support of the peace deal. However, in January 2008, when Museveni set 31 January as the date by which the LRA leader should have signed the peace deal, Kony rejected this ultimatum as unreasonable, claiming that it undermined the peace process and that, in any event, it was not the prerogative of the Ugandan Government to issue deadlines. If ultimatums had to be part of the process, deadlines were best set by the government of the Sudan from Juba, where the comprehensive deal was being promoted.⁵ Not only was all of this a setback for the peace process, but it was also a negation of the theory that there is an ‘African way’ of dealing with conflict (about which more later), and that in terms of this, Africans must be left alone to find ‘African solutions’ for ‘African problems’. Appeasement, it would appear, was not a viable option for the delivery of justice.

Even though there was considerable publicity about how the victims of LRA atrocities were quite ‘happy’ to be reconciled with their perpetrators, in the interests of peace and a guarantee of an end to the conflict it is clear that, to date, neither has the peace treaty been signed nor has the LRA leadership been arrested and incarcerated at The Hague. Consequently, justice has become the casualty. The people of Uganda have no truth about why the atrocities are taking place or what has happened to those who have disappeared, and neither do they have the justice to which victims are entitled in the form of retribution. Peace in the land – which could have justified, if it ever does, an abandonment of

⁴ <http://www.globalpolicy.org/intjustice/wanted/2006/081betray.htm>; last accessed 9 December 2008.

⁵ <http://www.globalpolicy.org/intjustice/icc/investigations/Uganda/2008/0109deadline/htm>; last accessed 9 December 2008.

prosecutions for that reason – has not returned. Most commentators have argued that the fickleness of the process that justifies abandonment of prosecutions in the interest of ‘peace’ is the very reason people claim that Truth Commissions cannot deliver justice. They ask why there are still voices that call for Truth Commissions instead of retributive justice.

It appears, though, that the question is not whether the Truth Commissions or the justice system delivers justice; rather, as it will be argued here, the question may well be whether a particular case calls for a particular response which may well justify both a Truth Commission and a process of prosecution and punishment. This was envisaged even in the case of the South African Truth and Reconciliation Commission (TRC), but was demonstrably evident in the Sierra Leonean scenario, where a Special Tribune (Special Court) was created for the prosecution of more serious crimes, and a TRC was established for the rest. In the Ugandan situation, the jury is still out as to whether the Sierra Leonean model could be emulated, except that where the ICC is now in place, as it is, there would be no need to create a ‘Special Court’.

Why a Truth Commission?

Why do communities even contemplate not prosecuting offenders? In the South African landmark case commonly known as the *AZAPO* case,⁶ the late South African Chief Justice, Mahomed CJ (as he then was), in articulating why in the context of that country there had been a need for a TRC, referred to a much-quoted statement attributed to Judge Marvin Frankel,⁷ which is worth recalling here in full:

The call to punish human rights criminals can present complex and agonizing problems that have no single or simple solution. While the debate over the Nuremberg trials still goes on, that episode – trials of war criminals of a defeated nation – was simplicity itself as compared to the subtle and dangerous issues that can divide a country when it undertakes to punish its own violators.

A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens, living

⁶ *Azanian People's Organisation (AZAPO) & Others v The President of the RSA & Others* (1996)(4) SA 684 (CC).

⁷ See Frankel & Saideman (1989:103–104).

alongside everyone else, and they may be very powerful and dangerous. If the army and the police have been the agencies of terror, the soldiers and the cops aren't going to turn overnight into paragons of respect for human rights. Their numbers and their expert management of deadly weapons remain significant facts of life. The soldiers and the police may be biding their time, waiting and conspiring to return to power. They may be seeking to keep or win sympathizers in the population at large. If they are treated too harshly – or if the net of punishment is cast too widely – there may be a backlash that plays into their hands. But their victims cannot simply forgive and forget. These problems are not abstract generalities. They describe tough realities in more than a dozen countries. If as we hope, more nations are freed from regimes of terror, similar problems will continue to arise.⁸ Since the situations vary, the nature of the problems varies from place to place.

The notion of *justice*

Justice, as most societies have known it, is of the retributive type – an eye for an eye, a tooth for a tooth – with some modernist embellishments in diction that do not succeed in completely hiding the fact that retributive justice simply means that those who upset the moral order and subvert accepted societal moral codes by their violative behaviour will be punished as a way of society demonstrating its disapproval of their unacceptable conduct. The more gross the violation – rape, murder, abduction – the more society clamours for revenge, for retribution.

