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TABLE OF CONTENTS

FOREWORD .................................................................................................................................................................................................. v

UNCONSTITUTIONAL REGIME CHANGE: TRENDS PERSPECTIVES AND POLITICAL REQUISITES FOR STRICTER LAW ENFORCEMENT ........................................ 1

1. INTRODUCTION .................................................................................................................................................................................................................................... 1
   1.1 Unconstitutional Change of Government in Africa .......................................................................................................................... 1
   1.2 Problem Statement ............................................................................................................................................................................................ 3

2. FINDINGS .............................................................................................................................................................................................................................................. 4
   2.1 Successful Coup D’états and Counter Coup D’états ................................................................................................................................. 4
   2.2 Causes of Unconstitutional Change of Government In Africa .................................................................................................................. 5

3. STEMMING UNCONSTITUTIONAL CHANGE OF GOVERNMENT IN AFRICA .............................................................................................................. 9
   3.1 African Charter on Democracy, Elections and Governance .................................................................................................................. 9
   3.2 Analytical Dimensions of Coup D’états in Africa ................................................................................................................................. 10

4. A FRAMEWORK FOR IMPLEMENTING THE ACDEG .................................................................................................................................................... 13
   4.1 Political Rules and institutions ................................................................................................................................................................. 13
   4.2 Elections, Election Observation and Monitoring ............................................................................................................................... 14
   4.3 Credible Alternative to Economic Adjustments .................................................................................................................................. 15
   4.4 Certification of Natural Resources: .......................................................................................................................................................... 16

5. CONCLUSION: DEMOCRATIC RULES AND INSTITUTIONS .................................................................................................................................. 16

THE ARAB UPRISINGS: IMPLICATIONS FOR SELF DETERMINATION AND GOOD GOVERNANCE IN THE AFRICAN UNION ........................................... 19

1. INTRODUCTION ................................................................................................................................................................................................. 19

2. PHILOSOPHIC FOUNDATIONS OF A STRUGGLE THEORY OF GOVERNANCE .............................................................................................................. 21
   2.1 Contemporary Exposition .................................................................................................................................................................................. 22

3. THE AMBIT OF SELF-DETERMINATION IN CONTEMPORARY INTERNATIONAL LAW ......................................................................................................... 23
   3.1 Classifications of the Right ........................................................................................................................................................................... 24

4. THE AU’S NON-INTERVENTION STANCE ................................................................................................................................................. 26
5. IMPLICATIONS OF THE ARAB UPRISINGS ON THE AU’S RELEVANCE
   5.1 Article 4(h) of the AU Constitutive Act creates an Intervention Obligation
   5.2 Determining the Authenticity of Mass Uprisings
6. CONCLUSION

CONSTITUTIONAL ENTRENCHMENT AS AN EFFECTIVE AND SUSTAINABLE BASIS FOR ATTACKING AFRICA’S ENDEMIC CORRUPTION
   1. INTRODUCTION
   2. OVERVIEW OF CORRUPTION IN AFRICA AND PAST STRATEGIES
   3. THE RATIONALE FOR A CONSTITUTIONALLY ENTRENCHED ANTI-CORRUPTION FRAMEWORK
   4. THE NATURE AND SCOPE OF CONSTITUTIONALLY ENTRENCHED ANTI-CORRUPTION FRAMEWORK
   5. CONCLUSION

THE PREDICAMENT OF AFRICAN REGIONAL COURTS: LESSONS FROM THE SOUTHERN AFRICA DEVELOPMENT COMMUNITY TRIBUNAL
   1. INTRODUCTION
      1.1 The Tribunal’s Decisions
   2. JURISDICTIONAL ISSUES OF OTHER AFRICAN REGIONAL TRIBUNALS
      2.1 The African Court of Justice and Human Rights
      2.2 The Common Market for Eastern and Southern Africa Court of Justice
      2.3 The East African Court of Justice
   3. OTHER CHALLENGES FACING REGIONAL TRIBUNALS
      3.1 The Legitimacy of the Tribunal
      3.2 Independence of the Tribunal
      3.3 The Ability of the Tribunal to Perform its Task
      3.4 Public Awareness and Perception of How the Tribunal Functions
   4. CONCLUDING REMARKS

DRAFTING A PROTOCOL TO EXTEND THE JURISDICTION OF THE EAST AFRICAN COURT OF JUSTICE
   1. INTRODUCTION
2. JURISDICTION OF THE EAST AFRICAN COURT OF JUSTICE AND ACCESS BY VICTIMS TO THE COURT .......................................................... 68
   2.1 Jurisdiction of the Court ........................................................................ 69
   2.2 The Law Applicable and Access to EACJ .............................................. 70
3. THE EACJ’S JURISDICTION ........................................................................... 75
   3.1 Territorial Jurisdiction .......................................................................... 76
   3.2 Personal Jurisdiction ........................................................................... 78
   3.3 Temporal Jurisdiction .......................................................................... 79
   3.4 Subject-Matter Jurisdiction .................................................................. 80
   3.4 Retroactive or Ex-Post Facto Prosecution ............................................ 82
4. ADOPTION OF A PROTOCOL TO EXTEND EACJ JURISDICTION:
   THE CHALLENGES .................................................................................. 88
5. CONCLUSION .................................................................................................... 95

