SUPPORTING THE RULE OF LAW IN AFRICA

10 years of the Rule of Law Program for Sub - Saharan Africa (2006-2016)

Konrad Adenauer Stiftung

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KAS Rule of Law Program for Sub-Saharan Africa

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THE FIRST DECADE (2006 - 2016)

Dr. Arne Wulff[1]

In November 2016, we held a successful symposium as part of commemorating ten years of our Program's existence on the continent. This event offered us an opportunity to reflect on our past, the present and also preview the future. Just as with most of the fora that we have organised during the first decade of our Program's existence, the presentations and ensuing discussions were dominated by our African partners and collaborators. This approach is anchored on the Foundation's strong conviction that Africa's challenges can only be overcome and sustained by African themselves albeit in partnership with the international community.

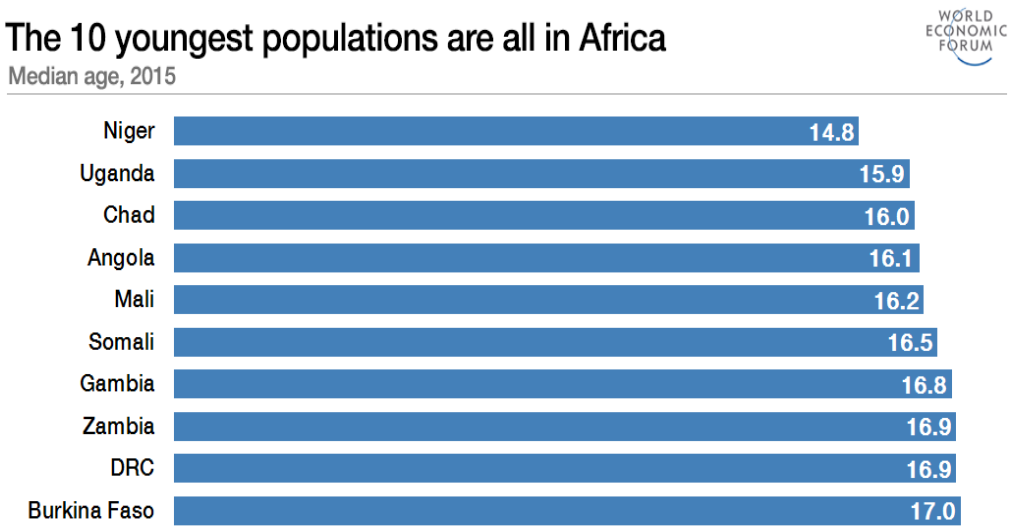
A number of opportunities and challenges have emerged and a lot of lessons learnt in the last ten years which we intend to build on as we look into the future in pursuit of the Program's main objective of contributing to a progressive Africa that upholds and adheres to the principles of the rule of law. The most important lessons learnt are embedded in four key concepts namely; Leadership, Institution-Building, Vision and the Rule of Law.

Africans have often highlighted the lack of political will as the main

1 The Director, Rule of Law Program for Sub-Saharan Africa.

hindrance to making progress or attaining the requisite balance of power for a thriving state of the rule of law on the continent. This underscores the need for a progressive leadership that serves the interests of the people both now and for generations to come. Creating an environment which enables citizens to participate fully in governance issues and empowering them to define their destiny is the hallmark of good, visionary leadership.

Currently, Africa has the highest youthful population in the world. All ten of the world's youngest countries are in Africa, as seen in this chart based on United Nations data.[2]



The question that must be answered is whether this population is a blessing or a curse. In the absence of proper planning, involvement of this critical population in meaningful nation-building processes can only result in one thing: Disaster! High rates of unemployment and continued marginalisation of the youth from key decision-making processes is a recipe for an unstable continent if left unaddressed. Conversely, if the youthful potential of the continent is properly harnessed and coordinated, it can form a valuable resource that will catapult Africa to the greatest levels of development across all spheres. The role of visionary leadership in harnessing the energy and the

2 An excerpt from an article at the World Economic Forum on Africa 2016 Kigali, Rwanda 11 - 13 May 2016 available at https://www.weforum.org/agenda/2016/05/the-world-s-10-youngest-countries-are-all-in-africa/.

innovation as well as inspiring this category of population for the development of the continent cannot be gainsaid.[3]

While advocating for progressive leadership, we note that such leadership must go beyond an individual or group of individuals for there to be stable and sustainable development. It must be built around and anchored upon institutions. Functional and independent governance institutions are critical to the growth of any society as they act as stabilisers in times of animosity, and protectors of the people in the face of a strong government or section of the population. The responsibility is on every State to find the right balance between the traditional arms of government namely, the executive, the legislature and the judiciary to ensure that the interests of the citizens are served at all times. Other sectors such as the free press and civil society must be allowed to play their rightful watchdog role if the rule of law is to thrive in any society, Africa included.

Having headed this programme for the last three years, I am not impressed by the state of the Rule of Law in Sub-Saharan Africa despite the many opportunities to turn it around. I feel that entrenchment of democratic principles is waning in many African democracies even among those thought to be the leading lights on the continent, based on a number of events and developments outlined below;

- In 2016, there were at least eight (8) general and municipal elections across the continent. The widespread irregularities in the run-up and during elections were a cause for worry for instance in Gabon. This raises doubts about the results and casts a shadow over the legitimacy of those in power.
- The elections in Uganda were characterised by violence, threats and harassment towards the opposition. This ensured that

3 An increasing working-age population is a major opportunity for economic growth in Africa. The World Bank estimates that this demographic dividend could generate 11-15% GDP growth between 2011 and 2030.

If Sub-Saharan Africa is able to take advantage, and provide adequate education and jobs, $500bn a year could be added to its economies for 30 years. This is the equivalent of one-third of Africa's GDP. However, without jobs and economic opportunities, social stresses such as unemployment could lead to unrest… available at https://*www.weforum.org/agenda/2016/05/the-world-s-10-youngest-countries-are-all-in-africa/*.

President Yoweri Museveni's 30 years rule continued.

- Elections planned in the DRC were not held as scheduled for various reasons, including failure by the incumbent President Joseph Kabila's government to facilitate the registration of voters.
- Another cause for concern is the unsolved situation of violent unrest and instability in South Sudan, Nigeria, Somalia and Congo.
- In Ethiopia, unrest sparked off by general problems such as corruption, land ownership, political repression and poverty led to violent protests against the government and private foreign companies. These riots and persistent conflicts are a threat not only to the state but also endangers the security and stability of the Horn of Africa region as a whole.

Continued disregard and blatant lack of respect for constitutions are another cause for worry insofar as realisation of rule of law in Africa is concerned. Several cases are reported where Heads of State have tried and, in some instances, succeeded in amending the constitutions exclusively for their own benefit.

For instance, in Tanzania one of the most peaceful and democratic States,[4] President John Magufuli drastically restricted the rights of the opposition and even temporarily prevented freedom of assembly.

In Burundi, President Pierre Nkurunziza's decision to stay for an unconstitutional third term in office was followed by serious acts of violence that gives rise to the fear of escalated conflict if the history of the country is anything to go by.

Constitutions are certainly not the same as traffic signs, which can be placed wherever suitable. The very meaning of a constitution lies in its function as the fundamental norm through which the State is created and upon which it is based. Constitutional instability due to amendments and the arbitrary interpretation of this supreme law often leads to instability of a state and the region at large.

The weak fight against impunity is another area that is cause for concern. The threat of Africa's mass withdrawal from the Rome Statute that establishes the International Criminal Court (ICC) led by South Africa, which has long

4 Has always had peaceful transition of power since the introduction of multiparty democracy.

been regarded as a role model in Africa, is a matter that raises serious concerns among ardent proponents of the rule of law on the continent.

Admittedly, the flaws of the ICC have always been obvious. For instance, the power of the Security Council to refer cases to the ICC when 3 of its 5 permanent members, namely China, Russia and the U.S.A remain 'above' International law and have not signed the Rome Statute is contradictory and poses a real challenge to the effectiveness of the Court. Owing to the dynamics and vested interests within the Security Council, it seems unlikely that a situation like the one in Syria involving protégés of the superpowers could ever be referred to the Court.

In addition, enforcement is still weak although these shortcomings trace back to the nature of international law and its institutions which are largely dependent on the cooperation and good will of State Parties. Therefore, international law can only be effective when all actors comply and ensure total enforcement within their powers.

In hindsight, critics need to justify how withdrawal can strengthen their moral position when it comes to condemning the most serious crimes.

International law evolves and develops through common practice and common understanding. Therefore, the naïve reasoning that accuses certain states like the U.S.A of shirking legal responsibilities, only to excuse oneself for doing exactly the same thing, will certainly lead to less justice. However, it is also worth recalling how the reputation of the U.S.A as a law-abiding state endorsing and protecting human rights universally was heavily damaged by not ratifying the Rome Statute.

Treaties are by no means rock-solid, would it not be thus more persuasive to make efforts to reform the Court from within, as an African bloc instead of only criticising a Court that was formally set up by the parties in conjunction with other States?

In fact, African states diminish their own power by withdrawing from the Rome Statute since the articulation of a common African position becomes less forceful and an African impact even more unattainable.

South Africa claims that the ICC is going to be replaced by domestic and regional courts. Indeed, a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) exists intending to expand the jurisdiction of the African Court on Human and Peoples' Rights to cover international crimes currently tried under the Rome Statute. Yet, since its adoption in June 2014, only nine countries

have signed the Protocol with no single ratification to date,[5] and one wonders if the trend is likely to change if ratification of other treaties on the continent is anything to go by.[6]

Assuming the resolution was ratified by all members today how would an understaffed and underfunded[7] court of such magnitude be able to deal with the expected huge number of cases? This can only lead to an unwarranted gap in criminal liability and the perpetuation of impunity.

Assuming the motive of those pushing for the withdrawal from the Rome Statute in favour of Africa's own mechanism is genuine, there is no need to pull out of the ICC since the latter is established to play a complementary role in protecting victims of serious crimes such as genocide, war crimes, crimes of aggression and crimes against humanity. The establishment of additional courts is a grand idea that is welcome but this must not be done at the expense of the already existing institutions that seek to provide universal justice.

The global as well as the African situation can certainly not be described as already preventing human rights violations, or at least prosecuting them adequately. In the foregoing, what is needed is more and not less criminal accountability.

Without discrediting the merits of the proposed expanded jurisdiction of the African Court on Human and Peoples' Rights, it is absurd to grant blanket immunity[8] to senior state official and sitting Heads of State who, more often than not, are the main perpetrators or facilitators of the aforementioned serious crimes.

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5 The 9 that have signed as at end of 2016 are Benin, Chad, Congo, Ghana, Guinea Bissau, Kenya, Mauritania, Sao Tome and Principe and Sierra Leone.

Available at https://*www.au.int/web/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights*.

6 The Protocol establishing the Court has been ratified by 30 States out of the 52 that have signed as at the end of 2016. Further, out of the 30 that have ratified the Protocol, only 8 have made the Declaration for recognising the Court's competence to receive cases from NGOs and individuals.

7 Adequate funding of the Court by African States is doubtful considering that the African Union itself and its organs, including the current African Court on Human and Peoples' Rights, are heavily funded by external partners, mainly, the European Union. The AU struggles to finance its own operations adequately, including its human rights treaty bodies funding less than 25% of its budget (excluding peace and security budget which is funded almost 100% by donors). Some donors who have traditionally financed the AU such as the EU have already indicated that they would not finance the Court on account of the immunity clause (Amnesty International Report).

8 Article 46A bis of the Malabo Protocol …No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

Further, I doubt whether a court set up to prosecute the most serious crimes that threaten humanity is a suitable place to show-off and flex sovereignty muscles by any State as is being exhibited by some African States.

Using international institutions as a scapegoat and weakening such institutions for unrelated national political supremacy battles is totally irresponsible and in no way assists the fight against impunity and the realisation of justice.

Condemning the ICC as an "*International Caucasian Court for the persecution and humiliation of people of colour*"[9] or insulting its staff as "*a bunch of useless people*"[10] is certainly populist and meant to serve the political interests of a few individuals.

My understanding is that international courts such as the ICC are not established to serve the political interests of certain states or individuals but rather are channels of justice for the victims of grave violations when their national courts and institutions fail or have no interest in prosecuting[11] the crimes committed against them, often by the very people in power. For all intents and purposes, this is a court of last resort.

If states seek to resolve domestic cases in a regional framework which has a better chance of creating broader acceptance among stakeholders, they are advised to provide an environment that will foster fair trial in accordance with internationally accepted standards and free from any manifestation of interference.

From the foregoing, the trial and conviction of the former Chadian President Hissene Habre by the Extraordinary African Chambers in Senegal in May 2016 can largely be perceived as a success story in the fight against impunity and for the furtherance of the rule of law in Africa.

It is worth mentioning that the resistance by several national courts to have their independence undermined by the executive and the political elite in the last ten years is something worth celebrating. South African courts present positive examples in this regard. Nevertheless, a ruling by an independent court is just the first step; compliance and enforcement are the next important steps if justice is to be served.

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9 Remarks attributed to Gambian Information Minister, Sheriff Bojang. It is worth noting that most of the cases before the ICC were in fact referred to it by the African States themselves.

10 Remarks attributed to Ugandan President; Yoweri Museveni.

11 Article 17 of the Rome Statute.

Using the experience and lessons of the last ten years to mirror the future, there is no doubt that a lot of work remains to be done to strengthen the weak areas and also improve and consolidate the progress already made.

With the support and collaboration of our partners on the continent we will continue to:

- Advocate for independent, strong and effective prosecution and judicial arms at all levels, especially in matters touching on international crimes;
- Fight against corruption and impunity;
- Advocate for strong democratic regimes that facilitate development across all spheres while respecting the tenets of the rule of law and principles of separation of powers;
- Promote human rights, particularly the social and economic rights of African citizens;
- Promote gender equality.

In this regard, the Program will strive to support the rising generation of lawyers and other key policy makers with the aim of preparing and equipping them with the necessary skills and knowledge to be competent and effective custodians of the rule of law on the continent.

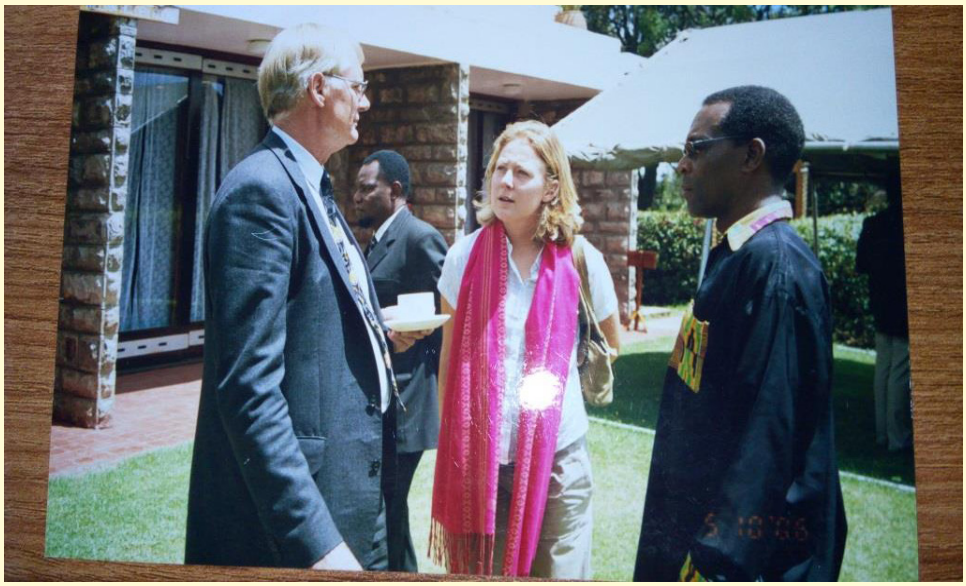
We recognise that the above aspirations can only be achieved through strong networks across the continent. Therefore, the Program will continue engaging state and non-state actors for the mutual benefit of all African citizens.

Konrad Adenauer Stiftung and this Program in particular does not pretend to offer solutions to the challenges facing Africa and indeed the world, but it intends to make its contribution by continuously engaging and offering support to willing partners and collaborators in pursuit of a just society that guarantees human rights, human dignity and development for all.

I extend my sincere appreciation to all our partners and collaborators for their support in the last ten years, without whom the existence and success of this Program would not have been attained.

I also wish to thank my predecessors, the late Mr. Gerd Bossen and Prof. Dr. Christian Roschmann for their visionary stewardship and the entire Konrad Adenauer Stiftung fraternity for their support.

Gerd Bossen (2006– 2007)



The Late Gerd Bossen (L) conversing with Prof. Shadrack Gutto (R) at the inaugural conference in Nanyuki, 2006.

Prof. Christian Roschmann (2008 – 2014)

Prof. Roschmann (R) handing over to Dr. Wulff in February 2014

Lastly, my sincere appreciation goes to my dedicated team comprising Mr. Peter Wendoh, Ms Sabrina Lahrmann, Ms Inez Odongo, Mr. Jacob Ariek and past members of staff, consultants and interns, all of whom have contributed immensely to the success of this Program this far.

I urge all of us not to stop, but to soldier on! Success in life is made up of little progressive steps and so is the Rule of Law!

A WALK THROUGH THE PROGRAM'S FIRST DECADE

By Peter Wendoh[12]

Africa is the second largest continent and has the second largest population in the world. The continent is endowed with rich deposits of minerals and natural resources as well as an incredible variety of peoples, cultures, animals, climate and spectacular places and features that cannot be found anywhere else in the world. In economic terms Africa is a very rich continent!

Regrettably, the continent is struggling to maximise on its potential and has suffered its fair share of conflicts, human rights violations and instability due to a concoction of factors both internal and external. One of the main contributors to the current retrogression, or at the very best, stagnation, is bad governance and a weak rule of law regime. It is an open secret that governance on the continent is centered around, and directed by a handful of political elite at the expense of strong and effective institutions.

The positive experiences of regional Rule of Law Programs in Latin

12 Project Advisor.

America, Asia and Europe and the Foundation's own conviction that democracy, economic and social development in Africa, like everywhere else in the world, are only achievable and sustainable under a thriving and strong rule of law regime, inspired the Foundation to start the Rule of Law Program for Sub-Saharan Africa.

The journey began in October 2005 in Mweya region of Western Uganda during a consultative meeting among key stakeholders from various African countries. The meeting brought together judges, representatives of the Bar Associations, the Civil Society, academia, practicing lawyers, human rights activists and other interested groups. From the onset, it was apparent that such an initiative was long overdue.

It is on the backdrop of the strong support and buy-in from the key stakeholders that the Program began its operations in January 2006 based in Nairobi, Kenya. The Program covers all the African countries except Morocco, Tunisia, Libya, Algeria and Egypt[13].

Owing to the broad concept of the rule of law; few critical thematic areas that are common across the continent were identified and isolated as the main strategic focus of the Program. These include:

I. PROMOTION AND PROTECTION OF THE INDEPENDENCE OF THE JUDICIARY

> *'For a society to thrive under an environment of freedom, democracy, justice and respect for human rights, it is important for that society to have and believe in a culture of a respected, independent, impartial and fearless Judiciary.'*[14]

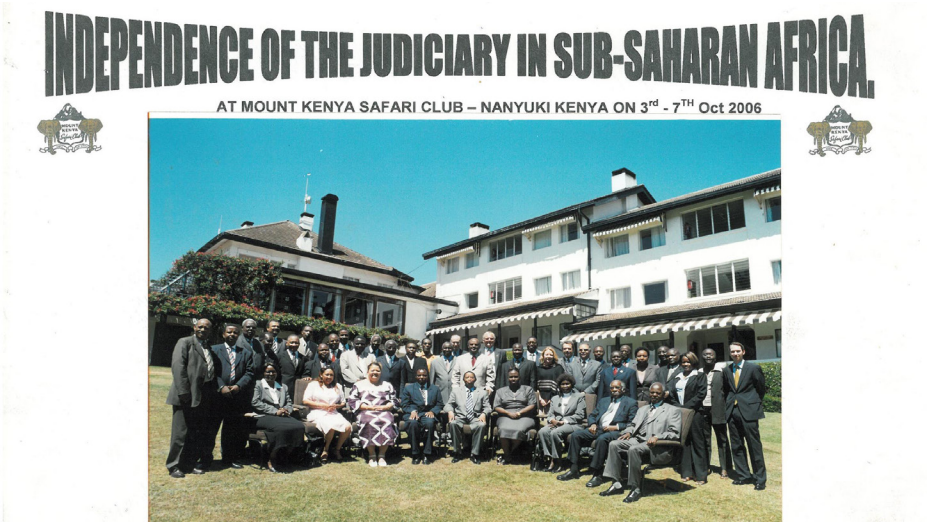
Recognizing the judiciary as the shield and guarantor of human rights and liberties coupled with its important role in balancing and checking State power, the Program identified its independence as a vital ingredient in realizing a thriving rule of law regime in Africa. The Program has since sought to contribute to judicial independence on the continent by focusing specifically on the constitutional and legislative framework that establishes and governs the functioning of the judiciaries on the continent; the legal and administrative policies that regulate the appointment, promotion and removal criteria of

13 The five countries are under the Middle East/North Africa Program based in Beirut, Lebanon.

14 GW Kanyeihamba, Constitutional and Political History of Uganda: From 1984 to the Present, Kampala, Centenary Publishing House (2002), p. 289.

judicial officers; the fiscal autonomy of the judiciaries and the extent to which court decisions are respected and enforced. Several conferences, seminars and workshops as well as study and information visits were organized for judges and other key stakeholders.

The very first activity after the inauguration of the Program was a Stakeholders' conference on the Independence of the Judiciary in Sub-Saharan Africa that was held in October 2006 in Nanyuki, Kenya. The conference was attended by senior judges from Kenya led by the Hon. Chief Justice (as he then was) Evans Gicheru, Uganda, Tanzania, South Africa, Ethiopia, Rwanda, Burundi and Namibia and Malawi.



At the end of the conference the delegates resolved to *inter alia:*

- Form a strong network in the region that will work towards the harmonisation of laws and policies at national and regional level that impact directly on the independence of the judiciary,
- Take forward through in-depth research, exchange of views among all key players and to play an active role towards the finalisation of basic Pan-African Principles and Best Practice model as relates to the independence of the judiciary in Africa,
- Work closely with the African Union and the Pan-African Parliament to ensure that there is harmonization of policies, laws and practices as regards the independence of the judiciary,
- Promote and lobby for the independence of the judiciary in their respective countries and the region as a whole.

A follow-up conference was held in June 2008 in Entebbe, Uganda that brought together participants from Kenya, Uganda, Tanzania, Burundi, Rwanda, Ethiopia, Democratic Republic of Congo (DRC), South Africa, Namibia, Malawi, Botswana, Mozambique, Cameroon, Mali, Gambia, Nigeria, Cote D'Ivoire and Southern Sudan. There were national heads of judiciaries, judge presidents of regional courts, judges, heads of National Assemblies and members of Parliament, members of the executive, national and regional Law Societies, Civil Society, the media and academia.

