HUMAN RIGHTS LITIGATION AND THE DOMESTICATION OF HUMAN RIGHTS STANDARDS IN SUB SAHARAN AFRICA

AHRAJ CASEBOOK SERIES

VOLUME 2

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TABLE OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ACmHPR	African Commission on Human and Peoples' Rights
AHRAJ	African Human Rights and Access to Justice Programme
AIPPA	
AU	African Union
CAF	Canadian Armed Forces
CAT	Convention Againist Torture
CCAR	Central Conference of American Rabbis
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CERD	Convention for the Elimination of all forms of Racial Discrimination
CHRA	Canadian Human Rights Act
CLA	Caprivi Liberation Army
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECHR	European Court of Human Rights
ECOSOC	Economic and Social Council
EEOC	Equal Employment Opportunity Commission
GPU	Gambia Press Union
HRC	Human Rights Committee
HURINET	Human Rights Network Uganda
ICCPR	International Covenant on Civil and Political Rights
ICESCR	Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
IL	International Law
ILO	International Labour Organization
KTDC	Kenya Tourist Development Corporation
LAC	Legal Assistance Centre
MFWA	Media Foundation for West Africa
OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
UDHR	Universal Declaration of Human Rights
UPDF	Uganda's Peoples Defence forces
URJ	Union for Reform Judaism
WTO	World Trade Organization

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(c) www.up.ac.za
(d) www.library.up.ac.za/law
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This *Casebook II* has been developed in a series following *Casebook I*, under the African Human Rights and Access to Justice (AHRAJ) Programmes, in a partnership of ICJ-Kenya and ICJ-Sweden. The Casebook deals with a number of significant court decisions and legislative developments during the past phase of the AHRAJ programme (2006 to 2008).

AHRAJ programmatic goal is to seek the 'domestication' of international human rights standards by enabling the capacity of municipal legal systems in Sub-Saharan Africa, to remedy violations of human rights through judicial remedies.This *casebook II* is therefore conceived in an era of optimism where AHRAJ, through selected cases, has provoked the national judicial systems to confront international norms and sanctions, and rationalise their conformity, using the law and making judicial pronouncements. Thus enabling judges to objectively state what norms and sanctions are comprehensively within the range of the victim of a human right violation. Some of the AHRAJ supported cases have been highlighted in this *Casebook II.*

In the process of writing this *Casebook II*, we have incurred many debts of gratitude to our fellow workers in the field of human rights in Africa. It would be invidious to identify particular individuals, other than to record our appreciation of the support of Mr. Magnus Killander who went out of his way to edit this volume, also particular contributions by James Gondi, Monica Mbaru, Innocent Maja, Angelo Dube, Solomon Ebobrah, and Tarisai Mutangi.

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George Kegoro
Executive Director

International Commission of Jurists, Kenyan and Swedish Sections

AHRAJ Casebook Series, Volume 2

HUMAN RIGHTS: FROM RECOGNITION TO IMPLEMENTATION

Magnus Killander[1]

1. Introduction

The African Human Rights and Access to Justice (AHRAJ) Programme is a joint project of the Kenyan and Swedish sections of the International Commission of Jurists. The project brings together lawyers from across the African continent involved in human rights litigation. The objectives of AHRAJ are:

1. To provide legal expertise through case support and case related support for national and regional domestication of international human rights standards;
2. To increase and strengthen the legal protection of access to justice rights for victims of human rights violation generally, and more specifically within the subject areas of women's rights, labour rights, health rights, the right to fair trial and access to justice;
3. To share legal expertise between national and regional human rights organizations and through international development support between the Swedish and Kenyan sections of the ICJ and their partners.

This is the second volume in the Casebook Series published under the auspices of AHRAJ. The first volume was published in 2007 and included articles on the role of international law in domestic courts, discrimination, labour rights, land rights, freedom of expression, the death penalty and fair trial rights.[2] One of the purposes of the Casebook Series is to provide

1 Jur kand (Lund), EMA (Padua). Researcher and LLD candidate, Centre for Human Rights, University of Pretoria, South Africa. Co-editor of the *African Human Rights Law Reports* (Pretoria University Law Press) and associate editor *International Law in Domestic Courts* (Oxford University Press). E-mail: magnus.killander@up.ac.za.

2 Available at www.icj-kenya.org.

information to African lawyers on litigation strategies which could be followed in cases with which they are involved. The Casebook Series also provide information to a wider audience about African case law at the national and international level.

2. The need for access to case law

For the human rights litigator access to case law is very important when trying to construct arguments to convince the court to apply his or her reasoning. Access to case law is hampered by the lack of, or delay in, law reporting in many countries. In addition to access to the cases of his or her own country the human rights litigator also need access to comparative case law. In order for courts not to cite only English and American cases, efforts should be made to ensure access to judgments by national African courts across the continent.

Much information is now available on the internet, an indispensable tool for the human rights litigator. The Southern African Legal Information Institute (SAFLII) publishes judgments from 14 countries in its online database, www.saflii.org.[3] Not all cases from all the countries are yet on the database but SAFLII is cooperating with the Southern African Judges Commission and national courts to make more judgments freely available online. SAFLII forms part of a world-wide network of legal information institutes determined to provide free access to judgments and other legal material online. Other online resources include www.commonlii.org, www.nigeria-law.org and www.kenyalaw.org. In Francophone Africa the *Association des Cours Constitutionelles ayant en Partage l'Usage des Francais* (ACCPUF), www.accpuf.org play an important in making higher judicial decisions from these countries more accessible.

A useful compilation for the human rights litigator is the yearly *African Human Rights Law Reports* (AHRLR) which include cases decided by the United

3 Botswana, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

Nations treaty bodies, the African Commission on Human and Peoples' Rights and domestic courts across Africa.[4]

The African human rights litigator would obviously also seek support in decisions of courts outside Africa. The legal information institutes mentioned above of which SAFLII forms part is one point of reference. Another useful resource for the human rights litigator is International Law in Domestic Courts (ILDC) an online database published by Oxford University Press. This database includes annotated case law on the interpretation of international law from domestic courts across the world, including many African countries. This is a subscription service but institutions in Africa can be provided free access on request.[5]

In working with comparative case law it is always beneficial to have access to the constitutional, treaty or legislative provisions being discussed. For information on the legal systems of different countries in Africa, including where to find primary materials consult the GlobaLex web site on foreign law research: www.nyulawglobal.org/globalex/index.html. All African constitutions can be found on the web site of the Centre for Human Rights, University of Pretoria, www.chr.up.ac.za, together with material from regional organizations. For the comparative lawyer the Law of Africa collection in the Oliver Tambo Law Library at the University of Pretoria is also a useful resource.[6]

Legal practitioners are strongly encouraged to share the outcomes of cases they have litigated by submitting them for publication in the various sources discussed above.

4AHRLR can be ordered from the Pretoria University Law Press or for the 2000-2004 volumes from the previous publisher, Juta. AHRLR is also available as pdf files at www.chr.up.ac.za.

5 If you are interested in obtaining free access to the ILDC please e-mail the author at magnus.killander@up.ac.za. Please also submit cases to add to the increasing number of African cases reported in ILDC.

6 www.library.up.ac.za/law/law_of_africa.htm.

3. The chapters

While access to primary materials such as case law, legislation and international instruments obviously are very important for the practitioner and the researcher it is also necessary to have access to informed commentary about these primary sources and how they can be used in a specific case. Four of the chapters of this book deal with the content of substantive human rights law, discrimination of sexual minorities, reproductive health rights, freedom of expression, eviction and how violations of these rights have been addressed, or not addressed, by national courts and international bodies. The other two chapters deal with procedural law: When should one submit a case to an international body and how can a decision by an international body be enforced at the national level?

The first step in the recognition of sexual minorities as equal citizens would be to decriminalize homosexuality. In his chapter James Gondi first considers international case law. Of particular importance is *Toonen v Australia* as it interprets the International Covenant on Civil and Political Rights (ICCPR), a treaty which has been ratified by 50 African states.[7] The Human Rights Committee held in *Toonen* that criminalization of homosexual sexual activity between consenting adults violated the right to privacy in the ICCPR. Despite this finding such criminalization remains on the statute books of many African states. Only the South African constitution explicitly prohibits discrimination on the grounds of sexual orientation. Mr Gondi discusses in detail the unsuccessful challenge against the prohibition of sodomy in Botswana in the case of *Kanane v The State*, a case supported by AHRAJ.

While discrimination on the grounds of sex is now outlawed in most of the constitutions in Africa,[8] ingrained gender discrimination remains a serious

7 The only African states which have not ratified the ICCPR are Comoros, Guinea-Bissau and Saõ Tomé and Principe.

8 C Heyns & W Kaguongo 'Constitutional human rights law in Africa' (2006) 22 *South African Journal on Human Rights* 683-84.

challenge on the continent. Monica Mbaru illustrates this with an AHRAJ supported case in which it is alleged that a woman was dismissed from her work because of a pregnancy and the resultant distress contributed to the stillbirth of her child. Ms Mbaru argues that this case raises issues of the reproductive and sexual rights of women, rights which have long been neglected. Ms Mbaru sets out how the right to health has gradually been recognised as a justiciable right in some states and by international monitoring bodies. There has however been a paucity of jurisprudence on reproductive rights, though they are recognised in a number of international instruments such as the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Freedom of expression is violated across the African continent. In his chapter Innocent Maja sets out the international instruments that protect the freedom of expression and which limitations are allowed. The chapter ends with an overview of the state of the freedom of expression in the countries of Southern Africa. With regard to each country Mr Maja details legislation which violates the freedom of expression as set out in the constitutions of these countries. It is clear that the legislation discussed needs to be amended or deleted from the statute books. Together with other advocacy efforts litigation can be one strategy to achieve this result.

Eviction is a serious challenge to human rights considered by Buhle A Dube in his chapter. Mr Dube sets out the international law provisions with regard to eviction. Using an example from Ghana he illustrates the often serious consequences of an eviction which may lead to a domino effect of violations of both socio-economic and civil and political rights. In the last part of his chapter Mr Dube analyses the human rights implications of case law on evictions from India, South Africa, Ghana, Swaziland, Zimbabwe and Botswana.

It is often reiterated that human rights are best protected at the national

level. However, regional and global fora can play an important role when the national judicial system is lacking. Courts established under African Regional Economic Communities (RECs) have the potential of playing a role in the protection of human rights. Individuals can submit cases to the courts of the Common Market of Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC). The EAC Court and the SADC Tribunal has recently handed down decisions dealing with human rights violations in member states.[9]

Most international courts or quasi-judicial organs would require the exhaustion of local remedies before admitting a case. As discussed by Solomon Ebobrah the ECOWAS Community Court of Justice (CCJ) is an exception allowing for residents of west Africa to submit human rights complaints to the court without first taking a case to a national court. Mr Ebobrah's article examines the limitations of national and international protection of children's rights. He finds that the ECOWAS CCJ has the potential of playing a positive role in the protection of children's rights in West Africa.

While lack of enforcement of judgments can be a problem at the national level (see for example Dube's discussion of eviction cases in Swaziland), enforcement is even more troublesome with regard to judgments of international courts. Tarisai Mutangi discusses the prospects of reopening cases at the national level after findings by international courts or quasi-judicial bodies that fair trial rights have been violated. He illustrates his discussion with cases decided by the African Commission and the UN Human Rights Committee where these have explicitly or implicitly called for the reopening of a case. In order for African countries to draw inspiration, Mr Mutangi further analyses the approach taken by a few countries in

9 *James Katabazi and 21 Others v Secretary General of the East African Community and the Attorney General of Uganda,* East African Court of Justice, Reference no 1 of 2007, 1 November 2007; *Mike Campbell (Pvt) Limited & William Michael Campbell v The Republic of Zimbabwe*, SADC Tribunal case no SADCT: 2/07.

respect of reopening national proceedings, notably Germany and Estonia in Europe, which reformed their respective laws to allow reopening in view of contrary findings by the European Court of Human Rights. Whilst Burundi and Cape Verde remain unmatched models in the African context, the chapter concludes by recommending to AHRAJ litigators to advocate law reform in this area of law.

The essays included in this book range from the recognition of contested rights (such as the rights of sexual minorities) to contested views on the implementation of the judgments of international courts. Freedom of expression and the protection against arbitrary eviction might be less contested at the theoretical level, but is in practice often mired in controversy. Innovation is reflected in the ECOWAS approach of creating an international jurisdiction which is parallel rather than above the national jurisdiction.

Chapter One

DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATON: AN INTERNATIONAL COMPARATIVE ANALYSIS

By James Gondi[1]

1. Introduction

The proscription of discrimination on the basis of sexual orientation is not vividly captured in any instrument of public international law. However as a result of litigation before the courts in various jurisdictions around the globe, there is a rich body of jurisprudence which can be effectively relied upon to deride discrimination on the basis of sexual orientation as a minority rights violation.

Furthermore, the United Nations Human Rights Committee, the UN treaty body responsible for monitoring compliance with the Covenant on Civil and Political Rights (ICCPR), views discrimination on the basis of sexual orientation as a violation of the ICCPR despite 'sexual orientation' not being explicitly mentioned as a prohibited ground of discrimination in the ICCPR.

The African Human Rights and Access to Justice (AHRAJ) programme supports cases in Africa challenging such discrimination. These are cases where sexual minority groups - lesbians, gays, bisexuals, transgender and inter-sex - have been singled out for harassment thus depriving them of their basic rights including equal protection before the law and the right to freedom from discrimination.

In Uganda, case support has been provided to Victor Juliet Mukasa, a

1 LLB Keele University (UK), LLM Free University (Brussels). African Human Rights and Access to Justice (AHRAJ) Legal Officer at the Kenyan Section of the International Commission of Jurists (ICJ-Kenya).

sexual minority rights activist who has been specifically targeted for abuse, physical assault and perennial harassment by state security organs. In Botswana AHRAJ supported the case *Ujitwa Kanane v Republic* where the applicant challenged the constitutionality of pre-colonial penal laws which proscribed 'carnal knowledge against the order of nature'.

The present analysis will delve into the manner in which international human rights treaty monitoring bodies deal with the issue of sexual orientation, the vast jurisprudence in various jurisdictions barring discrimination on the basis of sexual orientation; the African context pitting the legal school of thought which subscribes to universalism against the legal school of thought which reads international law through the lens of cultural relativism. Law reform initiatives in respect of the said subject in Africa and basic minimum standards of non discrimination of minority groups in Africa also form the basis of the present analysis.

2. International human rights law

The core international human rights instruments include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and the Convention against Torture (CAT). At the regional level there are the African Charter on Human and Peoples' Rights (ACHPR), the European Convention on Human Rights (ECHR) and the Inter-American Convention on Human Rights, among others. None of these international human rights treaties make any reference to sexual orientation or gender identity.[2] Indeed:[3]

> Recognition of sexual orientation rights is still developing. The contours of sexual orientation are unclear. There is no human rights treaty with the words sexual orientation

2 D Sanders 'Human rights and sexual orientation in international law' Faculty of Law University of British Columbia, Canada (2003). Available at www.ai-lgbt.org/international.PDF

3 H Lau 'Sexual orientation: Testing the universality of international human rights law' (2000) 71 *University of Chicago Law Review*.

in its title, nor any such treaty that specifically delineates sexual orientation rights.

In practice, courts and quasi-judicial bodies interpreting international human rights treaties have recognized sexual orientation rights as universal human rights. According to international law, when treaty and customary law are unclear, international court decisions, writings of international jurists (opinio juris) and soft law serve as a subsidiary source of international law.[4] It is from this practice and convention that the clamour for the prohibition of discrimination on the basis of sexual orientation derives its thrust.

3. Cross border jurisprudence: the right to privacy and prohibition of discrimination

Dudgeon v United Kingdom[5]

Dudgeon, a gay rights activist, challenged the criminal prohibitions on gay male sexual activity which were still in place in Northern Ireland while the same had been decriminalized in England and Wales in 1967. The European Court of Human Rights (ECHR) ruled that the said laws violated Dudgeon's right to privacy. This court decision made the reform of the law politically possible. After this ruling, the ECHR opined against the existence of similar laws in Norris v Ireland (1988) and Modinos v Cyprus (1993).[6]

Hertzberg v Finland

In this case, the first of its kind brought before a UN treaty monitoring body, radio and TV stations were censored under Finnish penal laws which prohibited the public encouragement of 'indecent behaviour' between persons of the same sex. Finland argued that the limitations to the freedom of expression through 'restrictions as are provided by law and are necessary for the protection of public health or morals' was applicable. The Committee ruled in favour of Finland but there was a dissenting opinion that:[7]

4 I Brownlie *Principles of public international law* 102.
5 (1981) 4 EHRR 149.
6 Sanders (n 1 above).
7 Communication No 61/1979, UN Doc CCPR/C/OP/1 at 124 (1985).

> Under article 19(2) and subject to article 19(3), everyone must in principle have the right to impart information and ideas - positive or negative - about homosexuality and discuss any problem relating to it freely, through any media of his choice and on his own responsibility.

Toonen v Australia

Nicholas Toonen was a gay rights activist from Tasmania in Australia. He challenged the validity under the Constitution of Australia and international human rights law, of laws in Tasmania which prohibited homosexual activity. All other states within the Commonwealth of Australia had repealed such laws and decriminalized same sex activity between consenting adults conducted within their private sphere.

Toonen argued that the Tasmanian law prohibiting homosexual activity violated his right to privacy and his right to non discrimination in keeping with the principle of equality before the law. Tasmania pleaded a moral basis for the maintenance of such laws in its statute books arguing that:[8]

> Domestic social mores may be relevant to the reasonableness of an interference with privacy while asserting the general view of the Commonwealth of Australia that discrimination on the basis of sexual orientation was wrong.

The Committee was guided by jurisprudence of the European Court of Human Rights including Dudgeon v United Kingdom, and found that the Tasmanian law violated Toonen's right to privacy. The Committee further dismissed the Tasmania's morality argument which they said, was a gross departure from the ethos of the decision in *Hertzberg v Finland.*

There was also an equality argument based on articles 2(1) and 26 of the ICCPR. Article 2(1) reads:

> Each State Party to the present Covenant undertakes to respect and to ensure to all

8 *Toonen v Australia*, case 488/92.

> individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 reads:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status.*

The argument was that variant sexual orientation should be included in the category of 'other status ' as provided for in the above sections of the ICCPR and that protection from discrimination and equal protection before the law should apply to gays and lesbians by virtue of their alternative sexual orientation. The Committee held that the provision 'other status' should be interpreted to include sexual orientation.

Furthermore, in 2003 the United Nations Human Rights Committee in *Young v Australia* upheld the right of a same sex partner to receive the same government benefits received by heterosexual domestic partners.[9]

P v S and Cornwall County Council

In this case, the European Court of Justice (ECJ) was guided by the European Union (EU) Charter on Fundamental Rights in ruling that discrimination on the basis of gender reassignment is a form of discrimination on the basis of sex, thus providing valuable jurisprudence on the trans-gender aspect of non-discrimination.

4. The United Nations and the rights of sexual minorities

Following the pronouncement in *Toonen vs. Australia* that the ICCPR protects sexual minorities, four other UN Committees affirmed that they would also construe

9 UN Doc CCPR/C/78/D/941.

the international conventions they oversee, CEDAW, CAT, CRC and CESCR, to protect sexual minority groups.[10] It is arguable, therefore, that all state parties to the treaties above are obliged to ensure that the rights of sexual minorities are not violated.

The Beijing Declaration and Platform for Action 1995, following the Fourth World Conference on Women[11] called on governments to activate strategies geared towards the elimination of discrimination in employment based on sexual orientation and to stave off denigration based on sexual orientation. Paragraph 232(f) of the Platform calls on states to:

> Ensure that human rights of women, including their reproductive rights and their right to have control over and decide freely and responsibly on matters related to their sexuality, are fully respected and protected. Furthermore, some governments have interpreted the prohibition against discrimination on the basis of 'other status' to include sexual orientation.[12]

The Platform for Action therefore provides some guidance for jurists who seek to invoke the provisions of international human rights instruments which proscribe discrimination on the basis of 'other status' to include the prohibition of discrimination on the basis of sexual orientation in their defence of the civil and political rights of gays, lesbians, bisexual, transgender and inter-sex groups including the rights of human rights defenders who advocate for the rights of sexual minority groups. However, only a few governments concurred on the mode of treaty interpretation to read 'other status' as including sexual orientation.

In 2003 and 2004 (during the 59th and 60th sessions of the UN Commission on Human Rights in Geneva), Brazil brought a resolution before the

10 Sanders (n 1 above).
11 A/CONF 177/20 (1995) and A/CONF 177/20/Add. 1 (1995).
12 Fourth World Conference on Women Beijing, China - September 1995
Action for Equality, Development and Peace: PLATFORM FOR ACTION www.un.org/womenwatch/daw/beijing/platform/

Commission seeking the reaffirmation of the protection of sexual minorities within the existing international human rights regime. There was stiff opposition, mainly from Muslim states including Pakistan, Saudi Arabia, Malaysia, Libya, Egypt and Bahrain. Other countries with liberal oriented foreign policies such as Costa Rica and Mexico were initially supportive but succumbed to pressure from the Vatican.[13]

The Office of the United Nations High Commissioner for Human Rights has been receptive to the protection of sexual minority groups under existing international human instruments even though sexual orientation is not specifically mentioned in the texts of the said instruments. High Commissioner Mary Robinson was particularly supportive, having earlier acted as counsel for Irish Senator Norris, who challenged Ireland's anti-homosexual criminal laws before the European Court of Human Rights in Strasbourg.[14]

The then UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, Asma Jahangir from Pakistan, was the first to include individual cases of severe persecution of members of sexual minorities in her reports to the Human Rights Commission (now the Human Rights Council). Jahangir, a renowned human rights lawyer and activist born in Lahore in Pakistan, and famous for her role in legal reforms in her country and internationally, systematically reviewed and probed violations of the right to life of sexual minorities and explored several dynamics including the climate of impunity surrounding crimes against LGBT groups, laws which maintain capital punishment for homosexual conduct and the linkages between violence and the criminalization of aspects of sexual orientation.[15]

The United Nations Sub Commission on Prevention of Discrimination and Protection of Minorities concluded a study on sexual orientation in 1987.[16]

13 *Sexuality in Africa Magazine* volume two, issue II (2005).
14 Sanders (n 1 above).
15 E Paradis 'Sexual minorities reach the UN, (2002) 9 *Human Rights Tribune*.
16 'Report of the sub-commission on Prevention of Discrimination and Protection of Minorities

Although the study did not result in significant policy shifts by the UN system on sexual minorities, its contents are used as a reference point by treaty monitoring bodies when issuing opinions. In 1992, the Sub Commission recommended the application of discrimination oriented indicators in measuring state compliance with economic, social and cultural rights. These would include discriminatory behaviour on grounds of social status, income level, marital status, age, property and sexual orientation.[17]

5. The African context: cultural relativism versus universalism

As displayed by the positions of the Muslim states and other religiously dominated jurisdictions, the interpretation of human rights standards as applied to sexual orientation, particularly LGBTI groups and defenders will depend on the cultural context of the particular jurisdiction and the intellectual disposition of the opinion makers therein.

Thus, the extension of international human rights policy and jurisprudence on sexual orientation is likely to be met by stiff opposition owing to the conservative African cultural context. This situation, however, affords judges, legal scholars and practitioners the opportunity to express the particular school of international legal thought to which they subscribe. Thus, cultural relativist international legal scholars will be pitted against their universalism school counterparts.

Relativist international lawyers construct their legal arguments within the context of their socio-political environment. Indeed, the law does not operate in a vacuum and must be read with view to delivering justice to the society which it regulates. Thus, social and moral considerations are bound to emerge in the interpretation of internationally recognised sexual minority rights as applied to the African continent. Hence, African moral dimensions as well as Christian and Islamic philosophy, among other factors are likely to come into play. A

on its Forty Sixth Session E/CN.4/1995/2, E/CN.4/Sub.2/1994/56.

17 Sanders (n 1 above).

cross section of policy makers and judicial officers are likely to retreat into their moral and religious enclaves when faced with such a significant challenge.

Jurists must therefore employ innovative legal strategies to address the fundamental issue of protecting the human dignity of minority citizens. The tactic is to stick to the fundamental concern, which is to urge the courts of law, as fountains of justice, and not mere guardians of social mob positions, not to be reduced to merely rubberstamping majority opinion and concentrate on upholding their duty to soberly adjudicate upon matters arising from the violation of citizens fundamental rights regardless of whether those citizens are a minority and regardless of the popularity of the subject matter.

This will require true judicial activism and will separate true jurists from those who subscribe to principle of equal protection of the law as a mere pretension. The former could draw inspiration from scholars of non western intellectual thought, who, according to Lau have argued that:

> Human rights definitions are still compatible with their native philosophies, despite their origin in Western liberalism. For instance, Islamic scholar Abdullahi An-Na'im argues that the Koran may be interpreted either to further the agendas of oppressive regimes or to support a universalist understanding of human rights. Similar to An-Na'im, Confucian scholars like Joseph Chan, Tu Weiming, and Chung-ying Cheng have used Confucian texts to support universalism; they argue that there is a substantial convergence between Confucianism and political liberalism.[18]

Related arguments can be extended by liberal jurists to counter the argument that the extension of international human rights law protections to apply to sexual minority groups such as LGBTI within the sphere of the African human rights system would be in conflict with African cultural norms. Jurists must speak of civil and political rights which are designed to secure the human dignity of all citizens in law, including minority groups.

18 Lau (n 2 above).

6. Decisions of the Constitutional Court of South Africa

6.1 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (CCT 11/98)

In this case, commonly referred to as the 'sodomy case',[19] the Constitutional Court determined that the criminalization of sodomy was unconstitutional. In his opinion for the Constitutional Court, Justice Ackerman established that sexual minorities were fully entitled to right to privacy, the right of dignity and the right to equal protection before the law. National legal systems across Africa ought to be guided by similar dialectics in shaping the adoption of basic minimum standards for the protection of sexual minorities.

6.2 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (CCT 10/99)

The Constitutional Court determined that the country's immigration law had to be altered to recognize same-sex couples as possessing, for all intents and purposes, the same immigration rights as legal spouses. The ruling was based on provisions of the South African Constitution that ban sexual orientation and marital status discrimination (section 9) and that guarantee human dignity to the entire citizenry of the Republic of South Africa.

6.3 *Fourie* case (CCT 60/04)

The applicants, Marie Adriaana Fourie and Cecelia Johanna Bonthuys complained that the South African Marriage Act excluded them from publicly expressing their commitment to each other in marriage. They argued that this was unfair and in contravention of the 1994 South African constitution which provides in section 9(1) that 'everyone is equal before the law and

19 (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)

has the right to equal protection and benefit of the law'.

Section 9(3) further provides that:

> The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status. Ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The Court ruled that the common law definition of marriage not only gave rise to an infringement of the appellants constitutional right not to be the victims of unfair discrimination in terms of section 9 of the Constitution but also their right to human dignity in terms of section 10.

7. AHRAJ cases and legal opinions

7.1 Ujitwa Kanane v The State

The argument

In this case, AHRAJ provided case support for a legal challenge to the constitutionality of the criminalization of sexual acts between consenting adults of the same sex. Ujitwa Kanane, a male adult citizen of Botswana was in 1995 charged with committing an 'unnatural offence' and engaging in 'indecent practices' contrary to sections 164(c) and 167 of the Penal Code respectively. In particular, Mr Kanane was accused of permitting Graham Norrie, being a male, to have carnal knowledge of him against the order of nature. In sum, the prosecution sought to incarcerate Mr Kanane for homosexual conduct.

The legal action supported by AHRAJ was a constitutional challenge at the Court of Appeal arising from proceedings at the Magistrate's Court which had original jurisdiction over the criminal trial. The initial challenge to sections 164 (c) and 167 of the Penal Code was unsuccessful as the High Court upheld their constitutionality. Mwaikasu J ruled that:

> The State may enact legislation that overrides the freedom of association and conscience and the right to privacy in order to defend public morality. Laws prohibiting homosexual conduct under the labels of 'unnatural carnal knowledge' and 'gross indecency' thus do not violate constitutional rights. Additionally, the laws do not discriminate against men and are not unconstitutionally vague. Therefore, the criminal action against the application may proceed.[20]

The appeal challenged the High Court's interpretation of the Constitution as incongruent with the right to privacy, freedom of expression and freedom of association on grounds of public morality. *Kanane v State* is the first case in Botswana to challenge laws pertaining to criminalization of homosexuality.

Defence counsel Duma Boko argued that social reality has been constructed around a heterosexist standpoint. He challenges this societal standpoint with an interesting diatribe:

> Peoples genitals are use to categorize them as either male or female so that they may assume and play out certain roles that society ascribes to each one of the categories into which their genitals put them.[21]

It was the submission of defence counsel that such societal standpoints are outdated and convoluted.

The present author was the legal expert in the case and argued in a legal opinion against the provisions of the Penal Code of Botswana which outlaw homosexual acts. Section 164(c) of the said statute provides as follows:

> Any person who permits any other person to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

Section 167 provides that:

20 1995 BLR 94.

21 AHRAJ case 153 legal opinion: 'Criminalizing sexual orientation and sexual acts between consenting adults of the same sex' www.ilsbu.com/cases_page/view_document.asp?id=194

> Any male person who whether in public or private commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him or attempts to procure the commission of any such act by any male person with himself or with another male person whether in public or private, is guilty of an offence.

The legal opinion advanced the argument that the terminology used to proscribe homosexuality is vague and unclear. This is apparent from reading sections 164(c) and 167 as set out above. By describing homosexual activity as unnatural, the effect of the Penal Code provisions are that the opposite of homosexuality, that is heterosexuality, is 'moral' and 'natural'. Another issue is triggered here- by which set standard is heterosexuality natural and moral?

These would be the standards of the heterosexuals who perhaps form the majority of society. The effect is that heterosexuality is 'natural' because the majority subscribes to it while homosexuality is 'unnatural' because it is practiced by the minority. The Penal Code of Botswana has thus institutionalized such thinking. It is the submission of independent legal thinkers that the law does not exist merely to sanction the whim of the majority at the expense of the minority. In order for a particular code of conduct to be proscribed by law, there must be a higher standard or test than the mere 'naturalness' or 'morality' of the said conduct.

Further, the statutory provisions appear archaic and effusive. Statutory provisions which proscribe certain conduct must be specific as to what particular conduct is against the law. Statutory provisions cannot merely prescribe an overall standard into which several forms of human conduct can be included and hence proscribed. Doing so leaves the law undefined, vulnerable to abuse and gross misinterpretation. Several types of conduct can be unnatural or immoral but not necessarily illegal.

The criminological ethos behind proscribing certain actions is tilted towards protection of the citizenry as part of the Hobbesian social contract. Thus, to

qualify as illegal, an act must be so dangerous or unsavoury that allowing it to continue undeterred places the entire citizenry at substantial risk. It has not been scientifically established that practicing homosexuality, despite it not being the orientation of the majority, is so detrimental to the existence of the populace that it ought to be proscribed by law.

Even if it were the intention of lawmakers to proscribe homosexual conduct, then such proscription must follow the due process of lawmaking and enforcement. This is to say that a statute must be clear and unequivocal in its proscription of the acts it seeks to criminalize. Failure to do so is an abhorrence of the rule of law as it leaves the law hanging in a balance of uncertainty and open to inconsistent and arbitrary application.

At a statutory level, sections 164(c) and 167 of the Penal Code of Botswana are vague, unclear and therefore open to misuse and arbitrariness of application. The Penal Code of Botswana is therefore not sufficient to criminalize homosexual conduct even if such criminalization were acceptable in the modern world and more specifically, in light of international human rights law.

Attorney Duma Boko submitted the following comparative foreign case law:

Bowers v Hardwick 478 US 1039
This case re-emphasized the purpose of the right to privacy. The learned judge ruled that the right of an individual to conduct intimate relationships lay at the very core of constitutional protections of privacy. Attorney Duma Boko, for the accused, submitted that the wisdom of Judge Blackburn falls within the scope of the right to privacy as enshrined under section 3 of the Constitution of Botswana. This averment is sound in law and is in consonance with international standards on the right to privacy.

Attorney General v Unity Dow, Botswana Court of Appeal (Civil Application 4/91)_

AG v Unity Dow confirmed the protection of the right to privacy as enshrined in the constitution of Botswana. The Botswana Court of Appeal held that section 3 of the Constitution of Botswana was a substantive section conferring rights of the individuals including the right to privacy.

The judgment of the High Court

The High Court upheld the constitutionality of sections 164 and 167 of the Penal Code, ruling that the time had not yet arrived to decriminalize homosexual practices even between consenting adult males in private and that the public interest must always be a factor in the court's consideration of legislation, particularly where such legislation reflects a public concern. The import of this argument is that homosexuality must remain criminalized in the interest of the public.

According to the learned judge of the superior court in this case, societies that fail to criminalize sexual immorality have experienced moral decline, health problems, and weak family structures. The empirical evidence to support such 'findings' remains a mystery.

From a universalist standpoint, the judgment of the High Court in the State v Kanane goes beyond the interpretation of law. It delves into the realm of morality by seeking to recommend what is 'healthy' for society, and what is not, in relation to sexual orientation. The learned judge argued that, even in private and among consenting adults, the laws that criminalize homosexuality are necessary to maintain a 'stable and healthy society'. To an extent, the High Court of Botswana has usurped the role of the clergy and the family with the moral overtones of this judgment.

Some would qualify the judgment in the present case as a brand of judicial activism designed to safeguard society. However, an emerging cornerstone of judicial activism is the ability of judges to adjust their approach to meet the expectations of modern society. Failure to do so entrenches the perception that judges are stuffy and remote. The opinion of the High Court in the present

case, based on notions of stability and health, sounds remote and far removed from the social reality characterized by divergence of sexual orientation.

There is need for an intelligent and informed debate on the issue of homosexuality in Africa especially on the legal aspects. There is clearly no express basis in law for the proscription and criminalization of homosexual conduct. The interpretation of sections 164(c) and 167 by the High Court is unconstitutional to the extent that it infringes upon the right to privacy as enshrined in the Constitution of Botswana. Furthermore, the opinion of the Court is contrary to international human rights law as it erodes the right to privacy and non-discrimination.

The judgment of the Court of Appeal

The Court of Appeal bowed to the 'public opinion' argument and shied away from making a landmark ruling towards the advancement fundamental freedoms enshrined the Constitution of Botswana. The Court held that discrimination on the basis of sexual orientation is not among the forms of discrimination set out in Section 15 (3) of the Constitution of Botswana. It also posed the question:[22]

> Whether in Botswana at the present time the circumstances demand the decriminalization of homosexual practices as between consenting adult males or whether there is a class or group of gay men who require protection under section 3 of the Constitution?

The Court of Appeal transposed the onus to the appellant to demonstrate that public persuasion has experienced the requisite paradigm shift to demand decriminalization of anti-homosexuality laws. The court held that regard must always be had to public opinion especially if expressed through legislation, in interpreting the Constitution.

The Court of Appeal in Botswana based this finding on the decision of McNally JA in the Zimbabwe case of Banana v The State. In this case, the

22 Criminal Appeal 9 of 2003 (unreported).

Zimbabwean Supreme Court held that:[23]

> From the point of view of law reform, it cannot be said that public opinion has so changed and developed in Zimbabwe that the Courts must yield to that new perception and declare the old law obsolete.

Human rights commentators have described the ruling of the Appeal Court in Kanane v the State as a missed opportunity for the advancement of the right to privacy, freedom of association, freedom of conscience, expression and assembly.[24]

7.2 The case of Victor Juliet Mukasa

Victor Juliet Mukasa is a Ugandan LGBTI human rights defender. The applicant's home in Kireka, a suburb of Kampala was raided by a government official on 20 July 2005. Property and documents related to the applicants work advocating for the protection of rights of all people, regardless of sexual orientation, were stolen during the raid. The applicant was treated in an inhuman and degrading manner while seeking to reclaim the said property.

The two were subjected to humiliating and degrading treatment because of their sexuality. No charges were pressed against them and were released, on the condition that they keep reporting back to the police. Victor went into safe housing and the other activists have left Uganda. These acts on the part of state security agents are in violation of the Constitution of Uganda.

The constitutional violations against the applicant (cited in Miscellaneous Cause No 247 of 2006 in – *Stella Ayoo and Victor Mukasa versus Attorney General of Uganda) include:*

1. Breach of the applicants guaranteed protection from any form of torture, cruel or inhuman or degrading treatment, under article 24 of the Constitution.

23 (2000) 4 LRC 621 (ZSC).
24 KN Bojosi 'An opportunity missed for gay rights in Botswana: *Ujitwa Kanane v The State*' (2004) 20 *South African Journal on Human Rights* 466.

2. Breach of the first applicant's protection from unlawful search of person and her privacy contrary to article 27 of the Constitution;
3 Breach of the applicant's right to privacy of person, home and property guaranteed by articles 27 of the Constitution.

In addition, other fundamental violations pleaded in the constitutional application before the High Court of Uganda at Kampala include:

- Illegal search of the home of Victor Juliet Mukasa without a search warrant and unauthorized seizure of items from the house amounting to trespass and theft.
- Illegal arrest of Yvonne Oyoo, guest found in the home at the time of the raid
- Inhuman and degrading treatment of the applicants amounting to sexual harassment and indecent assault
- right to freedom from unfair discrimination
- Violation of fundamental rights of right to security of the person regardless of sexual orientation or gender identity, the right to security of the person and to protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual or group

- Denial of freedom from arbitrary arrest and deprivation of liberty

- Right to treatment with humanity while in custody

The case of Victor Juliet Mukasa explores various legal avenues for redress of fundamental human rights breaches against sexual minorities including: the right to choose one's partner; the right to decide freely on matters related to one's sexuality without fear of violence, discrimination and coercion; the right to seek and provide information on sexuality; the right of access to confidential sexual health services, and the right of all persons to express their sexual orientation. A constitutional ruling is expected early in 2008 and it is hoped that the Court will take the opportunity to adjudicate objectively

on the fundamental rights issues raised in the case.

8. Conclusion

At the very least, discrimination on the basis of sexual orientation especially in employment and in public services, as well as the targeting of sexual minorities for cruel, inhuman and degrading treatment should be prohibited regardless of the opinion of the majority populace. This is because the true test of a democratic society is the extent to which it is able to protect its minority citizens in the midst of majority subjectivity.

The institutions of a democratic state, particularly the judiciary, must be able to the extent of the convergence and compromise between relativism and universalism, rise above stringent religious, cultural and moral standpoints in arriving at reasoned positions that are grounded in law and which reflect the obligations of African states to protect the fundamental rights of their minorities.

African jurists can draw inspiration from the Constitutional Court of South Africa and the Bill of Rights enshrined in the South African Constitution of 1996 which provides that everyone is equal before the law and prohibits unfair discrimination on the basis of sex and sexual orientation.

Chapter Two

THE RIGHT TO HEALTH: WOMEN'S REPRODUCTIVE AND SEXUAL HEALTH RIGHTS

Monica Mbaru[1]

1. Introduction

Mary[2] is a 36 year-old lady who had been employed as a school bursar at Joycare Secondary School for fourteen years. In late February 2005 she was hospitalised at Memorial Hospital Thika, Kenya until April 2005, where she underwent treatment due to complications with her pregnancy. On 14 April 2005 she applied for maternity leave, which would run until 12 July 2005. On 14 May 2005 she was denied maternity leave and on 25 May 2005 her employer summarily dismissed her. In the process of following up on her dismissal, she was admitted in hospital again where she had stillbirth. In the termination letter, the employer cited gross misconduct as a ground for termination. Mary claims that her termination was unlawful and discriminatory on the grounds of her seeking maternity leave.

Mary has now filed a petition against the public school administration, and the Attorney General of the Republic of Kenya seeking; reinstatement to her previous employment with full pay, a declaration that termination of her employment was a gross abuse of her human rights, illegal, null and void ab initio, general and punitive damages for wrongful dismissal, for abuse of her human rights and compensation for her loss, compliance by the employer and the government of Kenya to the Convention on the Elimination of All

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2 Not her real name. Names and places have been changed to protect the plaintiff whose case is still ongoing, but the facts remain factual.

Forms of Discrimination against Women.[3] The petition is pending hearing. The case of Mary casts out the scenario for a majority of women all over the world and especially in developing countries. Gender-based discrimination against women constitutes one of the greatest threats to women's health and lives worldwide. The right to health as guaranteed in international and regional human rights treaties, as well as in most domestic laws, are rarely achieved due to practical realities on the ground. These guarantees are not enforced by national-level courts, which are important venues through which human rights are affirmed or denied. The challenge to litigants is to not only cite international norms, but also be able to offer an examination, interpretation, and application of the same by national courts thus making them a reality.

Based on the background of the above case, this chapter explores international legal norms pertaining to the right to health as a human right, in particular reproductive health rights. Even where states face significant challenges in regards to the provision of health care access to reproductive health is a major concern for most governments.

The chapter's first section outlines how various international instruments have defined the right to health as a universally applicable human right. Even without considering the unique situation of women, this section shows the difficulties faced by most states and regional bodies in accommodating this positive entitlement within political, economic and social realities. Jurisprudential trends on the right to health are analysed. The second part of this chapter examines norms governing reproductive health.

2. The right to health in international law

2.1 United Nations human rights instruments

It is now firmly established that international human rights law accepts health as one of the rights accruing to human beings. International instruments such as the

3 AHRAJ supported the case under the theme women rights.

International Covenant on Economic, Social and Cultural Rights (ICESCR),[4] the Universal Declaration of Human Rights (UDHR)[5] and the African Charter on Human and Peoples' Rights (ACHPR)[6] are all in agreement and respectively provide for the right to health. The preamble to the Constitution of the World Health Organisation (WHO) presents the right to health as encompassing 'the highest attainable standard of health' and defines health as 'a state of complete physical, mental and social well being and not just the absence of disease or infirmity'.[7] Despite this universal recognition it is clear that weak institutions have hampered the access to the right to health, lack of an adequate legal framework,[8] and uncertain and variable policy frameworks. To a large extent, lack of adequate resources has contributed to failures in implementation of the right, as well as other social, economic and cultural rights, thereby decreasing the understanding of its contents.[9]

The right to health contains elements of both negative and positive duties: the state should not intervene with someone's health, meaning that the state should respect the integrity of the body, should neither torture nor impose diseases. At the same time, we associate a 'right to health' with an obligation on the part of the community to provide adequate health services. Provisions in a number of international legal instruments describe this second, affirmative, meaning of a right to health.

Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.[10] Thus to attain the standard to 'a standard of living for the health and well-being' of every citizen, states have the obligation according to article 2 of the International Covenant on Economic Social and Cultural rights (ICESCR) to,

4 Art 12.
5 Art 25.
6 Art 16.
7 Adopted 22 July 1946 and enter into force 7 April 1948 see also Basic Documents of the WHO.
8 World Bank, *Sub-Saharan Africa: From crisis to sustainable growth,* Washington, World Bank (1998).
9 General Comment No 14, para 33.
10 European Social Charter, Part 1, II.

> … take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[11]

The standards to be met are set out in article 12 of the ICESCR:

> …the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> …the steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
>
> (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
>
> (b) The improvement of all aspects of environmental and industrial hygiene;
>
> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
>
> (d) The creation of conditions, which would assure to all medical service, and medical attention in the event of sickness.

According to the Committee on Economic, Social and Cultural Rights a state will fail to discharge its obligations under ICESCR if 'a number of individuals are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education.'[12] States must thus protect a 'minimum core' of the right without reference to available resources.

Many states have ratified or acceded to treaties recognising the right to health, thus clearly giving credence that there is a right to health. However, many have not affirmed, in principle, the implementation of this right and prefer to view health and other socio-economic rights as a mere social

11 Art 2, ICESCR.
12 General Comment No 3 (UN Doc E/1991/23).

aspiration thus stripping it of the discursive power of the rights talk.

Consequently the view that health rights do not present a premium legal obligation, which states must guarantee, makes implementation, enforcement and or justiciability even more difficult. The lack of a violations based approach[13] to the enforcement of the right to health give state parties confidence in holding that they are doing people a favour when providing access to health rather than fulfilling a legally binding obligation.

The tangible legal value of the right to health, given the right configuration of political will, public opinion, and judicial resolve, can be legally enforced and thus generate real benefits for people.[14] This then scoffs at the opinion that health rights are not legally binding and therefore constitute merely programmatic goals and aspirations of state parties.

The essence of the interrogation is to review compliance with the tripartite obligations to respect, protect and fulfil the right to health: [15]

> The obligation to respect requires states to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect requires states to take measures that prevent third parties from interfering with the right to health; and to adopt legislation or to take other measures ensuring equal access to health services. Finally, the obligation to fulfil requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures toward the full realization of the right to health.

The right to health may also be implicated in cases based on protection of

13 A Chapman 'A violations-based approach to monitoring the International Covenant on Economic Social and Cultural Rights' (1996) 16 *Human Rights Quarterly* 23.

14 'Using the law to improve access to treatments' (2002) 7(2/3) *Canadian HIV/AIDS Policy and Law Review* 88.

15 As above. See also A Eide, *The right to adequate food as a human right,* Human Rights Study Series No 1, New York, United Nations, (1989).

civil and political rights. The Human Rights Committee, which examines compliance with the Covenant on Civil and Political Rights (ICCPR) found in its concluding observations on the state report of Israel that restrictions on freedom of movement that disrupt access to health care, including emergency medical services, and access to water are a violation of article 12 of the ICCPR.[16]

2.2 The African Charter on Human and Peoples' Rights and the right to health

The African Charter has been applauded as the most distinctive instrument in articulating a 'truly indivisible and interdependent' normative framework, addressing all rights equally in the same context.[17] Economic, social and cultural rights are placed on the same level as all other rights guaranteed under the African Charter. The Charter explicitly guarantees the right to work under equitable and satisfactory conditions, and to equal pay for equal work,[18] the right to health, right to education and the right to take part in the cultural life of one's community.[19] The Commission has in its case law interpreted the Charter to implicitly recognise other socio-economic rights.

Article 16 of the Charter, which deals with the right to health, provides:

> Every individual shall have the right to enjoy the best attainable state of physical and mental health … States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

The measures to be taken are stipulated under article 1 of the African Charter under which the states parties are obligated to adopt legislative and other measures to give effect to all the rights guaranteed under the Charter.

16 Concluding observations of the Human Rights Committee: Israel, 21 August 2003. CCPR/CO/78/ISR.
17 Y Klerk 'Forced labour and the African Charter on Human and Peoples' rights' in *The African Charter on Human and Peoples' Rights: Development, context, significance* (1990) 230.
18 Art 15.
19 Art 17.

The African Charter provides for a 'violations approach' to the implementation of socio-economic rights unlike the ICESCR approach of 'progressive realization'.[20] However, in *Purohit and Another v The Gambia*[21] the African Commission recognized the need to allow for progressive realization in the African context calling on states to take 'concrete and targeted steps' to ensure the realization of the right to health without discrimination.[22]

2.3 Case law on the right to health

The view that the content of the right to health cannot be determined with precision has supported those who view health as a non-justiciable right. The argument is taken further that even the courts cannot formulate content and hence are not in a position to give a remedy.

The perception that health is more a social concern than a right has led many constitutional processes to omit them from constitutions as justiciable rights. The constitutions upcoming in the new wave of people driven constitutions have ignited debate about socio-economic rights. However, these have largely been included as Directive Principles of State Policy (DPSP) rather than justiciable rights.[23] The South African Constitution has been bold to include them as justiciable rights. As noted by Viljoen '[a] bill of rights contains subjective rights while DPSP contains objective legal norms that need to be converted in the subjective rights'.[24]

Domestic justiciability of health rights is dependent upon invocation and judicial application of the legislated norms particularly in dualist jurisdictions like most common law jurisdictions where international norms have to be

20 C Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in Evans & Murray (eds) *'The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 196.
21 (2003) AHRLR 96 (ACHPR 2003).
22 As above, para 84.
23 See eg the Ugandan Constitution of 1995.
24 F Viljoen 'Justiciability of socio-economic and cultural rights: Experiences and problems' unpublished paper, Centre for Human Rights, University of Pretoria.

domesticated prior to their invocation. Otherwise, international law norms remain mere persuasive authorities of interpretation. This is exacerbated by the absence of judicial innovativeness and activism. The lack of an expansive and purposeful interpretation approach that has assisted jurisdictions such as the Philippines and India has not been internalised in other jurisdictions.

The Indian Constitution includes socio-economic rights as Directives Principles of State Policy. These DPSPs are not justiciable. Judicial creativeness and activism has however seen the Indian judiciary adopt the expansive and purposeful approach, which emphasises indivisibility of rights to ensure justiciability of socio-economic rights. The right to health has thus been derived from the right to life.

For instance, in the case of *Paschim Banga Khet Majoor Samity v State of West Bengal*[25] the Indian Supreme Court found a violation of right to life by the government because of the failure of public hospital to extend emergency medical assistance to the applicant who fell off a train and seriously injured his head. In addition to awarding compensation to the applicant, the Court ordered appropriate facilities be to upgraded to ensure similarly situated patients would not suffer the same predicament as the applicant. A government appointed Commission of Inquiry investigated the technical questions and presented its findings to the Court, which then became the basis of the remedial action ordered by the Court. In this way the lack of technical expertise of judges, an argument sometimes put forward against the justiciability of socio-economic rights, was addressed.[26]

In the Philippines case of *Minors Oposa v Factoran,*[27] the Supreme Court stopping the granting of timber logging licences found that the state had an obligation to protect the right to health of present and future generations.

25 (1996) 4 SCC 37 at 102.
26 A An-Naim 'To affirm the full human rights standing of economic social & cultural rights' in Y Ghai & J Cottrell (eds) *Economic social & cultural rights in practice* (2004).
27 (1993) Supreme Court of Philippines, GR101083.

The activities of the private companies were causing environmental degradation. The decision was based on the right to life as read with article 2 of the DPSPs of the 1997 Constitution, which guarantees the right to health and a healthy environment.

As states progress towards protection of human rights, the incorporation of constitutional provisions will also enhance access by litigants relying on constitutional provisions. The value of test cases at the national level as focal points for change cannot be over-emphasized.[28]

In South Africa, the right to health is constitutionally entrenched and justiciable.[29] The issue of content was examined in the case of *Soobramoney v Minister of Health (Kwazulu-Natal)*[30] where the Court tested the reasonableness of the government programme in giving renal failure patients access to medical facilities aimed at curing them and not just maintaining them in a chronically ill condition.[31]

The Court found that:

> …the guarantees of the Constitution are not absolute but may be limited in one way or another. In some instances, the Constitution states in so many words that the state must take reasonable legislative and other measures, within its available resources…[to achieve the progressive realisation of each of these rights]. In its language, the Constitution accepts that it cannot solve all of our society's woes overnight, but must go on trying to resolve these problems. One of the limiting factors to the attainment of the Constitution's guarantees is that of limited or scarce resources. In the present case the limited haemodialysis facilities, inclusive of haemodialysis machines; beds and trained staff constitute the limited or scarce facilities.[32]

Similarly the Constitutional Court of South Africa in *the Minister for Health v Treatment Action Campaign*[33] noted that, although its orders enforcing

28 M Freeman, 'Women, law, and land at the local level: Claiming women's human rights in domestic legal systems (1994) 16 *Human Rights Quarterly* 559 at 562
29 Art 27(2).
30 1997(12) BCLR 1696 (CC).
31 As above para 29.
32 As above para 43.
33 2002 (10) BCLR 1033 (CC), para 38.

socio-economic rights claims may have budgetary implications, the state has to manage its limited resources in order to address all claims from its citizens. This will require it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society. The Court held that courts are

> …ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates a rather restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance…[34]

The courts do not have direct influence over policy and budgeting for socio-economic rights fulfillment. However they influence how resources can be used for realizing socio-economic rights because the government has to take into account case law developments in policy and budgeting. In Creamer's words:

> Given the entrenchment of socio-economic rights in South Africa's Constitution, jurisprudential development and discussion on government's obligations with regard to the realisation of socio-economic rights should provide guidance to the development of social policy. In particular the budget process, as a key instrument of government planning and implementation, should involve the active application of evolving interpretations of government's socio-economic rights obligations.[35]

In a 1992 Colombian case about the terminal illness of an AIDS patient, the Colombian Supreme Court ruled that the state was required, under a

34 As above para 38.

35 K Creamer 'The implications of socio-economic rights', In S Liebenberg & K Pillay (eds) *Socio-economic rights in South Africa – A resource book,* (2002).

provision in the Colombian Constitution guaranteeing the right to health (article 13), to provide special protection when the lack of economic resources 'prevents a person from decreasing the suffering, discrimination, and the social risk involved in being afflicted by a terminal, transmissible, and incurable illness. To this end, the Court decided that the hospital was supposed to provide the AIDS patient with the necessary services.

The HRC in its General Comment 6 on the right to life under the ICCPR has explained that the right to life under the Covenant should not be construed narrowly but rather should be interpreted broadly as to include rights to housing, food and medical care.[36] Lending support to this broad interpretation, Yamin has noted that a denial of treatment to people living with HIV/AIDS may ultimately deprive them of their right to life.[37] The Venezuela Supreme Court has held that failure on the part of the government to provide ARVs for those infected and affected by HIV/AIDS in the country amount to violation of their right to life.[38] In the case of D v United Kingdom,[39] the European Court of Human Rights held that a purported deportation of a HIV positive immigrant to his/her country of origin where adequate treatment could not be guaranteed amounted to the violation of the right to human dignity guaranteed under the European Convention.

Claims based on the right to health have also been address by regional human rights bodies.

In the case of *Yanomani Indians* the Inter-American Commission declared that the right to health under article XI of the American Declaration had been violated.[40] The government of Brazil was held to have failed to protect

36 The right to life UN GAOR Human Rights Committee 37th session Supp No 40.
37 AE Yamin 'Not just a tragedy: access to medication as a right under international law' (2003) 21 *Boston University International Law Journal* 326 at 334.
38 *Cruz Bermudez et al v Ministerio de Sanidad y Asistencia Social* (MSAS) No 15789 1999. See also Supreme Court of Costa Rica, *Alvarez v Caja Costarricense de Seguro Social Exp* 5778-V-97 No 5934-97(SC).
39 *D v United Kingdom* (1997) 24 EHRR 423.
40 Annual Report of the Inter-American Commission, 1984-1985, Resolution No. 12/85. Case No. 7615.

the Yanomani against the exploitation of the rainforest and the detrimental health effects that could be caused.

As set out above the African Charter provides for a justiciable right to health[41] and affirms the indivisibility and interdependence of rights in the Charter.[42] The jurisprudence of the African Commission has further buttressed the justiciability of the right to health. The exemplary jurisprudence is a rebuttal of the usual challenges encountered at the domestic level and ought to inspire the national courts in their enforcement of rights.

In the case of *Social and Economic Rights Action Centre and Another v Nigeria*[43] *(SERAC)* the African Commission found that the right to health include a right to safe drinking water and electricity. The duty to protect the right from interference by third parties was enunciated and Nigeria was found to have failed to protect its citizens from the actions of Nigerian National Petroleum Company, and military operatives in the Ogoniland. The reasoning of the *SERAC* decision underscores the justiciability of socio-economic rights and the interdependence of rights.

In *Purohit and Moore v The Gambia*[44] the African Commission noted that the right to health means the highest attainable standard of health linked to all aspects necessary for the realisation of fundamental rights. The African Commission further laid down that the right to health includes access to facilities and access to goods and services. In the communication the complaint was against detention of mental health patients in a facility that did not meet health standards.

Specifically with regard to prisoners, the African Commission has held in *International Pen and Others (on behalf of Ken Saro Wiwa) v Nigeria*[45] that the responsibility of a state to ensure the well being of a prisoner is

41 Art16.
42 Para 8 of the preamble.
43 Communication 155/96, (2001) AHRLR 60 (ACHPR 2001).
44 Communication 241/2000 (n 20 above).
45 (2000) AHLR 212 (ACHPR 1998*)*

heightened due to their susceptible nature and that a denial of medical attention to a prisoner when critically ill, amounted to a violation of his right to health and life. In arriving at this conclusion, the Commission said as follows:

> The protection of the right to life in article 4 also includes a duty for the state not to purposefully let a person die while in its custody. Here at least one of the victims' lives was seriously endangered by the denial of medication during detention. Thus, there are multiple violations of article 4

3. Reproductive and sexual health rights

3.1 The United Nations

The explicit recognition of a woman's right to make choices in matters of reproduction can be traced to the late 1960s. The 1968, World Conference on Human Rights in Tehran recognised that 'parents have a basic human right to determine freely and responsibly the number and spacing of their children'.[46] This was a groundbreaking proclamation noting that for long women had limited decision-making power in matters of their reproductive and sexual health due to inadequate, social, and cultural empowerment to demand for health facilities capable to assisting in this regards.

This right was reaffirmed at international conferences several times throughout the following decades. This recognition led to the acknowledgement that widespread gender inequality must be addressed before women are able to exercise any other rights.[47] The right to health, including the right to reproductive health was defined in subsequent human rights treaties.

In 1966, ICSECR was the first human rights treaty to require states to

46 *Proclamation of Tehran, Final Act of the International Conference on Human Rights* (1968) 16.

47 *Recommendations for the further implementation of the World Population Plan of Action, Report of the International Conference on Population,* Mexico City, Mexico 6-14 August 1984 (Recommendation 30, UN Doc. E/CONF.76/19 (1984).

recognise the right to health and to take steps to achieve the realisation of that right for the benefit of families.[48] In addition to guaranteeing equality and the freedom to determine family size,[49] the 1981 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) guarantees non-discrimination in access to health care,[50] including information and services on family planning,[51] hence granting women the capacity to decide on their sexual health too.

The 1990 Convention on the Right of the Child, reiterates the right to maternal health and identifies it as intimately and intrinsically related to the right to health for children.[52] The 1966 ICCPR contains several key provisions relevant to the right to reproductive health, especially article 6 on the right to life, article 9 on the right to liberty and security, and article 17 on the right to privacy.

Reproductive health rights embrace certain human rights that are already recognised in national laws, international human rights documents and other consensus documents.[53] In 1995, the Platform for Action[54] issued during the Beijing Conference recognised woman's right to control her sexual relations on an equal basis with men.

Since the Beijing Conference various world regions have moved further to develop women rights based on the Plan of Action to further uphold reproductive and sexual rights in new and emerging areas of HIV/AIDS,

48 ICESCR art 12.
49 CEDAW art 16(1) (e).
50 CEDAW art 12(1) and 14(2) (b).
51 CEDAW article 16(1) (e).
52 Article 24 states:
1. States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right to access to such health care services.
2. State Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures…(d) to ensure appropriate pre-natal and post-natal health care for mothers;…
53 *Programme of Action of the International Conference on Population and Development,* Cairo, Egypt, September 5-13, 1994, 73 UN Doc. A/CONF.171/13 (1994).
54 *Beijing Declaration and the Platform of Action, 4th World conference on Women*, Beijing, china, September 4-15, 1995, 96, UN Doc. A/CONF.177/20 (1995).

crimes of sexual and gender based violence, and women human rights. The recognition of reproductive and sexual rights as human rights has thus formed a fundamental link in treaty monitoring, legislative reviews and reforms, and litigation.

The work of the CESCR Committee has been able to further expound on ICESCR and in particular the committee has expanded upon article 12 of ICSECR, within its General Comment (GC) No 14 in a most comprehensive interpretation of the international right to health, and corresponding state obligations, to date. In its GC No 14, the CESCR Committee interprets article 12(2)(a) of ICSECR as the right to maternal, child and reproductive health, which requires state parties to implement measures to

> …improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information.[55]

In emphasising women's rights, the CESCR Committee underlines the need for states parties to provide a full range of high-quality and affordable health care, including sexual and reproductive services. To reduce women's health risks and lower maternal mortality rates, states must remove all barriers to women's access to health services, education and information, including in the areas of reproductive and sexual health. This can only be possible on the application of non-discrimination on the basis of gender and equal treatment with respect to the right to health, and thus states parties are called upon to integrate a gender perspective in their health-related policies, planning, programmes and research.[56]

55 GC No 14, para 14.

56 GC No 14, para 20 states 'The Committee recommends that States integrate a gender perspective in their health-related policies, planning, programmes and research in order to promote better health for both women and men. A gender-based approach recognizes that biological and socio-cultural factors play a significant role in influencing the health of men and women. The desegregation of health and socio-economic data according to sex is essential for identifying and remedying inequalities in health.'

3.2 Advancing women health rights in Africa

Sub-Saharan Africa has the worst indicators of women's health – particularly reproductive health – of any region of the world. These indicators include the highest numbers of HIV positive women and the highest infant, maternal and HIV-related death rates worldwide.[57] Against this background, the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on Women)[58] in 2005, was a move in the right direction. The Protocol on Women provides broad protection for women's rights, including sexual and reproductive health rights.

Recognising the weaknesses in the African Charter with regard to women's rights, the Protocol on Women introduces reproductive and sexual rights protection in Africa within the context of existing international protections for women. The Protocol on Women thus add to the already existing rights in the African Charter which has been ratified by all African Union member states. The benefit of this is that the Protocol on Women puts a gender perspective into rights especially on 'new' rights being reproductive rights, widows rights, right to information, and consent in marriage

Article 14 of the Protocol on Women addresses women's sexual and reproductive health rights. Article 14(1) provides:

> State parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
> (a) the right to control their fertility;
> (b) the right to decide whether to have children, the number of children and the spacing of children; …
> (c) the right to choose any method of contraception;
> (d) the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS;
> (e) the right to be informed on one's health status and on the health status

57 UNAIDS *Handbook for legislators on HIV/AIDS, law and human rights* (1999) 61.
58 Protocol to the African charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the AU Assembly on 11 July 2003.

> of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices.

Further to giving women proper information and family planning education pertaining to their sexual and reproductive rights, states parties are called upon under article 14(2) to

> …take all appropriate measures to:
> a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
> b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
> c) protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

These provisions highlight the need to remedy the rights violations that women in Africa have endured, and urges states parties to implement systematic changes to ensure that women's rights are protected when they seek reproductive health care.

4. Employment and reproductive health

As noted above, Mary lost her employment due to her application for maternity leave and thus double loss, as due to the health complications and failure to get leave, she had stillbirth. Thus when looking at reproductive and sexual health rights, other human rights come into play as the lack of respect for reproductive rights impacts on the general health and life of the person. The victimisation of Mary at her workplace for reasons of seeking maternity leave should thus be seen as a violation of her human rights as well as her labour rights.

According to CEDAW, appropriate measures should be taken by all state parties to eliminate discrimination against women in the field of employment:[59]

> …State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: …
> In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, State Parties shall take appropriate measures:
>
> > (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
> > (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.

Gender sensitive labour policies and laws are therefore called for and the CEDAW Committee has generally been very critical of labour legislation designed to protect women in the workplace that has the effect of reinforcing stereotypes or restricting women's economic opportunities, and will always ask reporting states to review such legislation.

In its concluding observations on the state report of Colombia, the CEDAW Committee observed that it was discrimination against women at the workplace to require pregnancy test for employment and dismissal on the grounds of pregnancy.[60] The Committee explicitly characterised such discrimination as a violation of women's reproductive rights.

The protection of women's right to employment can therefore not be separated from their right to health, as discrimination against women in

59 CEDAW, art 11 which require states parties to take all appropriate steps to eliminate discrimination against women in the field of employment and requires states to prohibit dismissal on the grounds of *pregnancy*, to introduce *maternity leave,* to promote the *development of a network of child care;* and to *provide pregnant women with special protection from work that might be harmful to them.*.
60 Colombia, 4 February 1999, UN Doc A/54/38, 389.

the areas of health care, including reproductive health care such as family planning services impact negatively on their productivity. This is the condition envisaged under article 12, of CEDAW:

> 1. State Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
> 2. Notwithstanding the provisions of paragraph 1 of this article, State Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

At the work place the levels of productivity for women whose reproductive and sexual health rights are not guaranteed is reduced.

5. Enforcing health rights

When one talks of enforcement of rights one is inevitably talking about using the law to ensure that a right is protected. This means 'claiming an infringement of a subjective right before a body resembling a court to obtain redress or remedial order for a violation'.[61] In other words, can the right be invoked as a basis for a legal remedy? Are economic, social and cultural rights justiciable?

The tangible legal value of the right to health, given the right configuration of political will, public opinion, and judicial resolve, can be legally enforced and thus generate real benefits for people.[62] This then scoffs at the opinions that health rights are not legally binding and therefore constitute merely programmatic goals and aspirations of state parties.

The essence of the interrogation is to review compliance with the tripartite

61 Viljoen (n 23 above).
62 'Using the law to improve access to treatments' (n 13 above).

obligations to respect, protect and fulfil the right to health.[63] Several challenges to justiciability have occupied scholars and state parties alike. These include the inconclusive formulation or content of the right to health, non-inclusion of the right to health in national constitutions, the nature of the obligations arising from the right to health and counter-majoritarian dilemma. These are mentioned as illustrations of the challenges to justiciability and not as an exhaustive list, and each is elaborated below.

The content or demarcation of the right to health has presented one of the greatest challenges with regards to justiciability. The right to health defined, includes access to adequate health care (medical, preventative, and mental), nutrition, sanitation, and to clean water and air. It also includes occupational health consequences such as chronic injuries and diseases resulting from unhealthy and hazardous working conditions.

The Committee on Economic ,Social and Cultural Rights has defined it as

> the right to the enjoyment of a variety of facilities, goods, services, and conditions necessary for the realisation of the highest attainable standard of health. It identifies four interrelated and essential elements of the right to health: availability, accessibility (including affordability), acceptability, and quality.[64]

Justiciability must be distinguished from enforcement or implementation. Hurdles may also be faced in terms of enforcement. International enforcement mechanisms are generally weak because of lack of policing institutions. Domestic enforcement is thus better equipped because of national enforcement agencies. Case law has made it clear that the 'enforcement' of these rights is 'difficult' and needs to be 'explored on a case-by-case basis'.[65]

While hurdles are still being encountered, they can be overcome if political will

63 N 14 above.
64 General Comment 14.
65 *Grootboom v Oostenberg Municipality 2*000 (3) BCLR 277 CC, para 22.

is present. The fundamental multifaceted indivisibility and interdependence of human rights was emphasized in the Vienna World Human Rights Conference of 1993. Therefore, just as implementation and justiciability of civil and political rights developed and defined itself, time should be given for health rights to do the same.

6. Conclusion

The perceived differences between socio-economic rights and civil and political rights leads to the view that socio-economic rights such as health impose positive obligations resulting in resource implications while political rights impose negative obligations and hence no resource requirements. This is evident when one considers the wording difference between the ICCPR and the ICESCR. The ICCPR provides that parties to the Covenant 'undertake to respect and ensure all individuals within their territory and subject to their jurisdiction the rights recognised in the Covenant'.[66] In contrast, the ICESCR states that the parties 'undertake to take steps to … to the maximum of their available resources with a view to achieving progressive realisation of the rights recognised in the Covenant'.[67] The former is a qualified statement of states' responsibility to its citizens while the latter is laissez-faire statement and the right is dependent on availability of resources.

Recent scholarship views have however noted the indivisibility and interdependence of all rights. To this end all rights may give rise to both negative and positive implications for instance the right to health does not only give rise to the right to protect (prevent third parties from interfering with the right), nor promote and fulfill (promote awareness of the right) but also give rise to negative obligations which entails refraining from infringing the right.[68] Thus, what is 'tested in courts is not only the sufficiency of programmes and legislation but state parties' compliance with its negative obligations'.[69]

66 Article 22 of ICCPR.
67 Article 2(1).
68 T Kaime 'Beyond social programmes: The right to health under the African Charter' (2004) 10 *East African Journal of Human Rights* 10 199.
69 J Oloka-Onyango 'Human rights and sustainable development in contemporary Africa: A new

The justiciability of socio-economic rights are also often criticised for encroaching into the decision-making powers perceived to be the competence of the legislature and the executive. Objectors argue that it would result in the courts dictating to the government how the budget should be allocated. It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters.[70]

Because the decisions on health rights may give rise to resource implications, the legitimacy of courts to descend into that area is thus questioned since judges are not popularly elected. It is further argued that if courts make decisions on these rights then they have descended into governance of their respective countries.[71] Often, issues of socio-economic rights are deemed 'too political' and better left to elected members.

The South African Constitutional Court has held that it is correct that socio-economic rights require courts to make orders with resource implications affecting budgetary matters but noted the same is true even for civil and political rights for example in equality rights (extension of services to those previously disadvantaged) and fair trial rights (provision of legal aid).[72] Thus courts inevitably make orders requiring of resource and budgetary adjustments in adjudicating all different rights.

What is evident is that justiciability of health rights has faced and still faces challenges as outlined above. However innovative approaches such as expansive and purposeful interpretation of the rights guaranteed in national constitutions is one way of overcoming the hurdles. The Indian jurisprudence inspires confidence in this regard.

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dawn or retreating horizons?' (2000) 6 *Buffalo Human Rights Law Review* 39 at 57.
70 SBO Gutto 'Beyond justiciability: Challenges of implementing/enforcing socio-economic rights in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 79.
71 J Cottrell & Y Ghai 'The role of the courts in the protection of economic social and cultural rights' in Cottrell & Ghai (n 25 above) 59.
72 *Ex-parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 at para 77.

Public interest litigation has a useful role and NGOs ought to litigate on the right to health nationally and internationally. The African Commission jurisprudence show the justiciability of the right to health, its interconnectedness with all other rights as well as its value to human life. Equally so NGOs who now wield a better understanding on justiciability can take up challenges nationally using multifaceted approaches to jolt national judiciaries.

Ideally, inclusion of a justiciable right in the national constitutions and legislation would remove a multitude of hurdles. In the absence of that, continued lobbying for inclusion is required. Jurisprudence from other jurisdictions can also positively impact on judicial decisions and innovativeness.

Therefore the forum before which Mary has sought to claim her reproductive human rights can be enhanced by the jurisprudence already in existence. It is also a unique case that has chances of impacting on women's reproductive, sexual and labour rights in Kenya and within other common law jurisdictions. The decision on the case will be highly awaited to see how national court approach matters relating to claim for human rights.

CHAPTER 3

FREEDOM OF EXPRESSION: THE NORMATIVE CONTENT AND THE SOUTHERN AFRICAN PRACTICE

Innocent Maja[1]

1. Introduction

The right to freedom of expression refers to the freedom or liberty to hold opinions without any interference and to access, seek, receive and impart information through any media and without any frontiers. It includes freedom of speech, media freedom as well as intellectual, musical and artistic expression. This article seeks to explain the normative content of the right to freedom of expression and the extent to which Southern African states protect this right. The first part of the article deals with the normative content of the right to freedom of expression and the second part examines the extent to which national laws in Southern African states[2] guarantee the right to freedom of expression.

2. The normative content of the right to freedom of expression

2.1 Rationale for protecting freedom of expression

Ronald Dworkin cites two rationales of protecting freedom of expression. Firstly, free speech is important 'not because people have an intrinsic moral right to say what they wish, but because

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2 Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, South Africa, Tanzania, Zambia and Zimbabwe.

allowing them to do so will produce good effects for the rest of us."[3] Secondly, freedom of expression is valuable because expression is an important part of what it means to be human. In Dworkin's words:

> …Freedom of speech is valuable, not just in virtue of the consequences it has, but because it is an essential and 'constitutive' feature of a just political society that government treat its adult members … as responsible moral agents. That requirement has two dimensions. Firstly, morally responsible people insist on making up their own minds what is good or bad in life or in politics, or what is true and false in matters of justice or faith. Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to head opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us of the ground that we are not fit to hear and consider it.[4]

A third rationale initially couched by Dworkin and also embraced by courts in Southern Africa is that freedom of expression is important because it contributes to the constitution's project of overturning an authoritarian polity and establishing a democracy in its place.[5] In *South African National Defence Force Union v Minister of Defence,*[6] the South African Constitutional Court held that:

> Freedom of Expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally.

In *Banana v Attorney-General,* the Zimbabwean Supreme Court held that 'Freedom of expression is recognised as a core value of society, essential to truth, democracy and personal fulfilment.'[7] In the Zimbabwean Supreme

3 Ronald Dworkin *Freedom's law* (1996) 200.
4 Note 2 above, page 200.
5 See I Currie and J de Waal *The Bill of Rights handbook* (5th ed 2005) 361.
6 1999 (4) SA 469 (CC) at paragraph 7.
7 1999 (1) BCLR 27 (ZS) 31F. See also the Namibian Supreme Court decision of *Kauesa v Minister of Home Affairs* 1995 (11) BCLR 1540 (NmS), 1554C.

Court decision of *In re Munhumeso*, the court held that:

> Freedom of expression, one of the most precious of all the guaranteed freedoms, has four broad special purposes to serve:
> (i) it helps an individual to obtain self fulfilment;
> (ii) it assists in the discovery of truth; (iii) it strengthens the capacity of an individual to participate in decision making; and (iv), it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.[8]

In *Retrofit (Private) Limited v Posts and Telecommunications Corporation and Another,*[9] **the Zimbabwean Court explained the purview of these four purposes of freedom of expression:**

> … (a)'It helps an individual to obtain self-fulfilment'
> Speech is an expression of self, whether effected by face-to-face exchange, or over the telephone, by writing, by pictures, or by any other mode. The desire to communicate, to express feelings and thoughts and to contribute to discussion and debate, is an essential attribute of human nature. To unreasonably prevent a person from expressing a view, belief or emotion is to deny his or her basic dignity, freedom and individual autonomy as a human being …
> (b)'It assists in the discovery of truth'
> The search for truth rationale has been articulated in terms of the famous 'marketplace of ideas' concept. This holds that truth will emerge out of the competition of ideas. In his classic dissent in Abrams v US 250 US 616 (1919) at 630 the redoubtable Justice Holmes said that:

8 1994 (1) ZLR 422 (S) 57.

9 1995 (2) ZLR 199 (S) 211-213. Nkosi Ndlela, *Critical Analysis of Media Laws in Zimbabwe*, 2003, Konrad Adenauer Foundation, 6 echoes similar sentiments. He convincingly argues that: 'Firstly, it has been argued that freedom of expression is a vital aspect of democratic processes and it is important for the promotion of and respect for all other human rights… Secondly, a classical philosophical argument that has been advanced as a justification for freedom of expression, which includes freedom of the press, is that, it is the best way of attaining truth. Central to this argument is the notion of a market place of ideas. All points of view including the minority ones are entitled to be heard. Truth is best arrived at through a free exchange of ideas. A restriction on freedom of expression imposed by the state inhibits the discovery of the truth. Thirdly, freedom of expression is justified on the basis of individual self-fulfilment and development. This classical defence is founded on the role of an individual as a member of society and his/ her right to express his/ her beliefs and opinions to other members of his/ her community. It is the right of all individuals to form their own beliefs and communicate them freely to others. This right must be regarded as an essential principle of a democratic society. Imposing restrictions on what individuals may express or write compromises individual dignity and personal growth. Absence of coercion is arguably a necessary condition for individual self-realisation. Suppression of expression is an affront to the dignity of man, a negation of a man's essential nature. Absence of coercion is arguably a necessary condition for individual self-realisation.'

> '… when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out.'

(c)'It strengthens the capacity of an individual to participate in decision-making.

The proposition is self-evident and requires little elaboration. The free propagation of ideas and opinions be they one's own or of others and of information, together with the process of open debate and argument, far better enables members of society to make informed judgments on matters of national or private interest.

(d)'It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change'

> Social stability is strengthened and advanced by freedom of expression. Restraint impedes rational discussion and reduces society's ability to adjust to changing circumstances. The experience of participation makes it easier for those whose views are rejected or criticised to accept and abide decisions reached through an open, objective and non-coercive process. The uninhibited exchange of ideas, opinions and information is, after all, the very lifeblood of democracy.

It can be discerned from this subsection that freedom of expression is important in three material respects. Firstly, it is an essential and 'constitutive' feature of a just political society that government treat its adult members as responsible moral agents. Secondly, expression is an important part of what it means to be human. Thirdly freedom of expression is recognised as a core value of society, essential to truth, democracy and personal fulfilment.

2.2 International standards for the protection of freedom of expression

The right to freedom of expression is protected by various human rights

instruments both under the United Nations and regional human rights systems. The following are the major international law treaty provisions that protect freedom of expression;

Article 19 of the Universal Declaration of Human Rights (Universal Declaration) states that:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) states that:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. …

Article 13 of the Convention on the Rights of the Child (CRC) affords children the right to freedom of expression by stipulating that:

> 1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice. …

In addition to this provision, article 12 of the CRC stipulates that states have to assure and ensure that a child who is capable of forming his or her own views can express those views freely. These views should be taken into account in issues relating to the interests of the child accordance with the age and maturity of the child.

In the same breath, article 13 of the Convention on the Rights of Migrant Workers and Members of their Families (CMW) guarantees freedom of expression for migrant workers and members of their families. It stipulates that:

> 1. Migrant workers and members of their families shall have the right to hold opinions without interference. 2. Migrant workers and members of their families shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of their choice.

The Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict provides protection to civilian journalists working in areas of armed conflict.

On the regional front, freedom of expression is protected under article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which provides that:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Article 13 of the American Convention on Human Rights (ACHR) states that:

> Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

Article 9 of the African Charter on Human and Peoples' Rights (ACHPR) provides that:

> 1. Every individual shall have the right to receive information.
> 2. Every individual shall have the right to express and disseminate his opinions within the law.

What emerges from these provisions is that the normative content of the right to freedom of expression entails the freedom or liberty to:

a) Seek information;
b) Access information;
c) Receive information;

d) Hold opinions;
e) Impart information and ideas of all kinds either orally, in writing, in print, in the form of art, or through any medium of one's choice. These include media freedom as well as musical and artistic expression.
f) These freedoms should be exercised without any interference by public authorities and regardless of frontiers. States have an absolute and immediate obligation to guarantee freedom of expression.

2.3 Limitations to freedom of expression

It is important to note that the right to freedom of expression is not *per se an* absolute right.[10] Just like other human rights, the right to freedom of expression can be limited in certain specified circumstances. The rationale for this approach is to ensure that people use their freedom of expression in a responsible manner that will neither infringe on the rights of others nor compromise national security, public order, public health and or public morals. This can be gleaned from the carefully couched wording of human rights instruments that emphasizes that freedom of expression carries with it special duties and responsibilities.

The following provisions specifically limit the right to freedom of expression.

Article 19(3) of the ICCPR states that:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (order public), or of public health or morals.

Article 13(2) of the CRC buttresses this point and stipulates in similar terms that:

10 See General Comment 10 of the United Nations Human Rights Committee.

The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others; or
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

In a similar line of thought, article 13(3) of the CMW states that:

The exercise of the right provided for in paragraph 2 of the present article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputation of others;
(b) For the protection of the national security of the States concerned or of public order (ordre public) or of public health or morals;
(c) For the purpose of preventing any propaganda for war;
(d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Article 10(1) and (2) of the ECHR provides that:

1. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 13(2), (3), (4) and (5) of the ACHR elaborately states that:

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. Respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals.

> 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
> 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
> 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

It is interesting to note that article 19 of the UDHR and article 9 of the ACHPR have been criticized for providing for an absolute right to freedom of expression that fails to balance the concepts of freedom and responsibility laid down in United Nations General Assembly resolution 59(1) of 1946.[11] In terms of this resolution, the exercise of the right to freedom of expression is subject to the willingness and capacity to exercise the freedom without abuse as well as the moral obligation to seek facts without prejudice and to spread knowledge without malicious intent. With respect, this criticism is unwarranted because a careful reading of the UDHR and the ACHPR reveals that the right to freedom of expression is not absolute but limited. For instance, article 29(2) of the UDHR specifically states that the exercise of all rights and freedoms (including the right to freedom of expression)

> …shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The ACHPR limits the right to freedom of expression in two ways. Firstly, article 9(2) thereof highlights that '… Every individual shall have the right to express and disseminate his opinions within the law.' In *Media Rights*

11 Yearbook of the United Nations 1946 - 1947 (United Nations, 1948) 176.

Agenda and Others v Nigeria,[12] the African Commission on Human and Peoples' Rights interpreted this provision as follows:

> According to article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.

Secondly, another limitation is the general limitation clause of all rights in article 27(2) of the ACHPR which states that individuals should exercise their freedoms 'with due regard to the rights of others, collective security, morality and common interest.' This interpretation is consistent with the jurisprudence of the African Commission on Human and Peoples' Rights. For example, in *Constitutional Rights Project and Others v Nigeria,* [13] the African Commission stated that:

> In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in article 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest. The justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow. Most importantly, a limitation may not erode a right such that the right itself becomes illusory.

The African Commission affirmed this notion in *Interights and Others v*

12 (2000) AHRLR 200 (ACHPR 1998) para 66.
13 (2000) AHRLR 227 (ACHPR 1999) para 41 & 42. The African Commission expressed similar views in *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 68, 69 & 70.

Mauritania where it held that:[14]

> For the African Commission the only legitimate reason for restricting the rights and freedoms contained in the Charter are those stipulated in article 27(2) … And even in this case the restrictions should 'be based on legitimate public interest and the inconvenience caused by these restrictions should be strictly proportional and absolutely necessary for the benefits to be realized. Furthermore, the African Commission requires that for a restriction imposed by the legislators to conform to the provisions of the African Charter, it should be done 'with respect for the rights of others, collective security and common interest', that it should be based 'on a legitimate public interest… and should be strictly proportional and absolutely necessary' to the sought after objective. And more over, the law in question should be in conformity with the obligations to which the state has subscribed in ratifying the African Charter and should not render the right itself an illusion'.

It is interesting to note that even media freedom is subject to limitations. For instance, article 2(2) of the Declaration of Principles on Freedom of Expression in Africa states that any restrictions on media freedom should be provided by law, serve a legitimate interest and be necessary in a democratic society.

In summation, four crucial conclusions can be drawn from this subsection about the limitation of the right to freedom of expression. Firstly, freedom of expression can only be limited by law that conforms with international human rights standards. Secondly, the limitation should serve a legitimate interest. Thirdly, the limitation should not render the right itself an illusion. Fourthly, the limitation should be necessary in a democratic society for either of the following:

a) For respect of the rights or reputations of others. An example is defamation laws.
b) For the protection of national security or of public order, or of public health or morals,
c) For the purpose of preventing any propaganda for war,

14 (2004) AHRLR 87 (ACHPR 2004) paras 78 & 79.

d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,
e) For the interests of territorial integrity,
f) For the prevention of crime,
g) For preventing the disclosure of information received in confidence,
h) For the moral protection of childhood and adolescence, or
i) For maintaining the independence of the judiciary

2.4 Cases dealing with freedom of expression

The right to freedom of expression has engendered a substantial body of case-law, in which both the right itself as well its limitations have been further defined. These assist significantly in establishing and clarifying the normative content of the right to freedom of expression and its limitations.

2.4.1 The United Nations Human Rights Committee

The Human Rights Committee is a treaty body established by the ICCPR. Part of its mandate is to adjudicate on inter-state and individual complaints. In the individual complaints mechanism, the Human Rights Committee has dealt with a number of cases dealing with the right to freedom of expression. These have been very useful in understanding the normative content of the right to freedom of expression. For instance, in Sohn v Republic of Korea,[15] the Committee found that the imprisonment of a trade union leader for supporting a strike and condemning a government threat to send in troops violated his right to freedom of expression. This case reveals that a person can legitimately express himself through a legal strike. In Ballantyne et al v Canada[16] the Human Rights Committee held that commercial expression, such as outdoor advertising, is protected by freedom of expression. In

15 Communication 518/1992, UN Doc CCPR/C/54/D/518/1992 (1995).
16 Communications 359/1989 and 385/1989, UN Doc CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).

Gauthier v Canada[17] the Human Rights Committee found a violation of the right to receive information when a journalist was denied full access (because of an undisclosed reason) to parliamentary press facilities in his country.

The Human Rights Committee has also delivered decisions that affirm and set the limitations of the right to freedom of expression. For instance, in *Faurisson v France*[18] the Human Rights Committee found that the conviction of a person under a law that criminalised contesting the existence of the Holocaust served a legitimate aim. In *JRT and WG Party v Canada*[19], the Human Rights Committee found that freedom of expression can be limited if the expression (in this case anti-Semitic messages transmitted via recorded telephone) amounts to hate speech. The Human Rights Committee categorically observed that hate speech was manifestly incompatible with the right to freedom of expression protected in the ICCPR.

2.4.2 The European Court of Human Rights

The European Court of Human Rights has dealt with a number of matters relating to the definition of, normative content of and limitations to freedom of expression. For example, in *Handyside v The United Kingdom,*[20] the European Court of Human Rights held that freedom of expression

> constitutes one of the essential foundations of such a (democratic) society, one of the basic working conditions for its progress and for the development of every man. ... It is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'

17 Communication No 633/1995, UN Doc CCPR/C/65/D/633/1995 (5 May 1999).
18 Communication No 550/1993 , UN Doc CCPR/C/58/D/550/1993(1996).
19 Communication No 104/1981, UN Doc. CCPR/C/OP/2 at 25 (1984).
20 (5493/72) [1976] ECHR 5 (7 December 1976).