A CRITICAL ANALYSIS OF ARTICLE 14(1) (E) OF THE AFRICAN WOMEN’S PROTOCOL: DUTY TO DISCLOSE ONE’S HIV STATUS TO A SEXUAL PARTNER 97

   1. INTRODUCTION ....................................................................................... 97
   2. WOMEN’S VULNERABILITY TO HIV AND AIDS ................................. 99
   3. THE RIGHT TO KNOW ............................................................................ 101
      3.1 HIV and AIDS Education and Information ....................................... 101
      3.2 HIV Testing and Counselling (HTC) .................................................. 102
      3.3 The Right to be Informed of the Health Status of One’s Partner ....... 103
   4. CONCLUSION AND RECOMMENDATION ........................................... 107

POLICY BRIEFS ................................................................................................. 109

PALU Policy Brief No. 1: Matrix of Key Implementation Organs, Institutions and Mechanisms under The African Union (AU) System 111

PALU Policy Brief No. 2: Matrix of African Intergovernmental Courts and Tribunals ........................................................... 118

PALU Policy Brief No. 3: Tabulation of Cases Filed or Concluded before the African Court on Human and Peoples’ Rights (AfCHPR) from Inception till 31st August 2012 131

PALU Policy Brief No. 4: Tabulation of Cases Filed or Concluded before the East African Court of Justice (EACJ) from Inception till 31st August 2012 138
As an umbrella association of African lawyers and law societies that brings together the continent’s five regional and fifty-four national lawyers’ associations, as well as individual lawyer-members, the Pan-African Lawyers Union (PALU) has a unique position that enables it to garner the wealth of knowledge from across the continent. Acting as a focal point it works towards the development of the law and legal profession, the rule of law, human rights and socio-economic development of the African continent, including through supporting African regional integration. It has members who are experts in a myriad of legal areas.

With this unique position in mind, the PALU Executive Committee and senior management resolved to tap into this bank of knowledge and produce a periodical on various legal issues pertaining to Africa. The call for papers sent out in June 2012 was received with enthusiasm and the task of filtering articles to just six was daunting. PALU’s editorial team managed and I hereby present the very first edition of the Pan African Yearbook of Law (PAYL). It contains articles analysing legal issues arising in the recent Arab uprisings, the African Women’s Protocol, unconstitutional changes in government, corruption in Africa, the East African Court of Justice and the Southern African Development Community’s Tribunal.

Production of this first edition of the Yearbook is part of the organisation’s mission to be at the vanguard of the development of law on the continent. This is the first of many, and in 2013 the first volume of the PAYL will be available, contributing to the dissemination of a variety of African legal issues to engage African lawyers, academics and the general public.

I would like to express our appreciation for the funding received from the Swedish International Development Cooperation Agency (SIDA) for the production of this Yearbook, the Executive Committee, the editorial team and all staff at PALU for their hard work and dedication.

An Editorial team reviewed the first edition of PAYL. However PALU maintains that the ideas, analyses and recommendations belong to the respective authors.

Donald Deya
Chief Executive Officer, Pan African Lawyers Union
UNCONSTITUTIONAL REGIME CHANGE:
TREND PERSPECTIVES AND POLITICAL REQUISITES FOR STRicter LAW ENFORCEMENT

Bt Costantinos*

ABSTRACT

While more than a hundred coup d’états and counter-coups have been recorded in Africa because of various economic, political and social motives; the Afro-Arab Spring initiated a new trend in which people rise against their governments culminating in the forced removals of regimes. Economic adjustments, corruption and rising ethnic tensions that interact causally coincided with such unconstitutional power grab. A core contention is that political tensions are rising as a general resistance to pauperization by increasingly coercive states negligent of their basic welfare responsibilities. Using case studies, the research delves into the political transition processes that have haunted the continent and presents the analytical limitations in current perspectives of the transition to sustainable democracy, with the distinction between concepts and processes of political openness and political participation. It analyses the objective of the African Charter on Democracy, Elections and Governance (ACDEG) that seeks to promote adherence to the universal values and principles of democracy, respect for human rights, the rule of law premised upon the respect for and the supremacy of the Constitution and prohibits unconstitutional regime change. Hence, the nuclear thesis of the paper asks: Is the endowment of institutions in civil society and state conducive to democratic transition in Africa as a requisite foundation for implementation of the ACDEG?

1. INTRODUCTION

1.1 Unconstitutional Change of Government in Africa

On March 21 2012, young military officers in Mali protesting the government’s handling of a Tuareg-led rebellion staged a coup against President Amadou Toumani Touré. Human Rights Watch (HRW) stated:

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“After taking over the state television and radio station, a spokesperson for the officers announced the suspension of the constitution and “all institutions”, as well as the closure of all borders and the main airport in the capital, Bamako, and imposed a nationwide curfew. The coup leaders of the self-proclaimed National Committee for the Re-establishment of Democracy and the Restoration of the State said they had overthrown the government because of the inadequate support for the army in its military operations against the rebellion by the separatist Tuareg National Movement for the Liberation of Azawad (MNLA), which seeks autonomy for the north.”