CONFERENCE ON THE INDEPENDENCE OF JUDICIARY IN SUB-SAHARA AFRICA
TOWARDS AN INDEPENDENT AND EFFECTIVE JUDICIARY IN AFRICA
AT IMPERIAL RESORT BEACH HOTEL,ENTEBBE UGANDA. JUNE 24 - 28 2008

II. SUPPORT OF CONSTITUTION - MAKING PROCESSES AND PROMOTION OF CONSTITUTIONALISM IN AFRICA

> *'Even in countries where the democratic culture and institutions for sustaining constitutionalism are fully developed and functioning well, the process of implementing the constitution remains a challenge….the challenge therefore is to design a normative framework for constitutional implementation which is not vulnerable to being stalled by self-interested politicians or government officials."*[15]

Out of the realization that the social, legal and political agreement among the people of any state is paramount to the kind of relationship they have and the stability of such a society, the Program has focused on supporting various constitution-making and constitutional reform initiatives by laying emphasis on the legitimacy and credibility of both the process and the product. Generally, the Program has established that it is not necessarily the lack of a constitutional textual framework that is in short supply on the continent but rather, it is the implementation of these constitutions. In this regard, the Program has endeavoured to identify and address issues that contribute to the general lack of full implementation of the constitutions on the continent.

The Program has supported several events and publications under this thematic area including:

- Stakeholders' conference on the *State of the Rule of Law in Sub-Saharan Africa***,** held in Mombasa, Kenya in October 2006;
- Stakeholders' conference on *Constitution-making, Ratification and Implementation of International Instruments in Sub-Saharan Africa*, held in South Africa, February 2007;
- Stakeholders' conference on *Constitutional Adjudication in Sub-Saharan Africa* held in Tanzania, June 2007;
- Capacity Building Workshops for senior government officials on the constitution of Kenya, 2010 under the theme 'Rule of Law and Governance under the new Constitutional Dispensation: Implications for the Kenyan Public Service';

15 The Implementation of Modern African Constitutions: Challenges and Prospects, Charles Manga Fombad (ed), Pretoria University Press (2016), p. 223.

- Series of Stakeholders' fora on the Tanzanian Constitutional Reform Process;
- Stakeholders' conference on the *Implementation of Modern African Constitutions* held in Pretoria, South Africa**,** June 2016

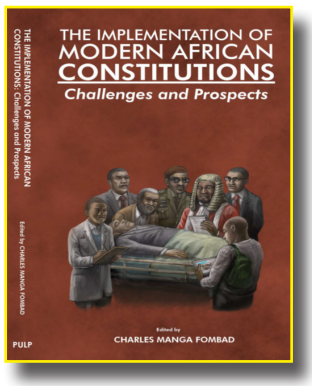
From (L-R) the late Hon. Mutula Kilonzo (then Minister for Justice and Constitutional Affairs - Kenya) with Prof. Bitonye Kulundu (then Director, Kenya School of Law) at one of the Capacity-building workshops for senior government officials in Naivasha, Kenya

Citizens at an open public forum on constitutional reform process in Dar es Saalam, Tanzania

On the left, young Tanzanians leading a discussion on constitutional reforms and on the right Prof. Christian Roschmann addressing delegates at an open forum in Arusha.

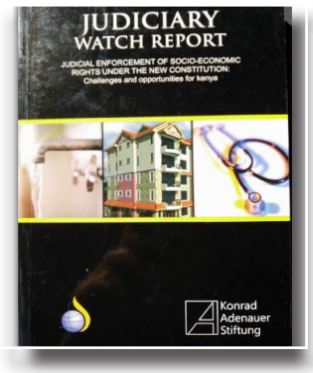
Delegates at the stakeholders' conference on the Implementation of Modern African Constitutions, Pretoria, South Africa

The publications include;



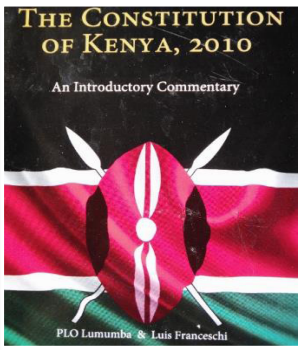
The Implementation of Modern African Constitutions: Challenges and Prospects, 2016

Published in collaboration with the Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria



Judicial Enforcement of Socio-Economic Rights under the new Constitution:

Challenges and Opportunities for Kenya (ed. Japhet Biegon & Godfrey Musila), 2011



The Constitution of Kenya:

An Introductory Commentary by PLO Lumumba & Luis Franceschi, 2014

Other notable publications in collaboration with the Kenyan Sections of the International Commission (ICJ – Kenya) include,

- *The Legal Profession and the new Constitutional Order in Kenya (ed.* Yash Pal Ghai & Jill Cottrell Ghai) 2014
- *Ethnicity, Human Rights and Constitutionalism in Africa,* 2008

III. SEPARATION OF POWERS

> *'The balancing game in the separation of powers is as important as the separation of powers itself if tyranny and absolutism is to be avoided….It will be observed that the principle of separation of powers, philosophically, historically, as well as practically, is a proven tenet of good governance which is essential for progressive well-being. The principle of separation of powers allows co-ordinated action at certain levels and is intended to result ultimately in the overall progressive well-being of society and individuals…"*[16]

The Program advocates for strong institutions as a guarantee to safeguarding the tenets of the rule of law on the continent. It therefore focuses on strengthening of institutions for effective checks and balances by *inter alia* reviewing how these institutions are created, their functional and financial autonomy in exercising their mandate and their relationship with other key governance institutions. The need for distribution of power and effective mechanisms to ensure that such power is exercised on behalf, and in the interest of the citizens cannot be gainsaid as it has been proven that '*unlimited power is apt to corrupt the minds of those who possess it*'.[17]

A stakeholders' conference on *Separation of Powers in Sub-Saharan Africa* held in Cape Town, South Africa in November 2006 remains one of the most well-balanced in terms of sector representation of all our events to date. Cabinet ministers in charge of justice and constitutional affairs from four countries;[18]

16 Excerpt from Justice Rizine Robert Mzikamanda's paper entitled 'The Role of the Judiciary in Safeguarding the Principle of Separation of Powers in a Democratic State', delivered at Konrad Adenauer Stiftung's Stakeholders' Conference on Separation of Powers in Sub Saharan Africa held in Cape Town, South Africa, 2006… Cf 'The Concept and Theory of Separation of Powers and the Role of Government Branches' by Prof. Garton Kamchedzera, 26th – 27th January 2006.

17 As was observed by William Pitt the Elder, Earl of Chatham and former British Prime Minister (1766 – 1778).

18 Hon. Brigitte Mabandla, South Africa; Hon. Bazuka Mhango, Malawi; Hon. Martha Karua, Kenya and Hon. Hashim Mohammed Tewfik, Ethiopia.

high-ranking members of the legislature[19] and senior judges[20] among other participants attended the event which not only granted them an opportunity to discuss pertinent issues in a closer and candid manner and disabuse each other of misplaced mistrust, ego and 'turf wars', but also set the platform for continuous engagement in a bid to serve the people better. Academia, the civil society and the media were also represented at this event.

Another stakeholders' workshop on *Decentralization and Administrative Law in Francophone Africa* was held in Dakar, Senegal in February 2010 in a bid to promote distribution of power and resources from the centre (often capital cities) and take them closer to the people in the various regions.

Participants at the Dakar workshop

19 Hon. Joseph Chimango, Speaker of the National Assembly, Malawi; Hon. Jean-Marie Rugira, President of the Senate – Burundi; Hon. Peter Oloo Aringo, Vice Chair of Kenya's Parliamentary Service Commission; Hon. Hafeni Ndemula, Chair, Committee on Constitutional and Legal Affairs, National Council of Namibia and Hon. Paul Muite, Chair, Legal and Administration of Justice Committee of the National Assembly, Kenya led a host of members of parliament from different countries.

20 Justice JDG Maritz, Supreme Court of Namibia; Justices AK Tembo and JB Kalaile, Supreme Court of Malawi; Justice JWN Tsekooko, Supreme Court of Uganda; Justice Emmanuel O'kubasu, Court of Appeal, Kenya; Justice Louis Marie Mugenzi, Supreme Court of Rwanda and Justice Gregoire Nkeshimana, Vice President of the Supreme Court of Burundi led a host of judges at all levels from various countries.

IV. PROMOTION AND PROTECTION OF HUMAN RIGHTS

> *'Once you have (justiciable) socio-economic rights in the Constitution and the Bill of Rights, I think it is too late to say that these are mere aspirations that cannot be enforced. Otherwise you are saying the founders of the Constitution played a hoax on the people. Because they are in the Constitution, they are pledges to the people – so you cannot say the difficulties of enforcement or impracticability should mean that judges say that it is too difficult'*[21]

The Program lays emphasis on the economic, social and cultural rights of the people. Besides assessing the extent to which fundamental rights and freedoms are enshrined in the respective constitutions, the Program evaluates the extent to which these rights and liberties are respected, upheld and enjoyed by all. It assesses the enforcement mechanisms put in place to guarantee full enjoyment of those rights. The recent modern constitutions on the continent provide for a wide range of rights and liberties which, if fully implemented and adhered to, will undoubtedly result into a better Africa; where the rule of law, human rights and human dignity shall dictate governance and developmental agenda.

In addition to the national courts, the African Court on Human and Peoples' Rights has been identified as an important organ in the promotion and protection of human rights on the continent.

In 2014, in collaboration with the Pan African Lawyers Union (PALU) a stakeholders' conference on the *Current Role and Proposed Evolution of the African Court: Keys for a Comprehensive Engagement of the African Human Rights System*" was convened in Arusha, Tanzania to *inter alia*:

- Reflect on the emerging African Human Rights System;
- Reflect on the progress, prospects and challenges of the existing African Court;
- Reflect on the progress, prospects, challenges and way forward for the future African Court with international criminal jurisdiction;

21 S Rajab-Budlender & N Budlender Judges in conversation: Landmark human rights cases of the twentieth century (2009) 166…Cf Judiciary Watch Report – Judicial Enforcement of Socio-Economic Rights under the new Constitution: Challenges and Opportunities for Kenya (eds. Japheth Biegon & Godfrey M. Musila) 2011, p. 33.

and

- Identify avenues to support the current and future Court.

Key speakers at the conference included Hon. Justice Gerard Niyungeko, Judge of the African Court on Human and Peoples' Rights and former President of the Court; Dr. Robert Eno, the Registrar of the Court on Human and Peoples' Rights; Mr. Hassan Jallow, UN Under Secretary General and the Chief Prosecutor, International Criminal Tribunal for Rwanda/Mechanism for International Criminal Tribunals (ICTR/MICT); Mr. Tom Bahame Nyanduga, Former Commissioner at the African Commission on Human and Peoples' Rights; Dr. George Mukundi, Head of the African Governance Architecture (AGA) Secretariat among others.

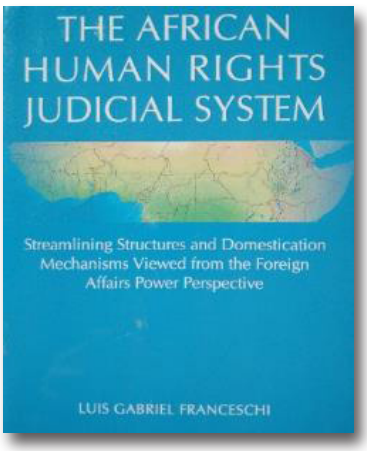
(L-R) Mr. Hassan Jallow and Dr. Robert Eno addressing delegates at the stakeholders' conference

A visit by the delegates to the African Court on Human and Peoples' Rights

Other notable events include:

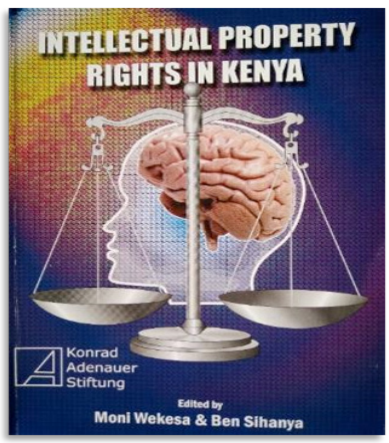
- Stakeholders' Conference on the *Freedom of the Press and Freedom of Information in Africa*, held in Addis Ababa, Ethiopia in February 2009 and
- *Training and Advocacy Workshop on the Rules of Procedure of the African Court, African Commission & ECOWAS Court of Justice* under the theme *Strengthening the Protection of Women Rights in West Africa,* held in Dakar, Senegal in February 2015.

Published works include,



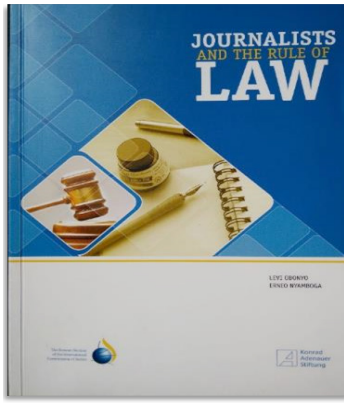
The African Human Rights Judicial System. Streamlining structures and domestication mechanisms viewed from the foreign affairs power perspective

(ed. Dr. Luis Gabriel Franceschi, 2014)



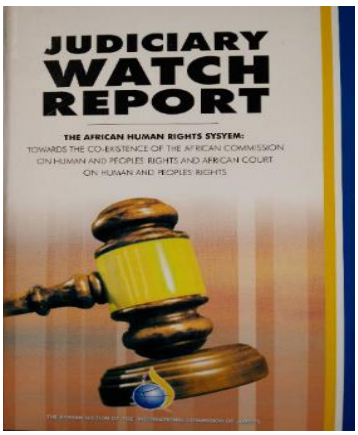
Intellectual Property Rights in Kenya

(ed. Moni Wekesa & Ben Sihanya,2009)



Journalists and the Rule of Law

(ed. Levi Obonyo & Erneo Nyamboga, 2011) in collaboration with ICJ Kenya



The African Human Rights System: Towards the co-existence of the African Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights

(ed. Frans Viljoen, 2006) in collaboration with ICJ Kenya

V. PROMOTION AND PROTECTION OF DEMOCRACY

> *'Successful and effective implementation of the African Charter on Democracy, Elections and Governance in the SADC region (and Africa in general)* **emphasis mine** *clearly requires mechanisms that will ensure sustainability as part of the domestication of the Charter. Observers argue that this entails* ***…domesticating good practices which have proved successful in other areas of the continent. The concept of domestication… does not entail blind copying of ideas from other countries or regions but rather applying those ideas to specificities of local conditions, that is, taking cognizance of complexities and difficulties in each country, and applying the practices to address those conditions*** *– (Ajulu and Lamin, 2007:11)'*[22]

The Program supports initiatives geared towards enhancing participation of the citizenry in democratic processes at all levels. In this regard, it endeavours to ensure that all players participate fully and freely in democratic processes and those that are marginalized such as women[23], youth[24] and people with disabilities[25] are fully supported to play a meaningful role in the process, particularly at the highest level of decision-making.

Among the activities that the Program has supported include;-

- Stakeholders' workshop on *Governance and Democracy in the SADC Region* held in Johannesburg, South Africa, in May 2015 in

22 Prof. Kealeboga J. Maphunye (PhD)'s paper 'Hurdles Confronting SADC Countries on the Implementation of the African Charter on Democracy, Elections and Governance – A Compendium of Speeches and Presentations , 27 – 28 May 2015, Johannesburg – South Africa, SADC LA Report, page 31.

23 Owing to their large number and the critical role they play in society at the social and economic levels, it is imperative that their voices and place in the political arena is respected and granted, not as 'flower girls', but as real decision and policy makers and implementers.

24 The youth population on the continent continues to grow and they must therefore be involved in key decision-making processes that not only affect them today but also has a bearing on their future. Never should they be used as 'cheerleaders'; militia or 'gangs for hire' by those in political leadership.

25 This group does not need hand-outs or programmes crafted by people who may not necessarily understand their plight; rather they yearn for empowerment and equal opportunity to fulfil their potential and contribute meaningfully to democratic processes and the general development of our societies.

partnership with the SADC Lawyers' Association (SADC LA)

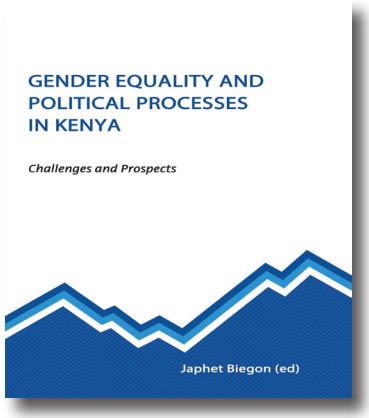
- The Annual Jurists' Conference on *Achieving Gender Equality in Political Process, from theory to practice: Lessons for Africa* held in Kenya in November 2015 in partnership with the Kenyan Section of the International Commission of Jurists (ICJ Kenya)

Group photo: Delegates at the 2015 Annual Jurists' Conference

(L-R) H.E. Dr. Maureen Mwanawasa former First Lady of Zambia and Hon. Martha Karua, former MP and Kenyan Presidential candidate (2013)

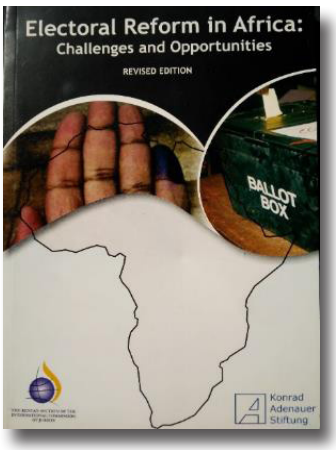
(R) Some of the female MPs at the conference

Some of the published works include:



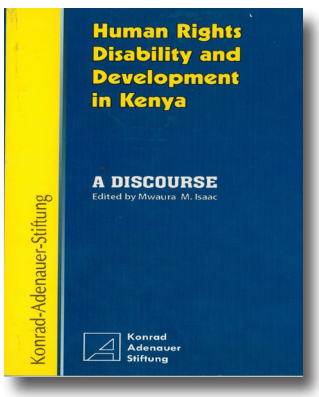
Gender Equality and Political Processes in Kenya, 2016

(published in collaboration with ICJ Kenya)



Electoral Reform in Africa:

Challenges and Opportunities, 2011 (published in collaboration with ICJ Kenya)



The Program also supported the publishing of a book (the only one of its kind in Braille) that reviews the interplay between **Human Rights, Disability and Development in Kenya**

(ed. by Isaac Mwaura, 2009)

VI. ADVOCATING FOR GOOD GOVERNANCE AND FIGHT AGAINST IMPUNITY

> *'Corruption is sometimes mistakenly been referred to as a victimless crime. This is because, unlike most other crimes the victims are not always immediately aware that a crime has taken place and cannot always identify the perpetrators. Nevertheless, the consequences of corruption for people in Africa are real and are staggering….In Africa, the social and political consequences of corruption deprive nations of resources and potential, it drives inequality, resentment and radicalisation and thereby contributes to instability, violence and mass migration.'*[26]

It is an open secret that corruption and widespread impunity are the biggest threat to any rule of law regime. Africa remains largely under-developed and her citizens regarded as the world's poorest, in spite of the rich mineral deposits and other natural resources available on the continent mainly due to corruption and bad governance. The Program contributes to the fight against these vices by advocating for and promoting transparency and accountability in governance processes at all levels. The Program's focus is on the empowerment of citizens to play an active role in governance processes aimed at preventing rather than dealing with the consequences of corruption for stability and sustainable development.

Some of the notable events in the fight against corruption include;

- Stakeholders' Conference on *Activism against Corruption in Africa* held in Johannesburg, South Africa in November 2016;

Justice (Rtd) Johann Kriegler making his contribution

26 Gareth Newham, Head of the Governance, Crime and Justice Division Institute for Security Studies in his keynote remarks at KAS' Stakeholders' Conference on Activism Against Corruption in Africa, 22 - 25 November 2016, Johannesburg, South Africa.

Conference on *Combating Corruption in Africa* held in Cape Town, South Africa in 2015; and

- Stakeholders' Conference on *The interplay between Budgetary Control, Corruption and Human Rights in Africa* held in Entebbe, Uganda in July 2014.

Dr. Gaby Schäfer, the President of the Budget Control Institution of Schleswig - Holstein,Germany sharing the German experience

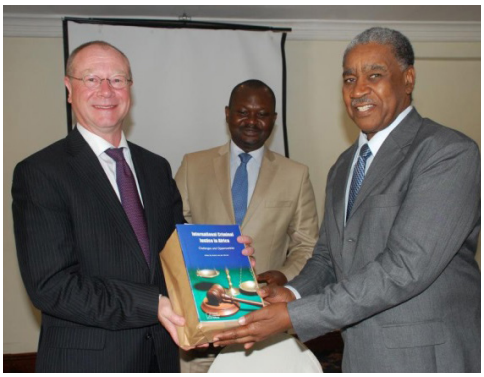
The Fight against Impunity: Criminal Accountability for Serious Crimes

International criminal law is a subject that is rapidly gaining prominence on the continent especially after the establishment of the International Criminal Court (ICC) in The Hague. It is for this reason that the Program supports a group of African Experts on International Criminal Justice comprising practitioners, scholars and researchers who seek to address this subject from an African perspective by not only focusing on international institutions such as the ICC but also Africa's own mechanisms. The group meets annually to discuss various topical issues and members contribute articles that are published in an annual report.

Membership to this group is voluntary and is driven by an individual's passion and commitment. ICC's Chief Prosecutor Fatou Bensouda and Jean-Xavier Keita, Principal Counsel at the Office of Public Counsel for the Defence at the ICC, Presidents and Judges of African Court on Human and Peoples' Rights, members of the African Commission and the various Regional Courts are some of the prominent people who have engaged and interacted with the group and have endorsed its contribution to this important yet sensitive subject.

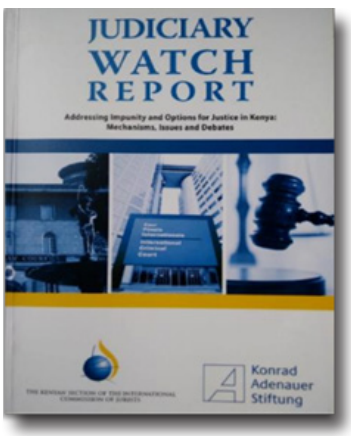
Members of the group with the ICC delegation led by Chief Prosecutor Fatou Bensouda (6th from the left) at a meeting in Nairobi in 2012. Other officials present were Jean-Xavier Keita (extreme left)

Below: From (L-R) representatives of the group paying a courtesy call on the President of the African Court on Human and Peoples' Rights Justice, Syvian Ore (in the middle) in Arusha, Tanzania, 2016 and Dr. Arne Wulff handing over the 2014 report to the then President of the African Court on Human and Peoples' Rights, Justice Ramadhan, at the official opening of the 2015 Annual workshop in Arusha, Tanzania



In addition to the Annual reports published by the Experts' Group, the Program has also supported other publications including;

Addressing Impunity and Options for Justice in Kenya: Mechanisms, Issues and Debates, 2009 in collaboration with ICJ Kenya



VII. PROMOTION OF REGIONAL INTEGRATION

In light of globalization, it is imperative for nations to foster strong regional blocs in order to have a stronger voice and realize their full economic and developmental potential which are paramount to state and regional peace, stability and social cohesion. The Program has endeavoured to support regional programs in particular in the area of strengthening regional judicial bodies and advocating for harmonization of legal framework and policies that facilitate safe, easy and free movement of the people and goods for the benefit of the ordinary people in the respective regions.