In *Nikula v Finland,*[21] the Court found a violation of a lawyer's right to freedom of expression when a defence lawyer was convicted of defamation for strongly criticising a public prosecutor's decision not to charge a witness who testified against her client. In *Informationsverein Lentia et al v Austria,*[22] the Court held that state monopoly on broadcasting constitutes an interference with the right to freedom of expression. Conversely, in *Ahmed et al v The United Kingdom,*[23] the Court found that restrictions on the rights to freedom of expression of public employees are justified.

The Court has also determined the duties of the state *vis-à-vis* the rights to freedom of expression. The state is obliged to interfere with the right to cnfree speech and the freedom of the press as long as the exercise of such freedom does not infringe on the rights of others and is consistent with public order, security, health and morals. It is interesting to note that in *Guerra et al v Italy*[24] the Court was of the strong view that that the right to receive information does not necessarily impose a positive duty on the state to collect and disseminate information.

2.4.3 The Inter-American Court on Human Rights

The Inter-American Court on Human Rights has also defined the scope of the right to freedom of expression. For instance, in *Ivcher Bronstein v Peru,* the Inter-American Court held that:

> … Freedom of expression has both an individual and a social dimension: it requires that, on the one hand, no one may be arbitrarily harmed or impeded from expressing his own thought and therefore represents a right of each individual; but it also implies, on the other hand, a collective right to receive any information and to know the expression of the thought of others. These two dimensions must be guaranteed simultaneously.[25]

21 (31611/96) [2002] ECHR 324 (21 March 2002).
22 (37093/97) [2002] ECHR 779 (28 November 2002).
23 (22954/93) [1998] ECHR 78 (2 September 1998).
24 (14967/89) [1998] ECHR 7 (19 February 1998).
25 Judgment of February 6, 2001, Inter-Am Ct HR (Ser C) No 74 (2001).

In *Olmedo Bustos et al v Chile* (The Last Temptation of Christ Case), the Court explained the two dimensions in the following words: [26]

> …With regard to the first dimension of the right embodied in the said article, the individual right, freedom of expression is not exhausted in the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate method to disseminate thought and allow it to reach the greatest number of persons. In this respect, the expression and dissemination of thought and information are indivisible, so that a restriction of the possibilities of dissemination represents directly, and to the same extent, a limit to the right to free expression.
>
> …Regarding the second dimension of the right embodied in Article 13 of the Convention, the social element, we should indicate that freedom of expression is a medium for the exchange of ideas and information between persons; it includes the right to try and communicate one's points of view to others, but it implies also everyone's right to know opinions, reports and news. For the ordinary citizen, the right to know about other opinions and the information that others have is as important as the right to impart their own.
>
> …The Court considers that both dimensions are of equal importance and should be guaranteed simultaneously in order to give total effect to the right to freedom of expression in the terms of Article 13 of the Convention. The importance of this right is further underlined if we examine the role that the media plays in a democratic society, when it is a true instrument of freedom of expression and not a way of restricting it; consequently, it is vital that it can gather the most diverse information and opinions.

2.4.4. The African Commission on Human and Peoples' Rights

The African Commission has decided on a number of communications that have further clarified the normative content of the right to freedom of expression. For instance, in *Media Rights Agenda and Others v Nigeria,* [27] the Commission established two important principles. Firstly, the African Commission stated the importance of freedom of expression to an individual: 'Freedom of expression is vital to an individual's personal development, his

26 [635], OEA/Ser.L/V/III.47, doc 6 (2000); para 147, 148 and 149.
27 Communications *105/93, 128/94, 130/94 and 152/96* (2000) AHRLR 200 (ACHPR 1998).

political consciousness and participation in the conduct of public affairs in his country.'[28]

Secondly, the African Commission clarified what it means when the ACHPR states that freedom of expression can be limited by law. The African Commission elaborately and argued that:

> … According to article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not however mean that national law can set aside the right to express and disseminate one's opinions guaranteed at the international level; this would make the protection of the right to express one's opinion ineffective. To permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making.
>
> …In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in article 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.
>
> ...The justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory.[29]

In *Jawara v The Gambia,*[30] the African Commission found the detention of members of opposition parties and trade unions (under legislation outlawing all political opposition during a state of emergency) a violation of the freedom of expression. It further found the failure of a state to investigate attacks against journalists to be a dual violation. Firstly, it violated the journalists' right to express and disseminate information and opinions. Secondly, it violated the public's right to receive such information and opinions.

In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria,*[31]

28 Paragraph 36 of the decision.
29 Paragraphs 40, 41 and 42 of the decision.
30 Communications 147/95 and 149/96, (2000) AHRLR 107 (ACHPR 2000).
31 Communications 137/94, 139/94, 154/96 and 161/97, (2000) AHRLR 212 (ACHPR 1998).

the African Commission made a finding that state harassment with the aim of disrupting legitimate activities of an organisation that informs and educates people about their rights constitutes a clear violation of the right to freedom of expression. The Commission further stressed the close relationship between the right to freedom of expression and the rights to association and assembly. Because of that relationship the Commission found that the severe punishments inflicted as a result of the rally were inconsistent with the right to freedom of expression. In the African Commission's words:[32]

> There is a close relationship between the rights expressed in the articles 9(2), 10(1) and 11. Communication 154 alleges that the actual reason for the trial and the ultimate death sentences was the peaceful expression of views by the accused persons. The victims were disseminating information and opinions on the rights of the people who live in the oil producing area of Ogoniland, through MOSOP and specifically a rally. These allegations have not been contradicted by the government, which has already been shown to be highly prejudiced against MOSOP, without giving concrete justifications. MOSOP was founded specifically for the expression of views of the people who live in the oil producing areas, and the rally was organised with this in view. The government's actions are inconsistent with article 9(2) implicit …

2.5 Other standards dealing with freedom of expression[33]

There are other principles that give insight into specific aspects relating to the right to freedom of expression. It is important to note that even though these principles are not binding on state parties (in the strict sense of international law because they are not binding treaties) they are of persuasive value and can be used as indicators of what freedom of expression should entail. The principles are sometimes referred to as 'soft law.'

32 Para 110.

33 I have extensively relied on M Sepúlveda *et al Human rights reference handbook* (2004) in the formulation of this section.

2.5.1 United Nations

Some UN specialised agencies like the United Nations Educational, Scientific and Cultural Organisation (UNESCO) have committed themselves to the promotion of freedom of expression, press freedom, independence and pluralism of the media as part of its activities. UNESCO has even adopted two resolutions on freedom of expression namely the 1995 Promotion of independent and pluralist media and the 1997 Condemnation of violence against journalists.

International organisations have addressed the implementation and supervision of the right to freedom of expression by, for instance, appointing experts on the issue. In 1993, the UN Human Rights Commission appointed a Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression.[34]

2.5.2 Regional organisations

African Commission on Human and Peoples' Rights

The Declaration of Principles on Freedom of Expression in Africa was adopted by the African Commission on Human and Peoples' Rights in 2002.[35] The preamble reaffirms the 'fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms'. The Declaration seeks to guarantee the freedom of expression and addresses, inter alia, limitations to the right, the obligation of states to promote diversity of information and private broadcasting, freedom of information, independence of regulatory bodies for broadcast and telecommunications, defamation laws, complaints about media content and attacks on media practitioners.

34 Resolution 1993/45 of 5 March 1993.
35 Reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (3rd ed 2007) 279.

One of the members of the African Commission on Human and Peoples' Rights is Special Rapporteur on Freedom of Expression and Access to Information in Africa. The mandate of the Special Rapporteur is to (a) analyse national media legislation, policies and practice within member states, monitor their compliance with freedom of expression and access to information standards in general and the Declaration of Principles on Freedom of Expression in Africa in particular, and advise member states accordingly; (b) undertake fact-finding missions to member states from where reports of systemic violations of the right to freedom of expression and denial of access to information have reached the attention of the Special Rapporteur and make appropriate recommendations to the African Commission; (c) undertake promotional country missions and any other activities that would strengthen the full enjoyment of the right to freedom of expression and the promotion of access to information in Africa; (d) make public interventions where violations of the right to freedom of expression and access to information have been brought to her attention, including by issuing public statements, press releases, and sending appeals to member states asking for clarifications; (e) keep a proper record of violations of the right to freedom of expression and denial of access to information and publish this in her reports submitted to the African Commission; and (f) submit reports at each ordinary session of the African Commission on the status of the enjoyment of the right to freedom of expression and access to information in Africa.

Southern African Development Community

In Southern Africa, Southern African Development Community (SADC) member states adopted the Windhoek Declaration on Promoting an Independent and Pluralistic Media which enunciates acceptable principles that foster media freedom. The declaration affirms that the establishment, maintenance and fostering of an independent, pluralistic and free media is essential to the development and maintenance of democracy in a nation and for economic development. It defines independent press as 'press independence from governmental, political or economic control or from control of materials and infrastructure essential for the production

and dissemination of newspapers, magazines and periodicals.' It further defines a pluralistic press as 'the end of monopolies of any kind and the existence of the greatest possible number of newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community.' The Declaration urges SADC member states to take positive measures to guarantee the establishment of media freedom.

Organisation for Security and Co-operation in Europe

The Organisation for Security and Co-operation in Europe (OSCE) has taken quite a number of initiatives to lay down principles pertaining to freedom of expression especially press freedom. For instance the Helsinki Final Act of 1975 highlights principles that participating states should include when legislating on issues like conditions for journalists and dissemination of information. Both the Madrid document of 1983 and the Vienna document of 1989 include provisions encouraging press freedom through exchanges in the media field and respecting journalists' copyrights. Paragraph 9 of the 1990 Copenhagen document provides that

> Everyone has the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Another interesting development was the establishment of the position of OSCE Representative on Freedom of the Media in 1997. The main function of the OSCE Representative on Freedom of the Media is to observe relevant media developments in OSCE participating states with a view to providing early warning on violations of freedom of expression. The Representative also assists participating states by advocating and promoting full compliance with OSCE principles and commitments regarding freedom of expression and free media.

The other development was the adoption of the 2003 Declaration on Freedom of Communication on the Internet. The Declaration obliges states

to abide by principles that establish, inter alia, that internet content should not be subject to restrictions that go further than restrictions on classical media and not to deny access to information and other communication on the internet. All these efforts tend to promote the realisation of the right to freedom of expression.

The Organization of American States

In 1997, the Inter-American Commission on Human Rights created the Office of the Special Rapporteur for Freedom of Expression. The mandate of the Special Rapporteur is to stimulate awareness of the importance of observance of the right of freedom of expression, to make recommendations to states for adoption of progressive measures to strengthen the right, to prepare reports and carry out studies, and to respond to petitions or other violations of the right in OAS member states. The Special Rapporteur may also solicit that the Inter American Commission requests precautionary measures from the member states, to protect the personal integrity of journalists and media correspondents who are facing threats or the risk of irreparable harm.

This is a very interesting development especially considering the roles that special rapporteurs have played in advocating for the protection of the right of freedom of expression in various ways. Firstly, the United Nations Special Rapporteur on the Promotion and Protection of the Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression issued a joint declaration on 18 December 2003, condemning the continued attacks on journalists, and the possible challenge to editorial independence posed by concentration of media ownership. Secondly, the trio also recognised the interdependence of a free media and an independent judiciary, and that concentration in ownership of the media and the means of communication might challenge editorial independence. Thirdly, they condemned criminal defamation as an unjustifiable restriction to freedom of expression.

2.6 Summary

A few conclusions can be drawn from this discourse. Firstly, the right to freedom of expression is one of the basic foundations of a democratic state. Secondly, it entails the freedom or liberty to seek information, access information, receive information, hold opinions and or impart information and ideas of all kinds either orally, in writing, in print, in the form of art, or through any medium of one's choice. Thirdly, these freedoms should be exercised without any interference by public authorities and regardless of frontiers. States have an absolute and immediate obligation to guarantee freedom of expression. Fourthly, the right to freedom of expression is not an absolute right. It can be limited by law that is necessary in a democratic society for respect of the rights or reputations of others, the protection of national security or of public order, or of public health or morals, the purpose of preventing any propaganda for war or any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, etc.

3. The practice of Southern African countries[36]

This section reviews legislation in Southern African countries that relate to the protection of the right to freedom of expression and assesses the extent to which the right is guaranteed.

3.1 Angola

3.1.1 Domestic application of human rights instruments

Angola has ratified the ICCPR,[37] CRC[38] and ACHPR.[39] However, the Angolan constitution does not say anything about the status of ratified international human rights instruments. Angola being a civil law country follows a monist

36 I have relied on BT Balule & K Kandjii *Undue restriction: Laws impacting on media freedom in the SADC*, Media Institute of Southern Africa (2004) in the formulation of this section.
37 Acceded on 10 April 1992.
38 Ratified on 14 February 1990
39 Ratified on 2 March 1990

approach to incorporation of international human rights instruments into law. Civil law provides that international human rights instruments have automatic application in Angola's domestic law. The international human rights instruments do not need to be incorporated by national legislation for them to be applicable in Angola. This means that even though Angola has not incorporated any of the international human rights instruments relating to freedom of expression into domestic law, international human rights instruments are directly enforceable in Angola. No wonder courts in Angola have used international human rights instruments as interpretation aids in dealing with the human rights enshrined in the bill of rights.[40]

3.1.2 Constitutional provisions

Articles 32 and 35 of the Angolan constitution guarantee the right to freedom of expression and freedom of press respectively. However, the rights are not absolute. Section 52 of the constitution generally limits all rights (including the right to freedom of expression) for the purpose of protecting the defence, public safety, public morality, public order and public health of the country and protecting the rights, privacy and reputations of other individuals and the restriction must be reasonably justifiable in a democratic society. The Angolan constitution is only limited by the law; the content of which is not articulated. It is my submission that the law envisages by these constitutional provisions is law that complies with international human rights principles.

3.1.3 Laws restricting freedom of expression

A number of laws restrict freedom of expression in Angola for example the Press Law,[41] the Law of Crimes against the Security of the State,[42] and the Law on State Secrets.[43] Article 181 of the Penal Code criminalizes defamation.

40 See *The Republic of Angola v Rafael Marques* case No 13 165/99–B.
41 Law N° 22/91 of 15 June 1991.
42 Law N° 7/78 of 26 May 1978.
43 Law N° 1/83 of 23 February 1983.

The use of charges of *difamação* and *injúria* to defend the reputation of public officials denies the rights of the public to receive information and the rights of journalists to express their opinions about the conduct of public officials. Professor Kevin Boyle supports this contention when he argues that:

> it is well established under international and comparative human rights law that politicians and public officials must tolerate a higher degree of criticism than ordinary citizens. The key role they play in the democratic process, the fact that they have willingly submitted themselves to public scrutiny and the importance of a free flow of information and ideas about political matters to a democratic system of government all inform this conclusion.[44]

Particularly interesting is that article 181 of the Angolan Penal Code provides that a person accused of defamation is required to prove the truth of statements which he or she has published and which are deemed to be defamatory. This contravenes the presumption of innocence enunciated in article 14(2) of the ICCPR.

3.2 Botswana

3.2.1 Domestic application of human rights instruments

Botswana has ratified the ICCPR,[45] CRC[46] and ACHPR.[47] *In Dow v Attorney General of Botswana,*[48] the Court of Appeal of Botswana held that international human rights instruments do not have automatic application in Botswana's domestic law unless incorporated by legislation. Botswana has not incorporated any of the international human rights instruments into domestic law. This therefore means that international human rights treaties are not directly enforceable in Botswana. However, courts in Botswana have used international human rights instruments as interpretation aids in

44 The Republic of Angola and Rafael Marques: Legal opinion of Professor Kevin Boyle, Professor of International Human Rights Law, University of Essex, United Kingdom, commissioned by Article 19, the International Centre against Censorship.
45 Ratified on 8 September 2000.
46 Ratified on 13 April 1995.
47 Ratified on 17 July 1986.
48 [1992] LRC (Const) 623 at page 654.

dealing with the Bill of Rights. In Balule and Kandjii's words:[49]

> Judicial activism has, however, gone some way towards altering this position. Courts in the country have in some cases used as an aid to the interpretation of constitutionally entrenched rights emerging international human rights norms located in conventions to which Botswana is or is not, a party to. Thus the international human rights instruments that Botswana has either ratified or adopted …even though not incorporated into the domestic law, may be used as an aid to interpretation.

3.2.2 Constitutional provisions

Section 12(1) of the Constitution of 1966 provides that:

> Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

This provision expressly protects the freedom to seek information, access information, receive information, hold opinions and impart information and ideas of all kinds either orally, in writing, in print, in the form of art, or through any medium of one's choice. These possibly include musical and artistic expression. It could be argued that this constitutional provision does not protect media freedom because media freedom is not expressly provided for. Such argument lacks merit for two reasons. Firstly, media freedom can be implied from the right to communicate ideas and information without interference. Secondly, as the High Court held *obiter in Media Publishing (Pty) Ltd v Attorney General and others,*[50] media freedom is an inherent aspect of freedom of expression.

It would appear that the Botswana Constitution that a citizen can waive his

49 N 35 above.
50 MICSA 229/2001 (unreported) at 21.

right to exercise the right to freedom of expression. This can be gleaned from the words 'Except with his own consent…'. Implied in these words is that a person can agree a hindrance to the enjoyment of his right to freedom of expression.

Section 12(2) of the Constitution limits the exercise of the right to freedom of expression as follows

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –
> (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
> (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless, broadcasting or television; or
> (c) that imposes restrictions upon public officers, employees of local government bodies, or teachers,
> and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Three things emerge from the restrictions on freedom of expression. Firstly, the restriction should be based on a legitimate public interest. In this regard, Balule and Kandjii[51] convincingly argue that the list of permissible restrictions under the Botswana Constitution is much broader than the permissible restrictions under international legal instruments. Secondly, the restriction must be done under the authority of law. Thirdly, the limitation must be reasonably justifiable in a democratic society.

3.2.3 Laws restricting freedom of expression

A number of laws restrict freedom of expression in Botswana. Most of these

51 Note 35 above, 18.

restrictions are either couched in vague language or give the government very wide discretionary powers thereby creating uncertainty on the extent of the limitation of the right to freedom of expression. For example, section 3 of the Anthropological Act (Chapter 59:02) gives the minister the absolute prerogative to grant or refuse permission to any person who wishes to conduct anthropological research. The Cinematograph Act again affords the minister an exclusive discretion to issue a film permit that then regulates the conduct of the film maker in making his film. It even provides for the appointment of a board of censors who issue certificates of approval before films are shown publicly. These provisions essentially interfere with the development of an economically viable independent, professional and creative film industry.

There are a number of laws that prohibit the disclosure of confidential information when it is in the interest of the public to do so. Examples include section 10 of the Botswana Housing Corporation (Amendment) Act No 5 of 1994, section 34(1) of the Public Service Act (Chapter 26:01) and section 4 of the National Security Act. Section 44 of the Corruption and Economic Crime Act of 1994 criminalizes the disclosure of any information relating to an on-going investigations or to the identity of a person being investigated for corruption or the commission of an economic crime.[52] These pieces of legislation make disclosure of confidential information a strict liability offence. The effect of these provisions is to entrench a culture of secrecy in the public service making it very difficult for the media to disseminate information and the general public from accessing information that could be in the public interest. This curtails freedom of expression.

3.3 Democratic Republic of the Congo

3.3.1 Domestic application of human rights instruments

52 See also section 23 of the Education Act (Chapter 58:01), section 9 of the Defence Force Act (Chapter 21:05) and sections 91, 178, and 192 of the Penal Code (Chapter 8:01).

The Democratic Republic of the Congo (DRC) has ratified the ICCPR,[53] CRC[54] and ACHPR.[55] The DRC constitution does not say anything about the status of ratified international human rights instruments. DRC being a civil law country follows a monist approach to incorporation of international human rights instruments into law. Civil law provides that international human rights instruments have automatic application in DRC's domestic law. The international human rights instruments do not need to be incorporated by national legislation for them to be applicable in DRC. This means that even though DRC has not incorporated any of the international human rights instruments relating to freedom of expression into domestic law, international human rights instruments are directly enforceable in DRC.

3.3.2 Constitutional provisions

Section 27 of the 2006 DRC Constitution grants everyone the right to freedom of expression. This includes the freedom to express opinions and feelings by way of speech, writings and images. Section 28 guarantees freedom of press and section 29 guarantees freedom of information. Section 29 further guarantees freedom of dissemination of information by radio, television, the print media or any other means of communication.

The constitution further provides for limitations to the right to freedom of expression. In a nutshell, freedom of expression can be restricted in the interests of public order, protecting the rights of others and good morals.

3.3.3 Laws restricting freedom of expression

DRC is one of the most unstable African countries characterized by civil unrest, coups and insurrections. Many a time the exercise of the right to freedom of expression is suspended owing to numerous state of emergencies that the country finds itself in. This is irrespective of the fact that DRC has

53 Acceded on 1 February 1977.
54 Ratified on 20 March 1990.
55 Ratified on 20 July 1987.

over 175 privately owned newspapers and more than 25 private television broadcasters.[56]

A number of laws protect freedom of expression in DRC. For instance section 154 of the Constitution establishes an independent High Authority of Media which regulates the registration, licensing and determination of the content of the media in DRC. However, HAM's operation is susceptible to ministerial control.

There are a number of restrictions to the exercise of the right to freedom of expression in DRC. Section 11 of Law No 96-002 of 22 June 1996: Providing for the licensing and registration of the print and broadcast media[57] provides that a journalist can be forced to reveal his sources in cases provided by law. This negates the journalist's right to protect his sources. Section 48 prohibits the sale of foreign publications in DRC which are inconsistent with public morals. This can stifle freedom of expression especially considering that public morals are not defined in the Act. The law further limits freedom of expression in the interests of public order, the rights of others and morality. Again, public order and morality are not defined and can be abused. Sections 74, 75, 76 & 77 criminalize defamation. This places an unnecessary restriction on freedom of expression especially considering that there is a possibility for the defamed party to bring a civil suit.

3.4 Lesotho

3.4.1 Domestic application of human rights instruments

56 See J White & D Bujitu *SADC media law: A handbook for media practitioners: A comparative overview of media law and practice in Lesotho, Tanzania and the Democratic Republic of Congo*, Konrad Adenuer Foundation (2005).

57 See also Law No 81-050 OF 2 April 1981, Law No 81-052 of 2 April 1981, Ministerial Decree 04/MIP/006/97 of 28 February 1997, Ordinance 23-113 of 25 April 1956, Ordinance 81-012 of 2 April 1981.

Lesotho has ratified the ICCPR,[58] CRC,[59] CMW[60] and ACHPR.[61] However, the Constitution of Lesotho does not say anything about the status of ratified international human rights instruments. Lesotho being a common law country, resort therefore should be had to common law that stipulate that international human rights instruments do not have automatic application in domestic law unless incorporated by legislation. Lesotho has not incorporated any of the international human rights instruments. This therefore means that international human rights treaties are not directly enforceable in Lesotho. Courts in Lesotho have used international human rights instruments as interpretation aids in dealing with the human rights enshrined in the bill of rights.

3.4.2 Constitutional provisions

Section 14(1) of the 1993 Constitution of Lesotho states that:

> Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of person) and freedom from interference with his correspondence.

Like the Botswana constitution, section 14(1) expressly protects the freedom to seek information, access information, receive information, hold opinions and impart information and ideas of all kinds either orally, in writing, in print, in the form of art, or through any medium of one's choice. These possibly include musical and artistic expression. It also impliedly protects media freedom which is an inherent aspect of freedom of expression. It is interesting to note that like the Botswana Constitution, the constitution of Lesotho apparently affords a citizen a right to waive his right to exercise the

58 Acceded on 9 December 1992.
59 Ratified on 21 August 1990.
60 Ratified on 24 September 2004. It is the only country in Southern Africa that has ratified the CMW.
61 Ratified on 27 February 1992.

right to freedom of expression. This can be gleaned from the words 'Except with his own consent…' Implied in these words is that a person can agree a hindrance to the enjoyment of his right to freedom of expression.

Section 14(2), (3) and (4) of the Lesotho Constitution limits the exercise of the right to freedom of expression. The restriction must be done under the authority of the law, must be in the interest of defence, public safety, public order, public morality or public health and must be for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing disclosure of confidential information, maintaining the authority and independence of the courts and regulating the media. It further restricts freedom of expression for the purpose of imposing restrictions on public officers. This places some form of censorship on public servants. These limitations conform to (but are broader than) international human rights standards.

3.4.3 Laws restricting freedom of expression

A number of laws restrict freedom of expression in Lesotho. For instance, section 3 of the Official Secrets Act, 1967 proscribes the unauthorised obtaining, retention, disclosure or publication of official information.[62] This restricts the amount of information that can be disclosed to the public. It therefore makes it very difficult for the media, non-governmental organizations and citizens to become watchdogs of government when they have little access to official information. Section 6 of the Parliamentary Powers and Privileges Act, 1994 prevents a stranger (any person who is not a Senator, member or an officer of either House of Parliament) from entering parliament. This hampers freedom of expression in that it potentially deprives ordinary citizens from accessing parliamentary proceedings where their representatives deliberate on issues of public interest.

62 See also sections 7, 9 and 34 of the Internal Security (General) Act, 1984.

3.5 Malawi

3.5.1 Domestic application of human rights instruments

Malawi has acceded to the ICCPR[63] and has ratified the ACHPR[64] and CRC.[65] As regards the domestic application of international human rights instruments, section 211 of the Malawi constitution states that:

> (1) Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.
> (2) International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement lapses.
> (3) Customary international law, unless inconsistent with this constitution or an Act of Parliament, shall have continued application.

It would appear from section 211(1) that an international human rights treaty can only become part of the laws of Malawi when this is specifically provided for in the act of ratification. No such provision has been made with regard to ICCPR, ACHPR and CRC. In principle these treaties cannot be directly invoked in domestic courts. However, Malawian courts have occasionally sought guidance and inspiration from these instruments when they have interpreted domestic laws.

3.5.2 Constitutional provisions

Sections 34, 35, 36 and 37 of the Malawi constitution provide that:

> 34. Every person shall have the right to freedom of opinion, including the right to hold opinions without interference to hold receive and impart opinions.
> 35. Every person shall have the right to freedom of expression.
> 36. The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public

63 22 March 1994.
64 17 November 1989.
65 Acceded on 1 February 1991.

information.

37. Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights.

These provisions guarantee freedom of opinion, freedom of expression, freedom of the press and access to information. However, these rights are not absolute. They are limited by section 44(2) and (3) which state that:

(2) Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

(3) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application.

It is imperative to note that the Malawi Constitution expressly provides that the right to freedom of expression can only be limited in five respects. Firstly, freedom of expression can only be limited by law. Secondly, the limiting law must conform to international human rights standards. Thirdly, the limitation should serve a legitimate interest. Fourthly, the limitation should not render the right itself an illusion. Finally, the limitation should be reasonably necessary in a democratic society. This provision fully embraces the international human rights instruments.

3.5.3 Laws restricting freedom of expression

Malawi has a number of laws that restrict freedom of expression. These include section 4 of the Official Secrets Act, 1913 which makes it a criminal offence for a public servant to disclose confidential information received in the course of his employment. Such laws instill a culture of secrecy and prevent the media, human rights organisations and the public from being a watchdog of government. Section 46 of the Penal Code (Chapter 7:01) empowers the Minister of Justice to ban the publication or importation of

any publication that in his or her view is contrary to the public interest. This provision is potentially susceptible to abuse by the Minister. Section 94 of the Taxation Act (Chapter 41:01) provides that the register of tax assessments is not open to the public for inspection. This prevents members of the public from accessing information that is in public interest. Section 39 of the Police Act (Chapter 13:02) prohibits, among others, an investigating officer from disclosing information regarding a matter he is investigating, or other police or administrative matter to an unauthorized person. This again hampers the right to access to information.

3.6 Mozambique

3.6.1 Domestic application of human rights instruments

Mozambique has ratified the ICCPR,[66] CRC,[67] and ACHPR.[68] Article 18(1) of the Mozambican Constitution states that:

> 1. Validly approved and ratified International treaties and agreements shall enter into force in the Mozambican legal order once they have been officially published and while they are internationally binding on the Mozambican State.

It would appear from section 18(1) that international human rights treaties do not automatically become part and parcel of Mozambican law unless they are officially published. In this respect, Mozambique seems to adopt a dualist approach to incorporating international treaties.

3.6.2 Constitutional provisions

Article 48 of the Mozambican Constitution guarantees the right to freedom of expression and to freedom of the press, as well as the right to information. It further stipulates that the exercise of freedom of expression shall not be restricted by censorship. Freedom of the press includes the freedom

66 Ratified on 21 October 1993.
67 Ratified on 26 May 1994.
68 Ratified on 22 February 1989.

of journalistic expression and creativity, access to sources of information, protection of independence and professional secrecy, and the right to establish newspapers, publications and other means of dissemination.

However, the right is not absolute but can be limited by the law, taking into consideration the dignity of the human person. The content of the law is not articulated. I submit that the law should enshrine fundamental international human rights standards. Suffice to point out that the limitation in the Mozambican constitution does not extend to that in international human rights treaties where the right to freedom of expression can be restricted for the purpose of protecting the defence, public safety, public morality, public order and public health of the country and protecting the rights, privacy and reputations of other individuals and the restriction must be reasonably justifiable in a democratic society. In terms of section 72 of the constitution, the right to freedom of expression can be derogated from, suspended or temporarily limited in the case of a state of war, siege or during a state of emergency. The suspension or temporary limitation of certain rights must be of general character, should be legally justified and the period of such limitation should also be specified.

3.6.3 Laws restricting freedom of expression

Mozambique is one of the countries renowned for protecting the right to freedom of expression to a large extent. The 1991 Press Act developed and regulates the right to freedom of expression. It basically protects freedom of expression as articulated in the Constitution. However, there are laws that restrict freedom of expression. The law on access to official sources of information proscribes the publication of official information if it is in the interest of security to do so. Such provisions potentially prevent members of the public from accessing official information when it is in the state interest to do so. Section 11 of Decree No 31/2000 of 10 October 2000, section 11 prohibits programmes which involve disrespect to the laws, which challenge the security of the state, public order and good morals, which encourage

behavior that defies national unity; and that encourage disrespect towards the environment, the flora and the fauna. The scope of public order, good morals and defying national unity is not defined and these are susceptible to abuse.

3.7 Namibia

3.7.1 Domestic application of human rights instruments

Namibia has ratified the ICCPR,[69] ACHPR[70] and CRC.[71] Namibia adopts a monist approach through article 144 of the Constitution that states that:

> Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

In terms of article 44, all international human rights instruments that Namibia ratifies are automatically applicable in Namibia's domestic law unless the constitution or an Act of Parliament states otherwise. Balule and Kandjii[72] succinctly contend that:

> This means that courts and other forums can directly apply and enforce international treaties that are binding on Namibia if they establish subjective rights and duties for the individual without having been translated into the domestic law by legislative and other mechanisms…International treaties become binding on Namibia once they have been ratified or acceded to by the Namibian Parliament.

3.7.2 Constitutional provisions

Article 21(1) specifically states that:

> (1) All persons shall have the right to: a) freedom of speech and expression, which shall include freedom of the press and other media

69 Acceded on 28 February 1995.
70 Ratified on 30 July 1992.
71 Ratified on 26 September 1990.
72 Note 35 above, 56.

Articles 21(2) and 22 of the Constitution state that the right to freedom of expression is subject to the following limitations:

> (2) The fundamental freedoms referred to in Paragraph (1) shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Paragraph, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.
>
> 22. Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this chapter is authorised, any law providing for such limitation shall:
>
> a) be of general application, shall not negate the essential content, and shall not be aimed at a particular individual;
>
> b) specify the ascertainable extent of such limitation and identify the article or articles on which authority to enact such limitation is claimed to rest.

3.7.3 Laws restricting freedom of expression

Notwithstanding the above constitutional provisions, a number of laws restrict freedom of expression in Namibia. For instance, section 4 of the Protection of Information Act of South Africa 84 of 1982 forbids a person from disclosing any information obtained by virtue of his/ her employment with the government. This potentially hampers access of official information. Section 4(2) of the Namibian Broadcasting Act 9 of 1991 empowers the minister to prescribe the terms, conditions and content of the broadcasting. This compromises on the independence of the Namibian Broadcasting Corporation.

3.8 South Africa

3.8.1 Domestic application of human rights instruments

South Africa has ratified the ICCPR,[73] ACHPR[74] and CRC.[75] As regards the domestic application of international human rights law, section 231(4) of the South African Constitution provides that:

> Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Two salient points are worth noting. Firstly, an international human rights treaty only becomes law in South Africa when it is incorporated into law through national legislation. Secondly, a self executing provision of an international human rights treaty ratified by South Africa automatically becomes law and binding unless it can be demonstrated that it is inconsistent with the Constitution or an Act of Parliament. According to Balule and Kandjii,[76] to be self executing, a treaty must

> (a) reflect either in language or its drafting history that its clauses are intended to be directly applicable in domestic courts; and
> (b) impose obligations which are specific, mandatory and capable of implementation without further acts of the legislature.

The ICCPR is arguably self-executing. This means that the ICCPR may be directly enforceable in the domestic law of South Africa. Even more interesting is the fact that section 39(1) of the South African Constitution obliges courts, tribunals and forums to consider international law (whether ratified by South Africa or otherwise[77]) in the interpretation of the Bill of Rights. This clearly demonstrates that international human rights instruments

73 Ratified on 3 October 1994.
74 Ratified on 9 July 1996.
75 Ratified on 29 January 1993.
76 Note 35 above, 68.
77 *S v Makwanyane* 1995 (3) SA 391 (CC) at 413-414.

are directly applied when interpreting domestic law. This contention is buttressed by section 233 of the South African Constitution that mandates courts to prefer an interpretation that is consistent with international law in interpreting national legislation.

3.8.2 Constitutional provisions

Section 16 of the South African constitution guarantees freedom of expression in the following respects:

> (1) Everyone has the right to freedom of expression, which includes -
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas;
> (c) freedom of artistic creativity; and
> (d) academic freedom and freedom of scientific research.

It is imperative to note that the right to freedom of expression is not absolute but subject to limitations. Section 16(2) of the constitution states that the right to freedom of expression

> … does not extend to-
> (a) propaganda for war;
> (b) incitement of imminent violence; or
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

A further limitation is imposed by general limitation of all the rights guaranteed by the Bill of Rights. Section 36(1) of the South African Constitution states that:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

In terms of section 36(1) of the constitution reveals that the limitation of the right to freedom of expression (and any other right in the Bill of Rights) can only be permitted if (a) the limitation is in terms of a law of general application and (b) the limitation is reasonable and justifiable in an open and democratic society. The Constitutional Court of South Africa adopted this two pronged approach to the limitation of rights enshrined in the Bill of Rights in *Harksen v Lane*[78], *Van Rooyen v S,*[79] *S v Manamela*[80] *and Khosa v Minister of Social Development.*[81]

3.8.3 Laws restricting freedom of expression

South Africa is renowned for having a Constitution that guarantees fundamental rights and a Constitutional Court that interprets laws in a manner that protects the rights enshrined in the Bill of Rights (including freedom of expression). It is celebrated for establishing institutions like the Independent Communications Authority of South Africa and the Broadcasting Complaints Commission that guarantee freedom of expression. It also has a myriad of non-governmental organisations that advocate for the protection of human rights. Again, its government is renowned for abiding by the judgments of the courts.

Notwithstanding these positive aspects, a number of laws (that have their roots in apartheid South Africa) restrict freedom of expression in South Africa. For instance, section 4(1)(b)(iv) of the Protection of Information Act 84 of 1982 prohibits a person from disclosing any information obtained by virtue of his or her employment with the government. Section 11A of the Armaments Development and Petroleum Act 57 of 1968 prohibits the unauthorized disclosure of information relating to the acquisition, supply,

78 1998 (1) SA 300 (CC).
79 2002 (5) SA 246 (CC).
80 2000 (3) SA 1 (CC).
81 2004 (6) SA 505 (CC).

marketing, import or export of armaments. Interesting to note is that a person charged under this provision cannot raise the defence that disclosure was in the public interest.[82] As already argued above, this creates an unnecessary official secrecy which has the effect of depriving the South African citizens of their right to access to information. This therefore hampers freedom of expression since access to information is one of the cornerstones for the right to freedom of expression.

3.9 Swaziland

3.9.1 Domestic application of human rights instruments

Swaziland has ratified the ICCPR,[83] ACHPR[84] and CRC.[85] In terms of section 238 of the 2005 Swaziland Constitution, an international treaty does not automatically become directly applicable in Swaziland. In the exact words of section 238:

> (2) An international agreement executed by or under the authority of the Government shall be subject to ratification and become binding on the government by -
>
> (a) an Act of Parliament; or
>
> (b) a resolution of at least two-thirds of the members at a joint sitting of the two Chambers of Parliament.
>
> (3) The provisions of sub-section (2) do not apply where the agreement is of a technical, administrative or executive nature or is an agreement which does not require ratification or accession.
>
> (4) Unless it is self-executing, an international agreement becomes law in Swaziland only when enacted into law by Parliament.

Three points are worth noting. Firstly, an international human rights treaty becomes law in Swaziland when it is either incorporated into law through national legislation or if at least two-thirds of the members at a joint sitting of

82 See also section 8A of the National Supplies Procurement Act of 1970, section 4A of the Petroleum Products Act 120 of 1977 and section 10(2) of the National Key Points Act 102 of 1980.
83 Acceded on 26 March 2004.
84 Ratified on 15 September 1995.
85 Ratified on 22 August 1990.

the two Chambers of Parliament pass a resolution to that effect. Secondly, an international human rights treaty only becomes law in Swaziland when it is of a technical, administrative or executive nature or is an agreement which does not require ratification or accession. Thirdly, a self executing provision of an international human rights treaty ratified by Swaziland automatically becomes law.

3.9.2 Constitutional provisions

Freedom of expression was initially protected by Chapter 2 of the 1968 Swaziland constitution. However, in 1973 King Sobhuza II issued the 1973 King's Proclamation which repealed the Constitution. Freedom of expression was therefore repealed as well. However, through protracted engagements a new Constitution was promulgated in 2005 which is currently in force in Swaziland. Section 24 of the 2005 Swaziland Constitution provides that:

> (1) A person has a right of freedom of expression and opinion.
> (2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say -
> (a) freedom to hold opinions without interference;
> (b) freedom to receive ideas and information without interference;
> (c) freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and
> (d) freedom from interference with the correspondence of that person.

Section 24 expressly protects media freedom, the freedom to seek information, access information, receive information, hold opinions and impart information and ideas of all kinds either orally, in writing, in print, in the form of art, or through any medium of one's choice. These possibly include musical and artistic expression. It is interesting to note that like the Botswana and Lesotho constitutions, the 2005 Swaziland Constitution apparently affords a citizen a right to waive his right to exercise the right to freedom of expression. This can be gleaned from the words 'Except with the free consent of that person …'. Implied in these words is that a person can agree to waive the enjoyment of his right to freedom of expression.

It is noteworthy that section 24 does not provide for an absolute right to freedom of expression.Rather it limits the right through section 24(3) which states that:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -
>
> (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
>
> (b) that is reasonably required for the purpose of -
>
> (i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;
>
> (ii) preventing the disclosure of information received in confidence;
>
> (iii) maintaining the authority and independence of the courts; or
>
> (iv) regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communication; or
>
> (c) that imposes reasonable restrictions upon public officers,
>
> except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in a democratic society.

Suffice to mention that the restrictions to the right to freedom of expression conform to (but are broader than) international human rights standards. Particularly noteworthy is that the Swaziland Constitution restricts freedom of expression for the purpose of imposing restrictions on public officers. This places some form of censorship on public servants.

3.9.3 Laws restricting freedom of expression

Swaziland has a number of laws that restrict freedom of expression despite the guarantee of the right in the constitution. For example, the 1973 King's Proclamation to the Nation restricts the freedom of expression by prohibiting

the gathering of persons for purposes of expressing political opinions. It even prohibits the formation and operation of political parties and similar organizations. Section 4 of the National Security Act, 1968 prohibits public servants from disclosing information acquired in the course of their employment.[86] This hampers freedom of expression.

3.10 Tanzania

3.10.1 Domestic application of human rights instruments

Tanzania has ratified the ICCPR,[87] CRC[88] and ACHPR.[89] However, the Constitution of Tanzania does not say anything about the status of ratified international human rights instruments. Tanzania being a common law country follows a dualist approach to incorporation of international human rights instruments into law. It stipulates that international human rights instruments do not have automatic application in Tanzania's domestic law unless incorporated by legislation. Tanzania has not incorporated any of the international human rights instruments into domestic law. This therefore means that international human rights treaties are not directly enforceable in Tanzania. Like in Botswana and Lesotho, courts in Tanzania have used international human rights instruments as interpretation aids in dealing with the human rights enshrined in the bill of rights.

3.10.2 Constitutional provisions

Section 18 of the Constitution of Tanzania protects freedom of expression as follows:

> (1) Without prejudice to expression the laws of the land, every person has the right to freedom of opinion and expression, and to seek, receive and impart or disseminate information and ideas through any media regardless of national frontiers, and also

86 See also section section 1 of the Sedition and Subversive Activities Act, 1938, the Emergency Powers Act, 1960 and Proclamation No 1 of 1981.
87 Acceded on 11 September 1976.
88 Ratified on 1 June 1990.
89 Ratified on 18 February 1984.

has the right of freedom from interference with his communications.
(2) Every citizen has the right to be informed at all times of various events in the country and in the world at large which are of importance to the lives and activities of the people and also of issues of importance to society.

It is interesting to note that unlike international law, the Tanzanian Constitution does not require that freedom of expression be limited by law of general application or that the limitation be reasonable and justifiable in a democratic society. Instead section 30 of the constitution chronicles interests that justify derogation from the right. In terms of section 30:

(1) The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.
(2) It is hereby declared that the provisions contained in this Part of this Constitution which set out the basic human rights, freedoms and duties, do not invalidate any existing legislation or prohibit the enactment of any legislation or the doing of any lawful act in accordance with such legislation for the purposes of-

(a) ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals;

(b) ensuring the defence, public safety, public order, public morality, public health, rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property or any oilier interests for the purposes of enhancing the public benefit;

(c) ensuring the execution of a judgment or order of a court given or made in any civil or criminal matter,

(d) protecting the reputation, rights and freedoms of others or the privacy of persons involved in any court proceedings, prohibiting the disclosure of confidential information, or safeguarding the dignity, authority and independence of the courts;

(e) imposing restrictions, supervising and controlling the formation, management and activities of private societies and organisations in the country; or
(f) enabling any other thing to be done which promotes, or preserves the national

interest in general.