Many African countries have experienced multiple coups and counter coups for various economic, political and social reasons over the last four decades. Looting of minerals, flora and fauna resources is also a source of grave concern for Africa and is, at times the cause of such coups and counter coups. Economic adjustment and rising ethnic tensions characterised much of Africa in the 1980s. Africa’s growing debt burdens have generated authoritarian responses to popular anger. The linkage to and rising ethnic tensions is manifested in the distribution of power, wealth and ethnicity, especially under conditions of increasing scarcity, needs to be reconsidered. A core contention is that political tensions are arising as part of the general resistance against their pauperizing impact, and against the state, which is seen as increasingly coercive and as negligent of its basic welfare responsibilities towards its citizens.

During the political transition in the 1990s, some countries though small in number, notably Zambia and Mozambique, had already made a successful transition from military-affiliated and backed single party dictatorships to pluriform institutions and practices. Ruling parties had used the moment of elections to rally the populace behind votes designed to intimidate the populace and being presented with a one party choice. Some had of course slipped into political oblivion by the restitution of military rule. Hence, the objective of the study is to analyse the nature of unconstitutional power grab in Africa, the economic, social and political trajectories that present the objective conditions and the requisite basis for its implementation. The nuclear thesis of the paper bases its question on: is the endowment of institutions in civil society and state conducive to democratic transition?


Quantitative and qualitative methods and literature review by the researcher, Costantinos, have identified policy issues and areas for particular field investigation and an overview of the challenges to determine the big picture of what is know and what is not know in relation to the research subject. Key informant interviews were accompanied by a literature review of major questions: What is the history of unconstitutional change of government in Africa? What are the economic, social and political trajectories that present the objective conditions for unconstitutional change of government? What are requisite foundations for implementation of the ACDEG?

The paper presents the analytical crises in explaining political transitions in Africa, establishes cases of coups and concludes by providing alternative ways of weighing up the transition process to a stable and sustainable democracy. They are by no means exhaustive and complete, but an attempt at fuelling the debate with issues that may reflect the root causes of the zero-sum political game. Profound commitment is needed to promote regional policies and strategies for democratic rules and institutions that ensure peaceful political participation and competition, in addition to guaranteeing livelihoods security for citizens; freedom from fear and freedom from want to every individual, family and community. Section one presents the introduction, statement of the problem, research questions, section two dwells on the findings, in section three, four and five present the mechanism for stemming unconstitutional change of government in Africa, a framework for implementing the ACDEG and conclusions on role of democratic rules and institutions.

1.2 Problem Statement

Seen from the outside, Africa is often characterized as a continent of civil conflict, of refugee and displaced populations, of economic crisis; and yes, some of the bloodiest conflicts since the end of World War II have been among Africans. Millions of refugees and internally displaced persons (IDP), proportionately the largest number in developing countries, are in Sub-Saharan Africa. The forces of lawlessness, mercenaries, petty arms traders, narcotic traffickers and smugglers have descended on African countries in conflict, fanning the flames of war, and profiteering from the destruction of the lives many. It is questionable whether the state-sponsored plunder of colonialism has not been replaced by private profiteering: the privatization of plunder and exploitation!

On the other side, within two millennia, the African state has exhibited an enhanced degree of coercive power, resulting in a pervasive military ethos leading to the emergence of self-labelled “socialist” military oligarchies through a long and

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4 Ibid.
5 Ibid.
painful process of ideological schooling. A major obstacle to efforts to install and consolidate democratic system in Africa is the all powerful, highly centralised and hierarchical bureaucratic structure; further exacerbated by economic adjustment programme and coups and counter coups, which antedated the democratisation process for almost a decade. The organisational imperative of the massive bureaucratic machine is to command and control, and is preoccupied with its own survival and enrichment. It is unlikely that the powerful bureaucracy will abandon its control of the state apparatus to elected leaders or respect the institutional restraints of democratic rule without struggle.6

The lack of political culture also imposes serious threats to democratic development in the continent. Practices such as free elections, the formatting of political parties, free and open discourse on public issues are all foreign concepts that need to be installed in the minds of the majority of the populace. While a host of other African countries set themselves to attain the institutions and practices that have been the basic ingredients of the Western liberal democratic model; ethnicity and the right to self-determination have come to be espoused as principal sources of political partisanship often leading to deadly internal strife. But how much of this has deep historical roots in Africa; or is it an elite ideology? Hence, the knowledge gap this paper is trying to address is focussed on how the African Charter on Democracy, Elections and Governance (ACDEG) can be implemented in light of the problems that haunt the continent: poverty, corruption and economic adjustments.