Some of the notable initiatives undertaken by the Program include:

- Two stakeholders' workshops on *Restoring the SADC Tribunal* held in Pretoria, South Africa in August 2014 and in Gaborone, Botswana in February 2016;
- Prior to the disbandment of the SADC Tribunal the Program had institutionalized an Exchange Programme between the SADC Tribunal and the East African Court of Justice (EACJ) which saw judges and senior court officials from the two Courts exchange visits annually to discuss topical issues from their regions and share their experiences. As a result of the strong ties forged then, EACJ has been among the strong supporters for the restoration of the SADC Tribunal to date.

Members of the two courts during some of the exchange visits in Arusha, Tanzania and Windhoek, Namibia respectively

- Further, the Program was actively involved in the establishment of the Association of East African National Human Rights Institutions between 2010 and 2011 bringing together the National Human Rights Institutions for the five (5) EAC Partner States.

Joint initiative of the Association held in Kigali, Rwanda

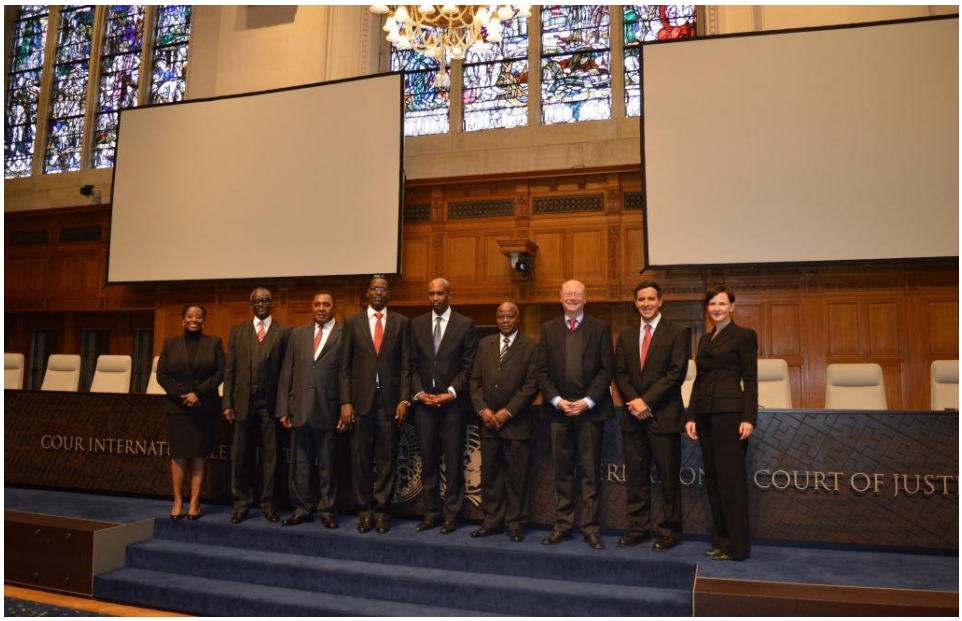
The official signing of the MoU

CAPACITY-BUILDING ACTIVITIES

The Program recognizes the importance of continuous learning and exposure as part of capacity building for the various institutions on the continent and it is for this reason that we have continuously supported study visits and exchange programmes within and beyond the continent. Below are some of the most important study visits that the Program has supported and facilitated since its inception:

- In 2007, soon after the African Court on Human and Peoples' Rights began its operations in Addis Ababa, Ethiopia, the Program facilitated a study tour for all the 11 Judges at the time to the ICC headquarters at The Hague, the European Court for Human Rights, the German Federal Constitutional Court, the Inter-American Court for Human Rights and the Supreme Court in Washington;
- In September 2007, five (5) Presidents of the Constitutional and Supreme Courts from Western and Central Africa visited Germany's legal and judicial institutions. A similar study tour was organized for the five (5) Chief Justices from the East African Community in February 2012;
- Different sets of judges of the East African Court of Justice visited the ICC, the European Court of Justice and the European Court for Human Rights and various German legal and judicial institutions in March 2011 and October 2015 respectively.

East African Court of Justice delegation at the ICC



East African Court of Justice delegation at the International Court of Justice

East African Court of Justice delegation at the European Court of Human Rights.

Conversely, European counterparts have also visited Africa to not only share their experiences and expertise on various issues but to also understand and learn from the African perspective. For example, owing to the similarities between the German Federal Constitutional Court and the Constitutional Court of South Africa, Judge Prof. Herbert Landau from the German Federal Constitutional Court visited the South African Constitutional Court in March 2011 to experience first-hand how this Court, which is widely praised on the continent, was operating.

Judge Prof. Herbert Landau in discussion with Justice Albie Sachs

Judge Prof. Herbert Landau in discussion with the Chief Justice and Deputy Chief Justice at the Constitutional Court in South Africa

The Program has also invested heavily in activities that target the next generation. For instance, the Program:

- supports *educational measures (scholarships), research* and *dialogue programmes* that not only strengthen the network among young African citizens but also exposes them to the world and offers them a platform to engage in order to effectively handle local needs both now and in the future;
- supports regular training seminars and annual joint- regional meetings for young legal researchers mainly from Francophone Africa; and supports the publication of their works under a series known as *KAS African Law Study Library*. This has opened many doors and opportunities for career progression for many of them.

In 2014, the Program partnered with the University of Nairobi and the Centre for Human Rights, the University of Pretoria to host the *23rd Africa Human Rights Moot Court Competition* in Nairobi.

EMERGING FRONTIERS

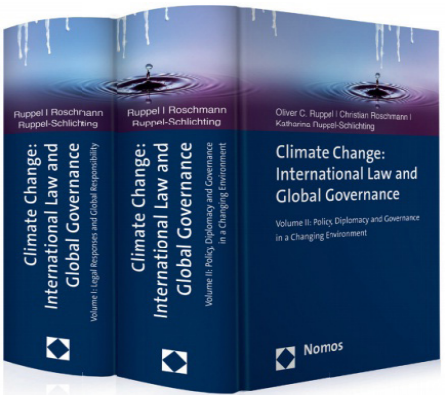
In the course of our work new areas have emerged that have an impact on the rule of law. These include terrorism[27] and climate change.

In 2013, the Program supported the publication of a two-volume edition on *Climate Change: International Law and Global Governance* (ed. Prof. Dr. Oliver C. Ruppel, Prof. Dr. Christian Roschmann and Dr. Katharina Ruppel-Schlichting)

Volume I: Focuses on the *Legal Responses and Global Responsibility* towards Climate Change and

Volume II: Focuses on *Policy, Diplomacy and Governance in a Changing Environment*

This is a comprehensive reference book on climate change issues with contributions of 80 renowned authors from all over the world.



The editors Prof. C. Ruppel (L), Dr. Katharina Ruppel-Schlichting (M) and Prof. Dr. Christian Roschmann at the launch of the publication

27 In 2014, in collaboration with Strathmore Law School (SLS), we convened a Stakeholders' Conference on the theme Terrorism: Challenges to Emerging Democracies in Africa in a bid to understand this phenomenon and its likely impact on the legal, political and socio-economic well-being of African countries (SLS, August 2014, Nairobi).

Besides the publication the Program was involved in convening *Stakeholders'* fora in collaboration with the United Nations Environment Programme *(UNEP)* to deliberate on various topical issues around this subject. This includes;

- The first ever *Africa Colloquium on Environmental Rule of Law* held in Nairobi in October 2015 at the UNEP Complex in Gigiri that brought together more than 200 delegates from all over Africa drawn from various sectors including judicial officers, cabinet ministers, prosecutors, representatives of environmental enforcement agencies, legal practitioners, academia, media and civil society representatives.

- A workshop for *East and Southern Africa to Reflect on UNEA-2 Outcomes and Climate Change Adaptation through a Multi-stakeholder Approach* held in Nairobi in September 2016.

- In July 2014, the Program supported a *Training Workshop for African Diplomats* in Addis Ababa, Ethiopia in collaboration with the African Institute of International Law on how to negotiate international treaties with specific reference to Climate Change for the ultimate benefit of Africa.

MOVING INTO THE FUTURE

Whereas this Program does not in any way pretend to offer solutions to the numerous challenges facing Africa, it endeavors to support rule of law and political development processes by specifically, offering platforms that enable an exchange of ideas, experiences, expertise, successes and challenges among key players within the fields of rule of law, politics, economics and the society in general, with a view to finding practical and sustainable solutions for Africa for the ultimate benefit of the people of Africa.

In pursuit of its objectives, the Program will continue engaging with key stakeholders on the continent not only as the ultimate beneficiaries of the initiatives but also as the rightful owners of the processes.

Every African citizen on the streets, homes, markets, offices, positions of power and authority is a key stakeholder for the Program. However, various cadres of people and institutions comprising of policy makers, policy shapers and implementers have been selected as the core strategic partners in the implementation of the Program's activities and projects. They include judges, prosecutors, legislators, the executive, political parties, legal institutions, Bar Associations, academia, civil society, and the media.

Some of our main partners for the last ten years include,

IFAISA ACCOUNTABILITY NOW

Accountability NOW – http://*accountabilitynow.org.za*

African Court on Human and Peoples' Rights

IFAISA African Court on Human & Peoples' Rights *http://en.african-court.org*

African Institute of International Law
http://aiil-iadi.org

Association of Law Reform Agencies for East & Southern Africa
http://www.justice.gov.za/alraesa

Catholic University of Bukavu
http://www.ucbukavu.ac.cd

East African Court of Justice
http://eacj.org

East Africa Law Society
http://www.ealawsociety.org

Inter-governmental Authority on Development
https://igad.int

Kenya School of Law
http://www.ksl.ac.ke

Kenyan Section of the International Commission of Jurists
http://www.icj-kenya.org

National University Rwanda
http://www.ur.ac.rw

Network of African National Human Rights Institutions
http://www.nanhri.org

Pan-African Lawyers Union
https://lawyersofafrica.org

SADC Lawyers' Association
https://www.sadcla.org

UNIVERSITEIT
STELLENBOSCH
UNIVERSITY

Stellenbosch University
http://www.sun.ac.za

Strathmore University (School of Law)
http://www.strathmore.edu

The Greater Horn Horizon Forum

African Court Coalition
http://www africancourtcoalition.org

Uganda Law Society
http://www.uls.or.ug

United Nations Environment Programme
http://www.unep.org

Gaston Berger University
http://www.ugb.sn

University of Benin
https://www.uniben.edu

University of Burundi
http://www.ub.edu.bi

University of Kinshasa
https://www.uniben.edu

University of Lubumbashi
http://www.unilu.ac.cd

University of Nairobi
http://www.uonbi.ac.ke

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

University of Pretoria

(Centre for Human Rights and Institute for International and Comparative Law)
http://www.up.ac.za

The continued growth of robust networks of key stakeholders at all levels across the continent is one of the main successes of our Program in the last ten years. As a result of these coalitions, the rule of law is increasingly becoming an important agenda item within national, regional and continental debates. For instance, in 2010, the Assembly of the AU Heads of State and Government established an African Governance Architecture (AGA), which was designed to establish a framework for developing and interlinking the numerous initiatives and processes at national and regional levels. The objective is to work in a coordinated and effective manner that will help achieve democratic governance and enhance respect for human rights and the rule of law on the continent.

Undoubtedly, this is a step in the right direction which Africa can ride on notwithstanding the prevailing structural, logistical and resource scarcity challenges facing the initiative.

Together, we can make a DIFFERENCE.

STAKEHOLDERS' SYMPOSIUM ON THE OCCASION OF CELEBRATING 10 YEARS OF THE RULE OF LAW PROGRAM FOR SUB SAHARAN AFRICA

The partners, collaborators and friends of the KAS Rule of Law Program for Sub-Saharan Africa comprising judges, legal practitioners, representatives of NGOs, scholars, media, students and politicians from all over Sub-Saharan Africa convened at Strathmore University in Nairobi on 15th and 16th November 2016 to commemorate ten years of the Program's existence on the continent. A symposium to review the past achievements and reflect on the future challenges and prospects was the highlight of this event which was officially opened by Kenya's Chief Justice Hon. David Maraga and closed by the Attorney General of the Republic of Kenya.

I. KEYNOTE REMARKS AT THE OFFICIAL OPENING OF THE SYMPOSIUM[28]

By Hon. Justice David K. Maraga

Distinguished Guests,

Ladies and Gentlemen,

It is my honor and privilege to give this keynote address at this symposium on the Rule of Law in Africa. The fact that this important event is being hosted at one of our country's most prestigious universities provides a unique opportunity for the participants to share great ideas on the subject of the Rule of Law in Africa.

Ten years is a long time, and as Konrad Adenauer Foundation reflects on its Rule of Law Program in Africa, the Judiciary will be waiting to receive a report on the lessons learnt. Our transformation agenda, which we began about five years ago, shall benefit immensely from these deliberations.

We all recall that after a long struggle and many false starts, Kenya finally ushered in a new constitutional dispensation on the 27th of August, 2010. Our constitution engenders various key concepts of constitutionalism: Checks & Balances; Individual Rights; Popular Sovereignty; Separation of Powers; Limited Government; devolution and the rule of law. Indeed, the rule of law is one of the national values and principles of governance enshrined in Article 10 of our Constitution.

28 Chief Justice and President of the Supreme Court of the Republic of Kenya.

Ladies & gentlemen,

The hope and aspiration of the people of Kenya, in passing the 2010 Constitution, is that it will promote a just and equitable society where sovereign power is exercised, on a fiduciary role, by our leaders. Organs of State, like the Judiciary, are agents of service delivery, and not avenues through which rights are violated and the citizen oppressed.

In promulgating one of the world's most progressive Constitutions, and in making the rule of law one of its high points, the Kenyan public played to the oath of fealty, allegiance and fidelity to the principle pronounced by Montesquieu who affirmed that '**be ye so high, the law is above you'.** The aspiration is that we must be a country governed by law not men; a country where the government and its officials as well as individuals and private entities are accountable under the law; a country where the laws are clear, stable, and just and are applied evenly; a country where fundamental rights are protected; a country where the process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient. Finally, we would like to live in a country where justice is delivered timely by a competent, ethical, and independent judiciary. A judiciary made up of neutrals who are of sufficient number and have adequate resources to deliver on their mandate. This is my promise to the people of Kenya.

It is indeed relevant that almost 60 years after independence, over two decades of plural politics, a decade of the birth of the new generation of Constitutions in Africa, and slightly over a half a decade of experimentation with extra-territorial jurisdiction questions in criminal law, we reflect deeply on our past and take stock of the prospects and challenges that lie ahead. This symposium would not therefore have come at a more appropriate time.

The question that I would like to pose is this: Where is our position as a country and as a continent with regard to the rule of law? Have we allowed the law to take its rightful position of authority within the society; or do we still allow our leaders to make arbitrary decisions, that have no basis in law and which portend far-reaching socio-political and even economic ramifications? Have we established sufficient checks and balances or are there institutional excesses and overreach? Does the law apply evenly to the mighty and ordinary, the rich and poor?

Whereas I look forward to this Symposium providing answers to these questions, my reading of the African situation is that our record on the rule of law is mixed. Many countries have Constitutions that proclaim all the

main elements of the rule of law but do not observe it. For example, on the independence of the Judiciary, whereas most countries in Africa claim it, in reality, this independence is undermined either directly, through executive and legislative actions, or subtly, through financial blackmail or capture by private interest, most of it corrupt. It is also a fact that the law affects the poor more adversely than it affects the rich undermining the rule of law notions about equality before the law. And in a continent where over half the population lives below the poverty line, the law risks being seen as an instrument of domination and subjugation of the poor rather than an instrument of justice.

Ladies and gentlemen,

Since the year 2010 when the current constitution was passed in this country, the Judiciary has undergone several transformative stages to make it not only a custodian of the basic constitutional principles, but also a champion of fundamental rights. In order to promote the rule of law, the Judiciary has expanded its access to the justice infrastructure by hiring more judicial officers, tripling the number of mobile courts and instituting various policies including bail, bond and sentencing guidelines. The Judiciary has also persistently and constantly reaffirmed its independence, creating the right jurisprudence on various issues of law, especially on the bill of rights. We have relentlessly given effect to the principles of checks and balances by knocking off legislative provisions that offend the Constitution. There can be no rule of law, however progressive the Constitution may be, if you have a Judiciary that is weak and cowardly. It is my commitment to provide a leadership of courage and steadfastness that ensures that the Judiciary protects and upholds the Constitution.

Further, as part of our transformation programme, the Judiciary, in realization that corruption is an enemy of the rule of law, embarked on steps to root out the vice and ensure that those citizens who seek justice get it without delay or bias. As I take on my new role as Chief Justice, I shall strengthen this effort by consolidating the various accountability institutions that have been set up for this purpose. The Office of the Ombudsperson, the JSC Inspectorate Unit, the Directorate of Internal Risk and Audit within the Judiciary shall be reorganized and energized to deliver on their obligations.

At the level of the courts, the Anti-Corruption Courts shall be revitalized and the back to back hearings of corruption cases that have begun, and are producing results, will be enhanced. Indeed, this year alone, based on the reforms in the anti-corruption court, EACC has registered 17 convictions - the highest number of convictions in a single year since EACC was established! I

have made the fight against corruption one of the key undertakings that will define my tenure. I take this opportunity, therefore, to call upon other arms of government and departments to join hands with me in this noble cause of stamping out the cancer of corruption that is ruining our country and the future of our heritage. And this week, I will be hosting the NCAJ agencies to discuss how further collaboration can be achieved in the investigation and trial of corruption cases. In the next few weeks, I will be formally launching the High Court Division on Anti-Corruption and Economic Crimes as well as inaugurate the Rules that will guide the court.

Ladies and Gentlemen,

As you are all aware, this country will be holding a general election next year. We no doubt recall that some of the major atrocities in human history have been preceded by election conflicts.

Disrespect for the law and anarchy have in the past prevailed when citizens fail to accommodate each other's views during electioneering periods. There is need therefore to have strong institutions that are capable of resolving election related disputes. I am happy to inform you that the judiciary is already preparing procedures and processes for election dispute resolution. Just before I was appointed Chief Justice, I was the Chairperson of the Judiciary Committee on Elections (JCE) and I am therefore privy to the ongoing comprehensive preparations and measures that Judiciary is putting in place in readiness for the elections.

Ladies and Gentlemen,

Kenya is much a part of the international community and learns and contributes to the development of the Rule of Law regionally and internationally. Both the East African Community and the African Union, of which Kenya is a member, have important institutions that are key to the nurturing and growth of respect for the law. The East African Court of Justice, for example, is one of the organs of the East African Community established with the responsibility of ensuring observance to the law in the interpretation and application of, and compliance with the EAC Treaty. The African Charter on Human and People's Rights on the other hand is established as an international human rights instrument that is intended to promote and protect human rights and basic freedoms on the African continent. My hope is that this forum will find time to interact proactively on ways through which such organs and instruments can better achieve the tenets of the rule of law in

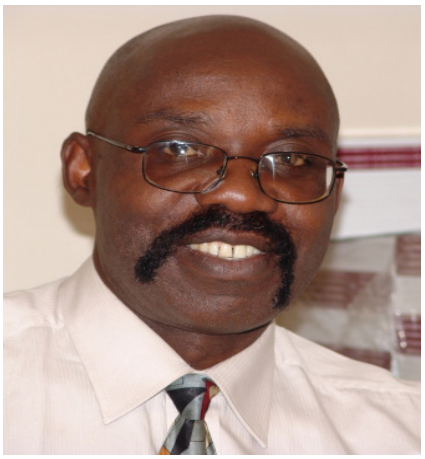
Africa. Africa as a continent is blessed with vast resources and a hard-working population. Yet dwindling commitment to the rule of law, corruption and weak institutions have undermined the realization of its full potential.

Even for those who may not be too high-minded, our commitment to the rule of law should be guided by its practical and pragmatic utility. The rule of law is good politics and good economics because it stabilizes society and creates certainty in business transactions. As the educated elite of this continent, the responsibility to author Africa out of its present misery rests with us. Let us seize the opportunity to revitalize this continent; to redirect its focus and renew its strength and vision.

I want to thank Konrad Adenauer Stiftung for organizing this symposium and to congratulate you as you celebrate ten years of the Rule of Law's Program existence on the continent. The Judiciary of Kenya assures you of its utmost support and looks forward to collaborating with you.

I thank you for the invitation and attentiveness.

II. THE IMPLEMENTATION OF MODERN AFRICAN CONSTITUTIONS: CHALLENGES AND PROSPECTS[29]



By Charles Manga Fombad[30]
Lic-en-Dt (Univ. of Yaounde), LL.M., Ph.D (Univ. of London)

1. INTRODUCTION

In the absence of full and effective implementation, a constitution, regardless of how prodigious it may be or purport to be, will be nothing more than a piece of "printed futility." Post-independence constitutions were quickly reduced to pieces of printed futility by the ease with which African leaders regularly and casually ignored or altered them to perpetuate themselves in power. It is therefore surprising that the issue of constitutional disobedience and infidelity was hardly given the prominence it deserved in the constitutional revision epidemic that has gripped the continent since the early 1990s.

29 This is an abridged version of some ideas fully developed in chapters 2 and11 of Charles Manga Fombad (ed), *The Implementation of Modern African Constitutions: Challenges and Prospects,* Pretoria, Pretoria University Law Press (PULP), 2016.

30 Professor of Law, Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria, South Africa.

Constitutional implementation is not only crucial to political stability but also central to sustaining constitutionalism, respect for the rule of law and good governance. The establishment of a specialised institution to deal with the implementation of the constitution under the Kenyan 2010 Constitution has underscored the importance of this issue as well as opened new vistas on how to critically engage with the challenges posed by the non-implementation of African constitutions.

I want to touch on three points:
First, why constitutional implementation is such an important issue;
Second, the different approaches to implementing constitutions;
Third, some ideas towards developing a sustainable normative constitutional implementation framework; and Fourth, concluding remarks

2. CONCEPTUALISING THE ISSUE OF CONSTITUTIONAL IMPLEMENTATION

In a broad sense, constitutional implementation can be defined as the process which is designed to ensure the full, effective and continuous working of a constitution by promoting, enforcing and safeguarding it. It is and should be an integral part of constitution-building and constitution-making both of which are not "one-off" events which start and end with the adoption of a new constitution.

The arguments against constitutional disobedience and its consequences go to the very core of constitutionalism. If it is accepted that the fundamental objective of a constitution is both to limit government in a manner that prevents the twin evils of anarchy and tyranny and promote constitutionalism, respect for the rule of law, good governance and democracy, it becomes clear that these objectives will be put in jeopardy if the constitution is not fully and effectively implemented. There are at least three reasons why I think the issue of constitutional implementation deserves more attention than it has so far received.

First, the constitution-making process is not a "one-off" event which starts and ends with the drafting and adoption of a new constitution. Nor is the legitimacy of the process once earned a guarantee that this legitimacy will be sustained throughout the life of the constitution. Constitutions are never perfect documents that will satisfy everybody. Rather, they are delicate and carefully negotiated compromises arrived at after hard and often protracted bargaining that try to satisfy, take account of, accommodate, reflect and incorporate the diverse and often conflicting interests, fears, concerns, hopes, aspirations and desires of all the citizens. It is therefore inevitable that these

compromises could be distorted if the constitution is not, or only partially, enforced and implemented.