3.10.3 Laws restricting freedom of expression

Tanzania has a myriad of laws that restrict freedom of expression. For instance, the Newspapers Act, 1976 empowers the registrar with a wide discretion to refuse registering a publication. It also gives the minister wide powers to ban a publication. Again, the Broadcasting Services Act empowers the Tanzania Broadcasting Commission with a wide discretion in issuing licences to private broadcasters, supervising content and discharging licence conditions. These provisions are susceptible to abuse and potentially hamper the dissemination of and access to information. The National Security Act, 1970 prohibits government officials from disclosing information that government considers classified.[90] This prevents members of the public from accessing information that could be of public interest.

3.11Zambia

3.11.1 Domestic application of human rights instruments

Zambia has ratified the ICCPR,[91] CRC[92] and ACHPR.[93] However, the Zambian constitution does not say anything about the status of ratified international human rights instruments. Zambia (like Tanzania and Lesotho) being a common law country follows a dualist approach to incorporation of international human rights instruments into law. Zambia has not incorporated any of the international human rights instruments relating to freedom of expression into domestic law. This therefore means that international human rights treaties are not directly enforceable in Zambia. Like in Botswana, Lesotho and Tanzania, courts in Zambia have used international human rights instruments as interpretation aids in dealing with the human rights

90 See also the Civil Service Act, 1989 and the Tanzania Revenue Authority Act, 1995.
91 Acceded on 10 July 1984.
92 Ratified on 30 September 1990.
93 Ratified on 10 January 1984.

enshrined in the bill of rights.

3.11.2 Constitutional provisions

Section 20 of the Zambian constitution guarantees freedom of expression in the following terms:

> (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.

Section 20(2) of the Zambian Constitution expressly guarantees freedom of the press. Important to note is that just like the constitutions of Lesotho and Swaziland, the Zambian Constitution apparently affords a citizen the right to waive his right to exercise the right to freedom of expression. This can be gleaned from the words 'Except with his own consent …'. Implied in these words is that a person can agree to waive the enjoyment of his right to freedom of expression.

However, freedom of expression is not absolute but can be limited. In the terms of section 20(3) of the Zambian Constitution, the limitation of the exercise of the right to freedom of expression must (a) be provided by the law, (B.) be for the purpose of protecting the defence, public safety, public morality, public order and public health of the country and protecting the rights, privacy and reputations of other individuals and (C) be reasonably justifiable in a democratic society. This test complies with the international human rights standards. Chanda and Liswaniso[94] convincingly contend that the Zambian standards of limiting the right to freedom of expression are less stringent than the international law standards in that Zambian restrictions should be 'reasonably required' to protect the listed interests as opposed

94 AW Chanda and M. Liswaniso *Handbook of media laws in Zambia* (ZIMA, 1999) 7.

to being 'necessary' as required under the international standards. Put differently, 'necessary' is a stricter standard than 'reasonably required.'

3.11.3 Laws restricting freedom of expression

Notwithstanding the constitutional protection of the right to freedom of expression, there are a number of Zambian laws that restrict the exercise of the right. For example, section 5 of the Printed Publications Act (Chapter 161) makes it peremptory for newspapers to register before publication. Even though mandatory registration makes administrative sense in that it fosters accountability on registered newspapers, it can potentially hamper the freedom to publish. Section 18 of the National Archives Act (Chapter 175) criminalizes the publication or production of any part or the whole of the contents of any public archives which have been transferred to the National Archives without the permission of the Director. This obviously prevents the dissemination of information and deprives members of the public (that cannot access the national archives) of access to archived information. Section 27 of the Zambian National Broadcasting Act (Chapter 154) creates a state monopoly in broadcasting, affords the minister of information a wide discretion to issue broadcasting licences and censor programmes provided by the Zambian National Broadcasting Corporation. These provisions negate the independence of not only the Zambian National Broadcasting Corporation but also the media fraternity. This in turn curtails the free flow of information in Zambia.

3.12 Zimbabwe

3.12.1 Domestic application of human rights instruments

Zimbabwe has ratified the ICCPR,[95] CRC[96] and ACHPR.[97] Section 111B of the Zimbabwean Constitution specifically stipulates that an international human rights treaty does not automatically become part and parcel of Zimbabwean law unless it is incorporated by statute, or Parliament or the President (on matters that fall within his Presidential powers) resolve that

95 Acceded on 13 August 1991.
96 Ratified on 8 March 1990.
97 Ratified on 30 May 1986.

it applied automatically or if it does not impose any fiscal obligation on Zimbabwe. In the words of section 111B of the Zimbabwean Constitution:

(1) Except as otherwise provided by this Constitution or by or under an Act of Parliament, any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organizations —

(a)shall be subject to approval by Parliament; and

(b)shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament.

(2) Except as otherwise provided by or under an Act of Parliament, any agreement—

(a)which has been concluded or executed by or under the authority of the President with one or more foreign organizations, corporations or entities, other than a foreign State or government or an international organization; and

(b)which imposes fiscal obligations upon Zimbabwe;
shall be subject to approval by Parliament.

(3) Except as otherwise provided by this Constitution or by or under an Act of Parliament, the provisions of subsection (1)(a) shall not apply to—

(a) any convention, treaty or agreement, or any class thereof, which Parliament has by resolution declared shall not require approval in terms of subsection (1)(a); or
(b) any convention, treaty or agreement the subject-matter of which falls within the scope of the prerogative powers of the President referred to in section 31H(3) in the sphere of international relations;

unless the application or operation of the convention, treaty or agreement requires—

(i) the withdrawal or appropriation of moneys from the Consolidated Revenue Fund; or
(ii) any modification of the law of Zimbabwe.

It would therefore appear that Zimbabwe follows the dualist approach to domestic application of international treaties. Even though the Bill of Rights of the Zimbabwean Constitution is couched in almost similar wording to the ICCPR, Zimbabwe has not yet incorporated into national legislation the ICCPR and other international human rights instruments dealing with the right to freedom of expression. But Zimbabwean courts have drawn inspiration from international human rights treaties in interpreting the Bill of Rights.

3.12.2 Constitutional provisions

Section 20 of the Zimbabwean constitution provides that:

> (1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

Two salient points are noteworthy. Firstly, just like the constitutions of Lesotho, Swaziland and Zambia, the Zimbabwean constitution apparently affords a citizen a right to waive his right to exercise the right to freedom of expression. This can be gleaned from the words 'Except with his own consent …'. Implied in these words is that a person can agree to waive the enjoyment of his right to freedom of expression. Secondly, it appears a child's right to freedom of expression can be waived by way of parental discipline.

In terms of section 20(2) of the Zimbabwean Constitution, the limitation of the exercise of the right to freedom of expression must (a) be provided by the law, (b) be for the purpose of protecting the defence, public safety, public morality, public order and public health of the country and protecting the rights, privacy and reputations of other individuals and (c) be reasonably justifiable in a democratic society.

3.12.3 Laws restricting freedom of expression

Even though in principle the Zimbabwean constitution guarantees freedom of expression, in practice Zimbabwe is renowned for suppressing the exercise of the right to freedom of expression. This is evidenced by the closure of independent newspapers like the Daily News, The Tribune and independent radio and television stations, and the banning and or interference of demonstrations and opposition political meetings.
A number of laws restrict freedom of expression in Zimbabwe. The Access to Information and Protection of Privacy Act (Chapter 10:27) broadly exempts

government from disclosing information relating to cabinet documents, advice relating to government policy, national security, economic interests of the state, inter-governmental relations or negotiations, research information and privacy. This curtails citizens' right to access this information which basically is for public interest. Section 66 requires all media services to register with the Media Information Commission. The recent experience has been politicization of the appointment of members of the Commission which has seen the body making biased decisions that hamper freedom of expression. The Public Order and Security Act No 1 of 2002 together with its amendments also proscribes the publication of false news that undermine national security, undermine the person of the President and are abusive, indecent or false about or concerning the president. The Broadcasting Services Act, 2001 (with its amendments) gives the minister of information wide powers over the appointment and functions of the Broadcasting Authority of Zimbabwe which powers compromise the independence of this body. Section 4 of the Official Secrets Act (Chapter 11:09) criminalizes disclosure of confidential information by a government employee or contractor even when disclosure of such information does not harm the public interest. Such provision curtails not only the dissemination of information that is in the interests of the public but also hampers access to information.

4.Conclusion

Seven conclusions can be drawn from this discourse. Firstly, the right to freedom of expression entails the liberty to hold opinions, the freedom or liberty to seek, access, receive and impart information, media freedom as well as intellectual, artistic and musical freedom. Secondly, these freedoms should be exercised without any interference by public authorities and regardless of frontiers. Thirdly, freedom of expression is important in three material respects namely (a) it is an essential and 'constitutive' feature of a just political society that government treat its adult members… as responsible moral agents, (b) expression is an important part of what it means to be human and (c) freedom of expression is recognised as a core

value of society, essential to truth, democracy and personal fulfilment. Fourthly, the right to freedom of expression is not absolute but can be restricted or limited by law that conforms with international human rights standards. The limitation should serve a legitimate interest, should not render the right itself an illusion and should be necessary in a democratic society. Fifth, in all Southern African countries (except Angola, DRC and Namibia), international human rights instruments do not have automatic application in domestic law unless incorporated by national legislation. Sixth, the constitutions of all Southern African countries in principle guarantee the right to freedom of expression in line with international human rights standards. Lastly, all Southern African countries have a number of national laws that restrict the exercise of the right to freedom of expression. This undermines the constitutional protection of the right to freedom of expression.

CHAPTER 4

DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS IN FORCED EVICTION CASES IN AFRICA

Buhle A Dube[1]

1. Introduction

The rights to life, dignity, equality and housing are enshrined in most African constitutions, and in some cases are also provided for in domestic legislation. These rights are further protected by a number of international human rights instruments as well as customary international law. All these guarantees notwithstanding, vulnerable sectors of society have and continue to be victims of unlawful evictions with impunity all over Africa. Many people have been rendered homeless, landless, and left without access to food and property on the continent. Forced evictions have been visited upon defenseless societies, usually by dominant sections of society since time immemorial.

Human rights are minimal standards and as such they leave most legal and policy matters open to democratic decision making at the national and local levels. This allows them to accommodate a great deal of cultural and institutional variation and also allows them to leave a large space for democratic decision making at the national level.[2] The question is how democratic is this decision making in real life?

This chapter traces the application of international human rights norms in domestic legal systems by looking at the position of international law in

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2 'Human rights' available at http://plato.stanford.edu/entries/rights-human/ (accessed 20 February 2008).

five different African countries, namely South Africa, Swaziland, Ghana, Botswana and Zimbabwe. It also looks at the role played by a progressive judiciary in applying international law. The article also looks at the jurisprudence of the African Commission on Human and Peoples' Rights as well as general comments of the Committee on the International Convention on Economic Social and Cultural Rights (Committee on CESCR) and how these can inform domestic application of international human rights norms to advance the rights of victims of forced evictions.

2. The place of international human rights law municipal legal systems

The application of international human rights law at the domestic level depends largely on that particular country's stance towards international law. The two schools, monism and dualism approach the application of international law in the domestic sphere differently. On the one hand, monist countries view municipal law and international law as components of a single legal system, with international law enforceable in the domestic courts as if it were domestic legislation.[3] Dualist countries on the other hand require domestication of international law before it can be relied upon in domestic courts.[4] Some countries' constitutions incorporate principles of international law which then apply at the domestic level without much difficulty. In some cases, through judicial activism, international law does become incorporated into domestic legal systems as litigants rely on it to advance their cases.

The Committee on CESCR in General Comment No 9, gave guidance on the domestic application of the CESCR where it stated that states have

3 An example of a monist country would be Moldova, whose 1994 Constitution in article 4 provides that constitutional provisions shall be implemented in accordance with ratified treaties. Moreover the primacy of international law is also reflected in Moldova's labour legislation. See also section 13 of the Moldovan 2003 Labour Code quoted by M Ndayikengurukiye 'International human rights law as a source of law in the Burundian judicial system', dissertation submitted to the Faculty of Law of the University of Pretoria, in partial fulfilment of the requirements for the Degree of Masters of Law (LLM Human Rights and Democratisation in Africa) (2005). Closer to home, Namibia is also a monist country.

4 Examples of dualist countries include South Africa, Botswana, Lesotho, Swaziland and Zimbabwe.

an obligation to use all the means at their disposal to give effect to the rights recognized in the Covenant. It further stated that the fundamental requirements of international human rights law must be borne in mind, and that the Covenant norms must be recognized in appropriate ways within the domestic legal order, ie appropriate means of redress or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.[5]

In the General Comment, the Committee urges state parties to consider two principles in relation to any question of the domestic application of the CESCR. Firstly, as reflected in article 27 of the Vienna Convention on the Law of Treaties, a state may not invoke the provisions of its internal law as justification for its failure to perform a treaty. In other words, states should modify the domestic legal order to give effect to their treaty obligations. The Committee further based its reasoning on article 8 of the Universal Declaration of Human Rights (UDHR), according to which everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.[6]

The Committee has held that in interpreting domestic law, courts should adopt an approach that conforms as far as possible to the state's international legal obligations. Failure by the domestic courts to adopt this approach would be incompatible with the rule of law, which as the Committee put it, must always be taken to include respect for international human rights obligations.[7] It went on to state that:[8]

> It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of

5 Committee on Economic, Social and Cultural Rights, General Comment 9, The Domestic Application of the Covenant (Nineteenth Session, 1998), UN Doc E/C.12/1998/24 (1998), para 2.
6 As above, para 3.
7 As above para 14.
8 Para 15.

> domestic law that would place the State in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.

3. The normative content of international human rights law on forced evictions

Forced evictions involve the violation of both civil and political rights as well as socio-economic rights. Because of the widely held view that socio-economic rights are not justiciable, the focus in cases of forced evictions tends to be on the latter set of rights as the battle for redress focuses on them; with the state claiming it is under no obligation to compensate victims of violation.

The African Charter on Human and Peoples' Rights (African Charter) in its preamble clearly manifests the intention of the drafters as regards the enforcement of socio-economic rights. It states that:

> [I]t is … essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

Article 3 of the African Charter provides that all individuals are equal before the law and are entitled to the equal protection of the law. The manner in which evictions are carried out in Africa has come to be characterized by flagrant violation of this provision. In most cases, evictees are not afforded the protection of the law, and hence they are not treated equally as is the case with other citizens.

Article 14 of the African Charter provides that the right to property shall be guaranteed and that it may only be encroached upon in the interest of

public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 16 provides that every individual shall have the right to enjoy the best attainable state of physical and mental health. It further enjoins state parties to the African Charter to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. Disease and sicknesses tend to spread in the conditions that evicted people find themselves in, and as such more human rights are violated.

Article 18(1) provides that the family shall be the natural unit and basis of society and as such shall be protected by the state. States are enjoined to take care of the family's physical and moral well being. In situations of forced evictions, the state neglects the obligations placed on it by these foregoing provisions. Families are scattered and displaced during evictions, and as such do not enjoy the protection of the state as envisaged by this provision.

Although the African Charter does not specifically provide for the right to shelter, the African Commission has held that at a very minimum, the right to shelter obliges states not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes.[9] It further held that the obligation of the state to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs. As regards the obligations of the state when non-state actors are involved in evictions, the Commission held that:

9 *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria*, communication 156/96, (2001) AHRLR 60 (ACHPR 2001) para 61.

> Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies. The right to shelter even goes further than a roof over ones head. It extends to embody the individual's right to be let alone and to live in peace- whether under a roof or not.[10]

The African Commission broadened the jurisprudence on the right to housing and not to be evicted. It stated that although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter. It emphasized that when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing.

The African Charter empowers the African Commission to draw inspiration from international law in determining cases brought before it. Article 60 of the Charter provides:

> The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.

Hence instruments such as the UDHR, International Covenant on Civil and Political Rights (ICCPR), ICESCR are relevant for determining the normative content of forced eviction human rights norms in Africa.

10 As above.

The UDHR is one of the major human rights instruments that have attained wide recognition by states. In article 1 it provides that all human beings are born free and equal in dignity and rights and they are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. The declaration affirms the rights to life,[11] equality,[12] the right to an effective remedy in case of violation of fundamental rights.[13]

In article 25(1), the UDHR provides that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The CESCR governs the cluster of rights known as socio-economic rights. These include the right to an adequate standard of living. Article 11(1) provides that:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The ICCPR also applies to cases of forced evictions. In article 17(1), the ICCPR sets out the protection against forced evictions in the following terms:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.[14]

11 Article 2.
12 Article 7.
13 Article 8.
14 See Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions and the right to adequate housing, (Sixteenth Session, 1997) UN Doc E/1998/22, para 9.

Article 17(1), when read together with the provisions of article 11(1) of the CESCR buttresses the right not to be forcefully evicted without adequate protection. The former provision further recognizes the right to be protected against arbitrary or unlawful interference with one's home. It is worth noting that the state's obligations to ensure respect for that right as provided for in article 17(1) of the ICCPR is not qualified by considerations of availability of resources.[15]

The Committee on ESCR has, while noting that attempts to define forced evictions can be problematic, come up with a definition for the term. It noted that this expression seeks to convey a sense of arbitrariness and illegality. It defined the term 'forced evictions' as the temporary or permanent removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the international human rights covenants.[16]

Evictions can only be resorted to in exceptional circumstances and must conform to a strict set of criteria. The ESCR Committee has set out these criteria in its General Comments No 4[17] and No 7.[18] Accordingly, evictions should not result in individuals being rendered homeless or vulnerable to the violations of other human rights.[19] In the event that those affected are unable to provide for themselves, the state has the responsibility to take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, is available.

15 As above.
16 General Comment No 7, paras 3 and 4.
17 Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing, (Sixth Session, 1991), UN Doc E/1992/23.
18 General Comment No 7.
19 As above, para 17

The Committee further set out a procedural outline, containing criteria that need to exist for forced evictions to be lawful. It stated that appropriate procedural protection and due process are essential aspects of all human rights. It considered that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions and where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

These criteria have been affirmed by the African Committee in the SERAC case.[20] In this case, the African Commission held that the particular violation by the Nigerian government of the right to adequate housing as implicitly protected in the African Charter also encompasses the right to protection against forced evictions. The African Commission drew inspiration from the definition of the term forced evictions by the Committee on ESCR which defines this term as the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.[21]

4. The domino effect of human rights violations

The practice of forced evictions is widespread and affects persons both

20 *SERAC,* n 8 above 40.
21 See General Comment No 7, para 4.

in the developing and developed countries. Because human rights are interrelated and interdependent, forced evictions tend to violate other human rights. They usually result in the loss of property and lives. The initial violation often opens doors to further and severe violations. Thus while manifestly breaching the rights in the CESCR, the practice often also results in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home, the right to the peaceful enjoyment of possessions,[22] and the right to self determination.[23]

In Ghana, for example, the national parks continue to be the cause of so much misery for many villagers, whose access to land is cut short in favour of protected areas. The establishment of the Kyabobo National Park (KNP) near the village of Shiare in the Volta region of Ghana was marred with human rights violations.[24] The people of Shiare have lived on that particular land for generations, dating back to the early 17th century.[25]

Although no physical boundary was erected, armed wildlife officers patrol the area to ensure that no one trespasses into the park. There were also allegations of the involvement of the police and the army in the destructive operations that left the villagers without farmland or crops to sustain themselves. The denial of access to farm land had a negative impact on the village socio-economically. Young men had to look elsewhere for land to farm, since the government did not provide alternative land for them. Those who were fortunate to locate alternative farming land were discriminated against by the original users of that land. They were mainly accused of giving their land to the government, and were told to leave those newly found farms.

The Ghana case illustrates that once eviction occurs, human rights violations

22 See also General Comment No 7, para 5.
23 See also articles 3, 4, 5, and 6 of the African Charter and article 1(1) of the ICCPR.
24 Interview with Mr Yentumy, Shiare, Volta Region 9 October 2007.
25 Initially three tribes were indigenous to the area, *viz* the Akyodes, Adeles and Ntriyos.

spiral out of control. The impact is heavier on vulnerable groups amongst the evictees, such as women and children.[26]

5. Applying international law through a progressive judiciary

5.1 India

The move towards a rights-based approach to forced evictions can be seen in the 1985 Indian Tellis case involving pavement dwellers.[27] In this case pavement dwellers and public interest organisations claimed that the eviction of pavement dwellers by the municipality would violate their right to life under the Indian Constitution, by depriving them of their livelihood. Further that the right to life includes protection of means of livelihood and that the municipality was under obligations to follow the rules of natural justice before eviction. The Court held in favour of the applicants and held that the right to life as enshrined in the Indian Constitution encompassed means of livelihood. It stated that this conclusion is supported by constitutional directive principles concerning adequate means of livelihood and work, and that the municipality's action amounted to a deprivation of the citizens' right to livelihood as they required housing for their livelihoods in order to secure their right to life.

However, the Court also held that deprivation of the right to livelihood could occur if there was a just and fair procedure undertaken according to law. The action must be reasonable and persons affected must be afforded an opportunity of being heard. The Court found that this condition was satisfied by the Supreme Court proceedings. As regards the right to alternative accommodation, the Court held that the municipality is not obliged to provide an alternative site for the pavement dwellers.

Since this progressive approach was adopted in the Indian Supreme Court, other countries have also followed suit, by adopting more and more international human rights law principles domestically, with South Africa

26 See General Comment No 7, para 11.

27 *Olga Tellis and Others v Bombay Municipal Council* [1985] 2 Supp SCR 51.

leading the pack.

5.2 South Africa

5.2.1 The constitutional framework

South Africa boasts one of the most progressive constitutional frameworks on the continent. After a long history of apartheid and social divisions along racial, ethnic, and economic lines, South Africa came of age in 1994 when an interim Constitution entered into force. In 1996 the final Constitution was adopted.

The South African Constitution contains a Bill of Rights that protects the rights to life,[28] housing,[29] human dignity,[30] equality[31] and property,[32] amongst others. In terms of section 39 of the South African Constitution, when interpreting the Bill of Rights the courts must consider international law.[33] This section requires an interpretation that promotes the values which underlie an open and democratic society based on human dignity, equality and freedom.[34] This open and democratic society does not refer to the current South African society but an ideal one, existing only in the abstract.[35]

Writing on section 35 in the interim Constitution which was couched in similar

28 Section 11.
29 Section 26 provides that:
(1) Everyone has the right to have access to adequate housing.
(2)The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.
30 Section 10.
31 Section 9.
32 Section 25.
33 Section 39(1) provides that:
(1) When interpreting the Bill of Rights, a court, tribunal or forum -
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.
34 I Currie I and J de Waal *The Bill of Rigths handbook* (2005) 159.
35 As above.

terms to section 39, Dugard,[36] stated that the provision does not merely require a court to consider treaties to which South Africa is a party or customary rules that have been accepted by South African courts, but also to consider (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom,[37] as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Dugard argued that such a conclusion follows logically from the use of the term 'public international law' without qualification in section 35(1) and to give maximum effect to the otherwise incomplete catalogue of rights in the Bill of Rights.[38] The current Constitution however, omitted 'public' and instead used 'international law'. The Constitutional Court (CC) relied on Dugard's postulation in 1995, when deciding the landmark case of *S v Makwanyane.*[39]

5.2.2 The Grootboom case

The *Grootboom case*[40] involved a group of people who, living in appalling conditions decided to move out and illegally occupy someone else's land. They were evicted and left homeless. The root cause of their problems was the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing.[41]

Mrs. Grootboom, in whose name the matter was brought in the High Court, was one of a group of 510 children and 390 adults living in appalling circumstances in Wallacedene informal settlement before illegally occupying nearby land earmarked for low-cost housing. During their subsequent

36 J Dugard 'The Role of International Law in Interpreting the Bill of Rights (1994) 101 SAJHR 208.
37 Section 232 of the Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
38 Dugard, n 35 above.
39 1995 (3) SA 391 (CC).
40 *The Government of the Republic of South Africa and Others v Irene Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).
41 Para 3 of the *Grootboom* case.

eviction from this land, their shacks were bulldozed and burnt and their possessions destroyed. In the meantime, their former places of abode in Wallacedene were filled and in desperation they settled on a sports field and in an adjacent community hall.

In the High Court, Mrs. Grootboom and the other applicants sought an order directing the municipality to provide forthwith:

(i) adequate basic temporary shelter or housing to the applicants and their children pending their obtaining permanent accommodation;
(ii) or basic nutrition, shelter, healthcare and social services to the applicants who are children.

They based their claim on two constitutional provisions, namely section 26 on the right to housing,[42] and section 28(1) (c)[43] on the rights of children to shelter. The High Court found in favour of Mrs. Grootboom and the other applicants. The municipality appealed to the CC.

The CC dealt with the question whether socio-economic rights were justiciable under the South African legal system. Yacoob J opined that while the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of their justiciability in South Africa has been settled by the text of the Constitution as construed in the Certification judgment.[44] During the certification proceedings it was contended that these rights were not justiciable and should therefore not have been included in the text of the new Constitution.[45] In response, the CC held:

> [T]hese rights are, at least to some extent, justiciable. As we have stated in the previous

42 See n 25 above for the text of the provision.
43 Section 28(1)(c) provides
(1) Every child has the right
…
(c) to basic nutrition, shelter, basic health care services and social services.
44 *Grootboom* case para 20.
45 Cf article 1 of the African Charter which provides that the member states ' shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.' See also article 17(1) ICCPR, which provides that no one may be subjected to arbitrary or unlawful interference with his home.

> paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.[46]

Yacoob J went on to say that since socio-economic rights are expressly included in the Bill of Rights, they cannot be said to exist on paper only.[47] He proceeded to consider the relevance of international law and its impact on section 26 of the Constitution. Relying on Makwanyane,[48] the Court held that the relevant international law can be a guide to interpretation. It thus turned to the CESCR for guidance, and confirmed its significance in understanding the positive obligations created by the socio-economic rights in the Constitution,[49] in particular article 11(1) which provides that:

> The states parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The states parties will take appropriate steps to ensure the realisation of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The CC went on to hold that the extent of the state's obligation must also be interpreted in light of the international obligations binding upon South Africa. It referred to the United Nations Convention on the Rights of the Child (CRC), ratified by South Africa in 1995, which seeks to impose obligations upon state parties to ensure that the rights of children in their countries are properly protected. It held that section 28 of the Constitution is one of the mechanisms to meet these obligations. It requires the state to take steps to ensure that children's rights are observed. In the first instance, the state

46 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, *1996* 1996 (4) SA 744; 1996 BCLR 1253 (CC) at para 78.
47 As above.
48 *S v Makwanyane and Another* above n 38 .
49 Although South Africa has not ratified the CESCR, the Court did not hesitate to seek guidance from this instrument.

does so by ensuring that there are legal obligations to compel parents to fulfill their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children. The state reinforces the observance of these obligations by the use of civil and criminal law as well as social welfare programmes.

The CC allowed the appeal by the government of South Africa in part, by setting aside the order of the High Court. It proceeded to substitute it with the following order:

> It is declared that:
>
> (a) Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.
>
> (b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.
>
> (c) As at the date of the launch of this application, the state housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in paragraph (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations. …

Although the case was decided almost a decade ago, implementation of the order of the CC has been problematic. An amount of R200, 000 was made available to the community for basic shelter, and was used to buy zinc sheets, windows and doors. Twenty toilets were subsequently erected for the community, and water taps were installed for running water. Each

dwellingwas allocated sheets for a roof, as well as one window and a door.[50]

The Grootboom case demonstrates that while the right to housing is protected in South Africa, the problem lies with the implementation of court orders enforcing this right. The Grootboom community still lives in appalling conditions. The government has not adequately implemented the Court's orders including the maintenance of adequate water and sanitation services, save for temporary and inadequate housing that has been provided. Some houses are built in water logged places with poor quality housing materials. Further, there is no drainage system in place and the toilets built by the government now pose a threat as they are not maintained.[51]

5.2.3 Occupiers case

The Occupiers of 51 Olivia Road case[52] involved the eviction of more than 400 occupiers of buildings in the inner city of Johannesburg on the basis that the buildings were unsafe[53] and unhealthy. Section 20 of the Health Act 63 of 1977 reads:

> (1) Every local authority shall take all lawful, necessary and reasonably practicable measures
>
> (a) to maintain its district at all times in a hygienic and clean condition;
>
> (b) to prevent the occurrence within its district of
>
> (i) any nuisance;
>
> (ii) any unhygienic condition;

50 K Pillay 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights', available at http://www.communitylawcentre.org.za/Socio-Economic-Rights/research-project/2002-vol-6-law-democracy-and-development/kameshni-pillay-12-march.pdf/ (accessed 26 February 2008).

51 Shadow report to South Africa's first periodic state report to the African Commission on Human and Peoples' Rights, to be presented at the 38th session of the African Commission on Human and Peoples' Rights, 21 November - 5 December 2005, Banjul, The Gambia available at http://www.chr.up.ac.za/hr_docs/countries/docs/Shadow%20report.doc (accessed 27 February 2008).

52 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg, Rand Properties (Pty) Ltd, Minister of Trade and Industry, and the President of the Republic of South Africa with the Centre on Housing Rights and Evictions and the Community Law Centre, University of the Western Cape as amici curiae* CCT24/07; [2008] ZACC 1, delivered 19 February 2008

53 Pursuant to notices issued in terms of section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977.

(iii) any offensive condition;

(iv) or any other condition which will or could be harmful or dangerous to the health of any person within its district or the district of any other local authority, or where a nuisance or condition referred to in subparagraphs (i) to (iv), inclusive, has so occurred, to abate, or cause to be abated, such nuisance, or remedy, or cause to be remedied, such condition, as the case may be.

The matter started in the Johannesburg High Court,[54] where Jajbhay J refused to evict the occupiers, and instead ordered the City to remedy its housing programme which was found to be inadequate. The City appealed against the order of the High Court to the Supreme Court of Appeal (SCA).[55] The SCA upheld the appeal and granted eviction on condition that the City would provide alternative accommodation to those who would be rendered homeless. In terms of the order, the City was to provide those of the occupiers who were desperately in need of housing assistance with relocation to a temporary settlement area.

In their appeal to the CC, two broad questions initially raised in the application for leave to appeal were whether the order for the eviction of the occupiers ought to have been granted and whether the City's housing programme complied with the obligations imposed upon it by section 26(3) of the Constitution.[56]

The occupiers sought to have the order of the SCA set aside. Soon after the CC heard the application for leave to appeal, it issued an interim order aimed at ensuring that the City and the occupiers engaged meaningfully on issues involving alleviation of the plight of the applicants. This led to an agreement which was endorsed by the Court.

54 *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W); 2006 (6) BCLR 728 (W); [2006] 2 All SA 240 (W).
55 *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) SA 417 (SCA); 2007 (6) BCLR 643 (SCA); [2007] 2 All SA 459 (SCA).
56 See n 28 above for the substance of the provision.

Despite the amicable settlement, the CC took the opportunity to deal with some of the issues raised in the case. As regards the fairness of the administrative action to evict the occupiers without prior engagement, Yacoob J held that

> … the duty of the City to engage people who may be rendered homeless after an ejectment to be secured by it is also squarely grounded in section 26(2) of the Constitution.[57] Reasonable conduct of a municipality … includes the reasonableness of every step taken in the provision of adequate housing. Every homeless person is in need of housing and this means that every step taken in relation to a potentially homeless person must also be reasonable if it is to comply with section 26(2).[58]

Justice Yacoob was also quick to caution that it is not in all cases that the municipality can be expected to provide housing. He stated that it may in some circumstances be reasonable to make permanent housing available and, in others, to provide no housing at all. Further that the City cannot be expected to make provision for housing beyond the extent to which available resources allow.[59]

As regards the constitutional validity of section 12(6) of the National Building Regulations and Building Standards Act, Yacoob J relied on section 26(3) of the Constitution which prohibits the eviction of people from their home absent a court order issued after taking into account all the relevant circumstances.[60] He explained that in other words, no person may be compelled to leave their home unless there exists an appropriate court order. He opined:

> The provisions of section 26(3) would be virtually nugatory and would amount to little protection if people who were in occupation of their homes could be constitutionally compelled to leave by the exertion of the pressure of a criminal

57 Section 26(2) provides: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of' the right of access to adequate housing.
58 N 51 above at para 17.
59 Para 18.
60 See para 49.

> sanction without a court order. It follows that any provision that compels people to leave their homes on pain of criminal sanction in the absence of a court order is contrary to the provisions of section 26(3) of the Constitution. Section 12(6) provides for this criminal compulsion and is not consistent with the Constitution. Continued occupation of the property should not be a criminal offence absent a court order for eviction.[61]

In the end, the Constitutional Court found in favour of the occupiers. It declared section 12(6) of the Act unconstitutional. It further read into the section the following proviso:

> This subsection applies only to people who, after service upon them of an order of court for their eviction, continue to occupy the property concerned.

The need and importance of the application of international human rights norms domestically can be seen in both the *Grootboom* and *Occupiers* cases. However, as seen in Grootboom, implementation of court orders is central to the realisation of the rights as provided for under both the Constitution and international human rights law.

5.3 Swaziland

5.3.1 The constitutional framework

Swaziland is a dualist state, hence international human rights law does not apply unless it has been domesticated by an Act of parliament. Swaziland is a signatory to most international instruments.[62] Whilst the country may be swift in ratifying international instruments, implementation hardly receives the same speed.[63]

Until 2006, Swaziland operated without a written constitution after the late King Sobhuza II unilaterally set aside the independence constitution by royal

61 Para 49.
62 Such as the African Charter, ICCPR, ICESCR, CRC and CEDAW.
63 BA Dube and AS Magagula, The Law and Legal Research in Swaziland, available at www.nyulaglobal.org/globalex/Swaziland.htm (accessed 20 February 2008).

proclamation in 1973. Many fundamental rights were suspended, including the rights to freedom of assembly, association, expression and protection against deprivation of property. This was done via the King's Proclamation to the Nation of 12 April 1973 (widely known as the 1973 Decree). Through this Decree, legislative, judicial and executive powers vested in the King. Further, the decree was the supreme law in the land, and any law that was inconsistent with it was to the extent of that inconsistency null and void.

5.3.2 Cases

The country showed its aversion towards international law in the case of *Professor Dlamini v the King.*[64] In this case the applicant was seeking to be admitted to bail and therefore challenging the provision of the Non-Bailable Offences Order (NBO),[65] which precluded people charged with particular offences from being admitted to bail.[66] This case determined the direct application of international law in the domestic legal system in Swaziland. It further looked at whether domestic legislation can be faulted for its inconsistency with international law.

Counsel for the applicant advanced two arguments that the NBO was *ultra vires* the African Charter.[67] In the first instance, he sought relief declaring the NBO *ultra vires* article 7(a) of the African Charter in so far as the said NBO violated the applicant's fundamental rights as recognized and guaranteed by the African Charter, UDHR and international human rights customary law and principles. In the second instance, he sought relief declaring the NBO ultra vires article 7(b) of the African Charter[68] in so far as it violates the

64 (41/2000) [2001] SZCA 13 (1June 2001) Appeal Case No 41/2000, available at www.saflii.org/sz/cases/SZCA/2001/13.html (accessed 18 February 2008).
65 No 14 of 1993.
66 These offences include rape, robbery and murder.
67 Article 7(a) provides
1. Every individual shall have the right to have his cause heard. This comprises
(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.
68 Article 7(b) provides
… (b) the right to be presumed innocent until proved guilty by a competent court or tribunal.

principles of presumption of innocence. In turning down counsel's argument, the court refused to accept international law as part of the domestic system. It held that the provisions of the Charter cannot be enforced in the domestic courts unless parliament has by legislation incorporated them into the municipal law of Swaziland. On appeal, counsel did not persist with this line of argument, but sought to invalidate the NBO by relying on the saved portions of the repealed independence constitution. It is doubtful that the Court of Appeal would have held differently to the High Court.

The case of Chief Mliba Fakudze and Others v Minister for Home Affairs and Others[69] involved the forced eviction of two chiefs and their followers, numbering over 200 for refusing to accept the King's brother as their traditional chief. The order for eviction was issued by the Minister for Home Affairs without prior consultation with the evictees.

A high number of Swaziland inhabitants (about 80 percent) reside on communal land under the authority of traditional chiefs that continue their reign at the pleasure of the Monarch. Violent land disputes coupled with conflicting demands from those who claim that they were lawfully appointed as district chiefs are common. Two chiefs, Chief Mliba Fakudze of Macetjeni and Chief Mtfuso Dlamini of neighbouring KaMkhweli were regarded as the rightful chiefs of their respective areas until 2000, when King Mswati III's brother, Prince Maguga Dlamini began claiming their areas as falling under his chieftaincy. He further persuaded the King to relieve the two chiefs of their titles and powers to make room for his appointment.[70]

The two chiefs were stripped of their titles, but they together with their followers refused to pay allegiance to Maguga. On 13 October 2000, the government deployed the army to forcibly remove about 200 residents (followers of the two chiefs) and dumped them more than 100 kilometres

69(2823/2000) [2000] SZHC 17 (6 October 2000), available at www.saflii.org/sz/cases/SZHC/2000/17.html (accessed 21 February 2008).
70 *Fact-finding mission to the Kingdom of Swaziland*, www.icj.org/news.php3?id_article=2936&lang=en, (accessed 21 February 2008).

from the village.[71] The eviction was not preceded by any form of engagement, or due process. The evictees were loaded into trucks in the middle of the night and were not provided with any shelter, or other basic necessities, save for interventions by the Red Cross. They were dumped in an open field.[72] The procedural criteria set out in General Comment No 9 was dispensed with. The displaced villagers were offered the opportunity to return, on condition they apologized to and recognized Chief Maguga as their Chief. The evictees rejected the offer.

Prior to the eviction, the two chiefs brought an application before the High Court seeking an order restraining the government from evicting them.[73] This order was subsequently and erroneously withdrawn by the High Court.[74] Subsequent to their eviction, they brought an application for an order to allow them to return to their land.[75] The High Court granted them their prayer. Upon returning to their homes, police intercepted and evicted them once again, acting on instructions from the Commissioner of Police, Edgar Hillary. He was subsequently convicted for contempt of court and sentenced to 30 days imprisonment, which he never served.[76]

The Macetjeni and KaMkhweli evictions violated article 7 of the African Charter, which guarantees that everyone has the right to have her or his cause heard, and outlaws collective punishments. Government in this case used eviction punitively to discipline the two chiefs for failing to accept their demotion and embrace Maguga as their chief. Their followers also had this punitive treatment visited upon them. Article 7 states in part that:

> (1) Every individual shall have the right to have his cause heard. This comprises:
>
> (a) The right to an appeal to competent national organs against acts violating his

71 Pursuant to an order issued by the Minister of Home Affairs.

72 As above.

73 *Chief Mliba Fakudze and Others v Minister of Home Affairs and Others* (2823/2000) [2000] SZHC 17 (6 October 2000), available at www.saflii.org/sz/cases/SZHC/2000/18.html (accessed 20 February 2008).

74 This allowed government to move in swiftly and evict the over 200 villagers.

75 *Chief Mtfuso II and Another v Swaziland Government* (2685/2000) [2000] SZHC 18 (13 October 2000). available at www.saflii.org/sz/cases/SZHC/2000/18.html (accessed 20 February 2008).

76 *Madeli Fakudze v Commissioner of Police and Others* (08/2002) [2002] SZCA 9 (1 June 2002), available at www.saflii.org/sz/cases/SZCA/2002/9.html (accessed 20 February 2008).

fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; …

(2) … Punishment is personal and can be imposed only on the offender.

They also violated article 14, which states that the right to property shall be guaranteed.

The African Commission has already stated that the right to housing and not to be evicted can be read into the combined effect of articles 14, 16 and 18(1) of the African Charter. The right to housing or shelter was thus read into the Charter from the provisions protecting the right to enjoy the best attainable state of mental and physical health, the rights to property and the protection accorded to family in its decision in the SERAC case.[77]

Owing to the impasse brought about by the Swaziland government's failure to comply with court orders in the *Madeli Fakudze* case the country was thrown into a judicial quagmire after all judges of the Court of Appeal resigned in protest.[78] For two years, Swaziland was left without a Court of Appeal, and the applicants were left without a remedy. Although international law was not invoked by the evictees in their court actions, presumably because of the High Court's stance towards international law in *Professor Dlamini*,[79] it is doubtful that the government would have been persuaded otherwise. In a statement issued through the Swaziland government website,[80] customary law was again elevated above the general law of Swaziland,[81]

77 Para 60 of the *SERAC* case, n8 above.

78 The government of Swaziland issued a statement through the then Prime Minister Sibusiso Dlamini stating that they would not comply with orders of the Court of Appeal because the judges had been influenced by foreign elements when coming to their conclusion.

79 *Professor Dlamini v the King*, n 63 above.

80 *A Ministerial statement in terms of Standing Order 42(d), made by His Excellency the Right Honourable Prime Minister: Re- KaMkhweli and Emacetjeni Matters*, www.gov.sz/home.asp?pid=4237, accessed 20 February 2008.

81 Paras 3 and 4 of the statement issued by the Prime Minister reads

3. It was the understanding of the government that while not derogating and undermining compliance with the court order but in order to a ensure smooth and safe return and settlement of the concerned persons, that such compliance would involve the appropriate mechanisms in

including international human rights standards, which gives the indication that reliance on international human rights norms would receive the same treatment.

Evictions from privately owned land, such as the Hlantambita evictions in 2006 are also common in Swaziland. The Hlantambita evictions are shrouded in a cloud of controversy in the manner in which they evolved. They resemble in many respects the Volta Dam and Shiare evictions in northern Ghana. They were characterised by violence and impunity for human rights violations committed by wildlife officers known as game rangers. These evictions involved the ejection of more than 20 families comprising more than 250 individuals from Farm 10/69 Hlantambita, to make way for the expansion of a wildlife protection area, Mkhaya Game Reserve (MGR).

In a matter that dragged well over a year, residents of Hlantambita were almost perpetually put on suspense as regards their fate. In November 2004 they were served with letters of eviction by the lawyers of MGR, instructing them to attend a meeting to discuss their looming evictions from the farm.[82]

Most of these letters were written in English in spite of the community's illiteracy. As expected, the residents did nothing about the matter until an onsite investigation of human rights violations committed by wildlife officers accidentally unearthed the impending evictions in late February 2005. Residents had been instructed not to plough their fields whilst waiting for their final exit. The MGR offered as compensation the amount of E5000.00 (approximately US$ 700) plus transport to wherever the residents would relocate to. They were also offered thatching grass, for which they would have to provide the labour. All these took place without going through the

accordance with the traditional structures since the areas in question are under the control of traditional institutions.