If one member of society has killed another, depending on how shocking and imaginably painful and egregious the murder was, the more society, in its name, demands a no less vengeful act – hence, death sentences and the rituals that are gone into in the execution thereof. After a perpetrator of a murder has been met with a sentence of death, in most communities it is either always or at least often accompanied by expressions of justice having been done. The logic of it takes a unilinear trajectory: the perpetrator killed, so s/he must also be killed. If a perpetrator commits a crime in the neighbourhood, so vile and outrageous that sometimes communities take the law into their own hands, so to speak, and chase the suspect and execute him or her; this is also sometimes seen as 'justice'.

During the struggle days in South Africa – particularly in the 1980s to 1994, after which a democratic government was established in South Africa – there

⁸ *Sustainable Democracy and Human Rights, Occasional Paper Series (3), The Truth and Reconciliation in Democratic Transition: The South African Example*, p. 37–38.

was a particularly gruesome method of killing that was meted out against people who were suspected of being informers for the apartheid state. It was called *necklacing*. The hapless suspect, sometimes only on mere suspicion, would be kidnapped and brought to a public place; a tyre would be put around his/her neck, petrol poured over him/her, usually his/her hands and feet would then be manacled; in this state s/he would be beaten and/or stoned, and then set alight. Even in the context of this viciousness, the view would be expressed that ‘mob justice’ had been short, swift and sweet: an evildoer had been given a dose of his or her own medicine.

Therefore, retributive justice is, in a sense, a vengeful exertion of inconvenience, sometimes visiting pain and/or suffering – and, in some jurisdictions, even death – on a perpetrator by those who claim entitlement to do it in the name of the victim or of the people.

On the other hand, as Charles Villa-Vicencio⁹ writes, the South African TRC was informed by a postamble that called upon the South African people to transcend the divisions and strife of the past that had resulted in gross violations of human rights and violent conflicts that had transgressed humanitarian principles. That past had been marked by racial hatred, fear, guilt and revenge. Justice, however, so argued the authors of the Interim Constitution in the postamble, could be still served if society appreciated that, in order to transcend the evils of the past, there was a need for understanding, not vengeance; a need for reparation, but not retaliation; a need for *ubuntu*,¹⁰ but not victimisation.

It is against his backdrop that the notion of *restorative justice* came to the fore. Generally, restorative justice prioritises beneficence to victims and survivors.¹¹ This victim-centred justice required Truth Commissions to approach even the task of listening to victims’ accounts of their suffering with care and dignity, and in a manner that restored to the victims of human rights abuses the dignity which they had lost in their previous dealings with officialdom. The essence of this form of justice is powerfully described by Elizabeth Kiss,¹² who wrote that, in order to achieve this kind of justice for victims, Truth Commissions invented new practices and norms – respectfully listening, allowing people to tell their

⁹ Villa-Vicencio & Doxtader (2004:3–4).

¹⁰ See later herein.

¹¹ Villa-Vicencio & Doxtader (2004:3–4).

¹² See Kiss (2000:73–74).

stories without interruption, singing and praying with them, visiting sites of atrocities with them – a kind of justice that requires an inclusive remembering of painful truth about the past, and a commitment to allow victims to tell their stories. This is in line with what Villa-Vicencio has also said,¹³ namely that it is important to ensure that society gives the victim equal status to anyone else, which then redresses the implied imbalance of human worth between perpetrator and victim. The greatest accomplishment, particularly in a transitional society, is when restorative justice achieves the three interrelated steps identified by Villa-Vicencio,¹⁴ namely –

- the acknowledgment of resentment among victims and survivors, as well as the justified moral outrage of society
- the addressing of the material needs of victims and survivors, and
- the restoration of relations between victims and survivors, on the one hand, and perpetrators of the crimes against them, on the other.