Second, a constitution, however elaborate and comprehensive it may purport to be, cannot provide all the laws, rules, regulations and other measures that are needed to ensure that society functions properly. Because a constitution is not a self-enforcing piece of legislation and is usually couched in broad outlines, it leaves details concerning institutions, the laws regulating them and other matters for subsequent legislation. If there is no mechanism for ensuring that these institutions are duly established and the necessary laws enacted, the constitution will only have limited effect.[31]

Finally, when governments feel free to choose which constitutional provision to honour and which to ignore, and when to do so, the very raison d'être of a constitution and constitutionalism in general is called into question. The certainty and predictability that the agreed commitments, duties and obligations contained in the fundamental law of the land will be scrupulously respected and enforced is critical to political stability and the confidence needed to attract investment in the polity. Failing such certainty, trust in the government, the main agent of constitutional implementation, will be put in jeopardy and in so doing, peace is put at risk. How is this problem being dealt with?

3. THE DIFFERENT APPROACHES TO PROMOTING AND FACILITATING CONSTITUTIONAL IMPLEMENTATION

So far, recent practice shows that there are four main ways in which African constitutions are being implemented:

i. Constitutions containing time-limit provisions for implementing certain obligations;
ii. Constitutions which provide special institutions for implementing its provisions;
iii. Institutionalised actors and institutions which play some role in the protection, interpretation and enforcement of the constitution; and
iv. Non-institutionalised actors: the actual and potential role of citizens and Civil Society Organisations (CSOs).

31 For example, chapter 9 of the 1996 Constitution of South Africa provided for the establishment of a number of state institutions to strengthen its constitutional democracy. This chapter only provided a broad framework whilst the detail legislation regulating the functioning and powers of these institutions was later enacted by Parliament.

3.1 Constitutions containing time-limits provisions for implementing certain obligations

To facilitate the process of implementation, some constitutions specify that certain specific laws must be adopted or institutions set up within specified time limits. Many examples of this appeared in the South African constitutions and a few others. The critical question which has so far hardly been answered is of course what happens if the obligation to enact laws or set up certain institutions within specified time limits is not complied with? Most constitutions gloss over this issue. Could section 324 of the 2013 Zimbabwe Constitution which states that "all constitutional obligations must be performed diligently and without delay," make a difference?

3.2 Specially created constitutional implementation institutions

Specially created constitutional institutions with responsibility to oversee and supervise the implementation of the constitution are a novelty. The best and most far-reaching African example is the Commission for the Implementation of the Constitution (CIC) that was provided for under section 5 of the sixth schedule of the 2010 Kenyan Constitution. The only other African example is the Review and Implementation Commission provided for under the dysfunctional provisional Constitution of the Federal Republic of Somalia, 2012. Quite unwisely, the designers of the CIC gave those who have the least inclination to strictly implement the constitution the right to terminate its mandate and they did not hesitate to terminate it.

3.3 Formal institutional actors and institutions with some role to play in the protection, interpretation and enforcement of the constitution

Although only certain specified officials take an oath to respect and enforce the constitution, constitutional enforcement is an obligation that applies not only to these officials or even government officials appointed directly or indirectly under the constitution, but also to all citizens. Nevertheless, it can be said that the primary responsibility for implementing the constitution rests with the executive, particularly the president. Their role can be described as active, proactive and reactive. The other two branches also play an important part although it can be said that the role of the judiciary is essentially reactive. The role of the three branches of government is usually reinforced and complemented by that of other actors such as citizens, civil society organisations and specialised constitutional institutions, which are considered separately below.

3.4 Non-institutional actors: Citizens and civil society organisations

The effectiveness of a constitution depends as much on its success in reflecting the desires and hopes of the people as well as their manifest will to protest, protect and defend it against any actual, threatened, active or passive violation of its provisions. A robust citizenry and an activist civil society are of critical importance to the implementation of the constitution.

Civil Society Organisations (CSOs), especially the media and legal profession, must be ready and willing to challenge any actions that adversely threaten the proper implementation of the constitution.

However, civil society can only counter the threats posed by active or passive violation of the constitution if they have knowledge of the constitution. One of the hindrances to constitutional implementation is the extensive lack of knowledge of the constitution and consequently the rights and obligations it imposes especially on the ruling elite. It is incumbent on CSOs to increase public awareness, especially in rural areas, about the constitution, its contents and the rights and obligations it imposes on all persons and institutions, both public and private. The Kenyan Constitution underscores the role of the people in the whole constitutional implementation process when it states that all sovereign power belongs to the people of Kenya and is only delegated to the three branches of government. The starting point is article 1(1) which states that "all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with th[e] Constitution." It then adds in article 1(3) that the sovereign power is only delegated to the three branches of government namely, executive, legislature and judiciary and must be exercised in accordance with the Constitution. This is reinforced in articles 10, 129 and 232 which provide for the participation of the people in all facets of law execution, including policy making. This departure from emphasis on the sovereignty of the state under the 1969 Constitution to sovereignty of the people in the 2010 Constitution is deliberate and underscores the importance of active involvement of the people in the successful and effective implementation of the constitution. This is why article 3 (1) states that: "Every person has an obligation to respect, uphold and defend th[e] Constitution." A similar approach is adopted by the Ugandan 1995 Constitution. Article 3(3) and (4) states that "all citizens of Uganda shall have the right and duty at all times" to defend the constitution and resist any action by any person or group who try to suspend, overthrow, abrogate or amend the constitution contrary to its provisions. It makes such conduct treason. Article 4 provides for the

promotion of public awareness of the Constitution.[32]

In spite of all this, it is a fact that very many provisions in most African countries continue to be ignored by those in power. In most cases, these are the provisions that try to limit the risks of dictatorship, the most common being the provisions dispersing powers by way of decentralisation. What can we do?

4. TOWARDS DEVELOPING A SUSTAINABLE NORMATIVE CONSTITUTIONAL IMPLEMENTATION FRAMEWORK.

Even in countries where the democratic culture and institutions to sustain constitutionalism are fully developed and functioning well, the process of implementing the constitution remains a challenge. As African countries grapple with the challenges of meeting the high expectations raised by new or revised constitutions which have gone a long way to entrench and promote constitutionalism, good governance and respect for the rule of law, there remain many obstacles to making these constitutional aspirations a reality. This is mainly from conservative forces or opportunists who prefer to operate under the opaque systems of the past. The challenge therefore is to design a normative framework for constitutional implementation that is not vulnerable to the process being stalled by self-interested politicians or government officials.

From the experiences of the last decades, I want to suggest what I think can be considered as the critical elements of a new normative constitutional implementation framework. These are:

1. The integration of measures and mechanisms to implement the constitution as an integral part of the constitution-making process.
2. As an important lesson from the Kenyan experience, every constitution should provide for a constitutional implementation commission. To improve on the Kenyan CIC the following measures should be constitutionally entrenched:

32 It states: "The State shall promote public awareness of this Constitution by-
(a) Translating it into Ugandan languages and disseminating it as widely as possible; and
(b) Providing for the teaching of the Constitution in all educational institutions and armed forces training institutions and regularly transmitting and publishing programmes through the media generally."

i. It should be made permanent because constitutional implementation is not a time-bound activity but rather one that will go on throughout the life of the constitution.

ii. Its mandate should be clearly spelt out to avoid any conflicts with other institutions and actors who have a role to play in the process.

iii. Finally, to ensure that the institution is genuinely independent and capable of performing its functions, it needs to be protected and shielded from political manipulation and interference. In this respect, the four "establishment and governing principles," provided for under section 181 of the Constitution is a good starting point.[33]

3. A legal duty to implement the constitution should be constitutionally entrenched. Elements of such a duty would include

i. A provision imposing a general mandatory duty to implement the constitution, rather than leaving constitutional implementation to the discretion of the government. E.g. section 2 of the SA Constitution states that "the obligations imposed by it must be fulfilled"

ii. Strict time lines must be set for complying with certain obligations. E.g. section 324 of the Zimbabwean Constitution states that "all constitutional obligations must be performed diligently and without delay." The wording of this provision appears to be sufficiently strong enough to justify an action to be taken for lack of diligence and undue delay in discharging constitutional obligations. The challenge however is to determine against whom such an action can be brought. One could borrow a leaf from the decision of the South African

33 Section 181 provides as follows:
i) These institutions are independent and subject only to the constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
ii) Other organs of state, through legislative and other measures, must assist and protect these institutions, to ensure the independence, impartiality, dignity and effectiveness of these institutions.
iii) No person or organ of state may interfere with the functioning of these institutions.
iv) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly & Others,* and *Democratic Alliance v Speaker of the National Assembly and Others*[34] where it held, inter alia, that the failure of the National Assembly to hold the President accountable and ensure that he complied with the remedial action taken against him was also violation of their constitutional duty under section 181(3) of the South African Constitution. One could argue that where a failure to carry out a constitutional duty results in some deprivation, loss or suffering, then the advantage of having a section 324 is that, an action can be brought against the authority that was supposed to act to request the court to order it to perform its duty with due diligence and undue delay.

iii. To further strengthen the possibility of an action for non-compliance with constitutional duty or obligation, the *locus standi* rules for constitutional action can be expanded.[35] The right of public interest action is a necessary response to the growing popular disenchantment with the unwillingness of many public officials and institutions to perform their duties. This will strengthen the hand of individuals and CSOs to actively monitor and expose public officials and institutions that are not complying with their constitutional mandate.

What emerges from the relative success of the South African 1996 Constitution is that effective constitutional implementation involves a good combination of many of the factors discussed here viz, strong and assertive CSOs, constitutionally entrenched and independent institutions, especially

34 [2016] ZACC 11 of 31 May 2016.

35 In this regard, article 22(2) of the Kenyan 2010 Constitution states that proceedings for violation of the Constitution could be instituted by:

(a) a person acting on behalf of another person who cannot act in their own names;
(b) a person acting as a member of, or in the interest of, a group or class of persons;
(c) a person acting in the public interest; or
(d) an association acting in the interest of one or more of its members.

Article 22(2) even goes further to limit formalities relating to proceedings to a minimum and provide that the court shall, "if necessary, entertain proceedings on the basis of informal documentation," and that "no fee may be charged for commencing the proceedings." A similar approach is provided for under section 85 of the 2013 Zimbabwe Constitution. The 2010 Angolan Constitution in articles 73-75 also appears to broaden the rules of *locus standi* but the language in which this is couched and articles 228 and 230 which restricts access to certain specified personalities casts serious doubts about its effectiveness.

those like the Chapter 9 institutions which are responsible for enforcing certain aspects of the constitution, and a properly functioning multi-party environment. Nevertheless, there is an important international dimension which must not be ignored.

5. THE INTERNATIONAL DIMENSION OF CONSTITUTIONAL IMPLEMENTATION

Although the authorship and ownership of a constitution as well as its implementation is essentially a national issue, the international community in general and regional organisations today have a legitimate interest as well as a duty in many respects, to bolster national efforts to implement the constitution. A government can no longer hide behind the principle of sovereignty and non-intervention to violate their constitutions in a manner that will not only put the lives of their citizens at risk but also directly or indirectly threaten international peace and security.

Be that as it may, the role of external actors in facilitating the implementation of a constitution may be limited but is very important. A distinction should be made here between the role of the international community in general and that of regional organisations such as the African Union (AU) and Regional Economic Communities (RECs).

These external actors can provide assistance by providing the funds for constitutional awareness campaigns and the publication of constitutions in local languages. They can also fund CSOs as well as offer them useful advocacy and constitutional implementation monitoring tools.

The AU has a reasonably strong framework for promoting democracy and good governance consisting of five major agreements viz, the Constitutive Act itself, the Declaration on the framework for an OAU (AU) response to unconstitutional changes of government of 2000, the Declaration on the principles governing the democratic elections in Africa of 2002, the Guidelines for African Union Electoral Observations and Monitoring Missions, and the African Charter on Democracy, Elections and Governance 2007.

The most potentially significant AU agreement that could give the organisation leverage to influence its member states in the implementation of their constitutions is the African Charter on Democracy, Elections and Governance which came into force in 2012. There is doubt whether there is sufficient political will to do so. This is due to the fact that the organisation is usually unable to garner the political support it needs for sanctions to be imposed.

6. CONCLUSION

It is clear that constitutional infidelity or disobedience through non-implementation is not often an accident. There is no longer any reason to assume that all the different actors involved in the process of implementing a constitution will be equally anxious to do so. Political convenience and other forms of self-interest often overtake constitutional imperatives. Nevertheless, non-implementation of constitutional provisions, especially over prolonged periods, clearly amounts to an illegitimate means of altering the constitution.

The entrenchment of constitutionalism in Africa has been and continues to be retarded by self-seeking elites who still want to use constitution and democracy as a smokescreen behind which to continue to perpetuate the repressive and autocratic practices of the past. It is thus no surprise that in spite of the many liberal provisions in post-1990 African constitutions, the quality of constitutional governance, respect for human rights and the rule of law and other indicators of good governance still shows that much of the progress that has been made remains stymied by the challenges of constitutional implementation.

Constitutional implementation must therefore be made a priority issue for any constitution-making process. Designing any constitutional framework today that will stand a good chance of being implemented in a transformative manner to improve the lives of the people must incorporate an implementation process and the necessary institutions to make this work. Such a design must include at least three fundamental elements: first, a special constitutional implementation institution, like Kenya's CIC, to complement and strengthen the role of the constitutional courts or bodies exercising constitutional review, which act as guardians and custodians of the constitution and its implementation; second, a number of independent constitutional institutions of accountability to promote good governance and accountability and third, the constitutionalisation of certain operational principles that will guarantee the independence of these institutions and shield them from political capture and manipulation. Ultimately, it must now be recognised that a constitution will only achieve its purpose of promoting constitutionalism, good governance and respect for the rule of law, if its implementation and enforcement can be guaranteed and put beyond the good will of any individual, group of individuals or institution. One of the main lessons of the last six decades of constitutional developments in Africa is that incorporating constitutional mechanisms and institutions to oversee, supervise and monitor the implementation of the constitution is now a critical aspect of constitutionalism.

III. WHY CORRUPTION IS DESTROYING AFRICA'S FUTURE

By Gail Washkansky[36]

1. INTRODUCTION

Thank you for the invitation; it is an honour and a privilege to be here among friends of KAS and those who drive its rule of law programme. Accountability Now really values the opportunity to be part of the work which KAS does in Africa. The goals of KAS overlap with our goals: Consolidating Democracy, promoting freedom, peace and justice. Protecting of and advocating for human rights and the dignity of all human beings is paramount as well as teaching people how to be accountable and take responsibility for their own actions in addition to holding their leaders to account. Accountability Now focuses on exacting accountability and promoting responsiveness through civic education and "law fare".

2. THE WORK OF KAS IN BRINGING STAKEHOLDERS TOGETHER

Accountability Now experiences the KAS Rule of Law programme as extensive in its outreach to individual countries. Working through the African Union (AU) it facilitates networking and the exchange of ideas with various key stakeholders by means of conferences, workshops, seminars and various other platforms that bring people together to facilitate collaborative innovation. The range of role players including civil society organisations, government bodies and communities helps to develop partnerships that play an important role

36 Operations Officer, Accountability Now (IFAISA).

in strengthening civil society. Coordinating these different elements helps to build a culture of coalition societies that support democratic institutions. This collaboration provides civil society with more leverage with which to challenge local government and to be both brokers and mediators between civil society and government during times of protest and upheaval. It also enables civil society to monitor and evaluate government policies. KAS is making a vital contribution to this changing context and it is hoped that through the work that it does in Sub-Saharan Africa it will encourage a new generation of vibrant civil society leadership. Now, more than ever civil society needs to form coalitions and work together in order to bring about positive change and to overcome the scourge of corruption that is sweeping through Africa today. The rule of law programme encourages collaboration, integration and innovation. A strong civil society leads to the strengthening of the rule of law thus safeguarding the independence of the judiciary, constitutionalism, human rights and democracy. An overall result is political stability, economic development and social cohesion. The people of Africa owe a debt of gratitude to the tax payers of Germany who provide the funding to KAS and to the Rule of Law oriented system of governance in Germany which replaced the dark days of the Reich.

3. THE RULE OF LAW

As far as the rule of law is concerned I would like to share a definition from the World Justice Project (WJP). The WJP uses a working definition of the rule of law based on four universal principles, derived from internationally accepted standards. The rule of law is a system where the following four universal principles are upheld:

1. The government and its officials and agents as well as individuals and private entities are accountable under the law.
2. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
4. Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

The WJP makes the point that "effective rule of law reduces corruption, combats poverty and disease, and protects people from injustices large and small. It is the foundation for communities of peace, opportunity, and equity

– underpinning development, accountable government, and respect for fundamental rights."

The WJP 2015 survey reveals that in many cases the rule of law is eroded as a result of government recalcitrance and lack of political will to uphold the law. Corruption and the weakening of the ability of state institutions to rectify the abuses by those in authority occurs when the rule of law is not properly in place. South Africa's overall profile score on the 2015 Rule of Law index was 0.59 (scores range between 0 being the lowest and 1 being the highest of eighteen countries in the region) placing it in first place in the region of Sub-Saharan Africa. Ghana was placed second with a score of 0.58 and Botswana came third with a score of 0.58 while Kenya was placed 14th with a score of 0.43. Cameroon had the lowest profile score (0.37) in the region. There is no perfect score as each country will have strong and weak areas. All countries no matter how strongly they fare will or should be in a constant process of encouraging a rule of law culture. The more committed a country is to advancing norms that promote the rule of law the stronger its governance. When the norms are not upheld the integrity and sustainability of state institutions is significantly compromised as those in government use political manoeuvring to avoid, or even worse, disable anti-corruption efforts. In South Africa, only the Public Protector has escaped these phenomena.

It is inescapable that accountability is an essential element of the rule of law and of the success of governance in the 21st century. Hence the focus of Accountability Now on the exacting of accountability from those in positions of power, in government, business and civil society. In Africa a major challenge to accountability is endemic corruption both in the private and public sector. Examples of our work include: Compelling a commission of enquiry into the arms deal (in 1999 South Africa borrowed money from European banks to buy jets, submarines, frigates and helicopters from European arms dealers to the value of 29 billion rand to defend the country against enemies it does not have). That saga continues. The *Glenister* litigation concerning the disbanding of the effective and independent anti-corruption entity known as the Scorpions and its replacement with a police unit called the Hawks which is neither effective nor independent. Breaking the bread cartel was the case about three bread manufacturers who were found guilty of fixing the price of bread and colluding to push up the cost of bread to consumers whilst decreasing the commissions payable to small bread distributers. *Bheki Cele* was a politician who was appointed as national police commissioner. He was dismissed after the Public Protector investigated our complaint and found irregularities regarding lease deals for police headquarters at three times the going commercial rate.

As long ago as March (2nd- 8th) 2013, a leading article in the Economist made this plea: "*Only if Africans raise their ambitions still further will they reach their full potential. They need to take on the difficult jobs of building infrastructure,* rooting out corruption *and clearing the tangle of government regulation that is still holding them back. And they should hurry.*"

The problem identified in March 2013 was referred to in a leading article in the Economist again in April (16th-22nd) 2016: ". . . *African governments need to keep up the hard slog of improving the basics. Bad roads, grasping officials and tariff barriers still hobble trade between African countries, which is only 11% of total African exports and imports. Improving that means investing in infrastructure,* fighting corruption *and freer trade. Africa's past has long been defined by commodities, but its future rests on the productivity of its people. By 2050 the UN predicts that there will be 2.5 billion Africans – a quarter of the world's population. Given good governance, they will prosper. The alternative is too dire to imagine.*"

It can be seen from the recurring reference to corruption in the commentary of this publication that progress in dealing with corruption in Africa has been slow. This is unfortunate because corruption has the potential to derail a peaceful, prosperous, progressive future for the continent.

In the famous *Glenister* case in South Africa the constitutional majority judgment, written jointly by Deputy Chief Justice Moseneke and Justice Cameron held: "*There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order*". In the later case of the same name Chief Justice Mogoeng remarked "*All South Africans across the racial, religious, class and political divide are in broad agreement that corruption is rife in this country, and that stringent measures are required to contain this malady before it graduates into something terminal. We are in one accord that South Africa needs an agency dedicated to the containment and eventual eradication of the scourge of corruption. We also agree that that entity must enjoy adequate structural and operational independence to deliver effectively and efficiently on its core mandate. And this in a way is the issue that lies at the heart of this matter. Does the South African Police Service Act (SAPS Act), as amended again, comply with the constitutional obligation to establish an adequately independent anti-corruption agency?*"

Because of his concerns about the efficiency and effectiveness because concerns of South Africa's anti-corruption machinery of state, Mr. Glenister has litigated on three occasions in the Constitutional Court assisted by Accountability Now in 2011 and 2014. The decisions in these cases are of universal application worldwide and not only in Africa.

4. OECD REPORT – ANTI-CORRUPTION MACHINARY OF STATE

In essence the Court has adopted the criteria and principles in the OECD report on specialised anti-corruption institutions. The report was a review of models of specialised anti-corruption institutions internationally but is not legally binding. This report identified the main criteria for effective anti-corruption agencies and the Court identified five characteristics that efficient and effective anti-corruption entities should have. Accountability Now has developed an acronym – STIRS – in respect of these criteria– Specialisation, Training, Independence, Resources, and Security of tenure. This acronym ought to be at the forefront of any discussion of legal reform anywhere in Africa where the need to root out corruption is under discussion. It is only through a specialised entity that dedicates its full attention to corruption and organised crime that the scourge can be dealt with. Its personnel must receive training in the skill and expertise required to deal with the corrupt, they must be properly resourced with guaranteed budgets and they must enjoy security of tenure of office. The entity ought to be adequately independent so as to enable personnel to act without fear, favour or prejudice. An entity that can be said to have all of the above characteristics in abundance is well-equipped to conquer corruption; but if it lacks any of these, it will struggle to perform effectively.

More specifically, the parties in the *Glenister* case who attacked the constitutionality of the relevant legislation successfully contended that failure on the part of the state to create a sufficiently independent anti-corruption entity infringes all of the rights guaranteed in the South African Bill of Rights. These include the rights to equality, human dignity, freedom, security of the person, administrative justice and socio-economic rights including the rights to education, housing and healthcare. They also persuaded the Court that in the absence of a STIRS-compliant entity the country would be in breach of its international anti-corruption obligations under UNCAC, the AU and the SADC protocols.

5. THE EFFECT OF CORRUPTION ON POVERTY

Poverty reduction is at the heart of the UN's Sustainable Development Goals (SDGs). The first SDG target is to 'eradicate extreme poverty for all people everywhere.' Goal 16 introduces a framework for improving governance. New Institute for Security Studies (ISS) research tests the impact of better governance on reducing poverty and improving human development in Africa. Results show that by 2050, 60 million fewer people could be living in poverty compared to the current development trajectory. Improving governance also

creates significant gains in GDP, GDP per capita and reductions in infant mortality.