4. It is unfortunate however, that the manner in which the return of Mr Madeli Fakudze overlooked the involvement of the traditional structures and mechanisms which would have ensured proper and complete resolution of the matter in the interests of safety, peace and stability with the affected areas.

82 Interview with Bhodo Vilakati, 23 February 2005, Farm 10/69 Hlantambita.

courts. There was no involvement of government as required by the criteria set out in General Comment No 9.

The Hlantambita case also exhibits use of violence as fear inducing tactics to get residents to comply with unlawful evictions. The MGR management used their feared wildlife officers to deliver these letters and to threaten residents to attend the meeting. Most of the residents in the community had at one point or another tasted the wrath of the wildlife officers, who are immune from prosecution.[83] A majority of the adult males had been beaten up, shot at or harassed by these wildlife officers on suspicion of poaching from the game reserve.[84] The game reserve employed armed wildlife officers to erect fences, blocking thoroughfares used by both livestock and residents of the land. This meant that anyone found on the wrong side of the fence would be shot, as their former dwelling places now fell within the game reserve.

The issuance of eviction letters and erection of fences took place prior to the coming into force of the Constitution. Hence resort was only to the Farm Dwellers Control Act[85] as the governing legislation for such issues.[86] The residents approached the regional tribunal as provided under the Act to protest their eviction. This process was riddled with delays and referrals back to the negotiating table for the game reserve owners to engage with the residents. The residents were advised to seek redress under Swazi customary law by appealing to the King whilst the matter was simultaneously being pursued through the farm dwellers tribunal. Acting upon such advice from their traditional leaders, the residents withdrew an interdict application

83 Wildlife officers are immune from prosecution for any act or omission done in exercise of their duties in terms of section 23(1) of the Game Act 1991.

84 Interview with Mjubi Tsabedze who was dragged out of his house at night, beaten until he soiled his trousers and was made to eat his own faeces by the wildlife officers. Interviewed on 22 July 2004.

85 1982.

86 The Farm Dwellers Control Act which is the principal instrument below the Constitution on matters of eviction from privately held land in Swaziland, does not address itself to any substantive rights of people to be evicted. Instead it dwells much on procedural aspects of how evictions are to be carried out. The Act sets up the tribunals and lays down their procedural rules. There is no law domesticating any international instrument dealing with the rights of evictees such as these.

they had already commenced at the High Court, and opted to pursue their case under customary law instead. Interestingly, the Attorney General did not intervene to represent the chief of the area, who was also a victim of this unlawful eviction.[87]

Although the matter never went to court, it is doubtful the Swazi courts would have held in favour of the residents. The High Court's aversion to the use of international law in the case of *Professor Dlamini*[88] would likely have been a bar to any claim by the evictees based on international law. It is doubtful if a claim based on the Constitution itself would have succeeded.

5.4 Ghana

5.4.1 The constitutional framework

Ghana has had its fair share of unlawful evictions. The eviction of settlers in the Digya National Park in 2006, the destruction of property and fields and use of violence against the villagers of Shiare, and the evictions of over 200 dwellers of Lakeside in Dambai in 2007 are some of the examples that come to mind.

Section 12(2) of the Ghana Constitution provides that:[89]

> Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.

The rights mentioned in the above article include the prohibition of the deprivation of life,[90] human dignity,[91] the right to own property and not to be arbitrarily

87 In terms of section 233 of the Swaziland Constitution, chiefs are the footstool of *iNgwenyama* and *iNgwenyama* rules through the chiefs. Ingwenyama is the traditional head of the Swazi State, in other words, the King. One of the functions of the Attorney General (AG) listed in section 77(4) is to advise the King on any matter of law including any matter relating to any function vested in the King by this Constitution or any other law. By the necessary extension, chiefs are the footstools of the King as the traditional head of state, and as such the AG ought to offer legal advice to them.
88 *Professor Dlamini v The King*, n 63 above.
89 Constitution of the Republic of Ghana 1992.
90 Section 13(1).
91 Section 15(1).

deprived of that property.[92] The Ghanaian Constitution further obliges the state to resettle displaced people whose property has been acquired by the state, having due regard to the economic well-being, and social and cultural values.[93]

Section 18 of the Ghanaian Constitution provides:

> (1 Every person has the right to own property either alone or in association with others.
> (2)No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.

Section 20 provides safeguards in the event that the rights contained in section 18 are violated. It also lays down the required criteria that must exist before people can be deprived of property. It further provides for compensation to be made available for deprivation of land. It provides that:

> (1) No property of any description or interest in or right over any property shall be compulsorily taken possession of or acquired by the State unless the following conditions are satisfied.
> (a) the taking of possession or acquisition if necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit; and
> (b) the necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property.
> (2) Compulsory acquisition of property by the State shall only be made under a law which makes provision for:
> (a) the prompt payment of fair and adequate compensation; and
> (b) a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from other authority, for the

92 Section 18.
93 Section 20(3).

determination of his interest or right and the amount of compensation to which he is entitled.

The provision in subsection (3) enjoins the state to resettle displaced evictees on suitable alternative land with due regard to their economic well-being and social and cultural values. It goes further to prohibit use of property acquired in the public interest for other purposes.[94]

Section 23 provides for the right of evictees to redress before a court or other tribunal. It provides that administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law. Further, that persons aggrieved by the exercise of such administrative powers have the right to approach a court for redress.

The above entitlements notwithstanding, forced evictions have continued in Ghana even after the 1992 Constitution came into force.

5.4.2 Cases

The Ghanaian case of *Issah Iddi Abass and 10 Others v Accra Metropolitan Assembly and Another*[95] involved the threatened eviction of the applicants from Agbogbloshie (popularly known as Sodom and Gomorrah) by the Accra Metropolitan Assembly. The applicants sued on behalf of the people of Agbogbloshie, praying that the court restrain the Assembly from evicting or ejecting them from Agbogbloshie, until their substantive claim was determined. The intended eviction was necessitated by the Korle Lagon Ecological Restoration Project, which sought to relocate or resettle the people of Agbogbloshie. The applicants claimed the eviction would be in violation of section 23 of the Ghanaian Constitution, and would cause hardship for the applicants since the Assembly intended to evict them without relocation or resettlement.

94 Section 20(5).
95 Misc case No 1203 of 2002, available at http://www.cepil.org.gh/ruling_31.pdf (accessed 20 February 2008).

In determining whether the planned eviction was contrary to law, the High Court found that it was not contrary to any known law of the land, and did not constitute an infringement on any of their rights enshrined in the Constitution or any other international convention of which Ghana is a signatory. The High Court judge, Yaw Appau J went on to state that the mere eviction of plaintiffs who were trespassers, from land they had trespassed onto, did not in any way amount to an infringement on their rights as human beings.

Appau J turned to the question of whether the Assembly was enjoined to resettle or relocate the applicants or in the alternative compensate them before evicting them. He concluded that the Assembly was under no obligation to resettle or relocate or compensate the residents of Agbogbloshie before evicting them, since they were illegal occupants.

Appau J termed the action of the residents of Agbogbloshie land invasion, and reiterated that such conduct cannot be countenanced. He stated that:

> This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a state structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case.
>
> So even in the heart of real homelessness (i.e. South Africa), where people's lands were forcibly taken away from them by white settlers and later legitimized, which led to the birth of their present constitution where a provision for adequate housing was inserted to assist such homeless people, the courts do not approve of land invasions or illegal occupations for the purpose of compelling state authorities to provide shelter or housing for such illegal occupiers.

The Court went on to order the Assembly to give the applicants a grace period of two weeks to organize themselves and vacate the land peacefully before the axe of forcible eviction falls. The Judge concluded by saying he

hoped the eviction would be carried out in a humane manner.

5.5 Zimbabwe

5.5.1 Constitutional framework

Zimbabwe is signatory to a number of international instruments aimed at protecting the rights of vulnerable groups, such as economically disadvantaged people.[96]

Section 16(1) of the Zimbabwean Constitution provides that:

> (1) Subject to section sixteen A, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that—
>
> (a) requires—
>
> (i) in the case of land or any interest or right therein, that the acquisition is reasonably necessary for the utilization of that or any other land—
>
> A. for settlement for agricultural or other purposes; or
>
> B. for purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or
>
> C. for the relocation of persons dispossessed in consequence of the utilization of land for a purpose referred to in subparagraph A or B; or
>
> (ii) in the case of any property, including land, or any interest or right therein, that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilization of that or any other property for a purpose beneficial to the public generally or to any section of the public;

5.5.2 Cases

Yet this notwithstanding, human rights violations in the form of forced evictions have been experienced by Zimbabwe's vulnerable groups. The

96 These include CESCR, ICCPR, CEDAW and CRC.

unlawful evictions carried out as part of Operation Murambatsvina in 2005 come to mind here. According to a UN Report, close to 10 000 housing structures were demolished, directly affecting 133 534 households. An estimated 569 685 persons lost their homes, while 97 614 lost their primary source of livelihood.[97]

The operation was not preceded by any process of consultation or debate at any level. The government of Zimbabwe did not attempt to evaluate the seriousness of the housing situation, or assess any alternative to forced eviction, or discuss the situation with those affected.[98]

Pursuant to Operation Murambatsvina, affected resident of Hatcliffe Extension brought an urgent chamber application for an order of spoliation.[99] One of the areas most affected by Operation Murambatsvina was Hatcliffe Extension where the evictees in this case had constructed their homes built on stands legally allocated by the government in 2002. They were subsequently declared illegal structures and destroyed during the operation. In their application to the High Court, they sought a spoliation order and/or an interdict to allow the evicted people to have restored possession of their homes, and secondly to stop any further destruction and evictions.

The matter was heard on 1 June 2005 by Justice Tedius Karwi, who ruled that the evictees had breached the lease agreements they had entered into with the government by erecting unapproved structures, that they had been given adequate notice by the authorities and that the public policy considerations in destroying their homes and evicting them far outweighed

97 Report of the Fact-Finding mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe, Mrs Anna Kajumalo Tibaijuka, 18 July 2005, 32.

98 *Operation Murambatsvina: Unlawful Forced Evictions; Crimes against Humanity; and Cruel, Inhuman or Degrading Treatment of the Poorest of the Poor,* Submissions to the African Commission on Human and Peoples' Rights (ACHPR) 41st session, submitted by the Centre on Housing Rights and Evictions (COHRE), 4 May 2007, 2.

99 *Dare Remusha Cooperative* **v** *The Minister of Local Government, Public Works & Urban Development & 4 Ors* **HC** 2467/05 (Supreme Court appeal No 169/05). See also www.zlhr.org.zw/media/cases.htm, (accessed 26 February 2008).

the interests of a few who had contravened the law. The Judge neglected to look at the question of spoliation or the human rights that had been violated through the forced evictions. He only stated in passing that the forced evictions had caused untold suffering to a number of people.[100]

The state in Zimbabwe continues to use police to threaten, bully and assault evictees. In the case of *Ashgtony Shumba & Others (Porta Farm Residents) v Officer in Charge Norton Police Station & Others,*[101] residents of Porta Farm were beaten by state police during an eviction which took place in violation of two High Court orders. When the evictees' lawyer asked them why they were violating the court orders, they responded that they could not read and were taking orders from above.

5.6 Botswana

Botswana belongs to the dualist school of thought. International law does not form part of the domestic law of Botswana until parliament enacts a law to that effect. However, in *Attorney General of the Republic of Botswana v Unity Dow*[102] the Court of Appeal relied on international law to find sections 4 and 5 of the Citizenship Act ultra vires the Constitution. The Court looked at international instruments including the African Charter, the Convention on the Elimination of All Forms of Discrimination against Women, CRC, and UDHR.[103]

The recent eviction of the Basarwa from the Central Kalahari Game Reserve (CKGR) clearly illustrates the evils of forced evictions. The Basarwa people of Botswana belong to the San ethnic group and have lived an indigenous form of life for centuries. The San can be found in Botswana, South Africa and Namibia, where they still live predominantly indigenous lives, relying

100 As above.
101 Norton Magistrates Court Case No. 376/05, summarized at www.zlhr.org.zw/media/cases.htm, (accessed 26 February 2008).
102 1992 BLR 119, www.law-lib.utoronto.ca/Diana/fulltext/dow2.htm, (accessed 25 February 2008).
103 As above.

on hunting and gathering for subsistence. In Botswana, the Basarwa are mainly located within a protected area, the CKGR.

The area comprising of the present day CKGR became part of the British Protectorate of Bechuanaland (as Botswana was known at the time) in 1885. Under the colonial law of the time, the pre-existing rights of the indigenous inhabitants of an acquired territory remained in place unless and until they were extinguished by the British authorities. When this happened the Basarwa had already occupied the CKGR for many years, regulating usage of the land in terms of traditional laws, and the take over by the Protectorate did not extinguish those rights. They remained in force even after Botswana's independence in 1966 and there was no legislative enactment revoking them afterwards.

The Constitution of Botswana buttresses the Basarwa's claim in that land. Section 14 on the protection of freedom of movement gives the Basarwa the right to reside in the CKGR. Further, section 8 prohibits the deprivation of property. It states that no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired. The proviso is that where it is necessary or expedient to take such property in the interests of defence, public safety, public order, public health or for development purposes, such property will be deemed to have been lawfully acquired.

Despite such provisions, the government used powers conferred upon it by the National Parks and Game Reserve Regulations effectively to force the Basarwa out of the reserve. The government invoked the need to protect the viability of the wildlife population in the reserve, the prohibitive cost of the provision of basic services to the settlements, and its desire to introduce the Basarwa to the mainstream of Botswana society. These reasons were advanced as justifications to make the government actions lawful. Such reasons go against the tenets of democracy, which manifest in a country's ability to tolerate and respect the choices made by its minorities, and to resist the temptation to impose upon them a way of life they may not want

and do not seek. Further, article 2 of the ILO Convention 169 calls for consultation of indigenous peoples before steps like these can be taken.[104] In other words it discourages imposition of policies and lifestyles upon a minority by a politically dominant group.[105]

During the High Court case in which the Basarwa were challenging their eviction from the CKGR,[106] the Basarwa sought an order declaring the termination of essential services by the government to the CKGR as unlawful and unconstitutional. The essential services included weekly drinking water provision, maintenance of the supply borehole, provisions of rations for destitute members of the community and orphans, as well as transport of the applicants' children to and from school. They further sought an order enjoining government to restore these essential services, and restoring them to the CKGR.

The Court unanimously held that prior to the termination of essential services, the applicants were in possession of the land which they lawfully occupied in the CKGR and that the government's refusal to issue special game licenses to the applicants was unlawful and unconstitutional. It however, concluded that the termination in 2002 by the government of the provision of essential services was neither unlawful nor unconstitutional, and that the government was not obliged to restore the provision of such services. Dow J delivered a dissenting judgment.

In her dissent, Dow J turned to international law for guidance. She also relied on *Attorney General v Dow*[107] to conclude that a generous interpretation is required to meet the just demands and aspirations of an ever developing

104 Article 2 of the Convention 169 Concerning indigenous and tribal peoples in independent countries provides:
(1) Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
105 Botswana has not ratified this Convention.
106 *Sesana and Others v Attorney General* (52/2002) [2006] BWHC 1 (13 December 2006), available at www.saflii.org/bw/cases/BWHC/2006/1.html (accessed 27 February 2008).
107 N 101 above.

society which is part of the wider and larger human society governed by some acceptable concepts of human dignity. She opined that:

> Botswana has been a party to The Convention of the Elimination of All Forms of Racial Discrimination since 1974. The Race Committee adopted Recommendation XXIII, which requires of state parties to: "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent".

Dow J held that the applicants had a right to be consulted on any variation of policy regarding the CKGR that had the foreseeable consequence of adversely affecting their enjoyment of such residence. She went on to state that pending the formulation of a clear policy on residence within the CKGR, and the giving the applicants an opportunity to consider and give their views on such policy, the government is obliged to restore provision of essential services. Further, the government is obliged to pay damages to those applicants who have due to passage of time, made homes outside the CKGR and have decided to settle at those homes instead of returning to the CKGR.

6. Conclusion

It is apparent that judicial enforcement of international human rights norms is highly dependent on the attitude and approach of the judiciary towards fundamental rights. Dlamini notes that the attitude of the judiciary towards the application of fundamental rights in Africa in general has not been one of enthusiastic support of judicial activism, but rather one of caution or conservatism.[108] This is particularly true in cases of forced evictions, where courts in some states, have shown a reluctance to reach decisions that are politically controversial.

The attitude of the executive, subject to budgetary constraints is also an important

108 CRM Dlamini *Human rights in Africa, which way South Africa?* (1995).

factor in the implementation of international human rights law in the domestic sphere. The *Grootboom* case illustrates the problem posed by a progressive judiciary in the context of scant resources. Whilst the courts can pronounce on the content of these rights, it remains largely within the purview of the executive arm, subject to availability of resources, whether such rights are implemented.

It is clear however, that forced evictions, once carried out often open doors to further and worse violations of human rights. From the body of cases examined, it is clear that forced evictions are by their nature intrusive and inhumane and degrading, and as such should be used as a measure of last resort.

CHAPTER 5

TAKING CHILDREN'S RIGHTS LITIGATION BEYOND NATIONAL BOUNDARIES: THE POTENTIAL ROLE OF THE ECOWAS COMMUNITY COURT OF JUSTICE

Solomon T Ebobrah[1]

1. Introduction

One of the greatest challenges that international human rights law has faced over the years is in the area of bringing rhetoric and 'paper commitment' in favour of rights into practical reality for the benefit of those most affected by human rights violations. The stark difference between the commitments voluntarily undertaken by governments when they ratify international human rights instruments and the seemingly blatant violations of rights that occur within the municipal territories of those ratifying states has often given rise to debates as to the relevance and usefulness of encouraging states to ratify these instruments.[2] Some have suggested that the ratification of international human rights instruments by states is merely an exercise aimed at attracting the socio-political benefits that come with joining the prevailing trend in the comity of nations.[3] Yet others have argued that ratification of human rights instruments by states is not a 'costless' venture and that by such ratification, states create an expectation of compliance in favour of the national and international communities.[4] Accordingly, human rights academics and practitioners have continually laboured to find innovative ways of making governments accountable for human rights violations that occur within their jurisdictions contrary to their treaty commitments.

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2 Eg O Hathaway, 'Do human rights make a difference? (2002) 111 Yale Law Journal, 101.
3 B Simmons, 'Theorizing treaty commitments' (2005), www.law.buffalo.edu/BALDYCENTER/pdfs/ Simmons.pdf (accessed 22 February 2008) 3.
4 As above.

While this has been successful in certain areas, within the African context (as indeed is the experience in most parts of the world), accountability for the violation of the rights of the child has remained largely untouched.

With the recognition and codification of the rights of the child came awareness that 'children in every country of the world suffer widespread and often severe breaches of the full range of their rights'.[5] However, while the codification of rights in international human rights treaties generally came with an impressive development in the use of mechanisms for the protection of rights, this aspect has been stunted with respect to the rights of the child. At all levels of human rights realisation or protection regimes, actions in favour of children's rights have mostly been relegated to programmatic measures. Part of the reason for this deplorable state of affair is the absence or underdeveloped state of fora for engaging in children's rights litigation. Up till now, the challenge has even been greater for children's rights practitioners in Africa.

Outlining the weaknesses of existing national, regional and universal mechanisms for children's rights litigation, it is argued that subregional courts and tribunals provide alternative fora for this purpose. Using the Community Court of Justice of the Economic Community Court of Justice (ECOWAS CCJ) as a case study, this contribution demonstrates that it is possible to litigate to enforce the rights of the child before subregional courts in Africa, especially where litigation at the domestic level is impracticable. The contribution begins by highlighting the normative framework for protection of the rights of children in Africa before reviewing the existing structures for implementation and realisation of the rights with emphasis on the shortcomings of the various mechanisms. In the last part, the ECOWAS CCJ is introduced as a viable mechanism for children's rights litigation in West Africa. The focus on ECOWAS is representative of the potential in the use of similar subregional courts for

5 P Newell, 'Children's use of international and regional human rights complaint/communication mechanisms', Background paper prepared for International Justice for Children campaign. (2007) www.coe.int/t/transversalproject/children%5Csource. (accessed 20 February 2008) 2.

2. The normative framework for protection of the rights of children in Africa

the protection of the rights of children in the various subregions in Africa.

2.1 Universal norms

The Declaration on the Rights of the Child adopted in 1924 under the auspices of the League of Nations is reputed as the earliest child-specific standard setting instrument ever adopted.[6] The Declaration reflected the recognition that children were a vulnerable group that required special protection. In 1959 a more elaborate Declaration on the Rights of the Child was adopted by the United Nations (UN) General Assembly.[7] However, it took thirty years before a binding children's rights specific treaty was adopted. Notwithstanding the special recognition introduced by such child specific instruments, children could also claim benefit of rights contained in the wider human rights treaties. This part of the contribution briefly examines the general and child specific human rights instruments applicable to children in Africa that provide the normative framework for children's rights litigation.

The UN Convention on the Rights of the Child (CRC) is the most important children's rights specific human right instrument at the universal level. Although work on the CRC began in the late 1970s, it was only adopted in 1989.[8] Containing 54 articles, the CRC converges around the principles of non-discrimination, respect for the best interest of the child, survival and development of the child and participation of the child. The CRC is one of the few human rights instruments that rise above the generational divide of rights.

6 Records of the Fifth Assembly. Supplement No 23 League of Nations Official Journal 1924. Reproduced in G Van Bueren (ed) *International Documents on Children*, (1998) 3. Commentary on this declaration is available in G Van Bueren (ed) *The International Law on the Rights of the Child* (1995) 5.

7 GA. Res 1387 XIV, 19, adopted on 20 November 1959. Also reproduced in Van Bueren (ed) (1998) (n 5 above) 4.

8 See M Selpulveda et al *Human rights handbook* (2004). The CRC entered into force on 2 September 1990. As at February 2008, 192 states had ratified the CRC. Only two states have not ratified the CRC, Somalia and the United States.

Hinged on the CRC are two optional protocols providing child specific rights. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (First Optional Protocol to the CRC)[9] prohibits the use of children under the age of 18 years in armed conflict and the compulsory recruitment of children under 18 years into armed forces by states and non-state actors. The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Second Optional Protocol to the CRC)[10] prohibits the sale of children, child prostitution and child pornography and obliges state parties to criminalize these activities by municipal law. Whereas the First Optional Protocol to the CRC makes provision for state assistance to enable recovery of victims[11] and their social reintegration, the Second Optional Protocol to the CRC makes clear reference to payment of compensation to victims.[12]

In addition to the instruments discussed above, other general human rights treaties could easily sustain litigation for protection of the rights of the child. The rights catalogued and guaranteed in international human rights instruments as well as those in the Universal Declaration of Human Rights (UDHR) apply equally to children. The International Covenant on Civil and Political Rights (CCPR), the International Covenant on Economic, Social and Cultural Rights (CESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Optional Protocol to the CEDAW, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) can all form

9 Doc A/RES/54/263 adopted on 25 May 2000 and entered into force on 12 February 2002. Ratified by 119 states as at October 2007.
10 Doc A/RES/54/263 adopted 25 May 2000 and entered into force on 18 January 2002. As at February 2008, 125 states had ratified this optional protocol.
11 See art 6(3) of the First Optional Protocol to the CRC.
12 Art 8(1)(g) of the Second Optional Protocol to the CRC.

the normative framework for children's rights litigation.[13] Some of these instruments also contain certain child specific rights which amplify their relevance for children's rights protection.[14] To the extent that they have been ratified by the relevant African states, these universal human rights instruments hold guarantees for the right of children in those states.

2.2 Regional norms

As this contribution targets the rights of children in Africa, the focus in this part will be on African regional and subregional instruments that address the rights of children. The children's rights specific instrument of the African Union (AU) is the African Charter on the Rights and Welfare of the Child (ACRWC).[15] As Chirwa notes, the ACRWC is the first regional human rights instrument to be dedicated specifically to the rights of the child.[16] Fashioned after the CRC, the ACRWC aims at contextualising the rights of the child in Africa. In its 48 articles, the ACRWC revolves around principles similar to those in the CRC but it brings the African 'signature' to bear on the rights of the child. Major differences from the CRC includes the firm pegging of the upper limit of childhood at 18 years,[17] a proclamation of supremacy over customs and traditions as well as cultural and religious practices inconsistent with the ACRWC,[18] and the couching of rights of the child in a manner that imposes duties on state and non-state actors alike. While it could give room for avoidance of duty by state parties, the last point is important because it holds great potential for horizontal application of the ACRWC.[19]

13 The Convention on the Rights of Persons with Disabilities and the International Convention for the Protection of All Persons from Forced Disappearance both of which are yet to enter into force can also base child right actions whenever they enter into force.

14 See for e.g. arts 10 and 13 of the CESCR, art 24 of the CCPR, art 16 of CEDAW, and arts 29 and 30 of the CMW.

15 Adopted in 1990 and entered into force on 29 November 1999. Ratified by 37 states as at January 2008. The African Youth Charter adopted in July 2006 is also relevant for the protection of the rights of young people. However, it is yet to enter into force.

16 D Chirwa, 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) *The International Journal on Children's Rights* 157.

17 Art 2 of the ACRWC. The significance of this provision in the ACRWC lies in the fact that the equivalent provision in the CRC contains allowance for national law to put the age of majority at an earlier age.

18 Art 1(3) of the ACRWC.

19 It has to be noted that there are declarations specific to the rights of the child in Africa but these

Similar to the universal regime, the general human rights treaties under the African human rights system also constitute a legal framework for children's rights litigation. The most important treaties in this regard include the African Charter on Human and Peoples' Rights (African Charter)[20] and the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol)[21]. Worthy of note at the sub-regional level is the Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security of the (the ECOWAS Good Governance Protocol) adopted by the Economic Community of West African States (ECOWAS). [22]

2.3 National laws

At the national level, municipal laws and international treaties may be applicable generally. For states on the dualist divide of legal orientation and philosophy,[23] the most important norm for children's rights litigation is the Constitution as there is usually a principle of constitutional supremacy. In such states, the rights contained in the bill of rights (if any) provide the main framework for the vindication of rights including rights of the child. However, rights contained in domesticated international treaties and in children's rights acts are also very relevant for children's rights litigation. With respect to states on the monist divide of legal philosophy, international instruments ratified by the state (and in some cases published in the official gazette) and rights contained in the Constitution form the most important framework for children's rights litigation. Guarantees contained in children's rights laws (where they exist) and in other statutes follow in order of importance. The Nigerian Child Right Act 2003 and the South African Children's Act 38 of 2005 are examples

are not binding and have thus been left out deliberately.

20 Adopted in 1981 and entered into force in 1986.

21 Adopted in 2003 and entered into force in 2005.

22 Protocol A/SP1/12/01 adopted in December 2001. It requires nine ratifications to enter into force but the status of ratification available at the ECOWAS Commission Abuja (on file with the present writer) suggests that there have only been eight ratifications. However, the Protocol is already in use.

23 Most common law practicing states fall under this category.

3. The framework for implementation and monitoring compliance with children's rights instruments

of national legislations targeted at the rights of children. As is the case with international instruments, general human rights laws apply to the child with equal force in addition to child specific legislation in the domestic arena.

Generally, implementation refers to action consciously taken to give effect to rights guaranteed in treaties. Actions for implementation of rights could be administrative, legislative or judicial. Hence, implementation could be by constitutional activities, enactment of new laws, amendment of existing laws, creation of national institutions for implementation or by judicial application. For human rights instruments to have any significance and positively impact on the lives of the targeted individuals and groups, there has to be mechanisms to ensure that the principles contained in the documents are being implemented. Such mechanisms can take any of several forms, but generally they require some form of activities from various actors and stakeholders. Thus victims and their representatives, state parties themselves and selected experts empowered by the treaty in question could have varying roles to play in ensuring that there is compliance with the spirit and principles of a human rights instrument. As van Bueren has observed, international law has generally developed five main methods, which are used jointly, or severally to ensure promotion and protection of human rights. These include the submission of reports by state parties, the submission and consideration of inter-state complaints, the use of individual complaint mechanisms, on-site visits or use of rapporteurs and the provision of technical advice and assistance to state parties.[24]

While the consideration of state reports, inter-state complaint mechanisms, individual complaints and (to some extent) the use of rapporteurs may all come under mechanisms for the protection of rights, it is commonly agreed that the individual complaint mechanism represents the most direct method

24 Van Bueren, (n 5 above) 378.

of protecting human rights. Hence it has been argued that:

> The principal advantages to a petitioning system are that complaints mechanisms provide a more direct, effective and speedier remedy than the submission of state reports. In relation to children, a right of individual petition has already proven to be effective under the European Convention on Human Rights.[25]

Apart from the argument that it is a more direct and effect method for seeking remedies at international law for alleged violation of human rights, the individual complaints mechanism is attractive because it is replicated at the municipal level in the form of litigation before domestic courts. It also allows alleged victims or their representatives to take active part in ensuring compliance with human rights obligations of states. In examining the mechanisms for monitoring the implementation of children's rights, this section will critically evaluate the effectiveness of the existing systems at universal, regional and national levels with a bias for systems that provide opportunity for victim participation.

3.1 Implementation monitoring under the UN treaty mechanisms

Compliance monitoring under the UN treaty system will be considered in the categories of children's rights specific instruments and general human rights instruments. As already stated above, the CRC is the central children's rights specific instrument under the UN system. The two optional protocols are attachments to the CRC and do not have independent monitoring bodies. Accordingly, since they are linked to the Committee established under the CRC, those protocols are considered along with the mechanisms of the CRC.

3.1.1 The Committee on the Rights of the Child

Monitoring and supervision under the CRC are done by the Committee

25 Van Bueren, (n 5 above) 411.

on the Rights of the Child (the Committee) which is established under the CRC.[26] The Committee is only empowered to receive and consider reports from state parties in order to 'examine progress made by state parties' in fulfilling obligations under the CRC. Under this system, the Committee 'encourages' state parties to submit reports, which reports are considered in a manner that allows for 'constructive dialogue'. This results in concluding observations and comments that the state party in question is expected to act upon and report on at the submission of the next report. The procedure is the same in relation to the two optional protocols to the CRC.

While it has the advantage of avoiding confrontation between the Committee and states, the system is not very beneficial to victims. Firstly, this procedure clearly does not hold any potential for addressing specific cases of violation and certainly does not allow for concrete participation of victims at any point. Secondly, it gives too much leeway to state discretion. As one commentator has observed, 'the Convention has a relatively weak implementation system … which is essentially a system of self-assessment based on the submission of periodic reports by states parties'.[27] While self-assessment by states is not bad in itself as it gives states the opportunity of introspection and may lead to genuine progress if there is political will, it takes too much for granted. As Fottrell correctly observes:

> …the system undoubtedly works best with those states that generally have high levels of compliance with international human rights treaties. …Relying entirely on supervision of human rights treaties through reporting mechanisms alone is probably unwise; international human rights regimes are most effective when reporting is combined with some kind of quasi-judicial processes allowing for inter-state cases and individual petitions from persons within the jurisdiction of the state parties.

The monitoring system under the CRC and its two optional protocols as it currently stands, does not allow for direct involvement of child victims or their representatives. Further, considering that state reports are submitted

26 See art 43 of the CRC.

27 D Fottrell, 'One step forward or two steps sideways? Assessing the first decade of the children's Convention on the Rights of the Child' in D Fottrell (ed) *Revising Children's Rights* (2000) 6.

at pre-determined intervals, urgent cases requiring urgent action by way of provisional measures are excluded. Similarly, the right of child victims to remedy in the form of compensation in deserving cases does not exist under this system. In the context of African realities, the system is at best a mirage and at worst a nightmare for effective realisation of the rights of the child.

3.1.2 Other UN treaty mechanisms

Apart from the Committee on the Rights of the Child, at least four human rights treaty bodies under the UN system have the potential to be (and in some cases have actually been) involved in the realisation of the rights of the Child. These bodies include the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture and the Committee on the Elimination of Discrimination Against Women.

By article 1 of the (First) Optional Protocol to the International Covenant on Civil and Political Rights,[28] the HRC is empowered to receive individual complaints from individuals within a state's jurisdiction, against state parties to the CCPR that have also ratified the Optional Protocol. An applicant before the HRC is required to exhaust all available remedies before submitting a complaint.[29] The CCPR has very few child specific rights. However, the whole range of rights contained in the treaty may base children's rights actions to the extent that they are applicable to the child. Indeed, the HRC to date has successfully considered and decided on certain complaints touching on the rights of the child.[30] While most of the complaints relating to children's rights considered by the HRC were not submitted by children or on behalf of children, some complaints submitted by adults (parents, grandparents and other relatives) have affected the rights of children. In the *Winata and Li v Australia* communication[31] for example, the matter was

28 Adopted 16 December 1966 and entered into force on 23 March 1976.
29 Art 2, First Optional Protocol to the CCPR.
30 See for eg communication 800/1998, *Thomas v Jamaica* (1999), communication 930/2000, *Winata and Li v Australia*, communication 1069/2002, *Bakhtiyari v Australia*. All these cases involve children whose rights are intertwined with those of adult relations.
31 As above.

by the parents of a 13 year old child and invited the HRC to hold that the deportation of the parents who arrived in Australia legally but remained there illegally amounted to arbitrary interference with family life. The basis of the communication was that the deportation decision put a burden the family to decide whether or not to leave the 13 year old (who had legally acquired Australian citizenship) alone in Australia. The HRC found a violation of certain provisions including the right of the child to special protection. In such cases, it has to be noted that there is a risk of children being used as tools by adults for the realisation of their own interests. However, in the *Thomas v Jamaica* communication,[32] the applicant was a 16 year old who alleged that he was imprisoned with adults and subjected to maltreatment while in custody. The HRC concluded that there was a violation of articles 10(2), (3) and 24 of the CCPR.

In the absence of any opportunity under the CRC for the submission of communications, and considering the range of rights contained in the CCPR, the possibility of submitting communication relating to the rights of children is a positive trend. However, certain obstacles can be identified as representing the restrictions of this option. First, it has to be noted that economic, social and cultural rights (ESCRs) are not covered by the CCPR. It is possible to make the argument that ESCR are primarily programmatic rights and nothing is lost by the fact of the inability of the HRC to consider that category of rights. But such an argument would be begging the question as it is now commonly accepted that ESCRs can and do give rise to justiciable rights.

Secondly, being a quasi-judicial body, the HRC can only make recommendations that are strictly not binding. While this may not pose any serious problem for children's rights practitioners in states with a culture of compliance with international law, it is still a challenge for states in Africa. In extreme cases, not even the possibility for 'naming and shaming' inherent in such process deters certain states from ignoring decisions of the HRC.

32 As above.

The requirement to exhaust local remedies is also particularly challenging, as there is a likelihood of difficulty at the national level and the possibility of litigation fatigue on the part of the child and the representatives of the child. The fact that only state parties can be respondent also has implication for effective protection of the rights of the child. Finally, since the HRC is not a full-time body, its work is constrained by time and complaints tend to take very long before they are considered. In relation to children, this poses a danger, as actions would appear to take too long.

The CERD Committee is the treaty body established to monitor and supervise implementation and compliance with the CERD. While the Committee is authorised to receive and consider individual complaints alleging the violation of the treaty, a state party needs to have made a declaration expressly recognising its competence in this regard.[33] CERD gives allowance for state parties to establish national bodies for the specific purpose of receiving individual petitions relating to the treaty but it appears that states have failed to take advantage of this provision.[34] This national procedure (if it is available) and other local remedies also need to be exhausted except they are unduly prolonged. The challenges identified in this regard in relation to the HRC could also arise here. However, the main restriction of proceeding under this mechanism is that only child rights relating to racial discrimination can be brought before the CERD Committee. All the other issues discussed in relation to the HRC are applicable.

The Committee against Torture is also empowered receive and consider individual complaints alleging violations of the CAT. By article 22 of the CAT, a state party needs to make a declaration recognising the competence of the Committee to receive complaints against it from individuals under its jurisdiction. Here also, one major restriction from the perspective of the rights of children is that only complaints alleging violations of CAT can be brought. Considering the common use of torture in the criminal justice

33 See art 14(1) of CERD.
34 Art 14(2) of the CERD.

system in most African states, this is a rather important treaty for the rights of children in conflict with the law. However, the issues of concern raised in relation to the HRC equally apply to the activities of the Committee against Torture.

By article 1 of the Optional Protocol to CEDAW, state parties recognise the competence of the CEDAW Committee to receive individual complaints alleging violation of rights contained in CEDAW. It has to be noted that not all parties to CEDAW have ratified the optional protocol and as such, the right to bring complaints do not accrue against states that are not parties to the optional protocol. It has to be pointed out also that where the applicant in a complaint before the CEDAW Committee is not the victim of violation, there is a requirement to show that the complaint is brought with the consent of the victim, or that there is justification for bringing the action without the consent of the victim.[35] Accordingly, for an action to be brought on behalf of a child, it has to be shown that the child has given consent, unless of course there is justification for bringing the action without the consent of the child. One possible constraint in this regard is that, where the interest of the child conflicts with those of the parent(s), the practitioner will have difficulty getting consent. At the risk of restating the obvious, only the rights of the girl child can be ventilated by this process. The process under CEDAW is affected by all the shortcomings associated with the procedure of the HRC.

The discourse above shows that it is possible to pursue actions for protection of rights of the child using the UN treaty system. It has to be reiterated that only states can be respondents in actions brought before any of these institutions. However, the discourse has also demonstrated that there are challenges that children's rights practitioners are likely to face in this area and therefore, there needs to be space for consideration of alternative fora for children's rights actions.

3.2 Implementation and monitoring mechanisms at the African regional

35 See art 2 of the Optional Protocol to CEDAW.

level

The existing mechanisms for implementation and monitoring of children's rights in Africa will also be treated in the two categories of child specific mechanisms and general human rights mechanism.

3.2.1 The African Committee of Experts on the Rights and Welfare of the Child

The African Committee on the Rights and Welfare of the Child (African Committee) [36] is the primary mechanism for monitoring child specific rights. It is mandated to promote and protect the rights guaranteed in the ACRWC, 'to monitor the implementation and ensure protection of the rights and welfare of the child' and to interpret the provisions of the ACRWC.[37] To carry out its mandate, the African Committee is granted the competence to receive and consider state reports and communications from 'any person, group or non-governmental organisation' recognised by the AU. It may also receive communications from member states and the UN.[38] There is also competence to conduct investigations. However, focus here will be on the competence to receive state reports and individual communications.

Initial state reports are required to be submitted two years after the entry into force of the ACRWC in respect of a state, and at intervals of three years thereafter.[39] Clearly, the issues raised with respect to the CRC on the usefulness of state reporting for the protection of rights of the child are present under the ACRWC. State reporting may be valuable for assisting states develop capacity for compliance but it does not have strong potential for active and immediate protection of victims.

The competence to receive communications is one clear advantage the African Committee has over the Committee established under the CRC. The first point to note however is that the African Committee is a quasi-judicial body therefore it can only issue non-binding decisions. Given the experience of the African Commission on Human and Peoples' Rights

36 Established by art 32 of the ACRWC.
37 See art 42(a)(b)(c) of the ACRWC.
38 Arts 43 and 44 of ACRWC.
39 Art 43(1)(2) of the ACRWC.

(African Commission),[40] there is the clear risk that state parties will ignore the decisions of the African Committee. It may be argued on the other hand that the innovative approaches adopted by the African Commission to ensure compliance with some of its more recent decisions may avail the African Committee.[41] Another potential cause for worry is the independence of the African Committee. Certain provisions in the ACRWC give rise to this worry: first is the requirement of confidentiality in the treatment of communications.[42] Commentators have argued that the confidentiality clause may be employed by states to subvert the process.[43] Secondly, there seems to be a requirement that communications considered be submitted to the Assembly of Heads of State and Governments (now Assembly of the Union) (Assembly) in a report every two years, and the African Committee can only publish a report of its activities after consideration by the Assembly.[44] On the one hand, the argument could be put forward that submission of decisions on communications along with the report on the other activities of the African Committee could be positive in the sense that it could give the Assembly opportunity to enforce decisions of the African Committee, yet on the other hand, such submission could also allow political pressure to be brought to bear on the African Committee. There is also a possibility that 'offending' decisions could be suppressed. Once again a ray of hope may lie in the fact that the African Commission seems to have risen over a similar provision in the African Charter. Yet as Killander has noted, the African Commission itself has not successfully and completely wiggled free of the constraints imposed by the similar requirement in article 59 of the African Charter.[45]

It may further be stressed that the African Committee is a part time

40 L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' (unpublished LLD thesis, University of Pretoria, 2005).
41 For eg in the *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* communication, (2001) AHRLR 60 (ACHPR 2001), para 72, the African Commission innovatively urged the Nigerian Government to keep the African Commission informed of the outcome of the remedial measures undertaken by the government.
42 Art 44(2) of the ACRWC.
43 See eg, Chirwa (n 15 above), 170.
44 See art 45(2) of the ACRWC.
45 M Killander 'Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples' Rights', (2006) 6 *African Human Rights Law Journal* 572.

body and this fact is likely to affect the effective and timeous consideration of communications. Delay at this level as in the cases already considered, would be amplified by the fact that applicants must have spent considerable time trying to exhaust local remedies as required by the Rules of Procedure of the African Committee. It has to be pointed out also that there is no provision in the ACRWC for the enforcement of the decisions of the African Committee. Taken together, these concerns severely limit the desirability of the African Committee as a serious forum for the protection of the right of the child using the medium of litigation. As at February 2008, the few communications pending before the African Committee had not been considered. These include its first communication relating to the plight of children in Northern Uganda. This communication was submitted before the 6th meeting of the African Committee in June 2005.[46]

3.2.2 General human right bodies in the African human rights system

As with the universal human rights system, general human rights monitoring and supervisory bodies can be relevant for children's rights litigation under the African human rights system. The African Commission and the newly established African Court on Human and Peoples' Rights (African Court)[47] are general human rights bodies that can consider children's rights litigation.

The African Commission on Human and Peoples' Rights

So much has been written on the African Commission and it would be unnecessary to treat this institution in details. The rights guaranteed in the African Charter can ground communications for the protection of rights of the child. However, children's rights actions have not been a strong point throughout the existence of the African Commission.[48] In any event, certain

46 See BD Mezmur 'The African Committee of Experts on the Rights and Welfare of the Child: An update', (2006) 6 *African Human Rights Law Journal* 549, 563.