Nor does restorative justice preclude punishing the guilty, according to Kiss, because punishment and forgiveness, as alternatives, are both ways of attempting to put an end to a cycle of vengeance, of action and reaction.¹⁵ In this kind of justice, forgiveness or reconciliation is emphasised over punishment, as is the humanity of both victim and offender.¹⁶ The most important thing about restorative justice, and what makes it salutary, is that it does not seek to ignore the past, particularly when perpetrators – as was the case in the South African TRC (and in Sierra Leone and Liberia) – were enjoined to make a full disclosure of their violations, in public, in the glare of national (and even global) media. In some cases, these disclosures were being heard for the very first time by the perpetrators' spouses, their friends and their children, and the darker side of their lives was being exposed in public. Perpetrators were running the gauntlet of public dismay, censure, and ostracism. The added social opprobrium that came with such societal demand for public accountability by perpetrators constitutes, I would argue, as heavy or telling a blow as a jail sentence itself (or even perhaps more so). Public disclosure of egregious crimes is a process that traumatises the perpetrators in the course, and aftermath, of their public confessions of their dark pasts. However, it also produces unintended consequences, and victimises the innocent spouses and children; hence, a need arises for society to reintegrate

¹³ (ibid.).

¹⁴ (ibid.:37).

¹⁵ (ibid.:80).

¹⁶ (ibid.:80).

not only the perpetrators, but also the victims of the unintended consequences of their confessions. That, I argue, is an element and an imperative of justice in and of itself.¹⁷

Truth Commissions in Africa: Will they deliver justice – any justice?

I am puzzled by the question: why Africa? It cannot be suggested that Africa has been singled out because it is a continent in which war crimes and crimes against humanity take place, even though this is so. Even though there may be more international crimes that have been committed in Africa in the recent past than elsewhere – even if that conclusion is not a subject of scientific research – it is arguable that, whilst Africa has its own fair share of egregious crimes for which there have been no satisfactory remedial measures (the Zimbabwe situation is a case in point), Africa does not have the monopoly over international crimes. At the beginning of this paper, I alluded to the situation in Uganda. I also mentioned Sierra Leone as a country in which both a Special Court and a TRC were established in order to deal with that country's horrendous past. Other African countries that have had Commissions seeking to address the past are Burundi, which established an International Commission of Inquiry to cover the period 1993–1995, which delivered a report published in 1996. Ghana established a National Reconciliation Commission to cover the years 1957 to 1999, although its report is still outstanding. Chad established a Commission of Inquiry into the crimes and misappropriations committed by ex-President Habre, his accomplices and/or accessories to cover the period 1982–1990; the Commission's report was published in 1992. The Democratic Republic of Congo set up a TRC in 2004, as did Liberia in 2006.

With respect to Liberia, on 8 December 2008, a list of potential perpetrators whom the Liberian TRC wished to interview was published. The Liberian TRC is responsible for investigating the root cause of the conflict in Liberia, correcting historical inaccuracies, and bringing truths to light.¹⁸ This TRC seeks not only to create an independent and accurate record of the rights violations and abuses as a result of the conflict of the past, but also to build the foundation for justice and reconciliation. The expectation is that this approach will foster

¹⁷ See Ntsebeza (2000:164).

¹⁸ See <https://www.trcofliberia.org>; last accessed 10 December 2008.

national repentance and *strike the delicate balance* between accountability and forgiveness, in order to heal the land and unite the people.¹⁹

This paper argues that, in Africa, there seems to be a trend to bring about justice in all its dimensions, and Truth Commissions seem to be one of the preferred mechanisms resorted to now fairly frequently on the continent to achieve that objective.

Ubuntu

There is a view that the notion of *ubuntu* has its foundation in traditional societies, mostly African. There is some measure of acceptance of this view – even by people from a Western culture. At an amnesty hearing in Cape Town on 10 July 1997, Pieter Biehl, Amy Biehl’s father, acknowledged this when he spoke at the amnesty hearing into the killing of his daughter by followers of the Pan-Africanist Congress of Azania. Stating that the process of granting amnesty was “unprecedented in human history”, he told the Amnesty Committee that they, as Amy’s parents, would not oppose amnesty if it was granted on merit because they realised that –²⁰

... in the truest sense, it is for the community of South Africa to forgive its own and this has its basis in traditions of *Ubuntu* and other principles of human dignity.

Ubuntu has been understood and articulated by many to mean “humaneness, or an inclusive sense of community valuing everyone”.²¹ For others, it is a word that implies both “compassion” and “recognition of the humanity of the other”.²²

The learned authors Asmal et al.²³ argue that those who insist on automatic trials as the only legitimate manner in which to mete out justice generally ignore the concept of *ubuntu*. They believe it is not enough to demand systematic trials as the automatic means of dealing with the past: one also needs to demonstrate that the trials would maximise the underlying value of *ubuntu*.²⁴

¹⁹ (ibid.).