The oft-identified and so called *"triple threats"* (or threatening troika) facing Africa and South Africa have been named as *"poverty, inequality and unemployment"*. Inequality is perpetuated and exacerbated as a by-product of poverty. In the present context, in which the effect of corruption on poverty is under examination, it is perhaps more appropriate to define corruption in the public sector more simplistically as *"theft from the poor"*. This is because corrupt activities have the effect of depriving the poor of the finances and resources that are diverted into corrupt activities whether directly or indirectly as a consequence of the inordinate amount of official energy that has to be expended on covering up past corrupt activities and engaging in them at present.

Whilst it is true that much of the corruption in the private sector does not impact directly on the poor and on poverty alleviation strategies and practices, the indirect effect of private sector corruption is a smaller fiscal catchment area, less tax recovery by government and accordingly fewer resources can be financed out of the fiscal pool.

There can be little doubt that in circumstances in which government is *"clean, just and effective"* (to use the adjectives preferred by Martin Plaut in Who Ruled South Africa, page 267) the capacity of the state to deal with poverty properly is considerably enhanced. The converse is also true, the loss of as much as R30 billion a year in South Africa on corruption in the state tender process, one which is meant to be compliant with the values of section 217 of the Constitution, is a blow to the ability of the state to fund social expenditure aimed at sustainably alleviating poverty. According to an anonymous analysis of official statistics, in the last five years two hundred and ninety three billion has been lost to corruption in South Africa. See Lily Gosam at *http://www.rdm.co.za/politics/2016/11/04/how-the-power-game-inside-the-anc-is-played* .

It can accordingly be argued that ongoing corrupt activity, especially in the public sector, is a major factor in the fight against poverty. With millions of fellow citizens living in relative poverty, the continuation of corruption is intolerable. The recently retired Public Protector, Adv. Thuli Madonsela has pointed to three strategies to steer the country away from a tipping point on corruption that she sees looming. First, public accountability needs to be promoted, secondly, the re-enforcement of transparency – largely via the media – is necessary, and thirdly the culture of impunity that is abroad needs to be tackled via better law enforcement in relation to criminality giving rise to corruption.

Combating corruption and fighting poverty are in many ways two sides of the same coin: the better the results on the former, the rosier the prospects for the latter. Even if only tender fraud and corruption are eliminated, this would free up R30 billion a year in South Africa to be spent on more worthy causes than the feathering of the nests of the corrupt among us.

One of the tenets of Amartya Sen's capability approach is the distribution of opportunities within society. It emphasizes functional capabilities ("substantive freedoms", such as the ability to live to old age, engage in economic transactions, or participate in political activities); these are construed in terms of the substantive freedoms people have reason to value. Poverty is understood as capability-deprivation. Sen is particularly concerned with those opportunities that are strongly influenced by social circumstances and public policy.

The poor are most frequently forced to resort to corrupt practices where marginalisation and political, economic and social exclusion are highest thereby severely limiting their substantive freedoms and capability. Combating poverty and corruption means addressing and overcoming the barriers that stand in the way of citizen engagement and a state's accountability.

6. POLITICAL PARTICIPATION AND ACCOUNTABILITY

According to the Transparency International report entitled the Global Coalition Against Corruption (2008) *"Linking the rights of marginalised communities and individuals to more accountable governments is a fundamental first step for developing a pro-poor anti-corruption strategy. A country's policies are shaped by citizens giving their governments the power to act on their behalf (e.g. the accountability cycle). Corruption by public and private sector actors taints this process, distorts constitutions and institutions, and results in poverty and unequal development. By strengthening political accountability, policies ensure that the poor are seen not as victims but rather as stakeholders in the fight against corruption. Such a refocusing of the issues raises questions about how to address key development frameworks, including Poverty Reduction Strategy Papers (PRSPs), which have been criticised for insufficient accountability and citizen participation. Until now, a consensus on how to strengthen these elements in practice has remained elusive within development.* "

Corruption is destroying Africa's future because it is a symptom of governance that is lacking in integrity, accountability and responsiveness to the needs of ordinary people. Corruption is a crime and needs to be dealt with by the state through effective and independent anti-corruption machinery of the kind ordered in the *Glenister* litigation. The *Glenister* cases are Accountability Now's gift to all Africans who seek to end the culture of impunity that invariably accompanies corruption in high places and to build a peaceful, progressive and prosperous future for our continent.

IV. PROSECUTION OF INTERNATIONAL CRIMES IN AFRICA: FOCUSING ON SEXUAL AND GENDER BASED VIOLENCE

By Dr. Jeanne-Mari Retief[37]

1. INTRODUCTION

The Al-Bashir saga, issues pertaining to the proper functionality of the African Court on Human and Peoples' Rights (ACHPR), the proposed establishment of the African Court on Justice and Human Rights (ACJHR), and the recent withdrawals from the ICC have all become rather "famous" points of discussion in Africa.

Although it is true that Africa faces many challenges and with recent developments it finds itself in uncertain times, one must not lose sight of other very real issues still plaguing the African continent.

In this regard, the issue of sexual and gender based violence (SGV) is still of grave concern. Prosecuting SGV as an international crime in Africa has been a slow (if not stagnant) development over the past decade. Although positive strides have been made through the implementation of various instruments relating to the protection of women's rights, practical outcomes are yet to be realised.

Rape is still being used as an accepted weapon of war and during recent armed conflicts in the DRC it was described as an epidemic with tens of

37 Human Rights Consultant/Attorney, CALIBRICS (South Africa).

thousands of women raped.[38] During 2008 the UN Population Fund found that approximately 15 996 new cases of SGV were registered that year with 4 820 cases reported in North Kivu alone.[39] Many described the brutality of the rapes during 2009 and throughout the ongoing fight for precious minerals, women remain easy victims.[40]

Research shows that SGV increased in recent times due to its effectiveness as a weapon of war.[41] SGV can subdue or punish an entire community, [42] with SGV being perpetrated against women and girls ranging in age from 8 months to 84 years.[43]

As at 2014 charges for gender-based crimes have been brought in six of the nine situations under investigation by the ICC which relate to Uganda, the DRC, the CAR, Darfur, Kenya and the Ivory Coast. 14 of the 19 ICC cases, and 4 of 6 ongoing trials included sexual and gender based violence charges.[44]

Women have historically been seen as spoils of war and if they are considered property they are considered plunder and for this reason women are continuously dehumanised to the point of property during armed conflicts.[45]

During recent raids in Nigeria, Boko Haram abducted women and girls and forced them into marriages with its members. These wives were raped and forced to perform domestic chores.[46] Even though rape was banned in

38 During the life of the various armed conflicts. Cf. Brown C "Rape as a weapon of war in the Democratic Republic of Congo" 2011 *Senior Project Social Sciences Department College of Liberal Arts California Polytechnic State University* 23.

39 Brown (2011) 24.

40 Brown (2011) 27-28.

41 Sexual and Gender based violence charges confirmed by ICC judges at pre-trial stage increased from 50% in 2013 to 62.8% in 2014. Cf. Gender report card on the International Criminal Court" *Women's Initiatives for Gender Justice* 2014 available at http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf.

42 Brown (2011) 29.

43 *Specifi*cally, such charges have been included in: the Kony et al case in the Uganda situation; the Katanga, Ngudjolo, Ntaganda, Mba*rushi*mana and Mudacumura cases in the DRC Situation, the Bemba case in the CAR situation; the Al Bashir, Harun and Kushayb, and Hussein cases in the Darfur *Situation; the* K*enyatta case* in the *Kenya Si*tuation, and Laurent Gbagbo, Simone Gbagbo, and Blé Goudé cases in the Ivory Coast situation. C*f Gender report card on the Internationa*l Criminal Court" Women's Initiatives for Gender Justice 2014 available at http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf.

44 *"Gender report card on the Internationa*l Criminal Court" Women's Initiatives for Gender Justice 2014 available at http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf

45 Brown (2011) 34.

46 "'Our job is to shoot, slaughter and kill': Boko Ha*ram's reign of terror* in North-East Nigeria (April 2015) Amnesty International 4.

territories under Boko Haram control women and girls were still raped in secret.[47]

During conflicts in South Sudan women of all ages were brutally raped and left unconscious and bleeding.[48] The bodies of raped women were found naked and tied up with their legs open.[49] Their genitals were mutilated and their bodies left for others to find.[50]

The first time a militia leader faced charges of sexual and gender based violence in the ICC was in June 2014, when the Congolese warlord Bosco Ntaganda was charged.[51]

The first conviction of using rape as a weapon of war was in 2016 when the militia leader, Jean-Pierre Bemba, was convicted of such charges. The Ugandan warlord, Dominic Ongwen, has also recently been charged with sexual and gender-based crimes and his trial is set to begin in December 2016.[52]

In light of the very real atrocities still being committed against women in Africa during armed conflicts, this paper will focus on the prosecution of SGV in Africa. Although this paper is based on SGV it should be noted that it focuses on the prosecution of SGV in Africa as an international crime committed during armed conflicts, and does not propose to address general SGV crimes within domestic jurisdictions where no situation of armed conflict exists.

Although I will provide brief definitions to SGV this paper does not purport to provide definitions for the various SGV crimes nor does it aim to go into depth about the definition of it in international law. To ensure a holistic view of the argument however it is necessary to give a brief overview of how these crimes fit into international law.

Furthermore, plenty can be said and various criticisms can be made

47 "'Our job is to shoot, slaughter and kill': Boko Haram's reign of terror in North-East Nigeria (April 2015) *Amnesty International* 4.

48 "Final Report on the African Commission of Inquiry on South Sudan" (15 October 2014) *African Commission of Inquiry on South Sudan* par 380.

49 "Final Report on the African Commission of Inquiry on South Sudan" (15 October 2014) *African Commission of Inquiry on South Sudan* par 518.

50 "Final Report on the African Commission of Inquiry on South Sudan" (15 October 2014) *African Commission of Inquiry on South Sudan* par 538.

51 "Sexual and Gender violence based crimes" *Coalition for the International Criminal Court* available at http://www.coalitionfortheicc.org/fight/strong-icc/sexual-and-gender-based-crimes

52 "Sexual and Gender violence based crimes" *Coalition for the International Criminal Court* available at http://www.coalitionfortheicc.org/fight/strong-icc/sexual-and-gender-based-crimes.

regarding the ACHPR, the proposed functionalities of the ACJHR, and the recent withdrawals from the ICC. It is not the objective of this paper to discuss this in full, but in order to provide accurate arguments to the practicalities related to the adequate prosecution of SGV in Africa it is necessary to give brief references to some of these arguments.

2. BACKGROUND TO SGV AS AN INTERNATIONAL CRIME

For many years domestic and international systems ignored crimes based on SGV,[53] but in recent times the prohibition of sexual violence during armed conflicts has become a *jus cogens* norm creating *erga omnes* obligations.[54] It has also been established through court precedent that SGV can be prosecuted as a crime against humanity, a war crime or genocide.[55]

Many definitions for rape, sexual violence and gender based crimes have also emerged and for purposes of this paper, broad definitions of SGV, gender-based crime and sexual crimes will be provided:

Sexual violence for purposes of this paper will be held to indicate a form of gender-based violence and encompasses any sexual act, attempt to obtain sexual act, unwanted sexual comments or advances and can be displayed in many forms ranging from rape to trafficking in persons.[56] Gender-based violence will refer to any act against persons based on their gender.[57]

Gender-based crimes for purposes of this paper is held to mean acts committed against persons based on their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender.[58]

Taking the above definitions into account this paper will refer to sexual

53 Honourable Goldstone, "Prosecuting rape as a war crime" 34 2002 *Case Western Reserve Journal of International Law* 276,280.

54 Dyani N, "Sexual violence, armed conflict and international law in Africa" 15 2007 *African Journal of International and Comparative Law* 230, 242.

55 "Sexual and gender-based violence in the context of transitional justice" (October 2014) *United Nations Human Rights Office of the High Commissioner*. Also refer to paragraph 3 below for further detail.

56 "Sexual and gender-based violence in the context of transitional justice" (October 2014) *United Nations Human Rights Office of the High Commissioner*.

57 "Sexual and gender-based violence in the context of transitional justice" (October 2014) *United Nations Human Rights Office of the High Commissioner*.

58 "Policy paper on sexual and gender-based crimes" (June 2014) *International Criminal Court the Office of the Prosecutor* 3 (hereafter "ICC Policy Paper").

and gender-based crimes (SGV) as the broad definition encompassing all the above.

3. ADVANCEMENTS TOWARD THE PROSECUTION OF SGV IN INTERNATIONAL LAW

It is always easy to paint a positive picture of progress and success when a surface view of a particular situation is adopted. Looking at the instruments drafted and adopted for the protection of women over the past decade, it is even easier to assume Africa is well on its way to positive progress.

I do not mean to deflate or degrade the efforts made toward the protection of women in Africa; on the contrary I have great respect for the work already done. I merely mean to state that it is time to take a critical look at what has been done, consider the positive, and then determine why progress has seemed to stagnate at a certain stage.

Developments in the past decade made great strides toward the protection of women during armed conflict and the promotion of women's rights and gender representivity in key organisations. The following initiatives deserve mentioning:

i. Promotion of gender representivity on key councils and international tribunals.
ii. The Special Rapporteur on Women's Rights in Africa.
iii. The Protocol on the protection of the Rights of Women in Africa (Maputo Protocol).[59]
iv. The ICC Women's Caucus for Gender Justice.[60]
v. Landmark judgments.[61]
vi. Truth commissions made important contributions toward addressing SGV.[62]
vii. The inclusion of a wide range of SGV crimes in the proposed statute of the ACJHR which can constitute genocide, war crimes and crimes against humanity.[63]

59 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003.

60 Details can be accessed at *www.iccwomen.org*.

61 To be discussed in 3.1 below.

62 These commissions were established in South Africa, Kenya, Liberia and Sierra Leone. Cf. "Sexual and gender-based violence in the context of transitional justice" (October 2014) *United Nations Human Rights Office of the High Commissioner*.

63 Refer to paragraph 4 below for a more detailed discussion.

3.1 Akayesu and other landmark judgments for SGV

Prior to the *Akayesu*[64] judgment there was no definition for rape in international law. This landmark judgment effectively dealt with SGV during armed conflicts and changed the landscape for prosecuting the latter in international law. In this judgment the court held that rape is "*a physical invasion of a sexual nature, committed on a person under circumstances which are coercive*."[65] The court further held that rape may constitute torture:

The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, lnhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity.[66]

This judgment gave rise to other important judgments concerning the prosecution of SGV in international law. In the *Celebici*-case[67] the court also held that rape constitutes torture and provided that:

The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict. Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criterion.[68]

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64 *Prosecutor v Jean-Paul Akayesu* (2 September 1998) Case No ICTR-96-4-T ICTR.
65 Akayesu (1998) 598.
66 *Akayesu* (1998) 597.
67 *Prosecutor v Zejnil Delalić (Celebici)* (16 November 1998) Case No IT-96-21-T ICTY.
68 Celebici (1998) par 495-496.

Furthermore, the *Furundzija* judgment provided that rape is a violation of the human dignity and physical integrity of the woman,[69] effectively confirming that the woman has rights as an individual and cannot be considered to be only property.

3.2. Africa under the microscope

Although the above are all excellent initiatives the question must be asked: From an African perspective, what has been achieved over the past decade? Has Africa managed to bring justice to victims of SGV?

Once this is put under the microscope a very glib reality surfaces. Although important instruments have been adopted the lack of implementation and follow through on it is bringing progress to a grinding halt. Therefore, it is necessary to examine the *status quo* and analyse what, if any, practical contribution to the prosecution of SGV has been made on the African continent.

4. REALITY VS FICTION: IS AFRICA EFFECTIVELY DEALING WITH SGV?

Most of the current situations under investigation by the ICC are in Africa,[70] with nine of the ten ongoing investigations being related to African countries.[71] Four additional preliminary investigations have also commenced against African countries.[72] Four additional cases have proceeded to the pre-trial phase,[73] three have proceeded to trial,[74] and three are already in the reparation and compensation phase.[75]

Most of the above involve investigations into crimes against humanity and war crimes with disturbing elements of SGV being committed as part of

69 In *Prosecutor v Anto Furundzija* (10 December 1998) Case No IT-95-17/1-T ICTY par 183.

70 Fung Wai Nam J "Jurisdictional conflicts between the ICC and the African Union - Solution to the dilemma" 4 2015-2016 *Denver Journal of International Law and Policy* 41 at 43.

71 See the current situations being investigated by the ICC, available at *https://www.icc-cpi.int/Pages/Situations.aspx*.

72 See the current situations being investigated by the ICC, available at *https://www.icc-cpi.int/Pages/Situations.aspx*.

73 The Barasa case (Kenya), the Hussein case (Sudan), Al Bashir case (Sudan), Hurun and Kushayb cases (Sudan). Cf. ICC current situations pages available at *https://www.icc-cpi.int/Pages/Pre-Trial.aspx*.

74 Gbagbo and Blé Goudé case (Ivory Coast), Bemba et al case (Central African Republic), and Ntaganda case (DRC). Cf. ICC current situations pages available at *https://www.icc-cpi.int/Pages/trial.aspx*.

75 Al Mahdi case (Mali), Katanga case (DRC), and the Lubanga case (DRC). Cf. ICC current situations pages *https://www.icc-cpi.int/Pages/ReparationCompensation.aspx*.

the hostilities, and forming an integral part of the investigations and/or trials.

Taking the above into account the ultimate question arises: What is being done from an African perspective? Multiple situations are being addressed by the international community but none seem to be getting attention from the African continent. Therefore, it is necessary to unpack the current African committees, procedures and other practices to determine whether any practical steps toward the prosecution of international crimes, specifically focusing on SGV, is being undertaken.

4.1 African Commission on Human and Peoples' Rights

The African Charter brings to life the African Commission on Human and Peoples' Rights[76] (African Commission) and provides for its mandate. It expressly provides that the functions of the African Commission will be to promote human and peoples' rights, ensure the protection of these rights[77] and to resort to any appropriate method of investigation in order to fulfil its mandate.[78]

The above provides for a strong mechanism to address SGV if utilised properly, and one would expect that with this mandate the African Commission would be investigating multiple cases of SGV and be advising on adequate prosecution thereof and ensuring justice to the victims.

However, upon examination it is clear that the African Commission is not fully delivering on its mandate. The latest communique on the 2016 extraordinary session[79] of the African Commission makes no reference to current situations in Africa, nor does it mention SGV atrocities committed and how these should be dealt with. It only provides a brief overview of the proceedings and lists many additional instruments adopted during the session, but never speaks to any ongoing investigations or ongoing initiatives towards improving the *status quo*.

Considering the extraordinary contribution that can be made through a Commission of this sort it is difficult to understand why there is not more being done to bring adequate information on SGV and other human rights

76 Article 30 of the African Charter.
77 Article 45 of the African Charter.
78 Article 46 of the African Charter.
79 "Final communique of the 19th extraordinary session of the African Commission on Human and Peoples' Rights" (16/25 February 2016) *African Commission on Human and Peoples' Rights* available at *http://www.achpr.org/files/sessions/19th-eo/info/communique19eos/final_communique_19th_extraordinary_session.pdf*.

violations during armed conflict to the forefront. Not only is the conversation regarding the latter lacking, it seems to be non-existent.

4.2. Special Rapporteur on Women's Rights in Africa

The Special Rapporteurship was created in 1998 and its mandate is renewed every two years. The Special Rapporteur (SR) is tasked with providing guidelines on the alleged violations against women, to analyse country practices and policies regarding the rights and protection of women, and to conduct country visits.[80]

The SR has lodged various activity reports and press releases which all deal with general matters relating to the rights and protection of women in Africa. Apart from the adoption of multiple instruments no great strides seem to have been made regarding SGV during armed conflict and the adequate investigation and prosecution thereof. This could be due to the extremely broad mandate given to the SR and the somewhat vague description of its duties. After all, without clear mechanisms in place to provide the right to investigation and to establish a clear mandate it becomes difficult to urge consideration and enforcements of procedures, and access to justice mechanisms.

One would expect that the creation of such an Office would lead to the adequate research of statistics relating to SGV during armed conflict on the continent, how it was dealt with or is being dealt with, and recommendations for adequate investigation and prosecution thereof.

Unfortunately the SR's latest report paints a bleak picture and does not inspire much hope of practical outcomes concerning the prosecution of SGV in Africa. As of October 2015 only 37 of the 54 African Union Member States have ratified the Maputo Protocol,[81] and many have ratified with unsettling reservations.[82]

Cameroon lodged reservations against certain acts that could be "wrongly understood as arising from the rights of women to respect as a person or to free development of her personality."[83] Kenya entered a reservation to

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80 Mandate of the Special Rapporteur on the Rights of Women available at *http://www.ijrcenter.org/regional/african/special-rapporteur-on-rights-of-women/*.

81 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003.

82 Justice Asuagbor L, "Status of implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (18 March 2016) 60th Meeting-Commission on the Status of Women at 2.

83 Justice Asuagbor (2016) 2.

reducing military expenditures in favour of promoting the development of women, and also the declaration to protect women's reproductive rights in cases of sexual assault, rape, and incest.[84] Rwanda also entered reservations to the latter and multiple other reservations were entered by Uganda, South African and Namibia.[85]

The SR has undertaken to continue work on the implementation of guidelines to combat sexual violence and its consequences which will be a guideline to states. It will deal with practical ways of ensuring access to justice for victims of sexual violence.[86] It does not however, specifically refer to cases of SGV committed during armed conflict as an international crime.

Reporting on the current situation, the SR's conclusions are anything but inspiring. Deadlines for the ratification of the Maputo Protocol have not been met, countries that already ratified the Protocol are still not prosecuting perpetrators of sexual violence, and inadequate funding is creating a large barrier to access to justice for the victims.[87]

There is no doubt that there is a lot of untapped potential that can be utilised through the Office of the SR; however, the lack of proper cooperation from states is severely derailing progress. Furthermore, even though the SR was clearly appointed to pinpoint deficiencies and identify improvements that can be made, a clear mandate was never given which makes practicality difficult.[88]

4.3. Important instruments for the prosecution of SGV in Africa

4.3.1. The African Charter

The African Charter[89] provides for the protection of rights of women and children in accordance with international instruments in article 18(3). However, it does not seem to protect women as individuals in their own right but only in the context of a family unit.[90] Article 18(1) specifically states:

> *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.*

84 Justice Asuagbor (2016) 2.
85 Justice Asuagbor (2016) 2-3.
86 Justice Asuagbor (2016) 12.
87 Justice Asuagbor (2016) 12.
88 Dyani (2007) 250.
89 The African Charter on Human and Peoples' Rights of 1982.
90 Dyani (2007) 244. Article 18(1) of the African Charter.

This is the only section that speaks to the protection and promotion of women's rights in Africa. The Charter does not deal with cases of SGV during armed conflicts, rights of the victims, or access to justice for the latter. In this sense it is severely lacking.

4.3.2. The Maputo Protocol

The Protocol very generally refers to the rights of women. Although it does deal with the protection of women against SGV it does so in a very broad sense, never fully setting out which avenues of recourse would be available to the victims, how it should be prosecuted and how the victims and witnesses should be dealt with. It also does not deal with adequate investigation and/or prosecution of SGV during armed conflicts. Article 25 only provides a broad remedy to the victims and merely provides that states should ensure remedies are made available.