47 The protocol establishing the African Court was adopted in 1998 and entered into force in 2004. The first set of eleven judges of the African Court were elected on 22 January 2006 at the Eighth Ordinary Session of the Executive Council of the African Union. The Court had its first meeting in July 2006.

48 The only case held out as a possible example in this regard is comm 236/2000 *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003) relating to violations against students. Since the ages of the students involved do not appear in the reports, it is difficult to ascertain if indeed the communication related to children.

weaknesses inherent in the system reduce the attractiveness of the African Commission as a forum for children's rights litigation.

Firstly, like the African Committee, the African Commission is a part time, quasi-judicial body that generally meets only twice a year and issues non-binding decisions in the form of recommendations. Although it would appear from the response of the Nigerian government in the *SERAC* communication[49] that the African Commission has begun to succeed in getting some form of compliance with its decisions, there is a long way to go in this regard. The provisional measures practice of the African Commission stands out as a potent tool in situations requiring urgent action.[50] However, the African Commission is yet to perfect this aspect of its work and there have been cases where state parties have ignored provisional measures issued by the African Commission.[51] Other weaknesses of the system from a children's rights perspective include the requirement to exhaust local remedies (although this has been tempered greatly by exceptions), delay in the process, and the lack of a proper enforcement mechanism.

The African Court on Human and Peoples' Rights

The African Court is the other institution in the African human rights system that can be used for the purpose of monitoring compliance with children's rights standards through the instrumentality of litigation. Unfortunately, despite the fact that the court was inaugurated in 2006, as at February 2008 the Court had not come up with its Rules of Procedure. Accordingly, no cases have been submitted before the Court yet. Being a judicial rather than a quasi-judicial body, expectations are high that it represents a great leap forward for the protection of human rights (including the rights of the

49 in 40 above.

50 The African Charter does not make clear provisions for provisional measures. However, rule 111 of the Rules of Procedure of the African Commission allows the African Commission to issue request or order provisional measures. Hence for example in *Interights (on behalf of Sikunda) v Namibia* (2002) AHRLR 21 (ACHPR 2002) and *Law Offices of Ghazi v Suleiman v Sudan* (2002) AHRLR 25 (ACHPR 2002), the African Commission made requests for provisional measures.

51 In the *Interights v Namibia* communication (as above), the request for provisional measures was ignored. See also *Interights and Others (on behalf of Bosch) v Botswana* (2003) AHRLR (ACHPR 2003) where despite the appeal for suspension by the African Commission, the applicant was executed.

child in Africa). On the positive side, the African Court has the competence to receive cases hinged on the African Charter and all relevant human rights instruments ratified by the state concerned.[52] In other words, in addition to the ACRWC, all other instruments already discussed can base children's rights litigation before the African Court. As a court, its judgments are final and binding and it is empowered to issue provisional measures and to make appropriate orders to remedy a finding of violation.[53] States make an undertaking to comply with the judgments of the court but the procedure for execution is yet to be developed. From a children's rights litigation perspective, the African Court seems to cure some of the shortcomings identified with the African Committee (and indeed the UN mechanisms).

On the negative side however, direct access to the court for individuals and NGOs is severely restricted by the requirement that a state party ought to have made a declaration allowing such access.[54] In effect, applicants need the African Commission or a state party to take a matter before the Court. While this may happen in the case of the African Commission, it would be at the cost of great delay as local remedies have to be exhausted and the procedure of the African Commission itself may have to be exhausted before the matter is brought before the Court. In any event, the African Court itself is a part time body (only the President serves full time) and this is a signal that cases will wait long before they are decided. It has to be added also that only state parties can be brought before the Court, shutting out the possibility of actions to directly enforce the rights of the child against non-state actors. On the whole, the African Court remains one of the potentially most potent institutions for children's rights litigation, but these negative features are bound to stand as obstacles to its full utilisation in favour of the rights of the child.

52 Art 3 of the Protocol to the African Charter of Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol).
53 Arts 27 and 28 of the African Court Protocol.
54 Art 34(6) of the African Court Protocol. As at February 2008 only one state had deposited such a declaration with the AU Commission.

4. Judicial application at the municipal level

The possibility of judicial application at the domestic level remains the most attractive option for a variety of reasons. It has to be widely accepted that human rights are better protected in the domestic arena where there is an independent and courageous judiciary willing to assert itself in the protection of rights. This needs to be complemented by a legislature willing to translate international human rights standards into concrete statutory norms, and an administration with the political will to enforce or comply with decisions. With the advantage of enforcement mechanisms, proximity to litigants, relatively uncomplicated procedures and jurisdiction over state and non-state actors, municipal judicial institutions ought to be the best option for protecting the rights of the child through litigation. However, there are harsh realities that stand against such idealistic expectations.

The first obstacle that comes to mind is the fact that in many states international human rights instruments are required to be domesticated before they become directly applicable before national courts. Several states have failed to engage in such domestication, raising difficulty for children's rights litigation as most existing laws can hardly be classified as child-friendly, often merely dealing with aspects of juvenile justice. Where the international treaties relating to the rights have been domesticated or where existing laws on the rights of children compare favourably with international standards, first resort should be to such laws. In situations where such progressive laws protecting the rights of children do not exist, practitioners could fall back on the bill of rights in national constitutions to base actions. In ideal situations, judges may also be urged to use international children's rights standards as interpretative aids to constitutional and statutory provisions. Certain decisions of the South African courts provide good examples of such usages.

In Bhe and Others v Magistarte, Khayelitsa and Others,[55] the South African

55 (2004) AHRLR 212 (SACC 2004).

Constitutional Court was required to access the constitutional validity of customary law rules that prevented child born out of wedlock from enjoying rights of inheritance similar to children born within wedlock. In its interpretation of section 28 of the South African Constitution which provides specific protection for the rights of children, the Court made ample references to the standards contained in the ACRWC, the CRC and the CCPR.[56] The Court relied on section 39(1) of the South African Constitution and applied international law to interpret the Constitution. The Court pointed out that apart from the specific provisions in section 28 of their Constitution, 'all other rights in the Constitution, appropriately construed, are also conferred upon children'.[57]

The ICJ supported Namibian case of *Frans v Paschke*[58] is also illustrative of the potential in the use of general human rights guarantees in national constitutions for the protection of rights of children. In this case, the action against discrimination on the grounds of circumstance of birth was successfully hinged entirely on provisions of the Namibian Constitution. The Namibian Court refused to be swayed by the argument that declaring common law discrimination against children born out of wedlock unconstitutional could result in the opening of a floodgate of litigation. It must be stressed that reference to international human rights instruments ratified by Namibia would have enriched this decision in no small measure. Notwithstanding the success evident in these and other similar cases, a further difficulty lies in the fact that actions for the protection of the rights of the child are usually not pursued unless they are linked with the interest of parents and guardians or other adults. Hence in a line of South African cases, the rights of the children were strongly linked to the rights and interests of parents and

56 As above, see especially paras 53 and 55.
57 As above, para 52.
58 Unreported, case no. (P) I 1548/2005 (Decided by the High Court of Namibia). Judgment delivered on 11 July 2007.

guardians.[59] Similarly in the Kenyan case of Midwa v Midwa,[60] the rights of the children were tied to the rights and interest of their mother in a divorce proceeding. In this genre of cases, it becomes a problem where the adult is unable or unwilling to act because the abuse results from conflict with the interest of the child. In these situations, the child ought to have access to the courts or a third party (a children's rights practitioner for example) ought to be able to pursue the case for the child. A further complication arises where the rules of standing are restrictive or where the consent of the parent or guardian is required and such a person is unwilling to grant such.

In some other situations, customs and traditions are invoked to suppress the rights of the child. The courts being products of the local environment would most often show sympathy with the local custom. In situations involving criminality, the police themselves could refuse to take up complaints by children on the grounds that the parent would normally act in the interest of the child or that giving the child opportunities against adults would 'corrupt' morals and threaten family bonds. In any of these situations, there is difficulty litigating to protect children's rights in several African states. Hence Newell came to a conclusion that

> in many cases, children do not have adequate or realistic remedies for breaches of their rights at national level. So seeking remedies through the use of international and regional mechanism is certainly growing….[61]

The observation above cannot be truer than it is in African states. Holding on to the legacy of an era when children were viewed as the properties of the parents and the responsibility of the local community, the national legal system has often shown a reluctance to interfere in order to protect the rights of the child. The result is that children's rights practitioners may need to look beyond national boundaries from time to time to litigate for the rights of the child.

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59 See eg, *Khosa and Others v Minister of Social Development and Others*; *Mahlaule and Another v Minister of Social Development and Others,* CCT12/03;CCT13/03, *Minister of Health and Others v Treatment Action Campaign and Others* (2002) AHRLR 189 (SACC 2002).
60 (2003) AHRLR 189 (KeCA2000).
61 Newell (n 4 above).

Having identified the strengths and weaknesses of the existing mechanisms at the universal and African regional stages, it has to be admitted that effective protection may yet lie elsewhere. While it would be almost impossible to find a perfect forum, this contribution will argue in the next section that looking inwards to the emerging subregional judicial institutions may provide viable alternative fora for effective children's rights litigation in Africa.

5. Litigating child rights before the ECOWAS Community Court of Justice (ECOWAS CCJ)

Writing on the impact of the CRC on the jurisprudence of the European Court on Human Rights, Kilkelly observed that children's rights were generally not part of the European Convention on Human Rights (ECHR), yet in the development of its highly effective case law system, the European Court has had cause to apply the detailed provisions of the CRC in cases involving children and in the process has built a possibility of maximising the potential of both treaties to protect the rights of the child.[62] Human rights protection was not originally within the competence of the ECOWAS CCJ and there is definitely no central ECOWAS human rights treaty on the basis of which an action to protect the right of the child can be initiated. Yet, similar to the European experience, courage and innovation can be combined to turn the existing human rights competence of the ECOWAS CCJ into a haven for children's rights protection. This is the focus of this section.

5.1 Introducing the ECOWAS Community Court of Justice

The 1975 founding Treaty of ECOWAS made provision for the establishment of 'the Tribunal of the Community'.[63] However, it was left to the Authority of Heads of State and Government of ECOWAS (ECOWAS Authority) to prescribe the composition, competence, statutes and other operational

62 U Kilkelly, 'The impact of the Convention on the Rights of the Child on the case-law of the European Court on Human Rights' in D Fottrell (ed) *Revising children's rights (*2000) 88.
63 See arts 4(1)(d) and 11 of the Treaty of the Economic Community of West African States, signed in May 1975 and entered into force in June 1975. 14 ILM 1975, 1200.

details of the tribunal.[64] It was not until 1991 that the ECOWAS Authority concluded a protocol to constitute and set out the composition, competence and statutes of what was termed a Community Court of Justice.[65] The 1991 Protocol refers to the ECOWAS CCJ as the 'principal legal organ of the Community'. At inception, the ECOWAS CCJ was basically empowered to ensure the observance of law and of the principles of equity in the interpretation and application of the ECOWAS Treaty. It was also given competence over disputes referred by state parties and over actions instituted by state parties on behalf of their nationals against another member state or any institution of ECOWAS.[66] With the revision of the ECOWAS Treaty and adoption of an amended Treaty in 1993, the ECOWAS CCJ is currently established by articles 6 and 15 of the 1993 revised Treaty of ECOWAS as one of the institutions of ECOWAS.[67]

With the introduction of human rights in the institutional agenda of ECOWAS by the 1993 revised ECOWAS Treaty, the stage was set to expand the competence of the ECOWAS CCJ to include jurisdiction over human rights issue. Enhanced by several events, a Supplementary Protocol was adopted in 2005 to amend the 1991 Protocol of the Community Court.[68] One of the high points of the 2005 Supplementary Protocol was the introduction of human rights into the competence of the ECOWAS CCJ. Hence, the 1991 Protocol and the Supplementary Protocol taken together set out the jurisdictional competence of the Court.[69] A combined reading of article 4(g) of the 1993 revised ECOWAS Treaty, the 1991 Protocol and

64 As above.

65 See Protocol A/P.1/7/91, which was adopted and entered into force provisionally in July1991. Reproduced in the official Journal of ECOWAS of July 1991. The ECOWAS CCJ was formally inaugurated in January 2001 when the first set of judges was appointed and it now takes the place of the originally proposed Tribunal of the Community.

66 Art 9 of the 1991 Protocol of the ECOWAS CCJ.

67 See art 6 of the 1993 revised ECOWAS Treaty.

68 Supplementary Protocol A/SP.1/01/05 amending the preamble and articles 1, 2, 9, 22 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and article 4 paragraph 1 of the English version of the
said Protocol (Supplementary Protocol) (adopted in 2005 and provisionally came into force upon signature in
2005). In some cases the supplementary protocol merely complemented the 1991 protocol.

69 *Ukor v Laleye* (2005) (*Ukor case*) unreported suit No ECW/CCJ/APP/01/04, p 7, para 23.

the Supplementary Protocol provides the legal basis for a human rights complaint mechanism in the ECOWAS Community Court of Justice.

The ECOWAS CCJ is composed of seven members who sit as full time judges. The members of the Court are independent judges appointed by the Authority from nationals of the member states.[70] The judges are required to be persons of high moral character between the ages of 40 years and 60 years, and who either possess sufficient qualification to be appointed to the highest judicial offices in their various states or be competent and recognised international lawyers.[71] By article 4 of the 1991 Protocol of the Court, the judges are appointed for a renewable term of five years, and are authorised to elect a President and a Vice President. However, the new regime approved by the Authority fixes a single four-year term for the judges 'so as to be in harmony with the tenures of the statutory appointees of the other institutions'.[72] The President and Vice President are allowed to hold office for terms of three years.[73] Originally, the President of the Court (and in his absence, the Vice President of the Court) was responsible for administration of the Court and presided at sittings and deliberations of the Court but the reforms have created a bureau of three judges to take responsibility for administration of the Court.[74] Currently, a Court Registry made up of a Chief Registrar and Registrars assists the President and judges in their functions.[75] Although the seat of the Court is in Abuja, Nigeria as agreed by the ECOWAS Authority, by article 26(2) of the 1991 Protocol, the Court may decide to move and sit in the territory of any other member state. While this may have high cost implications, from a human rights perspective, it brings the Court closer to those who need it but are unable to access it due to distance and cost. Hence, the Court moved to Mali in 2006 to hear the matter of *Moussa Leo Keita v The Republic of Mali.*[76] The 1993

70 Art 3 of the 1991 Protocol of the Court.

71 Art 3(1)(7) of the 1991 Protocol of the Court.

72 See the ECOWAS Newsletter (issue 1 of October 2006) 4. With effect from January 2007, the former ECOWAS Secretariat has now been transformed into a Commission with the last Executive Secretary emerging as the President of the ECOWAS Commission.

73 See art 3(2) of the 1991 Protocol of the Court. By art 4(1) of the 1991 Protocol, four members of the first
bench of the Court were required to only serve a term of three years.

74 See arts 7 and 8 of the Rules of Procedure of the Court. However, by the new regime, the administration of the Court is under review to give room for the judges to concentrate on their judicial functions. See the ECOWAS Newsletter (n 64 above).

75 Art 29 of the 1991 empowers the Court to set out the duties of the Registry in the Rules of Procedure. Accordingly, Chapter III of the Rules of Procedure deals with the Court's Registry.

76 ECW/CCJ/APP/05/06. The applicant in this matter was an eighty one year old retired civil servant and it is suggested that this was a major consideration in the Court's decision to move to Mali. See T Anene-Maidoh, 'Overview of the Rules of Procedure of the ECOWAS Court of Justice',

revised ECOWAS Treaty emphasizes the independence of the ECOWAS CCJ by setting out that the Court shall execute its functions independently of the member states and other institutions of ECOWAS.[77]

5.2 The human rights competence of the ECOWAS CCJ

The human rights competence of the ECOWAS CCJ is general in nature. Not statutorily linked to any particular catalogue of human rights, the practitioner has to look to the 2005 Supplementary Protocol to decipher the extent of the Court's competence in human rights. Building on the competence granted by the 1991 Protocol of the ECOWAS CCJ, the 2005 Supplementary Protocol in amending the original article 9 of the 1991 instrument adds that the Court shall have competence to adjudicate on the failure by ECOWAS member states to honour their obligations under the Treaty, conventions, protocols, regulations, directives and decisions of ECOWAS.[78] The Court is further given 'jurisdiction to determine cases of violation of human rights that occur in any member state'.[79] The Court's competence to hear cases relating to the 'failure of member states to honour obligations' under ECOWAS instruments is important to the extent that it creates room for human rights litigation arising from obligations voluntarily undertaken by ECOWAS states in the area of human rights. Unfortunately, it has to be pointed out that its usage is only open to other member states and (unless specifically excluded by a protocol) the Executive Secretary (now President of ECOWAS Commission).[80]

The more interesting opening however lies in the wider jurisdiction of the Court over violations of human rights that occur in member states. It would be observed that the provision is silent on the normative instrument on the basis of which the Court should exercise its human rights jurisdiction. There is a possibility to argue that this is an omission that could render the jurisdiction impotent. Yet it has to be noted that in addition to the number of rights scattered across the revised Treaty, conventions and protocols of

paper presented at the Conference on the Law in the Process of Integration in West Africa, Abuja in November 2007. On file with author.

77 Art 15(3) of the 1993 revised ECOWAS Treaty.

78 See the amended art 9(1)(d) in art 3 of the 2005 Supplementary Protocol.

79 The amended art 9(4) in art 3 of the 2005 Supplementary Protocol.

80 Revised art 10(a) in art 4 of the 2005 Supplementary Protocol is clear on this point.

the Community, ample reference is made in ECOWAS documents to the African Charter as a standard setting document.[81] Certain other documents of ECOWAS also oblige member states to guarantee rights 'set out in the African Charter on Human and Peoples' Rights and other international instruments'.[82] Accordingly, the Court can exercise human rights jurisdiction on the basis of either the African Charter or any other human rights instrument ratified by the state in which the violation has occurred. As the Court itself has stated, article 19 of the 1991 Protocol empowers it to apply the body of laws contained in article 38 of the Statute of the International Court of Justice.[83] This being the case, the Court can apply international conventions, international customs, general principles of law recognised by civilized nations and judicial decisions.

By the wordings of the amended article 9(4) of the Court's Protocol, it is clear that the competence of the Court covers violations that occur on the territories of member states. This would mean that it does not matter whether or not the state in whose territory the violation has occurred is responsible for the violation. In terms of access to the Court, the amended article 10 in article 4 of the Supplementary Protocol opens up access to different categories of individuals or groups on different grounds. From a human rights perspective, the amended article 10(d) gives access to 'individuals on application for relief for violations of their human rights'. One has to point out that the Supplementary Protocol of the Court conspicuously omits the competence of non-governmental organisations (NGOs) to bring human rights actions before the Court.

With regards to the question of who can be a respondent before the Court, both the 1991 Protocol and the 2005 Supplementary Protocol are silent on

81 See for eg art 4(g) of the 1993 revised ECOWAS Treaty.

82 Art 1(h) of Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Good Governance Protocol).

83 See *Hon J Ugokwe v The Federal Republic of Nigeria and others*, case No ECW/CCJ/APP/02/05, 14-15.

the point. However, it appears from a combined reading of the amended articles 9 and 10 of the Court Protocol that member states, the Community, Community institutions and Community officials can be defendants before the Court.[84] While the Supplementary Protocol identifies who can be respondent in other forms of action before the Court, in relation to paragraph d, the Protocol does not say against whom the individual right of access can be exercised. This leaves room for the exercise of discretion by the Court in its interpretation and application of the Supplementary Protocol. It is quite easy to argue that member states can be the respondents against whom the right of access should lie. The issue is nonetheless complicated by the emergence of individuals as respondents before the Court. The imprecise drafting of articles 9(4) and 10(d) of the Supplementary Protocol may have unwittingly created the room for human rights actions to be brought against non-state actors before the Court. As has been noted elsewhere:

> If there were expectations that the Rules of Procedure (Rules) and the practice of the Court would be used to limit the provisions, the contrary has occurred so far as the Court has entertained an action brought by a non-state applicant against a non-state respondent. In the *Ukor* case, all the parties were non-state actors yet the Court went on to exercise jurisdiction over the matter.[85]

Finally on the question of personal jurisdiction, it has to be noted that the Protocol makes provision for intervention by parties who consider that their interest may be affected by proceedings going on before the Court.[86] As there is nothing to indicate that the right of intervention accrues only to state parties, individuals are known to have applied as interveners in matters pending before the Court. Thus in addition to being able to initiate actions seeking relief for alleged violation of rights, the Supplementary Protocol

84 See arts 3 and 4 of the 2005 Supplementary Protocol.

85 See ST Ebobrah, 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 7 *African Human Rights Law Journal* 307. The *Ukor case* (n 68 above) was declared 'inadmissible for lack of merit' on grounds that the Supplementary Protocol did not apply retrospectively.

86 Art 21 of the 1991 Protocol (renumbered art 22 by art 5 of the Supplementary Protocol). Art 89 of the Rules of Procedure deals with the procedure for intervention.

gives room for intervention in an on-going matter where one's human rights interests are involved.

One of the main concerns for prospective litigant before international judicial and quasi-judicial bodies relates to the requirements for admissibility of cases. By the provisions of the Supplementary Protocol of the ECOWAS CJJ, there are only two conditions for admissibility of cases alleging human rights violations. These conditions are that the application should not be anonymous; nor be made while the same matter is pending before any other international court for adjudication.[87] The requirement that the application should not be anonymous does not seem to preclude a request for anonymity upon submission of a case. This position is prompted by the fact that even though there is a similar provision under article 27(1)(a) of the ECHR, the practice of the European Court on Human Rights shows that litigants have successfully requested for anonymity at the submission of their cases. The second condition for admissibility precludes a matter from being submitted before the ECOWAS CCJ if the same matter has been instituted before another international court. Clearly, while this can be interpreted to mean that a matter before any international court cannot be brought before the ECOWAS CCJ, whether or not the matter has been settled, it does not exclude a matter from coming to the Court if it had previously been instituted before a domestic court. A careful reading will show however that the wordings suggest that if a matter is pending before a 'friendly solution' mechanism, that fact alone does not preclude the matter from coming before the ECOWAS Court. It becomes more complicated to if this line of argument is pushed to infer that the specific reference to 'another international court' should warrant an elastic interpretation that should exclude quasi-judicial mechanisms like the African Commission. The advantage of such an elastic interpretation would be to allow matters

87 See the inserted art 10(d) in art 4 of the Supplementary Protocol. In a recent ruling in the case of *Professor Etim Moses Essien v The Republic of the Gambia* and another, (unreported) suit No ECW/CCJ/APP/05/05 (delivered on 14/3/07) the ECOWAS Court interpreted art 10(d) (ii) as *lis pendis* in another international court. See para 27 of the ruling.

instituted before the African Commission or the African Committee both of which are quasi-judicial bodies, to still qualify to be brought before an the ECOWAS CCJ.

It would be noticed that there is no requirement to exhaust local remedies before cases alleging human rights violation can be instituted at the ECOWAS CCJ. Although in article 39 of the ECOWAS Democracy Protocol it was proposed that the amendment of the 1991 Protocol should give the Court competence 'to hear … cases relating to violations of human rights, *after all attempts to resolve the matter at the national level have failed',*[88] this was not transferred into the 2005 Supplementary Protocol. This much the ECOWAS CCJ has pronounced in its ruling on the preliminary objection filed by the defendants in the case of *Professor Etim Moses Essien v The Republic of the Gambia and the University of the Gambia.*[89] In that case, the Court stressed that 'the issue of local remedy (sic) as mentioned in article 50 of the said Charter has no bearing with cases under the premise of article 10(d) of the Supplementary Protocol'.[90] Taking into account that the Court is an international court and the requirement to exhaust local remedies has almost become a standard practice in the admissibility procedure of international adjudicatory bodies, the argument could be forward that this may turn out to be a costly omission as it has the potential for grounding conflict between the ECOWAS CCJ and the municipal courts of member states. It also has the potential of leading to the court being inundated with cases. But some commentators have suggested that there is no need for the requirement to exhaust local remedies because ECOWAS as a community can be seen as one territory.[91] In any event, nearly three years after the 2005 Supplementary Protocol came into force, the Court has not been overcome by the burden of workload.

88 Emphasis mine.
89 N 86 above.
90 See para 27 of the ruling.
91 Ibrahima Kane of Interights, London, during lectures at the LLM (Human Rights and Democratisation in Africa) programme at the University of Pretoria in May 2007.

For the practitioner familiar with the difficulty of getting states to comply with the decisions and judgments of international courts, a very important question would relate to the status of judgments and decisions of the ECOWAS CCJ. By article 19(2) of the 1991 Protocol, decisions of the ECOWAS CCJ are final and immediately enforceable. With the introduction of a human rights competence and the prospects of judgments having financial implications (such as orders for compensation of victims) the 2005 Supplementary Protocol provides further that judgments of the Court having financial implications for individuals and states are binding.[92] Considering that the original competence of the Court related mainly to interpretation and application of ECOWAS instruments and the settlement of disputes, this latter provision is commendable as it prepares the ground for the award of monetary compensation in deserving cases. It has to be added also that the Court is authorised to issue provisional measures where the circumstances of a case so requires. Conscious of the difficulty of enforcement, the Supplementary Protocol provides that the decisions of the Court shall be executed in accordance with the civil procedure rules of the member state where the judgement is to be executed.[93] Hence, the Supplementary Protocol further requires that state parties should determine (and notify the Court of) the national authority saddled with the task of receiving and processing decisions of the Court. Lofty as this may be, it is not clear whether member states have complied with this obligation. Sanctions for refusal to comply with the decisions of the Court are not expressly stated in either protocol. But it is possible to find the sanctioning system in the 1993 revised ECOWAS Treaty itself. Article 77(1) provides for incremental sanctions for member states that fail to fulfil their obligations to the Community. The choice of the word 'Community' would mean that obligations meant here are not just decisions of the ECOWAS Authority, but all other institutions of the Community. This does not extinguish the possibility of an argument that the failure to indicate sanctions in the protocols amounts to a lacuna.

92 See the inserted art 24 in art 6 of the 2005 Supplementary Protocol.
93 Inserted art 24(2) in art 6 of the 2005 Supplementary Protocol.

5.3 Prospect for children's rights litigation

In the preceding section, the human rights competence of the ECOWAS CCJ has been laid out. This section will now investigate the prospect for children's rights litigation before the Court. It will consider the nature of cases that could be brought, the norms and the standards that can be relied upon and determines who could bring children's rights actions before the Court.

5.3.1 Nature of cases that may be brought before the Court

The discourse above has shown that an applicant may seek relief for all cases of human rights violation that occur within the territories of member states of ECOWAS. However, it may not be wise to take all action for children's rights protection to the ECOWAS CCJ. It has to be suggested that only cases that are absolutely necessary should go to the Court. In this regard, two categories of cases may be suggested. The one category would be cases where the parent, guardian or other representative of the child is unable or unwilling to pursue remedies on behalf of the child. The other category would be situations where national police are unwilling to prosecute persons violating the rights of the child or where national courts are unwilling to entertain actions for the protection of the child against state and/or non-state actors. To this category may be added situations where the legal system does not allow an applicant to seek civil remedy where the facts indicate the commission of an offence and criminal prosecution has not taken place.

Cases that can fall in either category would include actions relating to discrimination against the child, protection of the identity of the child (for example in refugee situations), due process in juvenile justice and protection of the human dignity of the child. In the context of West Africa, the following are examples of cases that could (and should) be brought before the ECOWAS Court for the protection of rights of the child; failure to compensate child victims of rape and forced recruitment particularly

affected by the civil wars in Sierra Leone and Liberia, especially where the perpetrators of the wrongs can be identified.[94] Other examples include the refusal of the authorities to enforce the ban on child marriages in Mali,[95] the continuing use of torture against children in conflict with the law in states like Nigeria and Liberia[96] and in the area of seeking civil compensation for victims of child trafficking in West Africa.[97] Also very worrisome is the practice of incarcerating children with adults in the criminal justice systems of West African States.[98] As the UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment observed in his 2007 report on Nigeria, in most cases of abuse:

> There was no question about accountability of perpetrators because there was no functioning complaint mechanism in place to receive allegations and to report and seek effective redress for acts of torture. Victims … have no confidence in the existing mechanisms.[99]

On the challenge of the tension between tradition and secular law in national legal systems, the Special Rapporteur noted that social acceptance of inappropriate practices and ineffective enforcement mechanisms ensure that such practices persist. Such situations call for extra measures such as international litigation to provide succour for victims and these are the nature of cases that should be brought before the ECOWAS Court.

5.3.2 Norms and standards

As already argued above, the African Charter seems to constitute the primary human rights instrument applicable in matters before the Court. Accordingly, all the rights guaranteed in the African Charter can be applied in favour of the child before the Court. However, in addition to the Charter, on the basis of the authority of the Court to apply the sources of law enumerated in

94 For eg see the Amnesty International Report, 'Getting reparations right for survivors of sexual violence' web.amnesty.org/library/index/engafr510052007 (accessed 20 February 2008).
95 'Child marriage a neglected problem' (2008) www.irinnews.org/Report.aspx?ReportId=74027 (accessed 19 February 2008)
96 See eg HRC/7/3.Add.4, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, November 2007, 22-23.
97 'Guinea's Children Face Threat of Abandonment, Trafficking' (2008) VOA Report, www.voanews.com/english/2008-01-13-voa21.cfm (accessed 20 February 2008).
98 Eg 2007 UN report 'Report calls for stronger juvenile justice system' reproduced at www.crin.org/themes (accessed 20 February 2008)
99 A/HRC/7/3.Add.4, (n 95 above), 13.

article 38 of the Statute of the International Court of Justice (ICJ Statute), all human right conventions ratified by the state in whose territory the violation against the rights of a child has occurred should be applicable before the Court, whether or not such instruments have been domesticated by the state in question. In essences, the CRC (which has been ratified by all the member states of ECOWAS) and the ACRWC (for the states that have ratified it) are applicable instruments. In addition customary international law (for example the prohibition of slavery) and the general principles of law in favour of children rights would also be applicable. The relevance of this is lost however when it is considered that treaty law covers the field that customary international law would have covered with respect to human rights guarantees.

On the basis of article 38(1)(d) of the ICJ Statute, judicial decisions of international courts protecting the rights of the child represent good authority before the Court. Indeed the Court has stated that while it 'appreciates the reliance on local authorities, counsel appearing before the Court should endeavour to expand to expand their scope of legal authorities to authorities from international courts'.[100] While this hold the risk of resulting in a 'less than African jurisprudence' being developed, it holds the promise of creating space for applying the experience of institutions like the African Court of Human Rights in the area of children's rights protection. Additionally, the legal documents of ECOWAS containing children's rights guarantees and national laws such as national constitutions can also base actions before the Court as pat of 'Community law'.

5.3.3 Access to the Court

In view of the relatively restricted access to the Court, only the child who is the victim of alleged violation or the adult who is directly affected by the violation would ordinarily have access to the Court. Hence, NGOs cannot bring actions in their corporate name on behalf of the child victim of human

100 See the *Professor Etim Moses Essien* case, (n 86 above) 12.

rights violation. This is a huge set back when it is considered that NGO actions have been the prime movers in favour of international human rights litigation in Africa. However, as the Rules of the Court indicate, litigants in the ECOWAS CCJ are entitled to legal representation in matters brought before the Court.[101] This means that legal officers of NGOs who are entitled to practice law in any of the ECOWAS member states,[102]or any other lawyer entitled to practice in a member state and engaged by an NGO may appear on behalf of the child. Similarly, any independent lawyer with a right of audience before the Court can act on behalf of the child victim.

5.3.4 Merits and demerits of children's rights litigation before the ECOWAS CCJ

This section will briefly outline the advantages in using the ECOWAS CCJ. It will also identify the disadvantages and challenges in the process of the Court.

Uncomplicated admissibility procedure

One of the most attractive advantages of litigating children's rights before the Court lies in the simplicity of its admissibility procedure. The fact that all cases of violations that occur in member states of ECOWAS can be brought before the Court without the need to first exhaust the local remedies available in the given state is a positive panacea for the risk of litigation fatigue. It is also important that there is no requirement for a state declaration for individual access to the Court. However, as already stated, the lack of access on the part of NGOs could create some obstacle for the promotion of children's rights before the Court.

Vertical and horizontal applicability

101 See art 12 of the 1991 Protocol of the Court.
102 Art 28(3) of the Rules of the ECOWAS CCJ.

An outstanding feature of the Court (unlike most international tribunals) is the possibility of horizontal application of rights. While it must be conceded that traditionally human rights claims lie against states, present realities have shown that non-state actors can equally be responsible for violations. In the case of children's rights, it would not even be a surprise that the violator may be persons who ought ordinarily to be the care taker. In view of these variables, the possibility of vertical and horizontal application means that the practitioner may elect to hold either the state or non-state actor responsible. Where the circumstances so demand, the practitioner would also have the liberty to bring a joint action against a state and non-state actor.

Flexibility in the choice human rights standards

The absence of a specific human rights catalogue over which the ECOWAS CCJ can claim authority may be seen as a negative feature as it could create an environment of legal uncertainty. However, it is also a positive feature as it gives the practitioner some flexibility in the choice of normative instruments upon which to base a children's rights action. Further, considering the relative experience of the European human rights system in the adaptive protection of children's rights, the option of reliance on judgments of international courts as a source of law in the ECOWAS CCJ presents an opportunity for innovative advocacy. One other point to note in this area is that there is no requirement of a human rights background for a person to be qualified for appointment as a judge of the ECOWAS CCJ. Thus, the quality of the Court's human rights decisions may be negatively affected in the face of potentially conflicting standards.

Potential for speedy trials

As already noted, the judges of the Court serve full time. Added to the lack of a requirement to exhaust local remedies, it holds a promise of speedy resolution of cases. However, there is a risk that in the future, the Court

may have to introduce some sort of 'valve' to control the number of cases submitted before in order to avoid an over flow of complaints.

Certainty of procedure for executing judgment

If the provisions relating to the execution of judgments of the Court are complied with to the letter, the certainty of the procedure places the ECOWAS CCJ above most other human rights supervision and monitoring systems. The prospect of execution in accordance with domestic legal procedure is likely to enhance confidence in the system as it would result in judgments having weight comparable to decisions of municipal courts. This applies to both decisions of provisional measures and final judgments of the Court. However, the concern that municipal courts may refuse to execute judgments not emanating from local courts cannot be ignored.

6. Conclusion

The development of child specific rights has been one of the achievements of the international human rights community. It is a perfect representation of the positive transition of children from being perceived as chattels to being recognised as human beings (albeit vulnerable beings) requiring as much protection from the state as any other human being or group of human beings. Yet, it is obvious that the willingness to introduce norms and standards for the protection of the rights of the child has not been matched with the required corresponding eagerness to facilitate procedures for the enjoyment of this protection. This contribution has tried to show the deliberate and inadvertent shortcomings of the existing national and international mechanisms for the judicial protection of the rights of the child. It has also demonstrated the potential in using a regional adjudicatory body established primarily to facilitate subregional integration for the benefit of children's rights protection through litigation. The examination of the ECOWAS Court system have shown that it may not be a faultless system, but that it has potential that can be positively explored. It also indicates that

there is a possibility for international child right litigation in all subregions in Africa where such institutions exist. The municipal legal systems hold the best promise for the protection of the rights of the child in an ideal world. But there is as yet no ideal world and if children must be protected and have their rights guaranteed, it is necessary to keep seeking for innovative approaches, even where these exist at international law.

CHAPTER 6

EFFECTIVE ENFORCEMENT OF FAIR TRIAL JUDGEMENTS THROUGH RE-OPENING OF CASES ON THE BASIS OF CONTRARY JUDGEMENTS OF INTERNATIONAL COURTS

Tarisai Mutangi[1]

1. Introduction

One noble objective of the African Human Rights and Access to Justice Programme (AHRAJ), which has just morphed into the second phase of implementation as from January 2008,[2] is to foster a culture of domestic implementation of international human rights standards. AHRAJ could not be more accurate in defining the net outcome it was meant to achieve, namely, to ensure that human rights are enjoyed at the domestic level. AHRAJ, therefore, affirms the primary obligations of states to protect and promote human rights at the domestic level such that international protection mechanisms become secondary, only becoming necessary where domestic protection has failed. The programme employs different but concerted strategies in giving effect to domestic enforcement of human rights in target countries. These include strategies targeted towards advocating ratification of international human rights instruments.[3] The advocacy work on ratification is closely followed up by campaigns for the domestication of ratified international human rights instruments especially in states that follow the dualist theory of international law.[4] It is through litigation that AHRAJ advocates for the realisation of the rights and liberties

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2 As per indications of Monica Mbaru, ICJ-Kenya Programme Officer during the 11th International Litigation Workshop, in Accra, Ghana.

3 See W Wahiu, 'Relevance of ratification on domestic human rights practices regarding right to a fair trial and right to justice in Africa' in *Human Rights Litigation and the Domestication of human rights standards in Sub Saharan Africa* AHRAJ case book series volume 1 (2007) 235.

4 States that follow a dualist approach to international law are those states whose constitutions provide that international law will only become part of domestic law upon an act of domestication by Parliament though enacting a piece of legislation to that effect. On the other hand, monists follow a legal doctrine, which, in theory, states that international law becomes part of domestic law upon ratification as no act of domestication is required. However, in practice there is need for certain procedures to be followed, which, as we have previously argued, are tantamount to rigorous requirements followed in dualist states.

contained in the domesticated international human rights instruments at municipal level. The majority of the cases supported by AHRAJ are litigated before domestic courts. At least half of these cases have been decided in favour of the individual complainants.[5] There is a real likelihood that the other half of the cases that are lost will find their way to the international human rights protection mechanisms such as the African Court on Human and Peoples' Rights (African Human Rights Court), African Commission on Human and Peoples' Rights (African Commission), the Committee of Experts on the Rights and Welfare of the Child or UN human rights treaty bodies.[6]

It then follows that the international human rights protection mechanisms will issue judgments that may or may not have financial relief. The extent of the protection of rights is determined in terms of the extent to which international judgments are enforced at the municipal level. Enforcement of judgments completes AHRAJ's campaign for the domestic implementation of international human rights standards. In our view there have always been mechanisms in place for enforcing financial judgments. It is therefore necessary that enforcement of non-financial international judgments be explored to forewarn and forearm the human rights litigator about the prospects and challenges that lie ahead.

The motivation behind focusing on mainly fair trial and access to justice in this chapter is the prevalence of this violation in Africa and more so in AHRAJ focus countries. For instance, of the 133 domestic and international cases reported in the *African Human Rights Law Reports* from 2000 to 2005,[7] 50 of them were on violation of right to a fair trial. This converts to at least 38% of all the cases reported in this era. This rate is too high by any standards given that out of about twenty rights and freedoms protected by the African Charter, almost 50% of the cases brought to the African Commission are on only one right, namely, the right to a fair trial.

5 AHRAJ boasts of having supported about 300 cases across Sub-Saharan Africa with at least 50% of the cases being litigated at the domestic level.

6 The African Commission is the monitoring mechanism established by Part IV of the African Charter on Human and peoples' Rights. The African Court was established by virtue of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (the Protocol) whereas the Committee of the Experts is a treaty body established by the African Charter on the Rights and Welfare of the Child.

7 The African Human Rights Law Reports is an official annual publication of the Centre for Human Rights, University of Pretoria. It contains both national and international judgments that have human rights arguments and implications. The electronic journal maybe accessed through the Centre for Human Rights website www.chr.up.ac.za.

Of the 38% of cases, 100% of the respondent states were found in violation of the various aspects of the right to a fair trial and access to justice. Of the 38%, at least 50% were litigated before the African Commission, which means that these international decisions ought to be executed at the domestic level. It is therefore, our strong view that unless effective enforcement mechanisms are put on the ground, domestic judgements revised and errors corrected, complainants' circumstances will not change despite having won in the international forum.

2. Scope of the work

2.1 Definitions of critical terms

Definitions should be straightened up before embarking on outlining the scope of this work. The phrase 'International judgements or decisions' refers mainly to the binding judgements or decisions of international human rights tribunals such as the African Human Rights Court, the European Court for Human Rights or the Inter-American Court for Human Rights. The views or findings of human rights treaty bodies such as the African Commission shall be specifically mentioned. 'Domestic courts' are courts and tribunals established by the law of a sovereign state hence are subject to and situate in the territory of such a state. These courts have competence to interpret and apply domestic law and to some extent international law, depending on the regime in force in that particular state. They also issue 'domestic judgments or decisions', which have legal force in the territory of that state only unless otherwise provided for by legislation. 'Re-opening a case' means to review or to re-consider a domestic judgment on the basis of a contrasting judgment of an international tribunal.

With regards to the scope of the work, this chapter will expose the challenges that lie in the enforcement of international decisions that have no financial implications. Unless judgments are enforceable, the reputation of the international human rights protection mechanism as an alternative to the domestic one is in jeopardy. Whereas international and regional international law practice favourably treat financial judgments in terms of

enforcement,[8] the position is different with non-financial relief. In the latter case, effective enforcement would mean that the domestic courts that handed down a judgment that triggered international litigation are again called upon to review their decision. For instance, where one's right to a fair trial or access to justice was violated leading to conviction and incarceration, or where a domestic court simply misdirected itself in deciding on a human rights matter. Effective enforcement means that the prisoner ought to be re-tried, not in a sham trial, but a genuine trial before a different judicial officer. Retrial means that a case that had been rendered final ought to be re-opened in view of the international judgment. At this point, the doctrine of *res judicata* comes in to tie the hands of national courts in reviewing their judgments.

This chapter will have three parts, part I will deal with the background and normative content of the rules against re-opening of settled cases. Part II will deal with how these rules interfere with effective enforcement of judgments. Part III will conclude by recommending to litigators how they should spearhead litigation against these rules, and an assessment of how cases supported by AHRAJ might have or will be affected by the application of the rules of law against re-opening of cases.

2.2 Judgements with financial implications

The motivation behind devoting this chapter to non-financial remedies is that in our view, judgements with financial implications are sufficiently catered for in terms of their enforcement as we shall demonstrate below. To that end, it is unnecessary to dwell on that category of rights in this work. As a matter of fact, our survey of the major human rights system at global, regional and sub-regional levels has shown that human rights instruments almost always provide for a procedure for the enforcement of such judgments. It is on this basis that we are convinced that there is a definitive procedure through which judgments with financial implications are enforced. The lacuna is with respect to non-financial judgments.