²⁰ See Sarkin (2004:223).

²¹ See Minow (1998:52).

²² See Asmal et al. (1996:21).

²³ (ibid.).

²⁴ (ibid.).

In some African countries, like Rwanda, where prosecutions were preferred over Truth Commissions, traditional methods of conflict resolution were eventually also relied upon. In the same way that *ubuntu* was relied upon in the South African amnesty process, in Sierra Leone, and even lately in Uganda's negotiations with the LRA, it would appear that *ubuntu* is the notion that has informed the Rwandese authorities to establish what it has termed *gacaca* courts. Writing in a journal published online on 14 November 2006, Coel Kirby²⁵ observed that the new courts are inspired by traditional dispute resolution mechanisms. Judges are elected by popular vote to hear cases such as murder, assault and property offences. The setting is less formal than criminal courts, and promotes confessions from perpetrators and forgiveness from survivors. Coupled with this process are two related schemes for victim compensation and community service for those convicted. The judges are laypersons, and yet are involved in complex legal adjudications. The accused have no right to legal representation, nor do they have a right of appeal to the domestic courts. Kirby concludes that, whilst the courts hold much promise of reconciling a deeply divided society, redressing the needs of the victims should become a priority.²⁶

It is submitted that, even in Rwanda, where no formal TRC was established, the Rwandese society soon sought other mechanisms to address the needs of both retributive and restorative justice, by way of dealing with the massacre and its aftermath.

For me, *ubuntu* – a word and a value that seems to be found in the traditions and idioms of most if not all the countries and cultures on the African continent – must mean much more than just “humaneness”. It does not seem to be capable of being explained in one word only. Whilst it indeed entails humaneness, it also includes the sense of kindness, nobleness (not just nobility), considerateness, humility, humbleness, the ability to forgive, understanding, the ability to empathise, the ability to sympathise, and the ability to grieve with someone in their moment of grief and pain; it entails sharing, brotherhood, sisterhood, compassion and so many other values that go with these multiple notions of being a good human being. Hence, *Umuntu ngumuntu ngabantu*²⁷ – literally, “a person is a person through other persons”.

²⁵ Text available at <http://journals.cambridge.org/action/displayabstract/sessionid=96D663F3C0F570E>; last accessed 10 December 2008. At the time of his publication (2006), Kirby was attached to the University of the Western Cape's Community Law Centre.

²⁶ (ibid.:Abstract).

²⁷ See Ntsebeza (2005).

Case study – Sudan

On 18 September 2004, the UN Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1564 in terms of which the then Secretary-General, Kofi Annan, was mandated to –

... rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.

In October 2004, I was honoured in being appointed by the UN Secretary-General, together with Antonio Cassese (Chairperson), Mohamed Fayek, Hina Jilani and Therese Striggner-Scott, as members of the UN Commission of Inquiry (UNCOI) on Darfur. We were requested to report on our findings within three months. We were supported in our work by a Secretariat and staff that included a legal research team, investigators, forensic experts, military analysts, and investigators specialising in gender violence – all appointed by the Office of the High Commissioner for Human Rights. Throughout our mandate period, we consulted the Government of Sudan in meetings in Geneva and Sudan itself, as well as through the work of the investigators. During our presence in Sudan, we held extensive meetings with government representatives, governors of the Darfur states, and other senior officials in the capital and at provincial and local levels. We also interviewed members of the armed forces and the police, leaders of rebel forces, internally displaced persons, victims and witnesses of violations, national government officials, and UN representatives.

Findings of the Commission

On 25 January 2005, we reported to the UN Secretary-General.²⁸ We had found, inter alia, that from February 2003 to mid-January 2005, grave human rights violations had occurred and been committed by all parties to the conflict. In particular, we found that, in Darfur, the Sudanese Government armed forces and militia under their control – the Janjaweed – had attacked civilians and destroyed and burned down civilian villages, and that rebel forces had done the same, but

²⁸ Text available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf; last accessed 8 December 2008.

on a much smaller scale; that unlawful killing of civilians by both the Sudanese Government armed forces and the Janjaweed had taken place, and that the killings had been widespread and systematic.