However, the Protocol does recognise the development of a woman's own personality and respect for her as an individual in her own right.[91]

4.3.3. The Malabo Protocol and the African Court on Justice and Human Rights

The Malabo Protocol[92] is a crucial legal instrument and extends the jurisdiction of international crimes to the African Court on Justice and Human Rights (ACJHR).[93] Should the Malabo Protocol come into force it will be a massive expansion to jurisdiction over international crimes but only within a set geographic sphere.[94] The ACJHR will have three main sections: First dealing with general affairs, the second dealing with human rights and the last dealing with the international criminal law section.[95]

Since violations of human rights during armed conflicts (especially related

91 Article 3 of the Maputo Protocol.

92 The 23rd Ordinary Session of the African Union Malabo *Press Release 18/23rd AU Summit* at *http://summits.au.int/ar/sites/default/files/PR%2018%20-%2023rd%20AU%20Assembly%20ends%20in%20Malabo%20(3).pdf* on 28 September 2015. The Protocol on the Amendments to the Protocol of the African Court of Justice and Human Rights of June 2014.

93 This court is not established since 15 states need to ratify the Malabo Protocol before it becomes effective. To date only five states have ratified it. Cf. "Malabo Protocol: Legal and institutional implications on the merged and expanded African Court" 2016 *Amnesty International* at 5 (hereafter "Amnesty Report") available at *file:///C:/Users/Jeanne-Mari/Downloads/AFR0130632016ENGLISH%20(2).PDF.*

94 Amnesty Report (2016) 5.

95 Amnesty Report (2016) 5.

to SGV) is a common occurrence in Africa,[96] a regional court will most likely have the potential of filling the current gaps. However, with the main reason for the proposed establishment of the ACJHR being African states assertion of targeting by the ICC and abuse of universal jurisdiction, one wonders if there will be any true practical effect.[97]

It is also important to consider that the ACJHR is merely a transplant of international law into a specific geographic region and local traditions and norms may not be properly considered.[98] How women are viewed within the context of their society is of utmost importance as many are culturally inferior which inferiority is furthered by customs, practices and legislation that discriminate against women.[99]

The Malabo Protocol does provide for SGV and includes acts of rape in genocide if committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.[100] Article 28B also cites SGV as a crime against humanity if committed as part of a widespread and systematic attack. It continues to make reference to SGV in articles 28D(b)(xxiii), 28D(e)(v) and 28J(2).

Although this is a very progressive document that could have far-reaching implications, it is worrying to consider that this court is far from being established, with only 5 of 15 ratifications received so far. Three of the states who ratified are currently under investigation by the ICC for, amongst others, SGV as part of war crimes or crimes against humanity.

The immediate issues of concern with the ACJHR is that its scope is too broad, it will require too many judges with specialised knowledge, the budget will be large, and deterrence is undermined by the immunity clause.[101]

Therefore, with reference to article 29 and 30 of the ACJHR Statute,[102] and

96 I.e. in Nigeria, Boko Haram and the Nigerian armed forces have committed war crimes and crimes against humanity. The latter include SGV and forced marriages. Further war crimes were also committed by Boko Haram in Cameroon, and multiple atrocities were committed in South Sudan. Cf. Amnesty Report (2016) 6.

97 Amnesty Report (2016) 6, 9.

98 Amnesty Report (2016) 15.

99 Brown (2011) 33.

100 Article 28B of the Malabo Protocol.

101 Article 46A provides for the immunity for heads to state. This is not guaranteed by any other regional court and the judgment of Charles Taylor confirmed there will be no immunity for heads of state in terms of international law. Cf. *Prosecutor v Charles Ghankay Taylor* (31 May 2014) Case No SCSL-2003-01-I Appeals Chamber Special Court for Sierra Leone, par 52, Amnesty Report (2016) 24.

102 The Protocol on the Statute of the African Court of Justice and Human Rights of 2014.

article 5 and 34(6) of the ACHPR Protocol it is clear there is very restrictive access to African human rights forums.

Although the African Court on Human and Peoples' Rights (ACHPR) is currently operational and can deal with human rights issues, which undoubtedly includes the prosecution of SGV, many states still have not submitted article 34(6) declarations which effectively denies citizens access to this court.

4.3.4. Contributions from international tribunals

The ICC was the first interment created for SGV.[103] The ICC was also very progressive on gender issues bringing to life the Victims' Rights Caucus and the Women's Caucus for Gender Justice (WCGJ) in the ICC.[104]

The Rome Statute of the International Criminal Court (RS) provides that sexual violence amounts to crimes against humanity and war crimes. This is quite a significant inclusion since the burden of proof is much lighter on war crimes than it is on crimes against humanity[105] since only rape committed as part of a widespread and systematic attack will amount to a crime against humanity.[106] War crimes have a lower burden of proof since no proof to systematic and widespread attacks need to be given, which is more appropriate for cases of sexual assault.[107]

The Fourth Geneva Convention also prohibits rape along with articles 76 and 2 of Additional Protocol I and II respectively.[108]

The ICTR and ICTY also laid down a solid foundation for progression in women's rights. This was in fact the first time women participated in the conversation.[109] The ICTY and ICTR took great strides in determining that rape could amount to a crime against humanity and war crimes.[110]

According to the UN the criteria for assessing redress to victims of SGV must be gender sensitive considering the gender specific nature of harm and

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103 Gabriel (2004) 43.

104 The WCGJ was effective in addressing failures of previous treaties pertaining to gender issues and gender-based crimes and the failures to properly investigate and prosecute violence against women. Cf. Gabriel (2004) 43.

105 Gabriel (2004) 47. Dyani (2007) 236.

106 Section 7 of the RS. Cf. Gabriel (2004) 47.

107 Gabriel (2004) 47.

108 Dyani (2007) 235-236.

109 Gabriel (2004) 44.

110 Refer to discussion in 3.1 above. Cf. Gabriel (2004) 44, Dyani (2007) 236.

stigmas attached to rape.[111] Therefore, efforts for dealing with victims and witnesses must be progressive and transformative.[112]

In this regard, Rule 96 of the ICTR states that there need not be any corroboration of the testimony of a victim of SGV, therefore there is no evidentiary distrust in the victim. Rule 92 also does away with previous sexual history as admissible evidence so there is no implication that women with rich sexual history are unreliable witnesses.[113]

The ICC Rules of Procedure and Evidence provide important safeguards for SGV victims as well.[114] Key strategic goals have been set for staff in dealing with SGV which provide for the adequate training of its staff, a victim-responsive approach and special attention to interaction between staff, victims and witnesses.[115]

The above rules of evidence and procedure are integral to properly investigating and prosecuting SGV and it is unclear why similar rules have not been proposed, drafted or implemented within the African instruments.

5. CONCLUDING REMARKS

SGV is still severely marginalised and dismissed as a natural occurrence of war in Africa.[116] Sexual violence is still an increasing phenomenon in Africa with statistics estimating 500 000 rapes during the Rwandan genocide and tens of thousands during the ten-year civil war in Sierra Leone.[117]

Historically women have been seen as property with no legal capacity of their own and thus rape is considered an injury to the male estate and not the woman as an individual. This remains a major incentive for soldiers during warfare.118

Although Africa is attempting to make a contribution to sexual violence prosecution,[119] the progress has been slow and in some instances non-existent.

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111 "Sexual and gender-based violence in the context of transitional justice" (October 2014) *United Nations Human Rights Office of the High Commissioner*.

112 "Sexual and gender-based violence in the context of transitional justice" (October 2014) *United Nations Human Rights Office of the High Commissioner*.

113 Honourable Goldstone (2002) 284.

114 ICC Policy Paper (2014) 5.

115 ICC Policy Paper (2014) 5.

116 Gabriel KA "Engendering the international criminal court: Crimes based on gender and sexual violence" 1:1 2004 *Eyes on the ICC* 43.

117 Dyani (2007) 230-231.

118 Dyani (2007) 232.

119 Dyani (2007) 232.

The latest activity report of the African Commission does not even deal with women's issues or any issues or investigations regarding SGV.[120]

SGV continues to be disproportionately committed against women and girls.[121] Rape is highly stigmatised with women often abandoned by their spouses or found to be unfit for marriage.[122] Many are also ostracized by their communities and forced to leave their families with the unbearable burden of shame.[123]

This raises very important questions relating to Africa's true capacity to deal with the very sensitive issue of SGV and the witnesses that come to deliver their stories. Although African tribunals are in operation, some are proposed, and various instruments have been adopted, there is still no practical outcome toward justice for the victims of SGV. Many instruments are severely under-utilised while others do not even purport to address the issue. International tribunals such as the ICC have proceeded to investigate and prosecute various perpetrators on the African continent while African feedback and/or action on the matter remains stagnant.

Tribunals such as the ICC, ICTY and ICTR have paved the way with excellent development regarding rules of procedure and evidence when dealing with witnesses and victims of SGV. This truly shows progress toward practically ensuring proper investigation and prosecution of the crimes. Once again, the African instruments either fail to address these important measures or deal with it in a generalised manner.

In light of the above the following recommendations are made to increase the efficiency of investigating and prosecuting SGV as an international crime in Africa:

i. More emphasis, and ideally a sense of urgency, can be placed on the development and adoption of the proposed methods of dealing with victims and witnesses of SGV, as proposed by the SR on Rights for Women in Africa.
ii. Regardless of the argument for and against the withdrawal of the ICC and the proposed ACJHR, a clear decision regarding this needs to be made so proper mechanisms can be developed to specifically address SGV.

120 "40th Activity Report of the African Commission on Human and Peoples' Rights" available at *http://www.achpr.org/files/activity-reports/40/actrep40_2016_eng.pdf*.
121 Gabriel (2004) 47.
122 Brown (2011) 36.
123 Brown (2011) 36.

iii. Gender representivity and gender-sensitive training of staff dealing with witnesses and victims is a non-negotiable prerequisite.
iv. Action-based investigations into SGV committed during armed conflict and harsh punishment to the perpetrators thereof.
v. Adequate victim redress and access to justice.
vi. The aid of psychologists should be enlisted when dealing with witnesses and victims of SGV.

V. THE FUTURE OF THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)

By Hon. Eddie Cross, MP Zimbabwe

Southern Africa stretches from the Congo to the Cape and embraces 15 countries that do not share much except their physical location on the continent of Africa. The Congo was settled by Belgium, South Africa by a mixture of Dutch, French and English, Angola and Mozambique by the Portuguese, Zimbabwe and Zambia by settlers from the United Kingdom, Swaziland, Lesotho, and Botswana were never occupied and the three island members by various people including France.

The indigenous peoples of this region speak several hundred languages – 73 in Mozambique alone. They occupy nearly 10 million square kilometers of land and serve over 300 million people generating $600 billion in economic output. Even so, they are minnows in the global village of nations and are in the majority absolutely poor. 5 of the members are middle-income States with average incomes of over $10 000 a year.

They have huge economic potential – the region contains a vast treasure trove of minerals – 85 per cent of global copper, chrome, gold, diamond and platinum reserves, the sole source of many critical minerals and huge resources of coal, iron ore, crude oil and gas. Its agricultural potential is almost unlimited – Africa has 60 per cent of the world's reserves of unused land and much of this is found in southern Africa.

But the problems of the region almost match its potential – the Congo hardly exists as a State, Mozambique has almost no infrastructure from north

to south. Angola is engaged in a long process of recovery from 35 years of war. Zimbabwe is engaged in internal conflicts that have crippled its economy and impoverished its people. South Africa is struggling with an uncompetitive economy and finding its feet in a highly competitive global market place. Still deeply divided, it is experiencing many problems with corruption and leadership failures.

Really, overall, only Botswana, Namibia, Mauritius and the Seychelles are stable, reasonable democracies with sound administrations and this points to how far the region has to go to deliver a good basic quality life to its peoples.

The Southern African Development Community (SADC) was established in stages as the process of decolonization and democratic transformation took root in the region. While this process was under way, the main preoccupation of regional leaders in the newly independent States was the ongoing struggle in Mozambique, Angola and Zimbabwe. Once these conflicts were resolved the emphasis shifted to the liberation of South Africa – the last State on the continent to remain under settler occupation. This was achieved in 1994 and in anticipation of this event, the SADC was formed in 1992.

This year SADC is ending its first quarter century and it is time to sit back and review what the organisation has achieved in those 25 years and what the future of the Community might be in the next quarter century.

Institutionally the SADC has achieved very little in its first 25 years. It remains funded mainly by foreign donors much like the African Union itself and this has to be a serious drawback to its capacity to work on behalf of the region. If regional Governments are not willing to pay for the costs associated with a regional grouping and Community, this clearly states their priorities.

The SADC has a Secretariat in Gaborone and an impressive headquarters complex, courtesy of the host Government. The main body controlling the Community's activities is the Summit of Heads of State and more recently they have established the Organ on Politics, Defence and Security which looks after these aspects of Community life. This body is underpinned by the SADC Protocols on Politics, Security and Defence and it is this sub-structure which is dealing with the problems of military insurgencies in the Congo and in Mozambique.

The issue of the political coup in Madagascar was dealt with by the Organ with the State ultimately being suspended from the regional Community until this issue is resolved. In this respect the SADC has adopted the AU resolve not to allow military or civilian Coups in Africa. When the democratic government of Lesotho was threatened by the Military, the SADC States intervened and

now a long process of a supervised transition back to democracy is under way. The good aspect of these activities is that they represent African leadership to resolve African problems.

In addition to this activity to resolve political and military conflicts in regional States, the SADC is playing an increasing role in many other areas – food security, emergency response, water management and trade. In the current year for example, climate change has resulted in a widespread drought with the result that only four States will be able to meet their own food needs. The region requires 35 million tonnes of maize and 12 million tonnes of wheat per annum. This is about one third of total African requirements.

In 2016 the region needs nearly 10 million tonnes of maize imports to meet basic food needs. This represents a massive logistical and financial burden on the region and would not be possible without regional coordination and mobilisation. This was provided by the SADC Secretariat. In addition the Secretariat provides all regional governments with early warning of climate induced problems and this has meant that agencies involved in meeting regional emergency needs as well as global aid agencies are now able to plan more effectively.

The logistical issues involved in this import programme are very considerable and involve the bulk movement of perhaps 25 million tonnes of basic commodities (maize, wheat, oilseeds) per annum. This represents over 1000 sea-going vessels and 800 000 rail wagons or road trucks. In times of drought emergencies such as in the 2015/16 season, additional imports impose a real burden to already congested port, transport and border control points. The costs involved are very considerable and the effect of corruption in licensing, procurement, transport and distribution increases the delivered cost of these basic needs by anything up to 40 per cent.

In an attempt to correct these problems and to reduce the cost of both importing and exporting from the region, the SADC Secretariat has established a Centre to work with all Member States and with regional companies. This potentially valuable work is slowly impacting the competitiveness of regional States. World Bank studies show that Africa has bridging costs for foreign trade which are on average three times the average for Asian States. Until this issue is addressed, it is unlikely that African States can lift themselves out of poverty in the export-driven way that has characterized the Asian States in the past 30 years.

In all other regional groupings and at the AU itself, there are regional Parliaments comprising delegates from country Parliaments. This is not true

of the SADC which only has a Parliamentary Forum. In a sense this clearly illustrates the main problem of the present SADC in that Member States are not willing to cede any significant authority to the regional grouping. Only when a real political or constitutional crisis emerges in a Member State which may impact on other States, has there been any serious use of regional group authority to force compliance by a Member State to SADC rules and norms.

It is in the legal sphere where this reluctance to accept regional standards has been most evident in what happened in respect to the SADC Tribunal. After establishing the Tribunal and locating it in Namibia with a bench drawn from regional States, the Tribunal ruled in favour of commercial farmers who had been dispossessed by the Zimbabwe government. The response of regional States was to suspend the Tribunal rather than implement its ruling.

This is in sharp contrast to the performance of similar legal institutions in both East and West Africa and calls into question their commitment to the rule of law in southern Africa. When in 2010 the Tribunal was given a new mandate it was as an intra-Government dispute resolution mechanism rather than an institution to deal with complaints by citizens and companies in Member States. This simply could not be justified and in 2012 the Tribunal was disbanded.

That there is a need for a regional Court that will deal with disputes that are not resolved at country level is indisputable but this cannot be resolved until there is a commitment to accepting such Tribunal judgments and rulings by regional States.

In a very real sense this is the central problem of the regional grouping. In no country is this better demonstrated than in the struggle over the past 25 years to restore some semblance of democracy and governance to the Government of Zimbabwe. In 1980, Zimbabwe came to Independence and, following an internationally supervised election in March 1980, a new Government was established under the leadership of Zanu PF – one of the two main liberation movements that had fought a long war against the Rhodesian regime.

In the first decade of Independence the regime in power established by force of arms, a one-Party State and this state of affairs continued until 2000 when a new political Party – the Movement for Democratic Change (MDC) came into being. In 2000 the new Party defeated a referendum for a new Constitution which would have entrenched the almost total control of the State President and the ruling Party. Immediately afterwards the MDC almost defeated the Zanu PF in a national election.

In the succeeding sixteen years, the Country has held 4 elections – a Presidential election in 2002, election for the National Assembly in 2005 and then harmonised elections in 2008 and 2013. In the 2002 election, the SADC failed to insist on agreed rules for elections in the region and its own observer missions were not allowed to conduct their mission independently. It was accepted that the President had been defeated but regional States colluded in an exercise to falsify the count and declare the incumbent the winner.

In 2005 the same situation prevailed and normal democratic rules were ignored and manipulated. The MDC was again defeated. However, as a consequence of mismanagement of the national economy, the social, economic and political crisis that followed eventually forced regional States to intervene, led by South Africa who acted as facilitators. In 2007 this led to a process which eventually resulted in reform of the electoral system and the holding of an election in March 2008 which was regarded as being more or less "free and fair".

The MDC won the election but Regional leaders subsequently allowed the Zimbabwe authorities to falsify the Presidential ballot. As a result a runoff vote was held which was so violent and distorted that the result was rejected by the AU. SADC leaders were forced back to the negotiating table and eventually a Government of National Unity was sworn in, in February 2009 observed by 29 African Heads of State.

There is little doubt that this was a visible and substantial achievement by the SADC leadership – but in fact the real mover and shaker was South Africa under the leadership of Thabo Mbeki. He used the SADC system to secure validity for his intervention but apart from this SADC played a minimal role. It would have been much better for the SADC Organ on Politics to make recommendations to the SADC Summit on the Zimbabwe crisis and for the SADC to then cover the role of facilitators to cement their role in the region.

Instead, when President Mbeki was summarily dismissed immediately after the swearing-in of the GNU Government in Harare, the new President of South Africa simply turned back to his domestic agenda and left the Zimbabwe Government to its own devices. Had SADC oversight been more institutionalized this would not have happened, but the Secretariat neither had the power nor the resources to perform this role.

Without supervision the Zimbabwe Government was able to disentangle itself from the shackles imposed by the "Global Political Agreement" negotiated by Mbeki to guide the activities of the GNU. As a result and using their grip on the hard levers of power in Zimbabwe and the failure to

implement the reform programme agreed on in the negotiations under Mbeki, the Zanu PF Party was able to manipulate the elections in 2013 and as a result they took back control of the House of Assembly and the State Presidency.

This resulted in the country immediately moving back into crisis and once again it is unable to meet its own essential needs and finance its own development. Without external intervention it is more than possible that the country will sink into a crisis with violence on the streets and widespread human suffering. The SADC is totally incapacitated in this situation and shows no sign of either being aware of the crisis or holding the capacity to intervene and force a free and fair election.

There is nothing wrong with the SADC Protocols on democratic elections which were first proposed in 2005 and are now adopted by every Member State – despite this the Zimbabwe regime shows no sign that it is prepared to adhere to these principles and norms. No sanctions and no remedial actions are possible from the SADC as an institution. Rather this role is again ceded to South Africa as the only country with the capacity to perform this role. However, asking South Africa to do what African leaders should be doing collectively is grossly unfair.

The Mbeki concepts of NEPAD and Peer Review have received widespread acceptance in Africa and are formal programmes of the African Union. Despite this they are not being translated into programmes where African leaders can supervise each other and insist that they play the game of nation building by agreed policies and principles. To do so they must have the power of sanction against those who abuse these principles and this requires exactly what the SADC leaders have consistently denied to the regional organisation because this would require subordination to the regional body and the loss of some sovereignty and authority over their own affairs.

They are not alone – many National States who are members of the European Union also find the overarching authority of the Union difficult to accept. The latest development – Brexit in the UK - is another example. However, the United States does offer an example where the Union has successfully managed the relationship between States and the Federal Government and thereby forged an administration which recognises the rights of the States but maintains overall control over National Affairs and resources and through the Supreme Court making sure that all States adhere to common rules and principles.

The vision of the SADC States envisages the region working together to create a better future for all Member States and all Citizens in the region.

A major achievement has been made in the way regional water resources are being managed in the interests of all Member States. This is critical in a region that ranges from the semi-arid south to the humid tropical rainforests of the northern States. South Africa has exhausted its own water resources and has turned to Lesotho for help – in so doing they have created a market for Lesotho water and helped the country in the process.

In the longer term South Africa will need help from its neighbors to the north. Namibia has to work with Angola in this sphere and all those Member States who share a river frontage on the Zambezi River will have to work together to ensure that the water in this system is managed in the interests of everyone. The creation of the Zambezi River Authority in Harare is a great step forward in this process.

In the power sector, the establishment of the Central African Power Pool which manages regional electrical energy generation and distribution is making a substantial contribution to regional affairs and needs. It has created a regional market for electrical energy allowing countries with surplus to sell to countries with a deficit in supplies. Regional interconnectivity is strengthened and individual States can make best use of their available resources and capacities.

In 2005, the SADC States developed what they called the SADC Protocol on Trade. In this they set themselves a target of establishing a free trade area by 2008. In reality by 2008 4 States had failed to implement the agreed targets and had either been given a waiver or a revised target. In the remaining 11 States the goal was achieved for 85 per cent of all trade and by 2009, the year after the target date, intra SADC trade had expanded from US$13,2 billion per annum to US$35 billion or by 150 per cent.

Of the four States that did not achieve the target, Zimbabwe was given a revised goal of 2014. The Congo, Angola and the Seychelles were given a waiver and remain outside the Trade Protocol.

By 2014, Zimbabwe had become the biggest trading Partner for South Africa in Africa with trade reaching 70 per cent of exports (US$1,9 billion) and 60 per cent of imports (US$3,6 billion). Combined this meant trade of US$5,5 billion per annum.

Then in 2016, faced by a massive current account deficit and shortages of foreign exchange, the Zimbabwe Government, in direct violation of the SADC Trade Protocols, slapped restrictions on imports and trade with South Africa, Zambia and Mozambique declined sharply. South Africa threatened to take Zimbabwe to the SADC Summit to secure condemnation of the actions taken by the Zimbabweans and then backed down and raised the issues on a bilateral basis.

But the main lesson of this interlude is that when it serves domestic interests, SADC States put their own interests first. This is quite understandable but the Protocols should have anticipated this and provided for such eventualities with Member States accepting that they were no longer free to do what they want when it impacts on the interests of their neighbors.