8 With regards to the procedure for the enforcement of international judgments, see article 32(1) of the SADC Protocol on the Tribunal and Rules of Procedure thereof, which provides that judgments shall be treated as foreign judgments for purposes of enforcement. The author has traced the reason behind this provision in the history of the negotiations of the Protocol. Similarly, article 24(2) of the amendment to the Protocol establishing the Community Court of Justice of the ECOWAS and section 68(1) of the American Convention on Human Rights, respectively, provide that decisions of the CCJ and the American Court with financial implications must be enforced in accordance with the civil procedure of the state party involved upon presentation of a writ genuinely issued by the international court concerned.

Comparatively, much as article 68 of the American Convention indirectly makes an order for compensatory judgments executable domestically (if the state so decides), it falls short of the execution provisions of the ECOWAS Supplementary Protocol Amending the Protocol Establishing the Community Court of Justice (CCJ).[9] Of paramount relevance is article 24 relating to the 'method of implementation of judgement of the Court'. In a nutshell, all judgments of the CCJ are binding and executed in accordance with the 'rules of civil procedure of that Member state';[10] upon the domestic authorities having been satisfied (recognised) that it is a judgment of the CCJ.[11] The credentials of such authority should be submitted to the CCJ prior to the adjudication of any case against a member state by the CCJ. The American Convention has emphasis on compensatory damages. One then wonders on the fate of other remedies the courts may give, for instance, specific performance with no substitute for monetary relief. It is however, acknowledged that just satisfaction often takes the form of compensatory damages. In that situation just satisfaction stands as the substantive relief, whether or not coupled with specific performance like an order for detainees to be released from arbitrary incarceration.

3. Res judicata and the reviewing of closed cases

The operation of the rules against re-opening of closed cases arises in the following scenario: X was arrested, tried and convicted through a sham trial in state Y. After fully utilising the appeal process available in state Y without success, he instructed his counsel to take the matter to the African Human Rights Court. Y had made a declaration under the Protocol establishing the African Court allowing direct access to the Court. After finding the case admissible, the African Human Rights Court found state Y in violation of X's right to a fair trial and ordered his release and compensation for unlawful detention. X had served just over half of his prison sentence. Now X wants to enforce the Court's decision for his release or retrial as well as compensation for the time spent in detention. In order for X to be released, he needs to be re-tried and to be released if found innocent. It therefore, follows that X should petition the domestic courts to re-open the closed proceedings that led to his conviction. This is when the rules against

9 Supplementary Protocol (A/SP.1/01/05) Amending the Protocol (A/P.1/7/91) Relating to the Community Court of Justice of the Economic Community of West African States of 19 January, 2005.
10 Article 24(1) of the Protocol Relating to the Community Court of Justice.
11 Article 24(2) of the Protocol Relating to the Community Court of Justice.

reopening of proceedings makes it extremely difficult, if not impossible, to reopen the case.

The question one needs to ask is why, after a litigant has exhausted both national and international human rights protection mechanism and having been successful at the international level, does his situation remain unchanged? It is simply because the domestic courts of his country may not re-open the case on the basis of *res judicata* or any other rules against review or re-opening of cases. This is so especially where there are no other means to redress the situation in such a way as to extinguish, as much as possible, all the consequences of the violation and to guarantee non-repetition.

3.1 The application of *res judicata*

Res judicata is a canon of law that precludes a person from filing a lawsuit in respect of facts and issues of law that have already been decided and finalised by a court of competent jurisdiction.[12] In other words finalised cases might not be called to question again. This is consistent with the principle of peace of law and legal certainty. It is settled law that *res judicata* is applicable in the main legal regimes, namely, the common and civil law as well as the Roman-Dutch law jurisdiction on satisfying certain criteria. By virtue of article 38(1)(d) of the Statute of the International Court of Justice that recognises general principles of law, *res judicata* is applicable to international litigation[13] and to both criminal and civil cases. For *res judicata* to apply in a certain situation there is a check list of requirements that needs to be satisfied. These can be summarised as follows: (1) there should exist a judgement previously given by a competent court between the same parties, (2) based on the same cause of action,[14] and (3) with respect to the same subject-matter, or issue or thing.[15] Where *res judicata* is raised as a defence to a claim, it has the effect of stopping the plaintiff from filing a suit (estoppel).

Readers must comprehend the effect of *res judicata* and hence the rationale behind embarking on a research as the current one. For the reason that there is no established contentious litigation on the issue in the African

12 See *Bafokeng Tribe v Impala Platnum Ltd & Ors* 1999 (1) SA 517 (BH). *Res judicata* is an abridged version of *exceptio res judicata* principle.
13 Article 38 of the Statute of the International Court of Justice.
14 This is embodied in the expression *ex eadem petendi causa*.
15 See n 11 above.

regional human rights system, we will have recourse to comparative law from the European regional human rights system. Despite having the oldest and most well established human rights protection system, the European regional human rights system struggled for decades with the scourge of non-enforcement of the judgments of the European Court for Human Rights. The reasons behind such tendency by the states were diverse; they included the white-haired controversy on the relationship between national and international law and the status conferred to the European Convention on domestication by member states.

Perhaps more germane to the current work is the proposition that as long as a national court has finalised a case, such a case cannot be reopened notwithstanding the view that the European Court found the decision to be inconsistent with the European Convention. However, one should exercise extreme caution when using the European human rights system as a comparator in a study of this kind. This is because judgements of the European Court are declaratory. Notwithstanding this fact, inspiration can always be drawn from the European human rights system in order to fully understand the context in which reopening of national proceedings occurs.

3.2 The theoretical basis on which re-opening of cases is proposed

The proposition for the reopening of cases on the basis of a contrary international judgement is based on a number of existing theories.

The possibility of reopening or reviewing of cases or correcting errors thrives to some extent on the legal consequences in the domestic legal order of the international judgment. The legal consequence of the international judgment is entirely based on the status in domestic law of the international court, whose status is determined in turn on the basis of the position enjoyed bythe international treaty or convention that established the international court. It is generally accepted that where an international treaty enjoys superiority over national law, the court or tribunal established by that treaty is not only superior to the domestic courts, but is an integral part of the domestic legal system.[16] This position is true in the case of Austria and Estonia with regards

16 See judgment of the Estonian Supreme Court constitutional judgment, 3-1-3-13-03, 6 January 2004, para 31.
Available at www.nc.ee/?id=823. (Accessed on 22 January 2008).

to the European Convention,[17] Costa Rica[18] with regards to the American Convention, Burundi and Cape Verde in relation to the African Charter.[19]
In as much as legal certainty and finality in litigation are principles of rule of law, reopening of cases in order to correct a violation of fundamental rights is also an important aspect of the rule of law. This argument has been proffered by adherents to the classic interpretation of rule of law. It is their contention that pursuant to the principle of legal certainty, the public should be able as easily as possible, to identify the position of the law on a particular aspect. This is only possible, they argue, where finalised judgments are not allowed to be questioned once again. The finality of litigation is what is also known as the 'peace of the law'. When used analogously, the peace of the law is likened to a burial where the subject of burial is laid to eternal rest.

While the peace of the law argument purports to be rooted in the rule of law, reopening a case for the sake of correcting a violation of one's right to a fair trial is also an indispensable aspect of the same principle of the rule of law.[20] Protection of fundamental rights is an integral part of the rule of law. Therefore, there is a conflict where one aspect of a principle seeks to exclude the other integral aspect. That is not possible. Harmony can only be achieved where legal certainty is not allowed to preclude the reopening of a case where there is no other means to remedy the situation.

States would be failing in their duty to give effect to the protection of fundamental rights through international mechanisms where their domestic laws do not allow or specifically preclude courts from reopening cases following judgments by an international court. In contrast, states have argued that notwithstanding that states have a duty to protect rights;

17 Austria and Estonia are good examples of cases where the European Convention enjoys superiority in municipal law having been elevated to a position above the constitution upon domestication. See HD Jarmul, 'The effect of regional human rights tribunals on national courts' (1995-1996) 28 *New York University Journal of International Law and Politics* 311 334.
18 Section 27 of the Headquarters Agreement signed by and between Costa Rica and the Inter-American Court on Human Rights. However, the provision espouses on the direct effect of judgments of the IACHR in Costa Rica, being enforceable as if they were issued by the courts of Costa Rica.
19 Article 19 of the Constitution of Burundi provides that international treaties ratified by these countries become part of domestic law to which domestic law must conform. Coupled with the organic law that enjoins courts to review their national decisions on the basis of a contrary international decision, there is little doubt that international decisions in that regard have precedence over national decisions. More categorical on international judgments, article 12 of the Constitution of Cape Verde provides that all judgments emanating from international institutions established by treaties to which Cape Verde is party, shall have direct application in the domestic legal order of Cape Verde.
20 'Rule of law' en.wikipedia.org/wiki/Rule_of_law (Accessed on 11 February 2008).

they also enjoy leverage in deciding on the mode of complying with their international obligations. In other words, a state should not be vilified for refusing to reopen a case as long as there is another avenue for effective implementation of the judgment of the international court *vis-à-vis* the individual concerned.

The source of the duty of states regarding the reopening of cases is clear in neither domestic nor international law. Accordingly, in Saidi v France,[21] the European Court for Human Rights made a ruling confirming its previous decision in *Belilos v Switzerland*[22] *holding that on the basis of the then article 50 of the European Convention on Human Rights (now article 53), it had no competence or jurisdiction whatsoever to direct the respondent state concerned to reopen proceedings in fulfilment of its judgment against it. The Court arrived at this conclusion on the basis that it is generally acknowledged that judgments of the European Court for Human Rights are declaratory rather than definitive of the action a state party ought to take to remedy the situation.*

The right to an effective remedy is recognised in many human rights systems having been clearly stated in article 2(3) of the ICCPR and other international human rights instruments. It is beyond question that where violation of rights is established, the remedy given should be capable of, as much as possible, completely eliminating the effects of the violation. In our view, where the right to a fair trial has been violated through a sham trial, the only effective way to redress the situation is to reopen national proceedings, retry or release the individual whatever the case might be.

3.3 Comparative state practice on reopening proceedings: Case study of Germany

The Federal Republic of Germany, as the name aptly implies, is a federation. The consequences are significant with regards to the reception of international law given that there are various levels at which such relationship should be consummated; namely, at federal and state level. The German legal system is dualist. The European Convention has been incorporated with the status of German Basic law.[23] This means that the European Convention is subject to the German Constitution but not to ordinary law. The German legal system, prior to 1998, presented a situation

21 Judgment of 20 September 1993, application No 14647/89, para 47.

22 Judgment of 29 April 1988, Series A No 132, p 32, para 76.

23 M Hartwig, 'Much ado about human rights: The Federal Constitutional Court confronts the European Court of Human Rights' (2005) 1 (5) *German Law Journal* 869 at 874.

in stark similarity to the one prevailing in most African states in respect of reopening of proceedings following an international judgment contrary to the findings of domestic courts. We would like to use Germany as the case study in order to simplify the nature of the problem that lies ahead of the operationalisation of the African Human Rights Court as well as the remedial regime that African states need to adopt so as to avoid falling into the same trap.

It is well documented that prior to the constitutional dispensation in Germany today, the attitude of the German courts were lethargic in terms of allowing the influence of the European Court of Human Rights in the domestic jurisdiction to the extent that a judgment in question needed re-opening of a finalised case. The position was succinctly summarised by Mahulena Hoskova as follows:[24]

> In the decision of Pakelli of 11 October 1985, the Federal Constitutional Court stated that a criminal judgement may not be set aside even if the ECHR found this judgement to be in violation of the Convention. It found that the ruling of the Regional Court of Stuttgart did not violate the Federal Republic of Germany's obligations under the Convention. The Court emphasised the declaratory character of judgements by the ECHR that leaves the States the choice of means to be utilised in its domestic legal system for the performance of its obligations under the Convention. This decision was founded on a restrictive construction of article 50 of the Convention designed to emphasise the high value of res judicata by the Convention as opposed to the obligation to grant *'restitutio in integrum'* arising from article 53 of the Convention.

The reason for coming to the above conclusion was so that the European Court of Human Rights issue declaratory judgments. In the interpretation of the European Convention on Human Rights preferred by the German courts, the Convention does not have provisions requiring the reopening of national proceedings in member states, hence 'the provisions on the re-opening of criminal proceedings are neither directly nor by analogy applicable'.[25] The *Pakelli* decision above was no secluded decision but a culmination of other decisions such as the *Hamm* case wherein the Higher Regional Court *(Oberlandesgericht)* ruled in 1978 that even where the European Court of Human Rights finds a judgment in violation of the European Convention on Human Rights, the judgment of the European Court of Human Rights does not render the domestic judgment as one that should be annulled, but rather one that is a pronouncement that the state should strive to have the law that led to the decision removed from its system.[26] However, the impugned

24 M Hoskova, 'Legal effects of the Judgments of the ECHR in German Law' in P Sturma (ed) *Implementation of human rights and international control mechanism* 143 at 148.
25 As above, 149.
26 As above.

national decision would remain in force and still good for execution.

Striking a fatal blow to effective enforcement of international judgments, the German superior courts subsequently made a collective finding that a European Court of Human Rights judgment does not constitute 'new facts' or 'new evidence' to entitle the re-opening of the judgments in question.[27] This became the unambiguous statement on the status of domestic judgments that led to international litigation before the European Court of Human Rights. However, the German courts' attitude towards reopening of cases morphed into a positive dispensation since 1998, the details of which will be dealt with in the concluding remarks of this chapter.

4. The position on re-opening of cases in some AHRAJ focus countries

The magnitude of the problem posed by *res judicata* in Africa can only be demonstrated by way of an abridged audit of AHRAJ target countries. This will enable readers to appreciate the challenges posed to the domestic implementation of non-financial judgments of the African Human Rights Court in not too distant future.
Whether provided for in legislation or common law, *res judicata* provides that a finalised case may only be re-opened where a party can demonstrate the existence of new facts that were not in existence at the time of trial, or new evidence which ought to have been adduced at the time of the trial but was not reasonably contemplated.[28] Given the context in which most of the statutes were enacted, the relevant provisions do not hint on the possibility of having to deal with reviewing or reopening international judgments, let alone contemplating that international judgments should be considered as 'new facts' or 'new evidence' to warranty the reopening of proceedings.

The problem of most African codes of procedure and evidence of failing to anticipate international judgments as basis for reopening closed proceedings is not peculiar to African countries. Research has demonstrated that most of the European and American statute books are also silent on the issue. We will make reference to, in this chapter, of our case study of Germany and a brief survey of Estonia. Section 77 of the Estonian Code of Criminal Court Appeal and Cassation Procedure (CCCACP) does not

27 See the Higher Regional Court of Stuttgart Decision of 13 February 1985, *Monatsschrift des Deutschen Rechts* 1985, 605.
28 This position seems to be true in respect of many common law and Roman-Dutch law systems. Some states however, have codified these principles in legislation.

allow the review of a judgment which has entered into force.[29] Similarly, section 359 of the German Criminal Procedure Code did not provide for reopening of proceedings on the basis of an international judgment of the European Court.[30] One explanation to this global lacuna in the law is the fact that such a direct influence over municipal law by international law was never contemplated, let alone the superiority of an international court over municipal courts established by the law of sovereign states.

Another explanation, in our view, is the position assumed by international human rights law in public international law discourse. International human rights law ought to be taken differently from conventional public international law. This is because of the nature of state obligations that acrue to states upon ratifying an international human rights instrument.[31] For instance, obligations arising from human rights treaties are owed by states to individuals whereas in conventional public international law obligations are assumed by states and owed to fellow sovereign states. The reason why human rights law is given so much deference is because of the inequality of arms between the state and the individual, which inequality the law seeks to achieve by giving primary consideration to the protection of human rights whenever they are allegedly violated. Because protection of human rights is at the heart of rule of law, this explains why the law should be stretched beyond ordinary limits whenever human rights protection so demands.

4.1 Fair trial litigation in focus countries

This section deals with an abridged survey of AHRAJ focus countries with respect to litigation around fair trial and access to justice issues. Attention will be concentrated on both domestic and international litigation in those countries or rather their respect for the right to fair trial and access to justice as shown by cases litigated in their jurisdictions.

4.1.1 Burundi

In our view, Burundi almost always stands out as a model in Africa in relation to issues on the relationship between national and international law. The most telling case in Burundi related closely to the need to the reopening of proceedings on the basis of a contrary international judgment is the case of

29 Judgment of the Supreme Court of Estonia (n 15 above) para 10.
30 Hoskova (n 23 above) 152.
31D Shelton, 'Hierarchy of norms and human rights: Of trumps and winners' (2002) 65 *Saskatchewan Law Review* 301.

Avocats Sans Frontières (on behalf of Bwampamye) v Burundi.[32] *The facts of the case were that Mr Bwampamye authored a publication in which it was alleged that he incited violence in breach of public order. He was convicted for violating articles 212, 417 and 425 of the Penal Code of Burundi on 23 October 1993.*[33] *His conviction was confirmed by the Criminal Chamber of the Appeal Court on 25 September 1997. The oral argument was concluded on 20 August 1997 on which day the prosecution sought adjournment before they could make closing address.*[34] *The matter was accordingly postponed to 25 September 1997, but unfortunately for the complainant, his counsel could not attend due to sickness.*

The complainant requested for an adjournment but the Court rejected the request, heard the prosecution, required the accused to represent himself and convicted him.[35] *On appeal to the Supreme Court, the accused argued that the judge in the Criminal Chamber of the Court of Appeal at Ngozi should have appointed another lawyer to do closing address. The Supreme Court rejected the argument citing the law that the judge was not compelled by law to appoint another lawyer. In any event, the sick lawyer had already submitted written submissions, so, according to the Supreme Court, it was not critical that he should be there.*

In its decision on the merits, the African Commission held that:[36]

> It is apparent, consequently, that Burundian legislation, in this regard, does not comply with the country's treaty obligations emanating from its status as a state party to the African Charter … By upholding the position of the appellate judge, the court ignored the obligation of courts and tribunals to conform to international standards of ensuring fair trial to all.

Having already found Burundi to be in violation of article 7(1)(c) of the African Charter, the African Commission requested Burundi to bring its legislation in conformity with international obligations arising from the African Charter. More germane to the current study in this chapter, the African Commission ruled as follows:[37]

> Requests Burundi to draw all the legal consequences of this decision; and to take appropriate measures to allow the reopening of the file and the reconsideration of the case in conformity with the laws of Burundi and pertinent provisions of the

32 (2000) AHRLR 48 (ACHPR 2000).
33 As above, para 2.
34 As above, para 5.
35 As above.
36 As above, para 31.
37 As above, para 33.

African Charter on Human and Peoples' Rights.

4.1. 2 Malawi

One of the cases standing good chances for reopening of proceedings due to a contrary international judgment in Malawi is the case of *Achuthan & Amnesty International (on behalf of Banda and Orton & Vera Chirwa) v Malawi.*[38] *Orton and Vera Chirwa* were living in exile in Zambia during the dictatorial rule of Kamuzu Banda. They were abducted in Zambia in 1981, put into custody, charged with treason, tried in the Southern Regional Traditional Court, convicted and sentenced to death. The National Traditional Appeals Court confirmed the conviction and sentence despite the fact that they were denied legal representation. Due to international pressure, their sentence was commuted to life imprisonment.

The African Commission found a violation of article 7(1)(c) for the reason that the complainants did not have legal representation. No detailed remedy was given perhaps because by the time the communication was decided, a new democratic government had been sworn in hence perhaps the African Commission duly hoped that most political prisoners were going to be released. Despite the possibility of release, the case stood as a good example of cases which ought to be reopened because their continued existence is tantamount to a perpetual violation of the African Charter.

4.1.3 Tanzania

In *Women's Legal Aid Centre (on behalf of Moto) v Tanzania*,[39] one Sophia Moto had sued for a decree of divorce in the lower courts and ultimately appealed to the High Court of Tanzania. She failed to appear on the date of the hearing and a default judgment was entered against her. Her explanation for failing to appear was that she had not been served with summons or notice of set down. It became apparent that her lawyer was present but this had no effect since matters that deal with the legal personality of a person require personal service and appearance in person. She applied for review or revision of the default judgment, but the application was dismissed. In terms of the laws of Tanzania, Order IX rule 8 of the Civil Procedure Code of 1966 allows the court to dismiss a claim for non-appearance. However,

38 (2000) AHRLR 144 (ACHPR 1994).
39 (2004) AHRLR 116 (ACHPR 2004).

Order IX rule 9(1) of the Civil Procedure Code confers the courts with discretion to set aside the default judgment on showing a good cause for non-appearance.

In its decision on the merits, the African Commission took judicial notice of the domestic laws of Tanzania, which conferred unfettered discretion on the courts to determine applications for review of judgments. Applicants were automatically barred from approaching superior courts if those applications were unsuccessful. Explicitly recommending the re-opening of the High Court of Tanzania decision which it found to be violating article 7(1) of the African Charter, the African Commission urged 'the government of the Republic of Tanzania to allow the complainant to be heard on her appeal'.[40]

4.1.4 Nigeria

The military junta that ruled Nigeria with despotism before the democratic transformation in 1999 was one of the main reasons Nigeria had the highest number of communications against it before the African Commission. Perhaps needless to say that most of them had to do with alleged violation of the right to a fair trial and access to justice when the government through executive decrees ousted the jurisdiction of courts to preside over individuals facing serious but fabricated charges. The case of *Civil Liberties Organisation & Others v Nigeria*[41] is a good example of the nature of the communications that flooded the African Commission Secretariat.

The facts were briefly that on 21 December 1997, the government claimed to have uncovered a *coup* plot. Consequently, about 26 persons were arrested. One of them was a civilian.[42] In the beginning of 1998, a special military tribunal was constituted, whose decision was final and only subject to approval by the Provisional Ruling Council, an executive functionary. On 28 April 1998, six of the 26 people were sentenced to death. They were the reason why the communication was submitted.

The Commission found Nigeria in violation of, *inter alia,* article 7 of the African Charter in respect of the facts that the complainants were not legally represented, they did not get a public hearing, the decision of the military tribunal was not subject to appeal and the presumption of innocence had been violated.[43] The African Commission recommended the repeal of the decree

40 As above, para 47.

41 (2001) AHRLR 75 (ACHPR 2001).

42 As above, para 4.

43 As above, para 46.

that ousted the jurisdiction of the courts and payment of compensation.

4.1.5 Sierra Leone

On 12 October 1998, 18 former members of the armed forces of the Republic of Sierra Leone were tried by a court martial and convicted of treason and failure to suppress a mutiny. Through their counsel, they filed a complaint to the UN Human Rights Committee. The complaint became the case of *Mansaraj & Ors v Sierra Leone*.[44] On 13 and 14 October 1998, the UN Human Rights Committee Special Rapporteur for New Communications besought the government of Sierra Leone in terms of Rule 86 to stay the execution of the authors pending the determination of the complaint. Twelve of them were however executed by a firing squad on 19 October 1998. It was alleged in the complaint that the decision of the court marshal was not subject to appeal.

The UN Human Rights Committee ruled that Sierra Leone flouted Rule 86 thereby irreversibly violating its obligations under the International Covenant on Civil and Political Rights (ICCPR). The absence of a right of appeal was in flagrant violation of article 14(5) of the ICCPR in respect of both the already executed authors as well as those awaiting execution. The UN Human Rights Committee held as follows in relation to the nature of the remedy in the context of the surviving complainants:[45]

> … these authors were sentenced on the basis of a trial that failed to provide the basic guarantees of a fair trial. The Committee considers, therefore, that they should be released unless Sierra Leonean law provides for the possibility of fresh trials that do offer all the guarantees of a fair trial.

4.1.6 Uganda

The case of *Hansungule & Ors v Uganda* before the African Committee of Experts on the rights and Welfare of the Child (Committee of Experts)[46] falls into a peculiar category because applicants did not exhaust local remedies basing their argument on the jurisprudence of the African Commission. We however, include it here for illustrative purposes. The abridged version of the facts of the case is that the applicants allege violation of certain articles of the African Charter on the Rights and Welfare of the Child (hereinafter

44 (2001) AHRLR (HRC 2001).
45 As above, para 6.3.
46 ICJ Case No 242 submitted before the Committee of Experts in May 2005. The admissibility decision is due to be taken during the forthcoming ordinary session in May 2008.

ACRWC). The rights of children allegedly violated as a consequence of the war in the North include right to education,[47] right to health,[48] protection from physical abuse and abduction,[49] right not to be involved in armed conflicts.[50]

The respondent state's liability is largely based on the failure to protect children from violations summarised above. No attempt to exhaust local remedies was done. The justification proffered is that the violations were well documented such that the state was put on notice to remedy them, but it did not do so. Further, the violations were of a massive and systematic nature such that it was unnecessary to exhaust local remedies, as per jurisprudence of the African Commission.[51] It is this fact that disqualifies the case from the ambit of the current discussion since there is no national judgment to be reopened should the Committee of Experts find Uganda in violation of international obligations under the ACRWC.

4.2 The collective analysis of the above cases and their relevance to AHRAJ litigators

The survey of cases above was done with the objective of making it clear which type of cases fall within the parameters of the reopening of national proceedings campaign. The most glaring example of the proper candidate for reopening of proceedings in order to purge the national legal system of the violation of African Charter is the *Bwampamye* decision. In that case all the local judicial remedies were exhausted and the applicant approached the international forum where he won. Given that he was still in custody and awaiting execution, reopening of proceedings would be the only way to effectively redeem the applicant's right to a fair trial. The *Mansaraj* case demonstrates that the UN human rights system also acknowledges that reopening of proceedings is also the most effective remedy for violation of fair trial rights, but seems to think that the remedy is dependant on the existence of a possibility in national law for reopening to take place. The *Achuthan* and the *Civil Liberties Organisation* cases also fall into this category.

In contrast to the default assumption that reopening of national proceedings should only apply to criminal cases as in Germany, the *Women's Legal Aid*

47 Art 11 of the ACRWC.
48 Art 14 of the ACRWC
49 Art 29 of the ACRWC.
50 Art 22 of the ACRWC.
51 *Jawara v the Gambia* (2000) AHRLR 107 (ACHPR 2000).

case demonstrates otherwise. In that case the legal issue was whether a divorce decree should be granted, a purely civil matter. In its decision the African Commission recommended that the applicant be heard, meaning that the civil case be reopened. On that note one can conclude that the African regional human rights system is more advanced as it has already seen the necessity of allowing reopening of national civil proceedings.

Finally, the Uganda based *Hansungule* case serves to exemplify the category of cases before the international human rights protection forum, but which were not initiated after exhausting local remedies. In other words the case was not as a result of national judgment allegedly violating one's rights under the international regional treaties. Even if the African Committee of Experts were to find Uganda in violation of the ACRWC, effective enforcement of the judgment does not require reopening of national proceedings because no such proceedings exist.

It is therefore, extremely important that AHRAJ litigators be aware of the various categories their respective cases fall into, the legal regime prevalent in their national systems, the nature of the state obligations under the African Charter and any other international human rights treaties to which they are party in respect of reopening of national proceedings, the alternative means of effectively redressing the violation other than by reopening national proceedings and so on. This kind of information would enable them to properly strategise their campaign for the reopening of national proceedings on the basis of a contrary international judgment.

4.3 The African Charter and reopening of cases

The mega-question to be asked is: Does the African Charter and or the Protocol contemplate and, therefore, impose an obligation on member states to reopen decisions on the basis of contrasting judgments of the African Human Rights Court? This is the question litigators should ask themselves before motivating for the reopening of proceedings in their respective jurisdictions. The question is even more relevant since human rights instruments from established human rights systems also do not mention whether state parties have an obligation of reopening national proceedings. The European Court had an occasion to make a pronouncement on the issue when it held in *Pelladoah v Netherlands* that[52]

> The Court recalls that it has no jurisdiction to direct the Government to reopen

52 Pelladoah v the Netherlands, judgment of 22 September 1994, para 44.

proceedings (see, as the most recent authority, the *Saïdi v. France* judgment of 20 September 1993, Series A no. 261-C, p. 57, para. 46); therefore it is not in a position to support the Commission's suggestion. As regards the applicant's claim for compensation, in view of all the circumstances of the case, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage the applicant may have suffered.

The facts were briefly that Mr Pelladoah, a Mauritian, was arrested and charged with bringing into the Netherlands substances containing heroin, with or without criminal intent. He was convicted by the lower court for unlawfully bringing a prohibited drug even though without criminal intent. Mr Pelladoah was consequently deported to Mauritius. On cross appeal in the Court of Appeal, he could not attend trial from Mauritius and the court did not consider the travelling expense as a compelling reason to allow his counsel to appear on his behalf. He was accordingly convicted *in absentia.* Before the European Commission on Human Rights, Mr Pelladoah alleged violation of article 6 of the European Convention on Human Rights when the Court of Appeal refused to hear his counsel and to cross-examine prosecution witnesses. The European Commission on Human Rights, which had brought the case before the Court had argued that in the event that the Court found a violation of the European Convention on Human Rights, the only way to effectively redress the injury suffered by the complainant was to reopen the court proceedings that led to his conviction in the Netherlands. Similarly to the finding of the European Court of Human Rights in Pelladoah, the European Court of Justice ruled in *Rosmarie Kapferer v Schlank & Schick GmbH* that the co-operation principle in community law did not require domestic courts 'to disaply its rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to community law'.[53]

In stark contrast, the African Commission accepts its jurisdiction in recommending reopening of cases where tenets of the right to a fair trial have been infringed. This was demonstrated in the *Bwampamye* case above. The African Charter on Human and Peoples' Rights and its Protocol on the establishment of the African Human Rights Court neither shed any light on the issue of the effect of the judgments of the African Human Rights Court nor the scope of execution of the same to the extent that they influence the reopening of proceedings on the basis of violation of the African Charter on Human and Peoples' Rights by a judgment of a national court. The furthest the Protocol goes in describing the manner of enforcement of the judgments of the African Human Rights Court is in its stating that state parties should

53 Case C-234/04 paras 20 & 21.

undertake to execute them,[54] the execution shall be monitored by the Council of Ministers,[55] and that the judgments shall be final and not subject to appeal.[56] Accordingly, we hope that the African Human Rights Court will adopt the same radical and bold stance adopted by the African Commission in interpreting the African Charter as conferring African judicial bodies with requisite jurisdiction to directly recommend to states to reopen domestic proceedings in order to purge itself of the violation of article 7 of the African Charter.

In Africa Burundi's position is exemplary in relation to the pronouncement of the status and effect of international judgments in the domestic legal system. Pursuant to article 19 of the Constitution of Burundi, the Parliament adopted a piece of legislation committed to addressing issues related to the effect of international judgments in the Burundi legal system.[57] In terms of that law, Burundian courts are enjoined to review their decisions in view of a contrary international decision, not only of a binding nature like judgments of the African Human Rights Court, but also those of any treaty body established by an international instrument ratified by Burundi.[58]

The import of the provisions of this law is that unlike the German procedural law, which vests the courts with unfettered discretion on whether or not to re-open or review a decision on the basis of a contrary international judgment, Burundian law requires domestic courts and tribunals to review their decisions as the default rule. Given that no cases have been rendered by the African Commission against Burundi since the adoption of this law, the practical implementation of this organic law remains to be tested. In the meantime though, Burundi remains a model in theory.

All in all, the practice of not mentioning the manner in which states should execute their international law obligations has, in our view, a two-pronged basis. First, it is simply logical that there are various ways through which judgments may be enforced when regard is given to the nature of the relief awarded. Second, state sovereignty dictates that states enjoy the liberty to

54 Art 30 of the Protocol.
55 Art 29 of the Protocol. Now the AU Executive Council.
56 Art 28(2) of the Protocol.
57 Art 47(7) des Amendment des articles 47 et 48 du projet de loi No 1/2003 regissant la court el que propose par l'honorable depute Laurent Gahungu.
58 Burundian organic law above. Perhaps more straight to the point is the Cape Verde situation described in article 12(3) which explicitly points to supranational decisions having a direct effect in the domestic legal system. The section does not however, explain the status of the decisions, that is, whether or not they have superiority over decisions of domestic courts as well as the manner of enforcement.

choose the manner of complying with international law. It is on the second leg that we will comment. Because of the status ascribed to international human rights law, deviation from traditional practices should be allowed in order to achieve the bargaining equilibrium between an individual and the strong state. Progressive jurisdictions like Estonia have adopted certain criteria to determine whether or not proceedings should be reopened. The Supreme Court of Estonia unanimously held that two principles should dominate the discussion on whether proceedings should be reopened in view of the judgment of the European Court on Human Rights.[59] It held that, first; the violation of the European Convention on Human Rights should be persistent at the time when a court is requested to reopen. Second, there should not be another way through which effective redress of the violation could be achieved.

With respect to those states that whose courts have insisted on the promulgation of a law allowing reopening of cases, Germany is the best example in this regard. The parliament amended section 359 of the Criminal procedure Code by adding paragraph 6, which now specifically deals with reopening of proceedings on the basis of a contrary judgment by the ECHR. The provision now reads as follows

> **Re-opening of case to the benefit of the condemned**
>
> A re-opening of a case closed by a *res judicata* judgment is admitted to the benefit of the condemned … Para 6: If the European Court of Human Rights declared an infringement of the European Convention or its Protocols and the judgment is based on this infringement.[60]

It therefore, follows that there exists a limitation to the application of the practice that states enjoy leverage to determine the manner of complying with international obligations. Where it can be demonstrated that a particular manner (reopening proceedings in this case) is the only effective way to redress a violation, state sovereignty should be neither here nor there. This is because remedies ought to extinguish as far as possible, all the consequences of violation and guarantee non-repetition.[61] We will further observe that the only way to guarantee non-repetition of violation of international law by a national judicial decision is to reopen and overrule it thereby striking it off the national jurisprudence.

59 Estonia Supreme Court judgment (n 15 above) para 32.
60 Hoskova (n 23) 152.
61 *Chorzow Factory* (Germany v Poland), jurisdiction, 1927 PCIJ (Ser A) No 9 21.

4.4 Brief analysis of cases supported by AHRAJ

We have tried to make this chapter not too smart for the human rights litigator. What needs to be achieved is to open the eyes of the litigator so that they are able to visualise the nature of challenges they are facing in shaping human rights litigation on the continent. AHRAJ's focus is the promotion of domestic application of human rights standards. We have argued that such focus have not been lost in this chapter because the domestic enforcement of international judgments forms an integral part of the domestication of international standards. What we seek to achieve with reopening domestic cases inconsistent with international human rights standards is to rid the domestic legal order of such jurisprudence. By so doing, we are motivating the obvious argument that domestic law should be consistent with international human rights law. If a case is reopened because of inconsistence with international human rights law, then domestication of international standards would have been successfully achieved. Now AHRAJ has supported a myriad of cases in which complainants did not seek financial relief, but a kind of relief that requires the state to conduct itself in a particular manner so as to purge itself of the violation of international human rights law. It must be noted that reopening of cases only applies where there were attempts to exhaust local judicial remedies before approaching the international forum. It does not apply to cases where, on utilising exceptions to exhaustion of local remedies, the complainant did not approach the international forum on the basis of an unfavourable domestic judgment against him.

5. Conclusion

The data summarised above on reopening of proceedings points to two related conclusions. First, the historical background of the states concerned played a prominent role in shaping the jurisprudential regime in force on the reopening of proceedings. Given that most of the countries follow the common law doctrine of law imposed through colonisation, it was never contemplated at the time of drafting these codes of procedure and evidence. This was a time when the dualist conception of international law enjoyed dominance. Therefore, one could not easily envisage that a need to harmonise the international and municipal legislation would arise. As a

result the English legal tradition never included provisions relating to the adoption of international judgments in the domestic legal systems let alone review of judgments in view of a contrasting international judgment.

Second, the majority of the states covered by the AHRAJ programme save for Burundi and Cape Verde;[62] do not have any constitutional provisions pronouncing the status of international judgments in the domestic legal order. This cannot be explained along the same lines with the historical background of the procedural statutory provisions, which we concluded that it is rooted in colonialism. A handful of states supported by AHRAJ have constitutions adopted well after the drafting of the African Charter on Human and Peoples' Rights, or at least when the deliberations for the adoption of the African Charter on Human and Peoples' Rights were already underway.[63] A state cannot be heard to argue, therefore, that it did not contemplate the establishment of the African Human Rights Court since the African Charter on Human and Peoples' Rights had already established the African Commission on Human and Peoples' Rights with competence to entertain contentious lawsuits.[64]

Third, the African Commission has interpreted the African Charter as conferring jurisdiction on African judicial bodies to order or recommend to states reopening of closed national proceedings in order to effectively redress violation of the right to a fair trial, access to justice or any other relevant non-financial relief.[65] In contrast, the European human rights system does not confer their respective judicial bodies with jurisdiction to order states to reopen proceedings. Such a course of action is conditional to existence of national law allowing that possibility.[66]

6. Recommendations and the way forward for AHRAJ supported litigators

62 Article 12(3) of the Constitution of Cape Verde, which provides that 'Judicial acts emanating from competent offices of supranational organisations to which Cape Verde belongs shall take direct effect in the internal judicial system, provided that has been established in the respective constituting conventions'.

63 The constitutions of the following AHRAJ states were adopted shortly before and after the drafting of the African Charter: Malawi Constitution (1995), Zimbabwe Constitution (1980), Zambia Constitution (1996), Burundi Constitution (2000), Uganda Constitution (1995), Rwanda Constitution (2003), the Gambia Constitution (1996), DRC Constitution (2006).

64 Chapter I of the African Charter on Human and Peoples' Rights establishes the African Commission on Human and Peoples' Rights whose mandates are in Chapter II (promotional mandate) and Chapter III (protective mandate).

65 See the African Commission decision in the *Bwampamye* case above.

66 See the UN Human Rights Committee in the *Mansaraj* case above.

We have already noted that the question as to whether a national court should re-open or review its previous decision on the basis of a contrary judgment by an international human rights court seems to be informed by the debate regarding the status of the decisions of such court in the domestic legal orders of member states to the convention creating the international court. This chapter did not pursue this debate as its correctness is almost undoubted, but rather efforts were directed into showing the general landscape on the African continent regarding Africa's preparedness in respect of the enforcement of non-financial international judgments.

One of the findings of this research was that whereas the African Charter imposes an obligation on states to reopen proceedings on the basis of an international judgment as the default rule, its counterparts do not. Accordingly, we recommend that litigators can argue that reopening of cases is a direct obligation of states emanating from the treaty in question, but it is subject to the existence of national laws allowing that possibility. That is why Germany and Estonia had to amend their respective procedural laws to accommodate judgments of the European Court for Human Rights. Where it has been demonstrated that there exists no other means to satisfy the international judgment, it is only then that the obligation arises, being the obligation of the state to end the violation and guarantee non-repetition.

With regards to which arm of the state has competence to initiate the reopening of proceedings, four possibilities have been identified based on practices of case study countries. First, national law provides that national courts are enjoined to review their decisions if an international court finds such decisions to be in violation of the treaty concerned. This, in our view, is the position in Burundi and Costa Rica. Second, where the international treaty concerned has status equivalent to or superior to the constitution, it means that the international court is superior to national courts and integral to the national legal system. To that end, national courts are obliged to reopen proceedings to correct errors if reopening is the only available effective way to redress the violation. This position holds true in Estonia where the Supreme Court of that country reopened proceedings in the absence of a law specifically authorising it to do so.[67]

Third, because of high esteem deference given to the peace and quietness of the law, the legislative body usually amends the relevant evidentiary legislation to allow courts to reopen proceedings.

67 Para 42.

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Preamble

The States Parties to the present Convention,

(a) Recalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world,

(b) Recognizing that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind,

(c) Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination,

(d) Recalling the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,

(e) Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,

(f) Recognizing the importance of the principles and policy guidelines contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in influencing the promotion, formulation and

evaluation of the policies, plans, programmes and actions at the national, regional and international levels to further equalize opportunities for persons with disabilities,

(g) *Emphasizing* the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development,

(h) *Recognizing* also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,

(i) *Recognizing* further the diversity of persons with disabilities,

(j) *Recognizing* the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,

(k) *Concerned* that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,

(l) *Recognizing* the importance of international cooperation for improving the living conditions of persons with disabilities in every country, particularly in developing countries,

(m) *Recognizing* the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty,

(n) *Recognizing* the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,

(o) *Considering* that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them,

(p) *Concerned* about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status,

(q) *Recognizing* that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,

(r) *Recognizing* that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis
with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child,

(s) *Emphasizing* the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities,

(t) *Highlighting* the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities,

(u) *Bearing in mind* that conditions of peace and security based on full respect for the purposes and principles contained in the Charter of the United Nations and observance of applicable human rights instruments are indispensable for the full protection of persons with disabilities, in particular during armed conflicts and foreign occupation,

(v) *Recognizing* the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms,

(w) *Realizing* that the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights,

(x) *Convinced* that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities,

(y) *Convinced* that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries,

Have agreed as follows:

Article 1
Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Article 2
Definitions

For the purposes of the present Convention:

"Communication" includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology;

"Language" includes spoken and signed languages and other forms of

non spoken languages;

"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

"Universal design" means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. "Universal design" shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

Article 3
General principles

The principles of the present Convention shall be:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

(b) Non-discrimination;

(c) Full and effective participation and inclusion in society;

(d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

(e) Equality of opportunity;

(f) Accessibility;

(g) Equality between men and women;

(h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 4
General obligations

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

(a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

(c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

(d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;

(e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

(f) To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;

(g) To undertake or promote research and development of, and to promote the availability and use of new technologies, including

information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

(h) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

(i) To promote the training of professionals and staff working with persons with disabilities in the rights recognized in the present Convention so as to better provide the assistance and services guaranteed by those rights.

2. With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

4. Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent.

5. The provisions of the present Convention shall extend to all parts of federal States without any limitations or exceptions.

Article 5
Equality and non-discrimination

1 States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2 States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3 In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4 Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 6
Women with disabilities

1 States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

2 States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

Article 7
Children with disabilities

1 States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

2 In all actions concerning children with disabilities, the best interests

of the child shall be a primary consideration.

3 States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

Article 8
Awareness-raising

1. States Parties undertake to adopt immediate, effective and appropriate measures:

(a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

(b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

(c) To promote awareness of the capabilities and contributions of persons with disabilities.