Furthermore, we found that the Sudanese Government armed forces and the Janjaweed had committed rape and other forms of sexual violence in a widespread and systematic manner, and that they had committed torture and inflicted inhumane and degrading treatment as an integral and consistent part of attacks against civilians. They had also forcibly displaced the civilian population in a widespread and systematic manner.

Our report further stated that the Janjaweed had abducted women, and the Sudanese Government security apparatus had arrested and detained persons in violation of international human rights law, again as part of widespread and systematic attacks against civilians. We had also found that the victims of attacks by the Sudanese Government armed forces and the Janjaweed had belonged mainly to the Fur, Zaghawa and Massalit tribes, and that the discriminatory nature of the attacks might constitute persecution.²⁹

Indeed, as a consequence of our findings, which were accepted by the UN Security Council, it referred the entire situation in Darfur to the ICC for further attention. ICC Prosecutor Moreno-Ocampo has since indicted three top government officials in Sudan for international human rights violations amounting to war crimes and crimes against humanity. Those indicted to be tried include the Sudanese President, Omar Al-Basheer.

Conclusion

The question might arise as to whether or not we, as members of the UNCOI on Darfur, considered the establishment of a TRC in Sudan. In our report,³⁰ we stated that we had indeed considered whether a Truth Commission was an option for the resolution of the humanitarian crisis in Darfur. We unequivocally articulated that, in post-conflict societies, there would always be a place for TRCs, precisely because they could play an important role in ensuring justice and accountability. As stated at the beginning of this paper, by their very nature, criminal courts may not be suited to reveal the broadest spectrum of crimes that have taken place

²⁹ See Ntsebeza [Forthcoming].

³⁰ UNCOI (2005:156–157, paras. 617–621).

during a period of repression, partly because they may convict only on proof beyond reasonable doubt. In situations of mass crime, such as those that have taken and regrettably continue to take place in Darfur, a relatively small number of prosecutions – no matter how successful – may not completely satisfy victims' expectations of acknowledgement of their suffering. What was important in Sudan, we concluded, was a full disclosure of the whole range of criminality. However, we argued that the final decision regarding whether a TRC would be appropriate for Sudan and, if so, at what stage it should be established, were matters that only the Sudanese people should decide through a truly inclusive participatory process. Those decisions, we argued, *should ideally occur* when the conflict was over and peace had been re-established, and as a *complementary* measure to criminal prosecution, which should be set in motion as soon as possible – even if the conflict was still under way – with a view to having a deterrent effect, that is, stopping further violence (my emphases). Furthermore, decisions should ideally be taken on the basis of an informed discussion among the broadest possible sections of Sudanese society, which would have taken into account international experience, and, on that basis, would assess the likely contribution of a Truth Commission to the Sudan.

We concluded that recent international experience had indicated that Truth Commissions were likely to have credibility and impact only when their mandates and composition were determined on the basis of a broad consultative process, including civil society and victims' groups. Commissions established for the purpose of *substituting justice* and producing a distorted truth should be avoided (again, my own emphasis). It is a position I still believe is a correct one.

From everything that has been said in this paper, it seems to me the question cannot and, indeed, should not merely be whether Truth Commissions do in fact deliver justice in Africa – or Burma, Thailand, Yugoslavia, or anywhere else. The real question would seem to be one that asks about the circumstances in which it can be said Truth Commissions can and do deliver justice, and what type of justice it is they deliver. I would hope that this paper has been a foundation for a debate of *that* question, rather than the one asked. It is fair to say that a simple answer to the topic question would be that Truth Commissions do deliver a justice of a particular type – depending on the timing, context and kind of justice a particular society expects.

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AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS

(Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)

Preamble

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights",

Recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of a "preliminary draft on an African Charter on Human and Peoples' Rights providing inter alia for the establishment of bodies to promote and protect human and peoples' rights";

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations. and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other

hand that the reality and respect of peoples rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinions;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instrument adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and people' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

Have agreed as follows:

Part I: Rights and Duties

Chapter I: Human and Peoples' Rights

Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized 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.

Article 3

- 1. Every individual shall be equal before the law.**
- 2. Every individual shall be entitled to equal protection of the law.**

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

- 1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.**
- 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.**

Article 8

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 9

- 1. Every individual shall have the right to receive information.**
- 2. Every individual shall have the right to express and disseminate his opinions within the law.**

Article 10

- 1. Every individual shall have the right to free association provided that he abides by the law.**
- 2. Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.**

Article 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

Article 12

- 1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.**
- 2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.**
- 3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.**
- 4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.**

Appendix I: African (Banjul) Charter on Human and Peoples' Rights

5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Article 13

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 15

Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 17

1. Every individual shall have the right to education.
2. Every individual may freely, take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the

community shall be the duty of the State.

Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 20

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

Appendix I: African (Banjul) Charter on Human and Peoples' Rights

2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 22

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

Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that: (a) any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter; (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

Article 24

All peoples shall have the right to a general satisfactory environment favorable to their development.

Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Article 26

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

Chapter II: Duties

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;

Appendix I: African (Banjul) Charter on Human and Peoples' Rights

3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defense in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

Part II: Measures of Safeguard

**Chapter I: Establishment and Organization of the African
Commission on Human and Peoples' Rights**

Article 30

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

Article 31

1. **The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.**
2. **The members of the Commission shall serve in their personal capacity.**

Article 32

The Commission shall not include more than one national of the same state.

Article 33

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States parties to the present Charter.

Article 34

Each State party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the States party to the present Charter. When two candidates are nominated by a State, one of them may not be a national of that State.

Article 35

- 1. The Secretary General of the Organization of African Unity shall invite States parties to the present Charter at least four months before the elections to nominate candidates;**
- 2. The Secretary General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections.**

Article 36

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years.

Article 37

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

Article 38

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

Article 39

- 1. In case of death or resignation of a member of the Commission the Chairman of the Commission shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.**
- 2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.**
- 3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.**

Article 40

Every member of the Commission shall be in office until the date his successor assumes office.

Article 41

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear the costs of the staff and services.

Article 42

- 1. The Commission shall elect its Chairman and Vice Chairman for a two-year period. They shall be eligible for re-election.**
- 2. The Commission shall lay down its rules of procedure.**
- 3. Seven members shall form the quorum.**
- 4. In case of an equality of votes, the Chairman shall have a casting vote.**
- 5. The Secretary General may attend the meetings of the Commission. He shall not participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.**

Article 43

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

Article 44

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

Chapter II -- Mandate of the Commission

Article 45

The functions of the Commission shall be:

- 1. To promote Human and Peoples' Rights and in particular:**
 - (a) To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.**
 - (b) To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.**
 - (c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.**
- 2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.**
- 3. Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU.**
- 4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.**

Chapter III -- Procedure of the Commission

Article 46

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.

Communication from States

Article 47

If a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available.

Article 48

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other States involved.

Article 49

Notwithstanding the provisions of 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General of the Organization of African Unity and the State concerned.

Article 50

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

Article 51

- 1. The Commission may ask the States concerned to provide it with all relevant information.**
- 2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representation.**

Article 52

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples' Rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in 48, a report stating the facts and its findings. This report shall be sent to the States concerned and communicated to the Assembly of Heads of State and Government.

Article 53

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

Article 54

The Commission shall submit to each ordinary Session of the Assembly of Heads of State and Government a report on its activities.

Other Communications

Article 55

- 1. Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.**
- 2. A communication shall be considered by the Commission if a simple majority of its members so decide.**

Article 56

Communications relating to human and peoples' rights referred to in 55 received by the Commission, shall be considered if they:

- 1. Indicate their authors even if the latter request anonymity,**
- 2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,**
- 3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,**
- 4. Are not based exclusively on news discriminated through the mass media,**
- 5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,**
- 6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and**
- 7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.**

Article 57

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

Article 58

- 1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.**
- 2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.**
- 3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may**

request an in-depth study.

Article 59

1. All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

Chapter IV -- Applicable Principles

Article 60

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

Article 61

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

Article 62

Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

Article 63

1. The present Charter shall be open to signature, ratification or adherence of the member states of the Organization of African Unity.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organization of African Unity.
3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence of a simple majority of the member states of the Organization of African Unity.

Part III: General Provisions

Article 64

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.
2. The Secretary General of the Organization of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

Article 65

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that State of its instrument of ratification or adherence.

Article 66

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

Article 67

The Secretary General of the Organization of African Unity shall inform member states of the Organization of the deposit of each instrument of ratification or adherence.

Article 68

The present Charter may be amended if a State party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties

Appendix I: African (Banjul) Charter on Human and Peoples' Rights

have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the States parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.

Adopted by the eighteenth Assembly of Heads of State and Government June 1981 – Nairobi, Kenya