2. FINDINGS

2.1 Successful Coup D’états and Counter Coup D’états

As stated earlier the following counties have all experienced coups and counter coups: Algeria, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Congo, Democratic Republic of the Congo, Cote d’Ivoire, Egypt, Equatorial Guinea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Lesotho, Liberia, Libya, Madagascar, Mali, Mauritania, Niger, Nigeria, Rwanda, São Tomé and Príncipe, Seychelles, Sierra Leone, Somalia, Sudan, Togo, Tunisia, Uganda and Zanzibar. Structural Adjustment Programmes (SAPs) and rising ethnic tensions characterised the eighties in much of Africa. These tendencies interact causally. Africa’s growing debt burden and the nature of the SAPs have generated authoritarian responses to popular anger. The linkage between SAPs and rising ethnic tensions is manifested in the distribution of power, wealth and ethnicity, especially under conditions of increasing scarcity, needs to be reconsidered. There are a number of reasons why ethnic and regional tensions are exacerbated by debts, economic crisis and SAPs; a core contention is that political tensions are

6 Ibid.
arising as part of the general resistance against SAPs, because of its pauperizing impact, and against the state, which is seen as increasingly coercive and as negligent of its basic welfare responsibilities towards its citizens.

2.2 Causes of Unconstitutional Change of Government In Africa

Many of these coups and counter coups were predicated on disillusionment by the newly independent state governments for having failed to fulfil the promises of freedom from colonialism, SAPs promoted by the IMF and World Bank and sheer power grab by the armed forces to loot national wealth.

2.2.1 Algeria

In 1962, after its vote for self-determination, Algerians declared independence and the French acknowledged its independence. Boumédienné, the then defence minister grew increasingly distrustful of President Ben Bella’s erratic style of government and ideological Puritanism and in June 1965, Boumédienné seized power in a bloodless coup. The country’s constitution and political institutions were abolished. After a botched coup against him by military officers in 1967 he tightened his rule. He then remained Algeria’s undisputed ruler until his death in 1978, as all potential rivals within the regime were gradually purged or relegated to symbolic posts, including several of his former allies from the Oujda era (named after the city in Algeria where Boumédienné was based during the resistance against the French). No significant internal challenges emerged from inside the regime after the 1967 coup attempt.

Economically, Boumédienné turned away from Ben Bella’s focus on rural Algeria and experiments in socialist cooperative businesses. Instead, he opted for a more systematic state-driven industrialization. Algeria had virtually no advanced production at the time, but in 1971 Boumédienné nationalized the Algerian oil industry, increasing government revenue tremendously and sparking intense protest from the French government. He then put the soaring oil and gas resources, enhanced by the oil price shock of 1973, into building heavy industry hoping to make his country the Maghreb’s industrial centre. His years in power were in fact marked by a reliable and consistent economic growth, but the drop in oil prices and increasingly evident inefficiency of the country’s state run industries prompted a change in policy towards gradual economic liberalization. In the 1970s, along with the expansion of state industry and oil nationalization, Boumédienné declared a series of socialist revolutions and strengthened the leftist aspect of his regime. At the time of his death, the political and constitutional order in Algeria was virtually entirely of Boumediene’s own design. This structure remained largely unchanged until the late 1980s when political pluralism was introduced.
2.2.2 Democratic Republic of Congo (Zaire)

Following the granting of independence on 30 June 1960, a coalition government was formed led by Prime Minister Lumumba and President Joseph Kasa-Vubu. The new nation quickly lurched into the Congo Crisis as the army mutinied against the remaining Belgian officers. Lumumba appointed Mobutu as Chief of Staff of the Armee Nationale Congolaise, and in that capacity, Mobutu toured the country convincing soldiers to return to their barracks. Encouraged by a Belgian government intent on maintaining its access to rich Congolese mines, secessionist violence erupted in the South. Concerned that the United Nations force sent to help restore order was not helping to crush the secessionists, Lumumba turned to the Soviet Union for assistance, receiving massive military aid and about a thousand Soviet technical advisers in six weeks. The US government saw the Soviet activity as a manoeuvre to spread communist influence in Central Africa. Kasa-Vubu, riled by the Soviet arrival, dismissed Lumumba. An outraged Lumumba declared Kasa-Vubu deposed. Both Lumumba and Kasa-Vubu then ordered Mobutu to arrest the other. On 14 September 1960 Mobutu took control in a CIA-sponsored coup, placing Lumumba under house arrest for the second time and kept Kasa-Vubu as president.

When Mobutu’s government issued an order in November 1996 forcing Tutsis to leave Zaire on penalty of death, the ethnic Tutsis in Zaire, known as Banyamulenge, were the focal point of a rebellion. From Eastern Zaire, the rebels together with Uganda and Rwanda launched an offensive to overthrow Mobutu, joining forces with locals opposed to him as they marched West toward Kinshasa. On May 16 1997, following failed peace talks, the Tutsi rebels and other anti-Mobutu groups as the Alliance des Forces Democratiques pour la Liberation du Congo-Zaire (AFDL) captured Kinshasa. Zaire was renamed the Democratic Republic of the Congo. According to Transparency International (TI), Mobutu embezzled billions from his country, ranking him as the third-most corrupt leader.

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8 On 25 November 1965, General Mobutu seized power for the second time in a bloodless coup, following another power struggle between Kasa-Vubu and Prime Minister Moise Tshombe. Under the auspices of a *regime d’exception*, Mobutu assumed sweeping, almost absolute, powers. Initially, Mobutu’s government was decidedly apolitical, even anti-political. Ironically, given the role he played in Lumumba’s ousting, Mobutu strove to present himself as a successor to Lumumba’s legacy. A key tenet was *authentic Congolese nationalism*.