The SADC trade policy situation is further complicated by the fact that 4 States in the SADC belong to the South Africa Free Trade Area and use currencies either linked to the Rand or the Rand itself. This is a Customs Union with South Africa collecting Customs Duties on behalf of its partner States and distributing these revenues to these States. No States have been allowed to join the Customs Union since SADC was formed – the objective being that the Free Trade area would eventually replace the Customs Union and Common Currency area.

These policies conflict also with the East African Free Trade area to which Tanzania and Zimbabwe are both members – potentially creating conflict with the SADC Trade Protocols to which both States subscribe. But if the goal is as stated to eventually create a free market in Africa, then, these minor regional problems will be swept aside and replaced by free trade conditions.

Free trade not only encourages trade and competition to the benefit of the population but it can affect domestic production which is either lower in quality or more expensive. It is very difficult to address these problems and it requires a great deal of will and determination to seek the wider good of the region against the interests of specific countries. States which have operated in what were essentially closed economies will have to learn the harsh realities of being competitive in a globalised world.

But the reality remains that production based on protected domestic market demand cannot drag our economies into the 21st Century. Export-led growth has been the key to the rapid growth of Asian economies. India is using a slightly different model but has a domestic market of 1,2 billion people. The middle income population of India today is larger than the total population of the UK. If the SADC is to attract FDI for industry as against primary production based on our natural resources then it has to offer companies a viable regional market. Only the SADC can do that and even so this depends on transport and logistics as well as regional communications networks.

The SADC also has programmes based on education and health as well as statistics and technology. But one has to say that the influence of these programmes is very limited in scope and application. Until the region moves to ensure that the region has common targets for macro-economic and monetary

policy as well as common guidelines for budget targets and programmes, it is unlikely that the SADC will be able to move beyond where it is at present and it has to be said that this very much looks like a rut in the road to the future.

The Future of the Southern African Development Community

Given the standing of present leadership in the region it is difficult to envisage how the SADC can move on its own into the future. Its aims and objectives are laudable and if implemented would in fact make a significant contribution to the lives of the millions of people who live in the SADC region. However, progress has been so slow in the past 25 years, it is difficult to expect anything more from the organisation in the next 25 years.

History shows that successful regional or continental groupings such as the EU or the USA require strong historical links, physical proximity and strong visionary leadership. In the case of the EU it was the common experience of two World Wars which originally motivated a remarkable group of post-war leaders to initiate the European Economic Community as an organisation to coordinate the coal, iron and steel industries as a means of restricting the capacity of Member States to go to war. This post-war grouping was expanded and gradually (like the SADC) became more of a federation of States involving 27 countries.

In the United States it was the early Pilgrim Fathers and then political leaders who crafted the Union. Its origins were bloody and the American Civil War is the bloodiest war in history. But today the USA is arguably the most successful Union in the World and is finding its way in the newly globalised markets. India began its post-Independence life in conflict in which 10 million people died, leaving behind three States which are more or less homogenous in religion and tradition. Despite this or possibly because of this the Indian sub-continent remains in a state of conflict.

China is another example and this surely should show the way for the SADC and eventually the African Union. What is needed for this to take place are the following key elements:

- Acceptance of an overarching citizenship of the continent as a whole as Africans – irrespective of our color, creed or tribe.
- Acceptance by all Member States of all the basic tenets of sound fiscal and monetary policy.
- Acceptance of the rule of law, supremacy of the Constitution and equality before the law.
- Subjugation of individual States to agreed governance principles

that will apply to all regional or continental States.

- Commitment to democratic practices and norms without exception with regular elections and peaceful transfers of power.
- A common understanding of the need to combat corruption in all its many forms and to combat international crime.
- Some form of overall democratic governance for the Region in the first place and the continent in the long term.
- Adoption of regional and continental official languages to facilitate communications and to facilitate business.

This is a tall order for the SADC region. East and West Africa seem to be further ahead in this process, but the African Union as potentially the long term centre of a united continent, also seems to be making little progress. However, it is clear from the past 25 years that the region can only hope to compete in the long term as a region that works, not only in fostering free trade between member States but also establishing efficient links to global markets, especially for the land-locked States.

VI. THE FUTURE IMPLEMENTERS OF THE RULE OF LAW: PRECONDITIONS, CHALLENGES, PERSPECTIVES

By Prof. Hartmut Hamann[124]

My collaboration with the Rule of Law Program for Sub-Saharan Africa of Konrad Adenauer Stiftung began in 2007. Our joint work started with a seminar for postgraduate students, university assistants and PhD candidates at the University of Lubumbashi in DR Congo. Seminars in Kinshasa and Bukavu followed. Later universities in Rwanda, Burundi, Benin and Senegal joined the programme. Over the years the Rule of Law Program for Sub-Saharan Africa together with 8 African partner universities organized 36 seminars. In addition we could organize four regional conferences, with participants also from Kenya, Tanzania and Uganda. Konrad Adenauer Stiftung created a law journal, KAS African Law Study Library, now edited as an open access online journal by Nomos, a leading German publisher. (www.african-law.nomos.de)

All these seminars focused on the implementation of the Rule of Law in practice, and on concrete subjects, relevant for the life of citizens. The subjects cover a broad range of different aspects, e.g.:

- role of the Judiciary in economic development[125]

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125 *Stanislas Makoroka*; Le rôle de la justice dans le dévelopment économique, in: KAS African Law Study Library Volume 3/2015, page 813-828.

- access to electricity[126]
- the organization of the police[127]
- regional organizations and peace keeping[128]

The long-term approach and the possibility to work with a growing network of brilliant, dedicated young African researchers and practitioners offered insights on trends, preconditions, and some challenges. Working with the younger generation also helps to understand their perspective.

I will start with a brief overview on my understanding of the Rule of Law (chapter I). Then I will share my thoughts on what I learnt from the future defenders and implementers of the Rule of Law (chapter II). This will be followed by an analysis of the preconditions for the implementation of the Rule of Law (chapter III), and a personal view on the challenges and perspectives (chapter IV).

1. THE RULE OF LAW

Any society needs rules. Under the Rule of Law such rules have to respect the core principles of law: to create and safeguard justice, a fair and equitable treatment of all citizens, respecting the rights of all members of society.

Every society needs a system that makes sure that rules are respected and that those who break the rules are sanctioned (and not privileged). Therefore institutions which have the power to decide are necessary. Under the Rule of Law the balance of power provides for an independent, impartial and efficient judiciary, organized by the state and under the control of the people.[129]

An independent, efficient judiciary can also strengthen economic development, making sure that contracts are respected.

126 *Symphorien Kapinga K. Nkashama*, Le droit d'accès à l'énergie électrique à la lumière de la loi 12 14/011 du 17 juin 2014 relative au secteur de l'électricité en République Démocratique du Congo, in : KAS African Law Study Library Volume 1/2015, page 135-154.

127 *Pacifique Muhindo Magadju*, Le rôle de la Police Nationale congolaise dans le contexte de la décentralisation en RD Congo, in : KAS African Law Study Library Volume 3/2014 page 599-618.

128 *Kilomba Sumaili Adolphe*, Le potentiel de la Communauté Economique des Pays des Grands Lacs et de la Conférence Internationale sur la Région des Grands Lacs pour l'instauration d'une paix durable en RDC, in : KAS African Law Study Library Volume 3/2014 page 648-671.

129 More in detail *Hartmut Hamann/Anne Schroth*, The Rule of Law in DR Congo, Burundi and Rwanda: Economic Aspects of Constitutional Law and Public International Law, in: VRÜ Verfassung und Recht in Übersee LAW AND POLITICS IN AFRICA/ASIA/LATIN AMERICA, Volume 04/2011, page 516-542; *Adalbert Sango Mukalay*, L'Etat de droit et la démocratie en Afrique – Le « jurisfascismepositiviste » en question, in: Law in Africa/Recht in Afrika/Droit en Afrique, Volume 01/2014, page 6-27.

Ensuring individual freedom of all citizens necessarily requires imposing limits on the freedom of each individual citizen.[130]


Participants attending the Regional Conferences in Nairobi (Kenya) in 2015 (L) and 2013(R) respectively

In our seminars special importance has been given to the preconditions for an independent, effective judiciary.[131] My presentation will reflect this core element of the Rule of Law. I am aware that the Rule of Law of course includes other important elements. But to achieve progress you sometimes have to concentrate on the precise elements of a broad concept.

Details of the judiciary will depend on the culture, the history, and the political and economic background of each country. But the challenge to ensure, defend or build up an impartial and effective judiciary exists in all countries, on all continents.[132]

Every generation faces that challenge in its own way. Every generation has a chance to influence the future of its country. In general it is easier to cope with

130 *Hartmut Hamann/ Jean-Michel Kumbu*, Necessary limits to the freedom to engage in economic activity as a Human Right – European and African perspective, in: Roschmann/Wendoh Conference Report: Economic Rights as Human Rights, KAS, page 9-51.

131 Conference contributions published in: KAS African Law Study Library, Volume 03/2016.

132 *Balingene Kahombo*, Summary Report on the 'Exchange Programme between Young Lawyers from Burundi, Rwanda and the Democratic Republic of Congo and the Judiciary of BadenWürttemberg (Germany)' from 5 to 18 October 2014, in: Law in Africa/Recht in Afrika/Droit en Afrique, Volume 02/2014, page 228-236; *Aniello Ambrosio/Mirjam Bäumer-Götz/Caroline Gräser/Mario Mannweiler/Carola Osswald/Cornelia Rank/Christian Trauthig*, Report on the Exchange Programme between Young Lawyers from Central and East Africa and the Judiciary of Baden-Württemberg and Rheinland-Pfalz, Germany, in Lubumbashi (Democratic Republic of Congo), Kigali (Rwanda) and Nairobi (Kenya) from 6 to 15 February 2016, in: Law in Africa/Recht in Afrika/Droit en Afrique, Volume 01/2016, page 94-101; *Magdalena Sylister/Balingene Kahombo*; Summary Report of the International Conference on Requirements for an Independent and Effective Judiciary in Nairobi (Kenya) from 11 to 14 February 2016; in: Law in Africa/Recht in Afrika/Droit en Afrique, Volume 01/2016, page 102-111.

that challenge when you are not alone. Steadily building up and strengthening a network which includes the younger generation of lawyers therefore is a very important element of the series of seminars and conferences organized within the framework of the Rule of Law Program.

2. THE FUTURE DEFENDERS AND IMPLEMENTERS OF THE RULE OF LAW

As it is a continuous process we are all concerned. The young generation will need to pursue this process. I will focus on what I perceive as the perspective of the younger generation of African lawyers I have been working with. Which are the trends I observed?

2.1 An outspoken African perspective

German solutions for German problems, European solutions for Europeansproblems, African solutions for African problems, Congolese solutions for Congolese problems. I always tell the participants of my seminars and conferences: Dare to think yourself. Develop your own thoughts. Work out your own solutions. Come up with your own proposals and present them to your peers. In the first seminars many articles started with quotes from well-known French, British or sometimes German researchers or from international jurisprudence. Over the years the contributions became much more genuine, tracing local or national roots and taking into account the specific national environment.

2.2 A regional approach

We could organize the first regional conference in 2010 in Butare, Rwanda, with participants from Kinshasa, Lubumbashi, Bukavu, Bujumbura and of course Rwanda.

The underlying tensions between some Congolese participants and some Rwandan participants endangered the success of the conference. One of the Congolese delegations threatened to leave, others might have followed.

On this occasion the elder generation intervened: The team leaders met, agreed on the common interest in the success of the regional conference, and calmed their teams. This was based on mutual professional respect and personal trust.

At the end of the conference mutual respect and trust were established between all participants. Members from the same teams met again at the following regional conferences and on other occasions.

The awareness that many national problems are not much different in

neighboring countries helps to join forces. Being aware of existing differences also helps to understand each other.

2.3 International inspiration

Over the years many participants won scholarships to study abroad, in South Africa, in Europe, in Canada. They got acquainted with international standards of research and publishing. The journal created by Konrad Adenauer Stiftung does meet international standards. This also means that African researchers who want to publish have to meet such international standards. They do so. In the beginning I was often asked: Is this really necessary? Please make an exception for us; you know that our working conditions are bad. I refused to lower the standards. The standards are met. The same is true for presentations on international conferences and when working in practice outside Africa.

A number of long standing participants of the seminar series qualified for an exchange programme with German judges and prosecutors. They all were excellent ambassadors for their African home countries and convinced their German counterparts of their outstanding legal qualification.[133]

2.4 Dedication to their countries

Without any exception all participants of the seminars went back to their home countries after having completed their PhD, Master Programs or exchange visits abroad. They all work either or both in the Academic field and the Judiciary in their countries.

They are willing to shape the future of their countries and the region they come from.

2.5 An attractive offer

All together the young generation of judges, prosecutors, advocates and researchers makes an offer to the leaders of their countries. An offer to use talent and energy to improve the structures of their countries in general and the judiciary in particular. The offer includes the ability to place national reforms in a regional context.

So my proposal to all those in power is: Give the younger generation a chance.

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133 *Balingene Kahombo*, Summary Report on the 'Exchange Programme between Young Lawyers from Burundi, Rwanda and the Democratic Republic of Congo and the Judiciary of BadenWürttemberg (Germany)' from 5 to 18 October 2014, in: Law in Africa/Recht in Afrika/Droit en Afrique , Volume 02/2014, page 228-236.

From a German perspective I can add: Since the 1960s Germany has profited a lot from integrating each new generation in decision-making structures. Members of the older generation can be proud of promoting the success of their scholars.

3. PRECONDITIONS FOR THE IMPLEMENTATION OF THE RULE OF LAW

3.1 Long-term horizon

A stable implementation of the Rule of Law requires that the citizens of a country ask for it. Without widespread public demand and support it cannot work. The implementation of the Rule of Law in Europe and in America was developed over centuries. The development had to face severe setbacks. And it remains an ongoing challenge. The further implementation of the Rule of Law in Africa will also take time.

The young generation has time and dedication for such a long-term approach, which is also in the interest of their children.

3.2 African approach

Rule of Law and good governance are not an export business. It can only work when developed in harmony with national culture and society, reflecting educational and economic standards.

Best placed for an African approach is the young generation of African lawyers: often educated on an international level, but at the same time with local roots and with a deliberate choice to work in their home countries or regions.

3.3 Clearly defined interests

Before starting legal proceedings or before drafting a contract as a lawyer in private practice I always ask my clients: What do you want to achieve? What are your interests? What are the interests of all other parties involved?

An honest and profound analysis of interests involved is the first prerequisite for a successful contract or dispute resolution.

With regard to the Rule of Law that may require

- An analysis of the existing situation in each country by those who are concerned
- An analysis of the interests of the decision-makers in power
- An analysis of the interests of potential future decision-makers

- An analysis of the interests of foreign players also by those concerned within each African country.

Once again: The young generation who had the privilege of realizing parts of their professional education in foreign countries should be able to do so.

In addition clearly defined interests on the German side also do make sense. What can we achieve in Africa, coming from Germany? What do we want to achieve? I am often asked by my African colleagues and friends: Which are the German interests? Why is Germany spending all this aid money in Africa? Which are the German political interests? Which are the German economic interests?

In order to be credible we should not hesitate to give clear answers.

4. CONSEQUENCE

At the very heart of the Rule of Law is the necessity to sanction any breach of the rules in place. That is only credible when those who break the rules suffer sanctions. Easy to say, hard to put in practice. Each single lawyer, African or European might well have to ask himself everyday: Am I acting according to the Rule of Law that I promote?

5. FOCUSED ACTION

As the Rule of Law is very broad it is open to various possible actions. That breadth may require decisions on what can be achieved where, when and with whom (independent judiciary? efficient tax collection systems? Efficient fight against impunity and corruption?)

6. CHALLENGES AND PERSPECTIVES – A PERSONAL VIEW

6.1 Hostile environment

Several leading German specialists in international public law have recently created a research programme on "The International Rule of Law –Rise or Decline", headed by Prof. Georg Nolte of Humboldt University, Berlin.

They did so because they are concerned about a possible threat to the importance of legal rules.

They describe their research theme as follow:

"*The Research Group examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are*

we, on the contrary rather facing a tendency towards an informalisation […] of international law, or even an erosion of international legal norms?"[134]

I do not have the answer. But implementing the Rule of Law will not be an easy task in the years to come.

At the same time, the Rule of Law still is popular. For example, the United Nations have adopted the UN Declaration on the Rule of Law and the Application of the Rule of Law to the UN Resolution 68/116.[135]

Even governments which face severe criticism with regard to their respect, or lack therof, of the Rule of Law often use legal arguments and decisions by Constitutional Courts when it comes to the interpretation of the provisions about a third presidential term or the validity of presidential elections.[136]

6.2 Progress in an hostile environment

Making progress under difficult conditions requires good ideas, innovative creativity and a reliable network.

Also from this perspective, the chances of success are better the more the input of the young generation is accepted. Combined with experience, knowledge and good will the joint implementation of the Rule of Law can lead to progress in all branches of social life.

6.3 Team spirit and network building

An example:

When starting the series of seminars each participant worked on his paper. It took some time to convince the participants that we were not looking for the best individuals. We were trying to convince all participants to work together, which includes proof-reading the papers of the others, peer-reviews, helping younger team members to finalize a first publishable article.

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134 http://*www.kfg-intlaw.de/*

135 Resolution adopted by the General Assembly on 16 December 2013, 68/116. The rule of law at the national and international levels, under: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/116; *Clemens A. Feinäugle*; The UN Declaration on the Rule of Law and the Application of the Rule of Law to the UN: A Reconstruction From an International Public Authority Perspective, in: Goettingen Journal of International Law 7 (2016) 1, p. 157-185.

136 *Stef Vandeginste*, Legal Loopholes and the Politics of Executive Term Limits: Insights from Burundi, in: Africa Spectrum, 02/2016 page 39-63.

Over the years we could observe an increasing team-spirit, teams being proud of integrating younger members, proud of the success of the experienced members, winning scholarships, becoming professors, judges and well-known lawyers in private practice.

The first regional conference in Rwanda brought together teams from DR Congo, Burundi and Rwanda. To the second conference in Nairobi we invited guest speakers from Kenya. The third regional conference was jointly organized with the Tanzanian German Centre for East African Legal Studies (TGCL) at the University of Dar es Salaam,[137] with participants from all EAC member countries. For the fourth regional conference we further developed the format: Instead of inviting teams from the universities with which we organize seminars we invited a defined number of highly qualified practicing young judges, prosecutors and advocates from each participating country. Most of them had participated in other activities of the Rule of Law Programme before.

This way the network keeps on growing. Visible results lead to invitations to join other networks initiated by institutions, such as the University of Cape Town, The World Bank or Robert Bosch Stiftung. These networks include members from both Anglophone and Francophone countries. It was and still is an interesting and sometimes challenging experience to further promote the exchange of thoughts and ideas between Anglophone and Francophone neighbors on the African continent.

A good network might also help its members not to forget their commitment to the Rule of Law when achieving power.

6.4 Working on both continents

This programme has been initiated in Germany, and is financed by the German state. It can also contribute to increasing the knowledge of Africa we have or should have in Germany.

In February a group of young German judges and public prosecutors shared the daily work of their African counterparts in Lubumbashi and in Kigali for a couple of days.[138] Back home, we asked them, what they had learnt

137 http://*www.tgcl.uni-bayreuth.de/en/index.html.*

138 *Aniello Ambrosio/Mirjam Bäumer-Götz/Caroline Gräser/Mario Mannweiler/Carola Osswald/Cornelia Rank/Christian Trauthig*, Report on the Exchange Programme between Young Lawyers from Central and East Africa and the Judiciary of Baden-Württemberg and Rheinland-Pfalz, Germany, in Lubumbashi (Democratic Republic of Congo), Kigali (Rwanda) and Nairobi (Kenya) from 6 to 15 February 2016, in: Law in Africa/Recht in Afrika/Droit en Afrique, Volume 01/2016, page 94-101.

in Africa, what they had brought back home.

They contribute to a more realistic view of modern Africa in Germany. They will influence decision-making procedures in Germany with regard to Africa. The competent Ministries for Justice and Court presidents have promised to further support future exchange visits in both directions.

An important challenge we have on the German side is to increase knowledge and understanding of a complete and honest picture of modern Africa.

I am sure that the young generation we are working with in Africa can help to make progress also in this regard.

7. CONCLUSION

I thank the Rule of Law Program of Konrad Adenauer Stiftung for giving me the chance to work with a growing number of highly qualified young African lawyers, to accompany them as they represent their countries on regional and international levels, and to develop new formats which follow the steps of the young generation in their professional careers. Thank you for your trust in the last ten years.

And I hope that we can meet again in ten years to celebrate the 20th birthday of the Program, to summarize the trends observed over the next ten years, to discuss the perspectives of a network which will have grown steadily.

VII. CLIMATE CHANGE AND LAW: REASSESSING AND UNLOCKING RELEVANT MULTI-DISCIPLINARY TRAJECTORIES

By Rev. Prof. Dr. Aidan G. Msafiri
Climate Change Ambassador for Tanzania and Senior Researcher

1. INTRODUCTION

0.1 Terminology

0.1.1 Climate Change

The Intergovernmental Panel on Climate Change (IPCC) defines climate change as the global increase in mean temperature marked with huge variations in weather and climate patterns regionally and globally. According to IPCC, the average global temperatures are rising by 0.6^0C annually.

0.1.2 Law

The English word has its etymology from Latin "jurisprudentia" consequently, "juris" meaning "law" and "prudentia" implying prudence or foresight, commonsense, good judgment, circumspection, caution etc.[139]

139 Cfr. En. M. Wikipedia.Org.

0.2 Rationale/Justification

The relevance of various legal approaches and action in responding to the climate change challenges cannot be exaggerated. However, due to its magnitude and complexity climate change challenges need more interdisciplinary and multidisciplinary approaches and solutions than ever before. These must necessarily be relevant, holistic, effective and sustainable.

Briefly, such solutions need to go beyond mere jurisprudence, hence enhancing life protecting and life-producing values, ethics, dignity, rights and duties of humans towards the earth and all resources, individually and collectively.

0.3 Some of the pertinent questions that must be addressed include;-

i. What are the current legal challenges, gaps, ("lacunae") and discrepancies in the climate change justice discourse and praxis?

ii. Which types of law really enhance climate justice locally, regionally and globally?

iii. What weaknesses are found in international laws for climate change and governance?

iv. Is jurisprudence intrinsically "*tabula rasc*" of eco-solutions?

v. To what extent are the current environmental laws, procedures and policies still relevant?

vi. What determines their relevance and effectiveness?

vii. Are climate change laws a monopoly of judges, legal practitioners and academia? What is the role of internal human law, particularly a well formed conscience in responding to the ecological and climate change challenges today?

viii. Do we agree that relative anthropocentrism, 'agape' and holistic justice could bring deep and inner transformations besides mere jurisprudence in environmental crises?

ix. How could jurisprudence, inner natural laws and ethics spearhead capacity building and true engagement for eco-justice?

x. Is eco-jurisprudence proactive enough? To what extent does it change personal or individual habits and lifestyles?

xi. Are traditional beliefs and faiths "*tabula rasa*" in terms of eco-integrity and change? What positive impact has the "*Laudato si*" Encyclical brought particularly in climate changes discourse,

negotiations and COP's etc. What could international climate change law and other jurisprudence practices learn from eco-spiritual values and ethics? Where and how do these converge?