2. Measures to this end include:

(a) Initiating and maintaining effective public awareness campaigns designed:

(i) To nurture receptiveness to the rights of persons with disabilities;

(ii) To promote positive perceptions and greater social awareness towards persons with disabilities;

(iii) To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;

(b) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons

with disabilities;

(c) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;

(d) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

Article 9
Accessibility

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

(a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;

(b) Information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures:

(a) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;

(b) To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;

(c) To provide training for stakeholders on accessibility issues facing persons with disabilities;

(d) To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;

(e) To provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;

(f) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;

(g) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;

(h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Article 10
Right to Life

States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

Article 11
Situations of risk and humanitarian emergencies

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Article 12
Equal recognition before the law

1 States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2 States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3 States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13
Access to justice

1 States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2 In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 14
Liberty and security of person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

Article 15
Freedom from torture or cruel, inhuman or degrading treatment or punishment

1 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

2 States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 16
Freedom from exploitation, violence and abuse

1 States Parties shall take all appropriate legislative, administrative,

social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

2 States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

3 In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

4 States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

5 States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Article 18
Liberty of movement and nationality

1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons

with disabilities:

(a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;

(b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;

(c) Are free to leave any country, including their own;

(d) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

Article 19
Living independently and being included in the community

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

(b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

(c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Article 20
Personal mobility

States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:

(a) Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost;

(b) Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;

(c) Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities;

(d) Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.

Article 21
Freedom of expression and opinion, and access to information

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

(a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;

(b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;

(c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;

(d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;

(e) Recognizing and promoting the use of sign languages.

Article 22
Respect for privacy

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

Article 23
Respect for home and the family

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

(a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

(b) The rights of persons with disabilities to decide freely and

responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

(c) Persons with disabilities, including children, retain their fertility on an equal basis with others.

1 States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

2 States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.

3 States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

4 States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

Article 24
Education

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of

equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

(a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

(b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;

(c) Enabling persons with disabilities to participate effectively in a free society.

2. In realizing this right, States Parties shall ensure that:

(a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;

(b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;

(c) Reasonable accomodation of the individual's requirements is provided;

(d) Persons with disabillities receive the support required, within general education system, to facilitate their effective education;

(e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

(a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation

and mobility skills, and facilitating peer support and mentoring;

(b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

(c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

Article 25
Health

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

(a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;

(b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;

(c) Provide these health services as close as possible to people's own communities, including in rural areas;

(d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;

(e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;

(f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

Article 26
Habilitation and rehabilitation

1. States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:

(a) Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;

(b) Support participation and inclusion in the community and all

aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.

1 States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.

2 States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

Article 27
Work and employment

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

(c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services

and vocational and continuing training;

(e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

(g) Employ persons with disabilities in the public sector;

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

(j) Promote the acquisition by persons with disabilities of work experience in the open labour market;

(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

Article 28
Adequate standard of living and social protection

1 States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

2 States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote

the realization of this right, including measures:

(a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;

(b) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;

(c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;

(d) To ensure access by persons with disabilities to public housing programmes;

(e) To ensure equal access by persons with disabilities to retirement benefits and programmes.

Article 29
Participation in political and public life

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

(a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

(i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

(ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all

levels of government, facilitating the use of assistive and new technologies where appropriate;

(iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;

(b) To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

(i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;

(ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

Article 30
Participation in cultural life, recreation, leisure and sport

1. States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:

(a) Enjoy access to cultural materials in accessible formats;

(b) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;

(c) Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.

1 States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative,

artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.

2 States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

3 Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.

4 With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

(a) To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;

(b) To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;

(c) To ensure that persons with disabilities have access to sporting, recreational and tourism venues;

(d) To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;

(e) To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.

Article 31
Statistics and data collection

1. States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall:

(a) Comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of persons with disabilities;

(b) Comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.

2. The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.

3. States Parties shall assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.

Article 32
International cooperation

1.States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities. Such measures could include, inter alia:

(a) Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;

(b) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;

(c) Facilitating cooperation in research and access to scientific and technical knowledge;

(d) Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

2. The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention.

Article 33
National implementation and monitoring

1 States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

2 States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

3 Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

Article 34
Committee on the Rights of Persons with Disabilities

1 There shall be established a Committee on the Rights of Persons with Disabilities (hereafter referred to as "the Committee"), which shall carry out the functions hereinafter provided.

2 The Committee shall consist, at the time of entry into force of the present Convention, of twelve experts. After an additional sixty ratifications or accessions to the Convention, the membership of the Committee shall increase by six members, attaining a maximum number of eighteen members.

3 The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the present Convention. When nominating their candidates, States Parties are invited to give due consideration to the provision set out in article 4, paragraph 3, of the present Convention.

4 The members of the Committee shall be elected by States Parties, consideration being given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities.

5 The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties from among their nationals at meetings of the Conference of States Parties. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The initial election shall be held no later than six months after the date of entry into force of the present Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit the nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating the State Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

6 The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of six of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these six members shall be chosen by lot by the chairperson of the meeting referred to in paragraph 5 of this article.

7 The election of the six additional members of the Committee shall be held on the occasion of regular elections, in accordance with the relevant provisions of this article.

8 If a member of the Committee dies or resigns or declares that for any other cause she or he can no longer perform her or his duties, the State Party which nominated the member shall appoint another expert possessing the qualifications and meeting the requirements set out in the relevant provisions of this article, to serve for the remainder of the term.

9 The Committee shall establish its own rules of procedure.

10 The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention, and shall convene its initial meeting.

11 With the approval of the General Assembly of the United Nations, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

12 The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 35
Reports by States Parties

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on measures taken

to give effect to its obligations under the present Convention and on the progress made in that regard, within two years after the entry into force of the present Convention for the State Party concerned.

2 Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee so requests.

3 The Committee shall decide any guidelines applicable to the content of the reports.

4 A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports, repeat information previously provided. When preparing reports to the Committee, States Parties are invited to consider doing so in an open and transparent process and to give due consideration to the provision set out in article 4, paragraph 3, of the present Convention.

5 Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 36
Consideration of reports

1 Each report shall be considered by the Committee, which shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned. The State Party may respond with any information it chooses to the Committee. The Committee may request further information from States Parties relevant to the implementation of the present Convention.

2 If a State Party is significantly overdue in the submission of a report, the Committee may notify the State Party concerned of the need to examine the implementation of the present Convention in that State Party, on the basis of reliable information available to the Committee, if the relevant report is not submitted within three months following the notification. The Committee shall invite the State Party concerned to participate in such examination. Should the State Party respond by submitting the relevant report, the provisions of paragraph 1 of this article will apply.

3 The Secretary-General of the United Nations shall make available the reports to all States Parties.

4 States Parties shall make their reports widely available to the public in their own countries and facilitate access to the suggestions and general recommendations relating to these reports.

5 The Committee shall transmit, as it may consider appropriate, to the specialized agencies, funds and programmes of the United Nations, and other competent bodies, reports from States Parties in order to address a request or indication of a need for technical advice or assistance contained therein, along with the Committee's observations and recommendations, if any, on these requests or indications.

Article 37
Cooperation between States Parties and the Committee

1 Each State Party shall cooperate with the Committee and assist its members in the fulfilment of their mandate.

2 In its relationship with States Parties, the Committee shall give due consideration to ways and means of enhancing national capacities for the implementation of the present Convention, including through international cooperation.

Article 38
Relationship of the Committee with other bodies

In order to foster the effective implementation of the present Convention and to encourage international cooperation in the field covered by the present Convention:

(a) The specialized agencies and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of

their respective mandates. The Committee may invite specialized agencies and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee, as it discharges its mandate, shall consult, as appropriate, other relevant bodies instituted by international human rights treaties, with a view to ensuring the consistency of their respective reporting guidelines, suggestions and general recommendations, and avoiding duplication and overlap in the performance of their functions.

Article 39
Report of the Committee

The Committee shall report every two years to the General Assembly and to the Economic and Social Council on its activities, and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

Article 40
Conference of States Parties

1 The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the present Convention.

2 No later than six months after the entry into force of the present Convention, the Conference of States Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the Secretary-General biennially or upon the decision of the Conference of States Parties.

Article 41
Depositary

The Secretary-General of the United Nations shall be the depositary of the present Convention.

Article 42
Signature

The present Convention shall be open for signature by all States and by regional integration organizations at United Nations Headquarters in New York as of 30 March 2007.

Article 43
Consent to be bound

The present Convention shall be subject to ratification by signatory States and to formal confirmation by signatory regional integration organizations. It shall be open for accession by any State or regional integration organization which has not signed the Convention.

Article 44
Regional integration organizations

1. "Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention. Such organizations shall declare, in their instruments of formal
confirmation or accession, the extent of their competence with respect to matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

2 References to "States Parties" in the present Convention shall apply to such organizations within the limits of their competence.

3 For the purposes of article 45, paragraph 1, and article 47, paragraphs 2 and 3, of the present Convention, any instrument deposited by a regional integration organization shall not be counted.

4 Regional integration organizations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 45
Entry into force

1 The present Convention shall enter into force on the thirtieth day after the deposit of the twentieth instrument of ratification or accession.

2 For each State or regional integration organization ratifying, formally confirming or acceding to the present Convention after the deposit of the twentieth such instrument, the Convention shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 46
Reservations

1 Reservations incompatible with the object and purpose of the present Convention shall not be permitted.

2 Reservations may be withdrawn at any time.

Article 47
Amendments

1. Any State Party may propose an amendment to the present Convention and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at

least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly of the United Nations for approval and thereafter to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

3. If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with paragraph 1 of this article which relates exclusively to articles 34, 38, 39 and 40 shall enter into force for all States Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment.

Article 48
Denunciation

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 49
Accessible format

The text of the present Convention shall be made available in accessible formats.

Article 50
Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention shall be equally authentic.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

Optional Protocol to the Convention on the Rights of Persons with Disabilities

Article 1

1. A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Rights of Persons with Disabilities ("the Committee") to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.
2. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

Article 2

The Committee shall consider a communication inadmissible when:

a. The communication is anonymous;

b. The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention;

c. The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;

d. All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;

e. It is manifestly ill-founded or not sufficiently substantiated; or when

f. The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

Article 3

Subject to the provisions of article 2 of the present Protocol, the Committee

shall bring any communications submitted to it confidentially to the attention of the State Party. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 4

At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.

Where the Committee exercises its discretion under paragraph 1 of this article, this does not imply a determination on admissibility or on the merits of the communication.

Article 5

The Committee shall holdclosed meetings when examining communications under the present Protocol. After examining a communication, the Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

Article 6

1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end submit observations with regard to the information concerned.
2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry

may include a visit to its territory.

3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.

4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

Article 7

1. The Committee may invite the State Party concerned to include in its report under article 35 of the Convention details of any measures taken in response to an inquiry conducted under article 6 of the present Protocol.

2. The Committee may, if necessary, after the end of the period of six months referred to in article 6, paragraph 4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 8

Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 6 and 7.

Article 9

The Secretary-General of the United Nations shall be the depositary of the present Protocol.

Article 10

The present Protocol shall be open for signature by signatory States and

regional integration organizations of the Convention at United Nations Headquarters in New York as of 30 March 2007.

Article 11

The present Protocol shall be subject to ratification by signatory States of the present Protocol which have ratified or acceded to the Convention. It shall be subject to formal confirmation by signatory regional integration organizations of the present Protocol which have formally confirmed or acceded to the Convention. It shall be open for accession by any State or regional integration organization which has ratified, formally confirmed or acceded to the Convention and which has not signed the Protocol.

Article 12

1. "Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the Convention and the present Protocol. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the Convention and the present Protocol. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

2. References to "States Parties" in the present Protocol shall apply to such organizations within the limits of their competence.

3. For the purposes of article 13, paragraph 1, and article 15, paragraph 2, of the present Protocol, any instrument deposited by a regional integration organization shall not be counted.

4. Regional integration organizations, in matters within their competence, may exercise their right to vote in the meeting of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Protocol. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 13

1. Subject to the entry into force of the Convention, the present Protocol shall enter into force on the thirtieth day after the deposit of the tenth instrument of ratification or accession.

2. For each State or regional integration organization ratifying, formally confirming or acceding to the present Protocol after the deposit of the tenth such instrument, the Protocol shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 14

1. Reservations incompatible with the object and purpose of the present Protocol shall not be permitted.

2. Reservations may be withdrawn at any time.

Article 15

1. Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly of the United Nations for approval and thereafter to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption

of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

Article 16

A State Party may denounce the present Protocol by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 17

The text of the present Protocol shall be made available in accessible formats.

Article 18

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Protocol shall be equally authentic.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Protocol.

Convention on the Elimination of All Forms of Discrimination against Women

Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979

Entry into force 3 September 1981, in accordance with article 27(1)

The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the

potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women has the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields, Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

PART I

Article 1

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

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against

women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to en sure the full development and advancement of women , for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary

and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 6

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

PART II

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity

to represent their Governments at the international level and to participate in the work of international organizations.

Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

PART III

Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and other study grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

(f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;

(g) The same Opportunities to participate actively in sports and physical education;
(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12

1 States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2 Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits;

(b) The right to bank loans, mortgages and other forms of financial credit;

(c) The right to participate in recreational activities, sports and all aspects of cultural life.

Article 14

1 States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

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

(a) To participate in the elaboration and implementation of development planning at all levels;

(b) To have access to adequate health care facilities, including information, counseling and services in family planning;

(c) To benefit directly from social security programmes;

(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;

(e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;

(f) To participate in all community activities;

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

PART IV

Article 15

1 States Parties shall accord to women equality with men before the law.
2 States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3 States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4 States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16

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

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage

only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;
(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
(f) The same rights and responsibilities with regard to guardianship, ward ship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

PART V

Article 17

1.For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be

elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.
2.The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

3.The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4.Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5.The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

6.The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.

7.For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

8.The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9.The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

Article 18

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:
(a) Within one year after the entry into force for the State concerned;

(b) Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfillment of obligations under the present Convention.

Article 19

1. The Committee shall adopt its own rules of procedure. 2. The Committee shall elect its officers for a term of two years.

Article 20

1.The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.

2.The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

Article 21

1.The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

2.The Secretary-General of the United Nations shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

Article 22

The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

PART VI

Article 23

Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

(a) In the legislation of a State Party; or

(b) In any other international convention, treaty or agreement in force for that State.

Article 24

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

Article 25

1.The present Convention shall be open for signature by all States.

2.The Secretary-General of the United Nations is designated as the depositary of the present Convention.

3.The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

4.The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 26

1.A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2.The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 27

1.The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2.For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1.The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2.A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3.Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 29

1.Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2.Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.

3.Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 30

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations. IN WITNESS WHEREOF the undersigned, duly authorized, have signed the present Convention.

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women

The States Parties to the present Protocol,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Also noting that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Recalling that the International Covenants on Human Rights and other international human rights instruments prohibit discrimination on the basis of sex,

Also recalling the Convention on the Elimination of All Forms of Discrimination against Women ("the Convention"), in which the States Parties thereto condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women,

Reaffirming their determination to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to prevent violations of these rights and freedoms,

Have agreed as follows:

Article 1

A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Elimination of Discrimination against Women ("the Committee") to receive and consider communications submitted in accordance with article 2.

Article 2

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

Article 3

Communications shall be in writing and shall not be anonymous.No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

Article 4

1 The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.

2 The Committee shall declare a communication inadmissible where:

(a) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;

(b) It is incompatible with the provisions of the Convention;

(c) It is manifestly ill-founded or not sufficiently substantiated;

(d) It is an abuse of the right to submit a communication;

(e) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

Article 5

1 At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to

avoid possible irreparable damage to the victim or victims of the alleged violation.

2 Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

Article 6

1 Unless the Committee considers a communication inadmissible without reference to the State Party concerned, and provided that the individual or individuals consent to the disclosure of their identity to that State Party, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.

2 Within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

Article 7

1. The Committee shall consider communications received under the present Protocol in the light of all information made available to it by or on behalf of individuals or groups of individuals and by the State Party concerned, provided that this information is transmitted to the parties concerned.

2. The Committee shall hold closed meetings when examining communications under the present Protocol.

3 After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.

4 The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.

5 The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under article 18 of the Convention.

Article 8

1 If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

2 Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

3 After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.

4 The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

5 Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

Article 9

1 The Committee may invite the State Party concerned to include in its report under article 18 of the Convention details of any measures taken in response to an inquiry conducted under article 8 of the present Protocol.

2 The Committee may, if necessary, after the end of the period of six months referred to in article 8.4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 10

1 Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 8 and 9.

2 Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

Article 11

A State Party shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to ill treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.

Article 12

The Committee shall include in its annual report under article 21 of the Convention a summary of its activities under the present Protocol.

Article 13

Each State Party undertakes to make widely known and to give publicity to the Convention and the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving that State Party.

Article 14

The Committee shall develop its own rules of procedure to be followed when exercising the functions conferred on it by the present Protocol.

Article 15

1 The present Protocol shall be open for signature by any State that has signed, ratified or acceded to the Convention.

2 The present Protocol shall be subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall

be deposited with the Secretary-General of the United Nations.

3 The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4 Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 16

1 The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.

2 For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 17

No reservations to the present Protocol shall be permitted.

Article 18

1 Any State Party may propose an amendment to the present Protocol and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties with a request that they notify her or him whether they favour a conference of States Parties for the purpose of considering and voting on the proposal. In the event that at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2 Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those

States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

Article 19

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect six months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 or any inquiry initiated under article 8 before the effective date of denunciation.

Article 20

The Secretary-General of the United Nations shall inform all States of:

(a) Signatures, ratifications and accessions under the present Protocol;

(b) The date of entry into force of the present Protocol and of any amendment under article 18;

(c) Any denunciation under article 19.

Article 21

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 25 of the Convention.

Beijing Declaration and Platform for Action Fourth World Conference on Women

4 -15 September 1995, Beijing, China

1. We, the Governments participating in the Fourth World Conference on Women,

2. Gathered here in Beijing in September 1995, the year of the fiftieth anniversary of the founding of the United Nations,

3. Determined to advance the goals of equality, development and peace for all women everywhere in the interest of all humanity,

4. Acknowledging the voices of all women everywhere and taking note of the diversity of women and their roles and circumstances, honouring the women who paved the way and inspired by the hope present in the world's youth,

5. Recognize that the status of women has advanced in some important respects in the past decade but that progress has been uneven, inequalities between women and men have persisted and major obstacles remain, with serious consequences for the well-being of all people,

6. Also recognize that this situation is exacerbated by the increasing poverty that is affecting the lives of the majority of the world's people, in particular women and children, with origins in both the national and international domains,

7. Dedicate ourselves unreservedly to addressing these constraints and obstacles and thus enhancing further the advancement and empowerment of women all over the world, and agree that this requires urgent action in the spirit of determination, hope, cooperation and solidarity, now and to carry us forward into the next century.

We reaffirm our commitment to:

8. The equal rights and inherent human dignity of women and men and other purposes and principles enshrined in the Charter of the United Nations, to the Universal Declaration of Human Rights and other international human

rights instruments, in particular the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, as well as the Declaration on the Elimination of Violence against Women and the Declaration on the Right to Development;

9. Ensure the full implementation of the human rights of women and of the girl child as an inalienable, integral and indivisible part of all human rights and fundamental freedoms;

10. Build on consensus and progress made at previous United Nations conferences and summits - on women in Nairobi in 1985, on children in New York in 1990, on environment and development in Rio de Janeiro in1992, on human rights in Vienna in 1993, on population and development in Cairo in 1994 and on social development in Copenhagen in 1995 with the objective of achieving equality, development and peace;

11. Achieve the full and effective implementation of the Nairobi Forward-looking Strategies for the Advancement of Women;

12. The empowerment and advancement of women, including the right to freedom of thought, conscience, religion and belief, thus contributing to the moral, ethical, spiritual and intellectual needs of women and men, individually or in community with others and thereby guaranteeing them the possibility of realizing their full potential in society and shaping their lives in accordance with their own aspirations.

We are convinced that:

13. Women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace;

14. Women's rights are human rights;

15. Equal rights, opportunities and access to resources, equal sharing of responsibilities for the family by men and women, and a harmonious partnership between them are critical to their well-being and that of their families as well as to the consolidation of democracy;

16. Eradication of poverty based on sustained economic growth, social development, environmental protection and social justice requires the involvement of women in economic and social development, equal opportunities and the full and equal participation of women and men as agents and beneficiaries of people-centred sustainable development;

17. The explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment;

18. Local, national, regional and global peace is attainable and is inextricably linked with the advancement of women, who are a fundamental force for leadership, conflict resolution and the promotion of lasting peace at all levels;

19. It is essential to design, implement and monitor, with the full participation of women, effective, efficient and mutually reinforcing gender-sensitive policies and programmes, including development policies and programmes, at all levels that will foster the empowerment and advancement of women;

20. The participation and contribution of all actors of civil society, particularly women's groups and networks and other non-governmental organizations and community-based organizations, with full respect for their autonomy, in cooperation with Governments, are important to the effective implementation and follow-up of the Platform for Action;

Platform for Action

21. The implementation of the Platform for Action requires commitment from Governments and the international community. By making national and international commitments for action, including those made at the Conference, Governments and the international community recognize the need to take priority action for the empowerment and advancement of women.

We are determined to:

22. Intensify efforts and actions to achieve the goals of the Nairobi Forward-looking Strategies for the Advancement of Women by the end of this

century;

23. Ensure the full enjoyment by women and the girl child of all human rights and fundamental freedoms and take effective action against violations of these rights and freedoms;

24. Take all necessary measures to eliminate all forms of discrimination against women and the girl child and remove all obstacles to gender equality and the advancement and empowerment of women;

25. Encourage men to participate fully in all actions towards equality;

26. Promote women's economic independence, including employment, and eradicate the persistent and increasing burden of poverty on women by addressing the structural causes of poverty through changes in economic structures, ensuring equal access for all women, including those in rural areas, as vital development agents, to productive resources, opportunities and public services;

27. Promote people-centred sustainable development, including sustained economic growth, through the provision of basic education, life-long education, literacy and training, and primary health care for girls and women;

28. Take positive steps to ensure peace for the advancement of women and, recognizing the leading role that women have played in the peace movement, work actively towards general and complete disarmament under strict and effective international control, and support negotiations on the conclusion, without delay, of a universal and multilaterally and effectively verifiable comprehensive nuclear-test-ban treaty which contributes to nuclear disarmament and the prevention of the proliferation of nuclear weapons in all its aspects;

29. Prevent and eliminate all forms of violence against women and girls;

30. Ensure equal access to and equal treatment of women and men in education and health care and enhance women's sexual and reproductive health as well as education;

31. Promote and protect all human rights of women and girls;

32. Intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people;

33. Ensure respect for international law, including humanitarian law, in order to protect women and girls in particular;

34. Develop the fullest potential of girls and women of all ages, ensure their full and equal participation in building a better world for all and enhance their role in the development process.

We are determined to:

35. Ensure women's equal access to economic resources, including land, credit, science and technology, vocational training, information, communication and markets, as a means to further the advancement and empowerment of women and girls, including through the enhancement of their capacities to enjoy the benefits of equal access to these resources, interalia, by means of international cooperation;

36. Ensure the success of the Platform for Action, which will require a strong commitment on the part of Governments, international organizations and institutions at all levels. We are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people. Equitable social development that recognizes empowering the poor, particularly women living in poverty, to utilize environmental resources sustainably is a necessary foundation for sustainable development. We also recognize that broad-based and sustained economic growth in the context of sustainable development is necessary to sustain social development and social justice. The success of the Platform for Action will also require adequate mobilization of resources at the national and international levels as well as new and additional resources to the developing countries from all available funding mechanisms, including multilateral, bilateral and private sources for the advancement of women; financial resources to strengthen the capacity of national, subregional, regional and international institutions; a commitment to equal rights, equal responsibilities and equal opportunities and to the equal participation of women and men in all national, regional and

international bodies and policy-making processes; and the establishment or strengthening of mechanisms at all levels for accountability to the world's women;

37. Ensure also the success of the Platform for Action in countries with economies in transition, which will require continued international cooperation and assistance;

38. We hereby adopt and commit ourselves as Governments to implement the following Platform for Action, ensuring that a gender perspective is reflected in all our policies and programmes. We urge the United Nations system, regional and international financial institutions, other relevant regional and international institutions and all women and men, as well as non-governmental organizations, with full respect for their autonomy, and all sectors of civil society, in cooperation with Governments, to fully commit themselves and contribute to the implementation of this Platform for Action.

AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* **Nov. 29, 1999.**

PREAMBLE

The African Member States of the Organization of African Unity, Parties to the present Charter entitled 'African Charter on the Rights and Welfare of the Child',

CONSIDERING that the Charter of the Organization of African Unity recognizes the paramountcy of Human Rights and the African Charter on Human and People's Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms recognized and guaranteed therein, without distinction of any kind such as race, ethnic group, colour. sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status,

RECALLING the Declaration on the Rights and Welfare of the African Child (AHG/ST.4 Rev.l) adopted by the Assembly of Heads of State and Government of the Organization of African Unity, at its Sixteenth Ordinary Session in Monrovia, Liberia. from 17 to 20 July 1979, recognized the need to take appropriate measures to promote and protect the rights and welfare of the African Child,

NOTING WITH CONCERN that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care,

RECOGNIZING that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality. the child should grow up in a family environment in an atmosphere of happiness, love and understanding, RECOGNIZING that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security,

TAKING INTO CONSIDERATION the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child,

CONSIDERING that the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone,

REAFFIRMING ADHERENCE Lo the principles of the rights and welfare of the child contained in the declaration, conventions and other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child; and the OAU Heads of State and Government's Declaration on the Rights and Welfare of the African Child.

HAVE AGREED AS FOLLOWS:

PART 1: RIGHTS AND DUTIES

CHAPTER ONE: RIGHTS AND WELFARE OF THE CHILD

Article 1: Obligation of States Parties

1. Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

2. Nothing in this Charter shall affect any provisions that are more conductive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State.

3. Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

Article 2: Definition of a Child For tile purposes of this Charter. a child means every human being below the age of 18 years.

Article 3: Non-Discrimination

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

Article 4: Best Interests of the Child

1.In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

2.In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

Article 5: Survival and Development

1. Every child has an inherent right to life. This right shall be protected by law.

2.States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.

3.Death sentence shall not be pronounced for crimes committed by children.

Article 6: Name and Nationality

1.Every child shall have the right from his birth no a name.

2.Every child shall be registered immediately after birth.

3.Every child has the right to acquire a nationality.

4.States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

Article 7: Freedom of Expression

Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.

Article 8: Freedom of Association

Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law.

Article 9: Freedom of Thought, Conscience and Religion

1.Every child shall have the right to freedom of thought conscience and religion.

2.Parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.

3.States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

Article 10: Protection of Privacy

No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

Article 11: Education

1. Every child shall have the right to an education.

2.The education of the child shall be directed to:

(a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on
human and peoples' rights and international human rights declarations and conventions;

(c) the preservation and strengthening of positive African morals, traditional values and cultures;

(d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups;

(e) the preservation of national independence and territorial integrity;

(f) the promotion and achievements of African Unity and Solidarity;

(g) the development of respect for the environment and natural resources;

(h) the promotion of the child's understanding of primary health care.

3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:

(a) provide free and compulsory basic education;

(b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;

(c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;

(d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;

(e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

4.States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children's schools, other than those established by public authorities, which conform to such minimum standards may be approved by the State, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child.

5.States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.

6. States Parties to the present Charter shall have all appropriate measures to ensure that children who become pregnant before completing their education
shall have an opportunity to continue with their education on the basis of their individual ability.

7.No part of this Article shall be construed as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in paragraph I of this Article and the requirement teal the education given in such institutions shall conform to such minimum standards as may be laid down by the States.

Article 12: Leisure, Recreation and Cultural Activities

1.States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2.States Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and

leisure activity.

Article 13: Handicapped Children

1.Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.

2.States Parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.

3.The States Parties to the present Charter shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to.

Article 14: Health and Health Services

1.Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.

2.States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:

(a) to reduce infant and child morality rate;

(b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
(c) to ensure the provision of adequate nutrition and safe drinking water;

(d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;

(e) to ensure appropriate health care for expectant and nursing mothers;

(f) to develop preventive health care and family life education and provision of service;
(g) to integrate basic health service programmes in national development plans;

(h) to ensure that all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents;

(i) to ensure the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of a basic service programme for children;

(j) to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.

Article 15: Child Labour

1.Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.

2.States Parties to the present Charter take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers both the formal and informal sectors of employment and having regard to the relevant provisions of the International Labour Organization's instruments relating to children, States Parties shall in particular:

(a) provide through legislation, minimum wages for admission to every employment;

(b) provide for appropriate regulation of hours and conditions of employment;

(c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this Article;

(d) promote the dissemination of information on the hazards of child labour to all sectors of the community.

Article 16: Protection Against Child Abuse and Torture

1.States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.

2.Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.

Article 17: Administration of Juvenile Justice

1.Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

2.States Parties to the present Charter shall in particular:

(a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;

(b) ensure that children are separated from adults in their place of detention or imprisonment;

(c) ensure that every child accused in infringing the penal law:

(i) shall be presumed innocent until duly recognized guilty;

(ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;

(iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;

(iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;

(d) prohibit the press and the public from trial.

3.The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.

4.There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

Article 18: Protection of the Family

1.The family shall be the natural unit and basis of society. it shall enjoy the protection and support of the State for its establishment and development.

2.States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the even of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child.

3.No child shall be deprived of maintenance by reference to the parents' marital status.

Article 19: Parent Care and Protection

1.Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.

2.Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.

3.Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.

3.Where a child is apprehended by a State Party, his parents or guardians shall, as soon as possible, be notified of such apprehension by that State Party.

Article 20: Parental Reponsibilities

1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty:

(a) to ensure that the best interests of the child are their basic concern at all times

(b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and

(c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

2. States Parties to the present Charter shall in accordance with their means and national conditions the all appropriate measures;

(a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;

(b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children; and

(c) to ensure that the children of working parents are provided with care services and facilities.

Article 21: Protection against Harmful Social and Cultural Practices

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

(a) those customs and practices prejudicial to the health or life of the child; and

(b) those customs and practices discriminatory to the child on the grounds of sex or other status.

2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

Article 22: Armed Conflicts

1.States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.

2.States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.

3.States Parties to the present Charter shall, in accordance with their

obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

Article 23: Refugee Children

1.States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.

2.States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family.

3.Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.

4.The provisions of this Article apply mutatis mutandis to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

Article 24: Adoption

States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

(a) establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws

and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives
and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling;

(b) recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;

(e) promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs;

(f) establish a machinery to monitor the well-being of the adopted child.

Article 25: Separation from Parents

1.Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance;
States Parties to the present Charter:

(a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care

of children;

(b) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.

3. When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.

Article 26: Protection Against Apartheid and Discrimination

1.States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under Apartheid and in States subject to military destabilization by the Apartheid regime.

2.States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under regimes practising racial, ethnic. religious or other forms of discrimination as well as in States subject to military destabilization.

3.States Parties shall undertake to provide whenever possible, material assistance to such children and to direct their efforts towards the elimination of all forms of discrimination and Apartheid on the African Continent.

Article 27: Sexual Exploitation

1. States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:
(a) the inducement, coercion or encouragement of a child to engage in any sexual activity;

(b) the use of children in prostitution or other sexual practices;

(c) the use of children in pornographic activities, performances and materials.

Article 28: Drug Abuse

States Parties to the present Charter shall take all appropriate measures to protect the child from the use of narcotics and illicit use of psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the production and trafficking of such substances.

Article29: Sale, Trafficking and Abduction

States Parties to the present Charter shall take appropriate measures to prevent:

(a) the abduction, the sale of, or traffick of children for any purpose or in any form, by any person including parents or legal guardians of the child;

(b) the use of children in all forms of begging.

Article 30: Children of Imprisoned Mothers

1. States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:

(a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;

(b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;

(c) establish special alternative institutions for holding such mothers;

(d) ensure that a mother shall not be imprisoned with her child;

(e) ensure that a death sentence shall not be imposed on such mothers;

(f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

Article 31: Responsibility of the Child

Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty;

(a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;

(b) to serve his national community by placing his physical and intellectual abilities at its service;

(c) to preserve and strengthen social and national solidarity;

(d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;

(e) to preserve and strengthen the independence and the integrity of his country;

(f) to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity.

PART 11

CHAPTER TWO: ESTABLISHMENT AND ORGANIZATION OF THE COMMITTEE ON THE RIGHTS AND WELFARE OF THE CHILD

Article 32: The Committee

An African Committee of Experts on the Rights and Welfare of the Child hereinafter called `the Committee' shall be established within the Organization of African Unity to promote and protect the rights and welfare of the child.

Article 33: Composition

1.The Committee shall consist of 11 members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare

of the child.

2.The members of the Committee shall serve in their personal capacity.

3.The Committee shall not include more than one national of the same State.

Article 34: Election

As soon as this Charter shall enter into force the members of the Committee shall be elected by secret ballot by the Assembly of Heads of State and Government from a list of persons nominated by the States Parties to the present Charter.

Article 35: Candidates

Each State Party to the present Charter may nominate not more than two candidates. The candidates must have one of the nationalities of the States Parties to the present Charter. When two candidates are nominated by a State, one of them shall not be a national of that State.

Article 36

1.The Secretary-General of the Organization of African Unity shall invite States Parties to the present Charter to nominate candidates at least six months before the elections.

2.The Secretary-General of the Organization of African Unity shall draw up in alphabetical order, a list of persons nominated and communicate it to the Heads of State and Government at least two months before the elections.

Article 37: Term of Office

1.The members of the Committee shall be elected for a tenn of five years and may not be re-elected, however. the term of four of the members elected at the first election shall expire after two years and the term of six others, after four years.

2.Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to determine the names of those members referred to in sub-

paragraph 1 of this Article.

3.The Secretary-General of the Organization of African Unity shall convene the first meeting of Committee at the Headquarters of the Organization within six months of the election of the members of the Committee, and thereafter the Committee shall be convened by its Chairman whenever necessary, at least once a year.

Article 38: Bureau

1.The Committee shall establish its own Rules of Procedure.

2.The Committee shall elect its officers for a period of two years.

3.Seven Committee members shall form the quorum.

4.In case of an equality of votes, the Chairman shall have a casting vote.

5.The working languages of the Committee shall be the official languages of the OAU.

Article 39: Vacancy

If a member of the Committee vacates his office for any reason other than the nonmal expiration of a term, the State which nominated that member shall appoint another member from among its nationals to serve for the remainder of the term - subject to the approval of the Assembly.

Article 40: Secretariat

The Secretary-General of the Organization of African Unity shall appoint a Secretary for the Committee.

Article 41: Privileges and Immunities

In discharging their duties, members of the Committee shall enjoy the privileges and immunities provided for in the General Convention on the

Privileges and Immunities of the Organization of African Unity.

CHAPTER THREE: MANDATE AND PROCEDURE OF THE COMMITTEE

Article 42: Mandate

The functions of the Committee shall be:

(a) To promote and protect the rights enshrined in this Charter and in particular to:

(i) collect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to Governments;

(ii) formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;

(iii)cooperate with other African, international and regional Institutions and organizations concerned with the promotion and protection of the rights and welfare of the child.

(b) To monitor the implementation and ensure protection of the rights enshrined in this Charter.

(c) To interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity, or any State Party.

(d) Perform such other task as may be entrusted to it by the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU or the United Nations.

Article 43: Reporting Procedure

1. Every State Party to the present Charter shall undertake to submit to the Committee through the Secretary-General of the Organization of African Unity, reports on the measures they have adopted which give effect to the provisions of this Charter and on the progress made in the enjoyment of these rights:

(a) within two years of the entry into force of the Charter for the State Party concerned: and

(b) and thereafter, *every three years.*

2. Every report made under this Article shall:

(a) contain sufficient information on the implementation of the present Charter to provide the Committee with comprehensive understanding of the implementation of the Charter in the relevant country; and

(b) shall indicate factors and difficulties, if any, affecting the fullfilment of the obligations contained in the Charter.

3. A State Party which has submitted a comprehensive first report to the Committee need not, in its subsequent reports submitted in accordance with paragraph I (a) of this Article, repeat the basic information previously provided.

Article 44: Communications

1.The Committee may receive communication, from any person, group or nongovernmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter.

2.Every communication to the Committee shall contain the name and address of the author and shall be treated in confidence.

Article 45: Investigations by the Committee

1.The Committee may, resort to any appropriate method of investigating any matter falling within the ambit of the present Charter, request from

the States Parties any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures the State Party has adopted to implement the Charter.

2.The Committee shall submit to each Ordinary Session of the Assembly of Heads of State and Govenrment every two years, a report on its activities and on any communication made under Article [44] of this Charter.

3.The Committee shall publish its report after it has been considered by the Assembly of Heads of State and Government.

5.States Parties shall make the Committee's reports widely available to the public in their own countries.

CHAPTER FOUR: MISCELLANEOUS PROVISIONS

Article 46: Sources of Inspiration

The Committee shall draw inspiration from International Law on Human Rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organization of African Unity, the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

Article 47: Signature, Ratification or Adherence

1.The present Charter shall be open to signature by all the Member States of the Organization of African Unity.

2.The present Charter shall be subject to ratification or adherence by Member States of the Organization of African Unity. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary-General of the Organization of African Unity.

3.The present Charter shall come into force 30 days after the reception by the Secretary-General of the Organization of African Unity of the instruments

of ratification or adherence of 15 Member States of the Organization of African Unity.

Article 48: Amendment and Revision of the Charter

1.The present Charter may be amended or revised if any State Party makes a written request to that effect to the Secretary-General of the Organization of African Unity, provided that the proposed amendment is not submitted to the Assembly of Heads of State and Government for consideration until all the States Parties have been duly notified of it and the Committee has given its opinion on the amendment.

2.An amendment shall be approved by a simple majority of the States Parties.

Declaration of Principles on Freedom of Expression in Africa

Preamble

Reaffirming the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms;

Reaffirming Article 9 of the African Charter on Human and Peoples' Rights;

Desiring to promote the free flow of information and ideas and greater respect for freedom of expression;
Convinced that respect for freedom of expression, as well as the right of access to information held by public bodies and companies, will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy;

Convinced that laws and customs that repress freedom of expression are a disservice to society;

Recalling that freedom of expression is a fundamental human right guaranteed by the African Charter on Human and Peoples' Rights, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as other international documents and national constitutions;

Considering the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy;

Aware of the particular importance of the broadcast media in Africa, given its capacity to reach a wide audience due to the comparatively low cost of receiving transmissions and its ability to overcome barriers of illiteracy;

Noting that oral traditions, which are rooted in African cultures, lend themselves particularly well to radio broadcasting;

Noting the important contribution that can be made to the realisation of the right to freedom of expression by new information and communication technologies;

Mindful of the evolving human rights and human development environment in Africa, especially in light of the adoption of the *Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, the principles of the Constitutive Act of the African Union*, 2000, as well as the significance of the human rights and good governance provisions in the New Partnership for Africa's Development (NEPAD); and

Recognising the need to ensure the right to freedom of expression in Africa, the African Commission on Human and Peoples' Rights declares that:

I
The Guarantee of Freedom of Expression

1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.

2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

II
Interference with Freedom of Expression

1. No one shall be subject to arbitrary interference with his or her freedom of expression.

2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.

III
Diversity

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include among other things-:

- availability and promotion of a range of information and ideas to the public;
- pluralistic access to the media and other means of communication, including by vulnerable or marginalised groups, such as women, children and refugees, as well as linguistic and cultural groups;

• the promotion and protection of African voices, including through media in local languages;
• and the promotion of the use of local languages in public affairs, including in the courts.

IV
Freedom of Information

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

2. The right to information shall be guaranteed by law in accordance with the following principles:

•everyone has the right to access information held by public bodies;
•everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
•any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
•public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
•no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
•secrecy laws shall be amended as necessary to comply with freedom of information principles.

3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

V
Private Broadcasting

1. States shall encourage a diverse, independent private broadcasting sector. A State monopoly over broadcasting is not compatible with the right to freedom of expression.

2. The broadcast regulatory system shall encourage private and community broadcasting in accordance with the following principles:

•there shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community;
an independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions;

•licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting; and

•community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves.

VI
Public Broadcasting

1. State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:

•public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;

•the editorial independence of public service broadcasters should be guaranteed;

•public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets;

•public broadcasters should strive to ensure that their transmission system covers the whole territory of the country; and

•the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.

VII
Regulatory Bodies for Broadcast and Telecommunications

3. Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.

4. The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall

not be controlled by any particular political party.

5. Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.

VIII
Print Media

1. Any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression.

2. Any print media published by a public authority should be protected adequately against undue political interference.

3. Efforts should be made to increase the scope of circulation of the print media, particularly to rural communities.

4. Media owners and media professionals shall be encouraged to reach agreements to guarantee editorial independence and to prevent commercial considerations from unduly influencing media content.

IX
Complaints

1.A public complaints system for print or broadcasting should be available in accordance with the following principles:

•complaints shall be determined in accordance with established rules and codes of conduct agreed between all stakeholders; and

•the complaints system shall be widely accessible.

2.Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts.

3.Effective self-regulation is the best system for promoting high standards in the media.

X
Promoting Professionalism

1. Media practitioners shall be free to organise themselves into unions and associations.

2. The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.

XI
Attacks on Media Practitioners

1. Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public.

2. States are under an obligation to take effective measures to prevent such attacks and, when they do occur, to investigate them, to punish perpetrators and to ensure that victims have access to effective remedies.

3. In times of conflict, States shall respect the status of media practitioners as non-combatants.

XII
Protecting Reputations

1.States should ensure that their laws relating to defamation conform to the following standards:

•no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;

•public figures shall be required to tolerate a greater degree of criticism; and

•sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.

2.Privacy laws shall not inhibit the dissemination of information of public

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interest.

XIII
Criminal Measures

1. States shall review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society.
2. Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

XIV
Economic Measures

1. States shall promote a general economic environment in which the media can flourish.
2. States shall not use their power over the placement of public advertising as a means to interfere with media content.
3. States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole.

XV
Protection of Sources and other journalistic material

Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

•the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;

•the information or similar information leading to the same result cannot be obtained elsewhere;

•the public interest in disclosure outweighs the harm to freedom of expression; and

•disclosure has been ordered by a court, after a full hearing.

XVI
Implementation

States Parties to the African Charter on Human and Peoples' Rights should make every effort to give practical effect to these principles.

Adopted by The African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002

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Dube also holds certificates in International Law, Socio-Economic Rights, International Arbitration, Biosafety and Biotechnology as well as Environmental Law. He has a keen interest in minority rights, forced evictions, disability rights, biotechnology and the law, as well as customary law and reproductive health rights. He has previously done research on forced evictions, biotechnology and police accountability in Swaziland and with the Commonwealth Human Rights Initiative (Africa Office) in Accra, Ghana. Dube serves on the boards of trustees of the Centre for Minority Rights and Development (Cemiride) Zimbabwe, and the Centre on Human Rights and Development (Swaziland).

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As part of this Casebook II she has related her past work and focused on the right to health based on women's reproductive and health rights.