In the past, a lack of political will and weak governance has tended to contribute to the burgeoning illegal exploitation of natural resources in the Great Lakes region. Historically, the illegal exploitation of natural resources has played a key role in triggering and financing conflict in many parts of the Great Lakes Region. This is therefore an important problem that needs to be confronted as a matter of urgency. In recent years, the region has witnessed orchestrated cross-border pillaging of natural resources, ranging from gold, diamonds, and other gemstones, Colombo–tantalite, or “Coltan” (timber – especially so-called “precious woods”), cultivated crops (coffee and tea), livestock and indigenous flora and fauna (including frogs, butterflies, green parrots, medicinal plants and unique genetic material). Experience has shown that all natural resources can in some way or other contribute to the perpetuation of conflict.\(^\text{10}\)

2.2.3 Ethiopia

In a gradual coup that began in February 1974, and culminated in September of that same year with the ouster of Emperor Haile Sellassie, a group of military officers seized control of the government.\(^\text{11}\) Haile Selasse’s failure to deal adequately with the long-term drought in 1973–1974 was reportedly a major reason for his downfall. The constitution was suspended, parliament was dissolved and Lt. Gen. Aman Michael Andom became head of a newly formed Provisional Military Administrative Council (PMAC). In 1977 Lt. Col. Mengistu Haile Mariam became head of the PMAC, which soon diverted from its announced socialist course. Under the Mengistu regime, thousands of political opponents were purged, property was confiscated and defence spending was greatly increased. The Tigryan Peoples’ Liberation Front (TPLF) began a campaign of urban guerrilla activity that was contained by government-organized urban militias in 1977. In 1991 the Ethiopian People’s Revolutionary Democratic Front (EPRDF) made up of the TPLF, the Amhara National Democratic Movement (ANDM) and the Oromo People’s Democratic Organisation (OPDO), began to achieve real successes and ultimately routed the Ethiopian army, forcing Mengistu to resign and flee the country. It organized an interim government and a new constitution that divided the country into ethnically based regions, each of which was given the right of secession, was approved in 1994.

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10 BT. Costantinos, Stemming State Fragility, failure and Collapse (2010, Createspace) 457-512.
11 Untarnished by colonisation, the historic Ethiopian state existed long before the emergence of Western nations and civilisations, although the degree of social tissue and shared cultural values, which bind the community together outside the realm of ethnic and religious loyalties, were not strong enough to tie the people under one national symbol. Aside from the gastronomic mix, marriage and mourning ceremonies and some attitudinal and behavioural similarities and the religions that permeate our art, literature and customs, there are few commonalties in languages, culture, economics or social organisation.
2.2.4 Egypt

Egypt’s 1952 military coup and revolution led by Gamal Abdel-Nasser and the Free Officers ousted Egypt’s decadent monarch, King Faruq, and put Muhammad Naguib as President of the new Republic. Interpretations of Nasserism have centred on the state apparatus, characterized by an ideology and practice of social-welfare, premised upon the state apparatus as arbiter not only of economic development, but also of social welfare. The demise of Nasserism was predicated on a complex product of class contradictions and the 1967 war with Israel. Anwar Sadat’s liberalization policies of *Infitah* were inaugurated in 1974, based on rapprochement, a free-market economy and a strengthening of the private sector.

The spontaneous eruption of protests on 25 January 2011 may seem to lack ideological or political cohesion, but can be viewed instead as the product of an unprecedented historical assemblage of complex forces, a wide range of groups with differing ideological orientations and contradictions; but nonetheless, reasoned and expressive in their quest for an end to the *ancien régime*. These have included strong elements of youth members of civil society who wanted an end to Mubarak, his emergency laws and a demand for a civil government and trials for those involved in the massacres of the protesters. The voices of *Tahrir* indeed are *a people’s revolution*, with unpredictable end where military might be able to prevail.

2.2.5 Nigeria

The economic policy orientation during the 1970s left the country ill prepared for the eventual collapse of oil prices in the first half of the 1980s. To reverse the worsening economic fortunes in terms of declining growth, increasing unemployment, galloping inflation, high incidence of poverty, worsening balance of payment conditions, debilitating debt burden and increasing unsustainable fiscal deficits, among others, government embarked on austerity measures in 1982. Arising from the minimal impacts of these measures, an extensive structural adjustment programme (SAPs) was put in place in 1986 with emphasis on expenditure reducing and switching policies as well as using the private sector as the engine of growth of

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12 Nasserism represented the formation of a state capitalist class, the liquidation of its main ideological rivals, and the suppression of popular mobilization from below even as it was coupled with a powerful social welfare ideology and a charismatic anti-imperialist rhetoric. Such a model was premised on an ethical covenant between the people and the state, a social contract in which the possibility of revolutionary political change was exchanged for piecemeal social reform and a view of “the people” (*al-sha’ab*) as the generative motor of history and as resources of national wealth and an interventionist policy of social planning and engineering.