2. CLIMATE CHANGE AND EXTERNALLY MOTIVATED PRINCIPLES AND LAWS (ECO-JURISPRUDENCE): CHALLENGES

2.1 The Principle of Common But Differentiated Responsibility (CBDR)

In Climate Change: Its Weaknesses

First, it inspires action at all levels. It strongly affirms that: "States shall cooperate in a spirit of global partnership to conserve; protect and restore the health and integrity of the Earth's ecosystem. In view of different contributions to global environmental degradation states have common but differentiated responsibilities ..."[140]

The key challenges are: who implements this? Does CBDR have a legal character?

Second, the adoption of the principle of CBDR in the UNFCCC process and body, but without a 100% legal character or force. Article 3.1 of the UNFCCC states: "Parties should protect the climate system for the benefit of present and future generations of humankind on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities ..."[141]

Third, as Achala C. Abysinghe and Gilberto Arias (2013:249) observe that "it is not surprising that the preponderance of practical interpretation of the principle of CBDR has been conservative, emphasizing the differentiation of the responsibility rather than the more pro-active common element which needs to include some degree of domestic climate action initiatives within the global context ..."[142]

First, from a jurisprudential viewpoint most of the Agreements made at COP's (COP 21 in Paris in 2015) in particular remain greatly ambiguous. They lack clear legal character. One cannot ascertain whether they are binding treaties or protocols, conventions, etc.

140 Cfr. The 1992 Rio Declaration Principle 7.

141 CFr. UNFCCC Article3:1.

142 Achala C. Abeysinghe and Gilberto Arias in Oliver C. Ruppel et alii (Eds) "Climate Change: Internationa Law and Global Governance Vol II" (Baden – Baden: Nomos, 2013) p. 249.

Second, some if not most of them have fallen into the global climate change syndrome(s) and illusions.

- "The Business as usual COP's Syndrome"
- "The Dog Eat Dog's COP's Syndrome"
- "The Ignorant Ostrich COP's Syndrome"
- "The Arrogant Buffalo COP's Syndrome"
- "The Chameleon COP's Syndrome"
- "The Tortoise withdrawal COP's Syndrome"
- "The Stubborn Elephant COP's Syndrome" etc.

2.2 The "Pledge" Challenges And Disasters In Climate Change

Holger Haibach and Kathrin Schneider (2013:364) claim that: "Powerful states like China the US and further emerging economies again opposed common, binding emissions reduction obligations and insisted on voluntary commitments in a so-called pledge and review arrangement. Once again, industrial states considered the demands as economically harmful ..."[143] especially to the present and future victims of climate change as a whole.

2.3 The Fate and Failure of Law to Climate Change Refugees Conflicts and Gender

First, today, due to the ever-growing effects of climate change, climate-induced migrations, refugees and conflicts are becoming commonplace. As Achim Steiner (2011) once put it, climate change "*is a threat multiplier*"[144]. It paralyses security, social protection mechanisms and food security water availability, peace etc.

Second, Oliver C. Ruppel (2013:37-38) admits that "t*here is no clearly defined term, nor a marked branch of the law which would cover all legal implications of climate change. Subsuming climate change under any legal structure is a challenging task due to the endless ramifications of climate change and particularly due to the inter-disciplinary nature of climate change and its impacts on various segments of our planet. Climate change can therefore only be tackled through a combination of political legal and natural, legal and natural science tools* ..."[145] from a gender-based perspective Patricia-Kameri-

143 Holger Haibach and Kathrin Schneiner in Oliver C Ruppel et alii p. 364.

144 Address at the UN Security Council debate on the effects of Climate Change on international peace and security, July 20, 2011 – *https://climateandsecurity.org/2011/08/02/Steiner-speech/*.

145 I bid, Oliver C. Ruppel et alii (eds) p. 37-38.

Mbote (2013:324) underlines the fact that climate change impacts different groups of all humans but particularly women.[146]

2.4 Weaknesses and Discrepancies In Environmental Law Regimes

First, despite multiple multilateral negotiations from Rio to Kyoto up to Marakkesh last year (2015), most of which have immensely consumed human, financial intellectual and economic resources, very often, their implementation has not been 100% successful!

Second, in most cases the stipulated targets to reduce climate change to 1.5^0C or 2.0^0C have either been illusory too simplistic or too ambitious.

2.5 Gaps And Constraints In Customary International Law

First, customary rules of international law have their own limitations particularly in the short-term. In this regard, developments in 'soft law' are often cited.

Second, due to the complexity, magnitude, unreliability and unpredictability of climate change, existing international law cannot adequately and efficiently stand to curb GHG's or spearhead climate justice as a whole.

2.6 Limitations In Human Rights Law Regimes For Climate Justice

First, besides its strengths particularly as a recent avenue or platform to respond for rights of individuals and communities affected by certain environmental threats or harm, the human rights law regime lacks a legal character and force especially in the area of mitigation.

Second, among other limitations, human rights law came into practice before the destruction of the environment especially by humans. International law lacks a free standing right to a clean, and healthy environment.

Third, both human rights law and customary international law, international courts of justice, international trade laws etc. have inherent limitations particularly in addressing deeper aspects of humans, e.g. a correct conscience and will power for the change and different lifestyle.

146 Cfr. Patricia Kameri-Mbote in Oliver C. Ruppel et al.

3. NEW SIGNS OF HOPE: BEYOND MERE JURISPRUDENCE

3.1 The evolution of a more "legally" binding instrument and nature particularly after the 2015 Paris Climate Change Agreement.

i. The emergence of a new global diplomatic breakthrough and transformation today the world is more unified and sensitized than ever before.

ii. The evolution of a new global culture consensus, vision, reflection, and capacity building in responding to climate change challenges today.
Further, a rediscovery of value-based principles for climate justice. Among others these include an ensemble of 'agape' (True Love) trajectories and norms particularly dignity, integrity, trust, stewardship, hope, accountability, care, modesty, prudence, partnership, transparency, generosity etc.

iii. The demise of purely jurisprudential approaches and methods to climate change, that is, solutions to climate change are no longer a monopoly of lawyers, but of every person, every profession, every faith and tradition, every society, every generation. Today, climate is considered as the common threat to the well-being of all!

iv. Emergence of New Life Visions for Self-Organization in climate change

v. Human economics should enhance systems, which serve individuals, families, communities and nations for common welfare dignity, equity and freedom.

vi. New Life Vision for moderation and sharing of both non-renewable and renewable resources. This will reduce the effects of climate change nationally and globally.

vii. New Life Vision for Inclusivity In Resources

viii. This entails a new global culture of socio-economic security. Cooperation is as key today as it was yesterday.

ix. New Life's Vision for eco-diversity And eco-justice. All life forms are interconnected and interdependent. Hence, avoidance of dangerous philosophical and ideological life news/ world views such as extreme anthropocentrism biocentrism, cosmocentrism, consumerism etc.

x. Emergence of New Valve – Based Inner Laws In Climate Change

These are increasingly becoming decisive especially in climate change discourse and action today. They include:

- The principle of interdisciplinarity.
- The intergenerational principle.
- The Agape Principle (Golden Rule – Mt. 22:37-39).
- The "Middle path" Principle.

xi. The role and centrality of an active conscience in promoting environmental justice

First, right and active human conscience should be the right compass and or "GPS" eco-justice and for true stewardship.

Second; right human conscience as the right measure orienting human behavior policies, laws especially with regard to climate change crises.

Third, human conscience as an inspiring and edifying gift in enlightening "homo oiconomicus" to be "homo integralis". E.F. Schumacher in his world-class book, "SMALL IS BEAUTIFUL.: ECONOMICS AS IF PEOPLE MATTERED" ably and categorically contrasts the hyper-consumerist life style which endless by multiplies human "want" and not "needs" at the expense of global resources and global commons!

Fourth, in his powerful and highly cherished Encyclical Letter on "Care For Our Common Home " ("Laudato Si") 2015 No.2,) Pope Francis reminds us of the inner voice of our consciences for reflection and change, individually, communally, nationally and globally.

"*This Sister (Earth) now cries out to us because of the harm we have inflicted on her by our irresponsible use and abuse of the goods with which God has endowed her. The violence present in our hearts wounded by sin is also reflected in the symptoms of sickness evident in the soil, in the water, in the air and in all forms of life. This is why the earth herself, burdened and laid waste, is among the most abandoned and maltreated of our poor; she groans in travail" (Rom 8:22)"147*

This plea re-echoes both the deontological, teleological as well as the eco-feminist trajectories more than ever before.

147 Pope Francis "Laudato Si" No.2.

4. CONCLUDING REMARKS

Admittedly, climate change cannot simply be considered as a pure jurisprudential issue. It is profoundly multifaceted and interdisciplinary in nature as well as in its solutions. Consequently, the following in particular need special attention and emphasis.

First, more than ever before, humanity needs to rediscover the "inner laws" and values which tell each one of us what is right to be done and what is wrong to be avoided. That is, the right human conscience as a means for radical change of mind, heart, life styles, priorities etc.

Second, effective and sustainable solutions and alternatives can adequately be realized through the 5 M's approaches:

These are the Principles of:

- Multi-disciplinarity
- Multi-conscience
- Multi-stakeholder
- Multi-responsibility
- Multi-eco activism.

Conversely, it is through the enhancement of personal and collective consciences that solutions to climate change can be achieved. Again laws and laws alone are insufficient and unsustainable. In this regard, the centrality and role of right human individual and collective consciences against further climate change scenarios. In order to realize these noble aspirations and particularly long-term eco-justice values, there is need to re-affirm and rediscover anew the values of gratitude, humility and solidarity for Mother Earth.

Let me conclude by paraphrasing Ulrich Duchrow and Franz J. Hinkelammert excellent remark particularly on visions of life inspired by internal laws and motivation:

"In order to achieve the necessary transformation toward a new culture of life, the personal level is as important as the institutional…The key, therefore, is that even unequal human beings enjoy dignity which shows itself in mutual and recognition."[148]

148 Ulrich Duchrow, Franz J. Hinkelammert "Trancending Greedy Money" (New York: Palgrave Macmillan) P. 186-187.

VIII. CLOSING REMARKS

By Ms Christine Agimba[149] On behalf of the Attorney General

Distinguished Guests,

Ladies and Gentlemen,

It is my singular privilege and honour to join the Konrad Adenauer Stiftung (KAS) during the celebration of your work and operations in the Sub-Saharan region over the past ten years.

A review of your main areas of engagement and activities are a clear demonstration that KAS ensures that the Rule of Law remains in sharp focus within national, regional and continental discourse. We commend KAS for your invaluable contribution to the development and strengthening of the rule of law on the continent; specifically in the areas of **democracy**, **human rights, constitutionalism**, **separation of powers**, **good governance** and **regional cooperation**. We commend in particular your focus on women, youth, persons with disabilities and other marginalized groups.

It is noteworthy that Kenya has been host to some of the initiatives by KAS - such as conferences of stakeholders, and Kenyans and Kenyan institutions have collaborated in research and publication on contemporary issues pertaining to the concept of the rule of law. It is also noteworthy that

149 The Deputy Solicitor-General, Office of the Attorney General, Republic of Kenya.

various Kenyan actors, including those in the judicial and legal sector, have been beneficiaries of KAS support through study and exchange programmes, scholarships, and have also participated in the various forums and networks. We are grateful for this support.

Ladies and Gentlemen,

Over the past two days, the symposium has provided a forum for participants to review progress, identify challenges and consider emerging issues in relation to rule of law, independence of the Judiciary, access to Justice, constitution-making and constitutionalism in Africa, international crimes, human rights and democracy and to consider new frontiers. Indeed, the work of KAS is important to this office as its main areas of engagement mirror some of the areas of focus for the Government's governance, justice, law and order sector, and the responsibilities of the office of the Attorney General. This symposium therefore provides a timely opportunity to reflect on Kenya's experience and perspectives on some of these issues.

Ladies and Gentlemen

Kenya's considerable experience in constitution-making, implementing the Constitution and entrenching constitutionalism cannot be gainsaid. Laws, and the Constitution of any country is the supreme law of all, are the instrument by which citizens, through their government, protect themselves and regulate their relationships with each other. A fundamental principle of the rule of law is that all are equal before the law. Respect for the rule of law therefore protects and empowers citizens by creating an environment that is fair, equal, consistent, and transparent and allows people to pursue their lives and reach their potential.

The process of development and the eventual promulgation of the Constitution of Kenya 2010 were universally commended by both developing and developed countries. The process towards our current governance success has been long drawn and agonizing – with past and current generations having lived through the colonization of the state; enslavement of peoples and cultures; the rise of tribalism; disenfranchisement; the muzzling of democratic space; incidences of injustice and inhumane treatment; post-election violence and internal displacement.

This process developed the governance structure and articulated the constitutional principles and national values that the people of Kenya embraced and endorsed in August 2010. In doing so, the Kenyan state has set the bar high as the tenets of rule of law, democracy and participation of

the people, equality, human rights, non-discrimination and protection of the marginalized, good governance and transparency are clearly now embedded in our Constitution.

Unfortunately the achievement of this standard is often forgotten when we focus on the challenges experienced during the constitutional implementation period. The transitional period has necessitated the rebuilding of institutions and the restoration of rule of law. As a country, we should extol this success story and seek to ensure that while we acknowledge the present and very pressing challenges, this does not shadow the resolve by Kenyans to create a new constitutional dispensation.

Ladies and Gentlemen,

A legal framework that is clear, defined and predictable and functioning legal institutions are essential and integral tenets of the rule of law, vital for good governance and essential to development, peace and security.

The process of the implementation of the Constitution 2010, which is consistent with the implementation of the political pillar of Kenya's Vison 2030, has seen the transformation of the country's political governance system and seen Kenya undertake various programmes aimed at strengthening its legal frameworks and institutions. The following are indicative of our discernible progress in achieving democracy, transparency and rule of law:

- Reformed electoral laws and institutions with the transition from central to devolved system of governance in relative peace and minimal service disruption as witnessed following the 2013 elections. This is a result of a constitutionally defined governance structure, a clear and independent electoral programme and a reformed electoral body.
- Entrenchment of a bill of rights in the constitution, including socio-economic rights, with a robust enforcement framework ; the expanded right of individuals to go to courts to enforce their human rights including relaxed *locus standi* rules; the expansion of High Court jurisdiction (including through specialized courts) to review constitutional questions especially human rights questions (This has seen a considerable increase in human rights and public interest litigation); the launch of National Policy and Action Plan on Human Rights in October 2016, which seeks to actualize the bill of rights and ensure that citizens enjoy their fundamental rights and freedoms

- The elevation of transparency and accountability and entrenchment of independent oversight organs and mechanisms, which include:
- Separation of powers in the three arms of government;
- An independent judiciary – with the responsibility to act as a check on the power of the executive and the legislature and ensure that there is no erosion of the rule of law and;
- Establishment and support of Constitutional Commissions and Independent Offices – the Office of the Auditor General an independent DPP, the EACC;
- Citizen oversight through public participation;
- Robust Parliamentary oversight through budget-making responsibilities, committee system of oversight;
- Submission to international special mechanisms e.g. Peer Review through the AU, under UNCAC, Review of Kenya's human rights record under Universal Periodic Review process in January 2015; the reporting on various international human rights treaties that Kenya has ratified. In January 2016, Kenya defended her 2nd-5th periodic report on the International Covenant on Economic, Social and Cultural rights. In November 2015, Kenya presented the 8th- 11th periodic report on the African Charter on Human and Peoples' Rights;
- Expansion of access to justice – with ongoing judicial reforms, police reforms, Judiciary, Prisons Reforms, Legislative reforms, national Legal Aid Scheme.

Ladies and Gentlemen

The country's reform programmes in the governance, justice, law and order sector in alignment with our constitutional imperatives, are a work in progress. The Office of the Attorney General has been a critical actor in the implementation of governance, justice, law and order sector reforms, and indeed, under article 156(6), the Attorney General has a role to play in promoting, protecting and upholding the rule of law to defend the public interest.

There have been varied results in the implementation of these reforms, with some more successful than others. However, the continued commitment to their comprehensive implementation by the various organs of government,

non-state actors and citizens is the ultimate indicator of commitment to the Rule of Law. We must do this recognition that respect for the rule of law and observance of good governance and accountability in national affairs is central to the realisation of Kenya's socio-economic development agenda.

Ladies and gentlemen

Various challenges in promoting and strengthening the rule of law must have been articulated during the Symposium. Allow me to highlight two areas which are illustrative of the challenges, with a view to provoking further deliberation in the future:

The first is corruption, which poses a serious threat to the Rule of Law, given that incidences of corruption both in the public and private sector continue to plague Kenya and its citizens' collective reputation and to undermine socio-economic progress. Weak legal and judicial systems foster corruption and undermine progress toward development.

Kenya has since 2003 undertaken extensive anti-corruption legislative and institutional reforms and submitted to peer-review and other special mechanisms under various international instruments. Unfortunately, these anti-corruption initiatives have suffered variable coordination, resourcing and competence constraints and thus achieved only limited results. The need to re-engineer the strategies, mechanisms and tools for fighting corruption has never been more urgent.

As part of the Government's efforts to improve coordination of law enforcement actors in the fight against corruption, H.E. The President has established a Multi-Agency Team chaired by the Attorney General, which innovatively brings together investigation and prosecution, tax administration, asset tracing and recovery under one cohesive framework. The institutions comprising the MAT maintain their independence but function in an interdependent manner to achieve the common objective of eradication of corruption.

There has been a measure of success – with an increase in the numbers of persons (both public officials and private individuals) arraigned in court to answer to various charges of corruption and economic crime; assets worth millions of shillings have been frozen and are in the process of recovery through the operationalisation of the Asset Recovery Agency and enhanced Mutual Legal Assistance with other States.

The Judiciary on its part has established specialised anti-corruption courts to fast track corruption cases. The Office of the Director of Public

Prosecutions has also established a dedicated division to ensuring timely and effective prosecution of corruption and economic crimes, and has trained prosecutors to develop competencies and skills to handle these matters.

There have also been ongoing efforts to strengthen the legal, policy and institutional framework for fighting corruption, Cases in point are:

- The **Bribery Bill 2015,** currently before Parliament, which focuses intervention on bribery of foreign officials and private sector in line with international best practice;
- Development of a draft **Whistleblower Protection Bill, 2016** which creates an elaborate legal framework for protection of persons reporting incidents of corruption and other forms of improper conduct. The Bill provides for a Whistleblower Fund to incentivize whistleblowers and reward persons reporting for cases resulting in conviction or recovery of public property.
- Development of a draft **Anti-Corruption Laws (Amendments) Bill, 2016** which proposes amendments to various anti-corruption laws to address gaps and challenges identified by the Multi-Agency Task Force set up by the Attorney General, and which undertook a comprehensive review of the legal, policy and institutional framework for fighting corruption in Kenya.
- Development of draft **False Claims Bill** *(Qui Tam Actions)* to provide a legal framework for private citizens to initiate actions against persons who have embezzled public funds and against whom no action has been taken by the State. The law is based on the principles set out in the US False Claims Act as well as the recommendations of the Pending Bills Committee, established about a decade ago.

While the challenges facing the fight against corruption are multifarious and complex, the commitment to fight corruption must not wane.

Ladies and Gentlemen,

A second emerging challenge for many governments in the sub-Saharan region is in the maintenance of peace and security, in the face of new threats such as piracy and terrorism. Striking a balance between a country's sovereign right to protect its people -specifically the right to life of its citizens - and the rights of persons suspected of or charged with unusual crimes such as terrorism is challenging.

There are therefore tensions inherent in balancing rights such as the right to bail, right to freely mingle with other inmates, right to freedom of association and movement of an accused person or suspect as against the risk that they shall, in enjoying such rights, successfully undertake a terrorist action.

Sir Edward Garnier QC MP, a former Solicitor General in the UK, in his reflections in 2015 on Democracy under the Rule of Law captures this quandary best:

> *"The "public interest" and the maintenance of the rule of law are frequently used to justify incursions into the principle of the rule of law on the basis that they are necessary for the safety of the public and the preservation of the state. In the late 20th and early 21st centuries, the threat posed by international terrorism has particular significance in this context. Clearly, if the state succumbs to its external enemies, the rule of law will be lost. Yet equally, if the State does not uphold the basic principles of law and justice when faced with such threats, its citizens may well be in no better place than if it had succumbed to the external threat."*

Indeed the discussions that ensued in and out of the courts with regard to the amendments to Kenya's security laws are instructive of the challenges of balancing these issues- the public interest and the rule of law - and the threat posed to the rule of law.

Ladies and Gentlemen

The foregoing remarks have been a modest contribution to the deliberations that have engaged you during the Symposium.

The need to continuously review, research and analyse emerging threats to the Rule of Law and to explore and adopt new measures to protect the rule of law is clearly demonstrated by the foregoing examples. New measures must be continuously explored to address inadequate or weak linkages and collaboration among institutions charged with the responsibility of promoting and protecting the rule of law; otherwise this will continue to hamper the administration of justice, the rule of law and protection of human rights.

These are no doubt challenges experienced by many jurisdictions. All key actors and stakeholders – the Judiciary, Prosecutors, the Legislature, the Executive, the legal profession, the civil society, Academics – must remain vigilant and alive to emerging issues and trends, sharing best practice and experience and enhancing capacity to address these and other threats to the Rule of Law. We are confident that KAS will continue to support local and regional initiatives to encourage discourse in these areas. We look forward to

continued engagement with KAS as you carry on with your critical mandate of development and strengthening of the rule of law on the continent.

To conclude, please join me in recognizing and appreciating the excellent results and outcome of the work by KAS.

I thank you for your attention!

PICTORIAL

Hon. Justice David Maraga, Chief Justice of the Republic of Kenya (L) and Hon. Justice Emmanuel Ugirashebuja, Judge President of the East African Court of Justice keenly following the presentations

Hon. Justice David Maraga, CJ (L) in side discussions with Dr. Arne Wulff,

Professors Kwame Frimpong (Ghana) making his presentation

Prof. Frans Vijoen (Director, Centre for Human Rights, University of Pretoria) making his presentation

Hon. Justice Emmanuel Ugirashebuja (Judge President EACJ) making his presentation.

Dr. Luis Franceschi (Dean, Strathmore Law School) making his presentation

Panel presentation by Dr. Jeanne-Marie Retief (Calibrics, South Africa) on the left; Emilia Siwingwa (Civil Society, Tanzania) in the middle and Mr. Wilfred Nderitu (Legal Practitioner, Kenya) on the right.

Panel presentation by Prof. Frans Viljoen (CHR, University of Pretoria) on the left and Ms. Makanasa Makonetse (SADC Lawyers Association) on the right

Mr. Henry Maina (Article 19) on the left and Rev. Dr. Aidan Msafari (Climate Change Ambassador for Tanzania) on the right making their presentations

CLOSING SESSION

Deputy German Ambassador to Kenya, H.E. Mr. Michael Derus making his address

Deputy German Ambassador to Kenya, H.E. Mr. Michael Derus, and Dr. Arne Wulff, Director KAS Rule of Law Program for Sub-Saharan Africa cutting the cake