13 Policy of “opening the door” to private investment in Egypt accompanied by a peace process with Israel.

the economy. As the benefits could not trickle down to the poor, resistance came up from civil society, leading to a military coup on 31 December 1983.

The regime under Buhari sought to reinforce the 1982 austerity measures by further tightening financial policies and administrative controls. Irregularities associated with the counter-trade deals were cited as one of the reasons for the 27 August 1985 military putsch. Crippling import shortages and growing social and political discontent set the stage for another military coup, under Babangida, who assumed power in August 1985. It became clear to policymakers that short-run stabilization measures and increased regulation were not appropriate responses to deep-seated problems, but then an important question that needed to have been addressed was the desired type of adjustment.

3. STEMMING UNCONSTITUTIONAL CHANGE OF GOVERNMENT IN AFRICA

3.1 African Charter on Democracy, Elections and Governance Charter

The preamble of the ACDEG states that the Charter is inspired by the principles enshrined in the Constitutive Act of the African Union, which emphasises the significance of:

“Good governance, popular participation, rule of law and human rights. It further goes on to reaffirm the collective will to work relentlessly to deepen and consolidate the rule of law, peace, security and development in our countries; guided by a common mission to strengthen and consolidate institutions for good governance and committed to promote the universal values and principles of democracy, good governance, human rights and the right to development.”


16 Based on the realization of the relevance of the tenets of SAP to economic reality, present civilian regimes embarked on the reform of the economy with a view to enhancing efficiency and higher productivity growth and transparent and accountable governance that still meet with opposition, posing the question, are there lessons to learn from the past efforts? The apathy the regime is facing on its economic reform programmes still bother on the alienation of the cross-section of the society and the inability to learn from the what, how and why of the past efforts. This, therefore, calls an in-depth analysis of the past reform programmes with a view to drawing lessons for future reforms. Indeed, there is need to understand not only why the former reforms failed in the case of Nigeria despite the government advocacy to elicit stakeholders’ interest and support with a view to sustaining the initial positive impact of the reform on the economy but also the why and how of the past reforms. No efforts have been made to examine in detail, why majority of the stakeholders in the country resisted the past reform efforts and how inclusive socio-economic programmes can be put in place.

17 AU Constitutive Act, Articles 3 and 4.
Cognizant of the historical and cultural conditions in Africa; it seeks to entrench a political culture of change of power based on the holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies. Concerned about the unconstitutional changes of governments that are one of the essential causes of insecurity, instability and violent conflict in Africa; it is determined to promote and strengthen good governance through the institutionalization of transparency, accountability and participatory democracy. Convinced of the need to enhance the election observation missions in the role they play, particularly as they are an important contributory factor to ensuring the regularity, transparency and credibility of elections, it is desirous to enhance the relevant Declarations and Decisions of the OAU/AU. The objectives of the Charter are:

“To promote adherence, by each State Party, to the universal values and principles of democracy, respect for human rights, and the rule of law premised upon the respect for, and the supremacy of, the Constitution and holding of regular free and fair elections and institutionalize legitimate authority of representative governments. Further, it is to prohibit, reject and condemn unconstitutional change of government in any Member State as a serious threat to stability, peace, security and development and promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in public affairs.”

3.2 Analytical Dimensions of Coup D’états in Africa

Current discussions and analyses of ACDEG generally are marked by several limitations. The first set of limitations relate to a tendency to narrow democratic thought and practice to the terms and categories of immediate, not very well considered, political and social action, a naive realism, as it were. Second, the limitations arise from inattention to problems of articulation or production of democratic systems and process within African politics rather than simply as formal or abstract possibilities. Third, we have the ambiguity as to whether civil society is the agent or object of democratic change. Fourth, it is a nearly exclusive concern in certain institutional perspectives on ACDEG, with generic attributes and characteristics of political organisations and consequent neglect of analysis in terms of specific strategies and performances of organisations in regime change. Finally, it is the inadequate treatment of the role of international agencies and the relations between global and indigenous dimensions of ACDEG.19

3.2.1 Inattention to Problems of Articulation of the ACDEG

When it is not dissolved into the immediate reality of political, often partisan or ethnocentric activity, ACDEG is likely to be represented as pure principle that needs only proper application. Practitioners and analysts of democratisation in the continent tend to pass over quickly the particular nature of ACDEG in fragmentary presence, adjusting it against an ideal-general conception of what it might be. On the implicit, theoretically complacent assumption that formalistic, rhetorical modes of circulation of ACDEG ideas and values in Africa nearly exhaust their articulation there, one often rushes to matters of implementation. Consequently, critical problems concerning the philosophical and practical entrenchment of the ACDEG system and process in Africa receive scant attention.

The fundamental issues of how the concepts, standards and practices of democratic rule could be generated and sustained under historically hectic conditions, and the manner in which they are likely to gain systemic integrity and autonomy as well as broad social currency are inadequately addressed. This relative inattention leads analysts and practitioners to make internal observations and assessments in terms of the democratic or undemocratic performances of African polities without raising the question of setting up or securing the polities as democratic systems in the first place. Democracy must actually exist, take definite shape and structure and become a working process, before particular criticisms, claims and demands can be based on it.\(^\text{20}\)

3.2.2 Civil Society: Agent or Object of the ACDEG

In the current drive for the ACDEG, civil society and institutions within it are foregrounded as the arena, agents and instruments of the movement. Internal and external demands for good governance and democratisation in Africa and the need to reform the indigenous state into a system of transparent practices have placed a heavy emphasis on social institutions as autonomous actors within democratic projects. While the co-operation of governments or would-be governments must be secured for transitions to democracy, it cannot be expected that pressure for regime transformation will come from above. The most effective initiative will come from below, outside the decrepit, authoritarian state, in civil society.\(^\text{21}\) Society yields the spontaneous interests, demands and institutional mechanisms of democratic transition. From this perspective, the state has only a limited role to play: to create the enabling conditions for their free play. Nevertheless, the overall weakness of civil societies is often cited as a fundamental structural constraint on democratic transformation. Rather than offering agents and arena of transitions to democracy, civil societies are generally seen as objects and problems of reform.


\(^{21}\) Ibid.
On account of this view, the state assumes a large role in the ACDEG. It is assigned the task of nothing less than cultivating civil society itself through political education and mobilization. Government is not pushed to the background as society activates itself and leads the struggle for reform. Rather, the former acts on the latter, promotes and manages the participation of individuals and groups in the ACDEG. We have then two divergent representations of civil society accompanied by somewhat conflicting conceptions of the role of the state in the African passage to the ACDEG. The perception of society as producer of the spontaneous interests, demands and institutional resources of the change inherent in the ACDEG, to some degree, conflicts with the view of weak civil societies in need of cultivation by the state. The conception of the state as an enabler of free democratic activities of individuals and groups also diverges from the view of it as political educator, mobiliser and democratiser of society.\textsuperscript{22}

3.2.3 Inadequate Analysis of the Role of ‘Internationals’ in the ACDEG

Intervention by transnationals and multinationals disrupt the ACDEG to the extent that it is perceived as partisan. International intervention contributes most to democratic struggle when it provides neutral arbitration services like support for election administration and election observing. In recent years, multinational, multilateral, bilateral and non-governmental external agencies have taken a large number of initiatives aimed directly or indirectly at helping Africa democratise its way out of economic chaos and political instability. In doing so, they rely on a wide variety of programmes, institutional mechanisms and policies. Indeed, growing external involvement in African projects of democratisation and economic recovery has resulted in increasingly challenging problems of conceptualising and understanding the role and function of international agencies. Many groups argue that SAPs impose harsh economic measures, which deepen poverty, undermine food security and self-reliance and lead to unsustainable resource exploitation, environmental destruction, and population dislocation. They increased the gap between rich and poor in both local and global terms.

Despite claims to the contrary, World Bank-imposed SAPs have paid little or no attention to their environmental impact. SAPs call for increased exports to generate foreign exchange to service debt. The most important exports of developing countries include timber, oil and natural gas, minerals, cash crops, and fisheries exports. The acceleration of resource extraction and commodity production that results as countries increase exports is not ecologically sustainable. Deforestation, land degradation, desertification, soil erosion and salinization, biodiversity loss, increased production of greenhouse gases, and air and water pollution are but among the long-term environmental impacts that can be traced to the imposition of SAPs. Women are bearing a disproportionate

\textsuperscript{22} Ibid.
The policies of adjustment reinforce authoritarian and repressive tendencies in the state’s mode of dealing with organized interests in society. Not only from economic and social rights but also from political and civil rights. In the case of Nigeria and Guinea, popular opposition to economic and social difficulties imposed by adjustment reforms reinforced the already evident authoritarian tendencies of the ruling military regimes. In Nigeria, where the Babangida regime had pledged itself to promoting human rights, adjustment created a crisis of legitimacy to which the regime responded with repression, abandoning its declared position on human rights. In Ghana, the acclaimed success of structural adjustment did not preclude resorting to repression and authoritarian rule. The success of adjustment empowered the state but not civil society. This approach falls dismally short of addressing the human rights issues associated with the authoritarian character of SAP implementation in Africa.23

4. A FRAMEWORK FOR IMPLEMENTING THE ACDEG

4.1 Political Rules and institutions24

Democratic transitions can be explained with reference to two institutional factors: political organisations and political rules. Democratisation requires a plural set of political organisations, which promote and protect rules of peaceful political participation and competition. Together, democratic institutions (plural organisations plus rules of accountability) ensure control of the state executive. In taking an institutional perspective, we assume that actors in the political system express preferences through organisations and that these organisations vary in strength according to their resource base. The relevant organisations are found both in society, where they represent and aggregate individual interests, and in the state, where they check and balance executive authority.

Different kinds of organisations play a leading role during different phases of transition. Popular protest against a regime may be initially driven by a few resentful agent provocateurs or the independent Press as a critical element. As political momentum accumulates, the organisational strength of the opposition

24 Article 14, ACDEG.
becomes a more critical variable; mass membership organisations like unions and faith groups step in to sustain and direct protest. Concurrently, the organisational cohesion of the state becomes important; the state may begin to fragment, as elite factions use the legislature, bureaucracy and judiciary to assert autonomy from the chief executive. If and when elections are convened, political parties and the electoral agency, each with their own strengths and weaknesses, become the leading institutions. We hypothesise that the absence or weakness of certain kinds of organisations explains why transitions stall at certain key junctures.

Democracy can be attained only if legal texts are applied to ensure full accountability, transparency and predictability of executive authority. Invariably, this means that we need to build the capacity for political culture development even before we go to the polls for elections that may be harbingers of more violent protests. Democratisation is a process of institutional learning, in which state and societal organisations develop a new and stable set of mechanisms to manage conflict peacefully. Historically, it is clear that few authoritarian regimes successfully achieve a transition to full democratic rule on their first attempt. In a majority of cases, several unsuccessful attempts have been necessary before a transition was actually consolidated and sustained for the long term. Indeed one can ask how one would recognise that democratisation had occurred. Essentially, democratic norms and procedures would have to become fully assimilated by a majority of the players within the political system. There must be consensus on the rules of the game, whether these rule are embodied in legal texts, or in less formal but no less real customs of politics as it is practised. As scholars have noted, democratic rule institutionalises uncertainty. It can succeed if and when all the political actors accept such uncertainty as preferable to the rigidities of dictatorship.

4.2 Elections, Election Observation and Monitoring

State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union’s Declaration on the Principles Governing Democratic Elections in Africa.25

Election observation and monitoring are indeed legitimate instruments to ensure peaceful political participation and contestation. They must be encouraged at all costs. While it is not difficult to critique African ruling regimes these days, many are beleaguered why the international community are so intent in launching nations into chaos in the aftermath of elections. Motives aside, election observers can wreck havoc by leaking information to the media and resorting

25 ACDEG, Article 17.
to a strikingly crude modus operandi, with varying impacts that might hand nations over to junta rule or religious fundamentalists on a silver platter? True, elections hold great promises but cannot be expected to be absolutely problem free, notwithstanding the boorish behaviour of political parties. Nevertheless, claims and counter claims abound on the far-reaching damage caused by observers. In good age-old international relations, how diplomats from observer nations (who also couple as donors), manage to handle such sad interlude is bound to reverberate throughout Africa, because, observers could actually be a contributing force for sanity.

Lodged in a highly turbulent region, the legitimacy of the elections and democratic process underway in Africa will depend in important ways on it being perceived as reasonably honest, transparent and accountable in the execution of political responsibility. It is apparent that as the continent enters this new era of political pluralism, there is a need to overhaul the political machinery and develop institutional alternatives to the ethnicised party structures.

4.3 Credible Alternative to Economic Adjustments

A variety of options are available that address both the adjustment models are based and the excessively harsh method are they were imposed upon African states. In 1989, The UNECA provided a comprehensive and credible alternative: The African Alternative Framework called for “adjustment with transformation” which called for a reduction in the continent’s reliance on external trade and financing, the promotion of food self-sufficiency and greater popular participation in economic planning and decision-making. African states must promote diversification in export products, increase processing capacity and provide protection to infant industries, promote greater inter-regional trade, facilitating the diversification away from traditional commodities, and determining and promoting investment priorities. African states must underpin institutional reforms to increase democratic practice and accountability with an emphasis on non-price structural reforms such as land reform and economic policies and planning which include a human security of the various options that include sustainable natural resource use benefiting local communities. African states must take financial reform measures to reduce the debt problems of poorer countries, regulated capital markets and address unfair trading practises.

Any serious attempt at promoting an agenda of good governance and popular participation in government must start with a more coherent human rights agenda. To begin with, the focus of adjustment reforms must shift from state macroeconomics to the primary social well-being of the individual.26

4.4 Certification of Natural Resources:

Profound commitment is needed to promote regional policies and strategies for the diversification and enhancement of sources of income, competitiveness of productive sectors, rational management of land resources, sustained and sound management of vital regional natural and environmental resources such as aquatic ecosystems, mineral deposits and forests of the Congo Basin, as well as sustainable human settlements. These commitments need reflect the political determination the strategic vision necessary for the articulation of a project aimed at the realization of the objective of the establishment of an effective regional mechanism for the certification of natural resources. In order to be successful, any attempt to develop a certification scheme must take cognizance of emerging global trends in the conservation, development and management of such resources. These include a carefully managed devolution of administrative responsibilities, the critical need to ensure that all stakeholders recognise and understand the role that certification schemes could play in protecting their resources and contributing towards their development and quality of life and the fact that no certification scheme can realistically hope to be effective unless the private sector.

5. CONCLUSION: DEMOCRATIC RULES AND INSTITUTIONS

The democratic development process prescribed in the ACDEG is a system of rule making in which citizens obtain opportunities for political contestation and political participation. Political contestation refers to open rivalry and competition among diverse political interests. Political participation refers to the entitlement of citizens, considered as political equals, to be involved in choosing governmental leaders and policies. Democracy is a regime in which authority to exercise power derives from the will of the people.

Insofar as current perspectives on political reform in Africa neglect to pose the problem of articulation of democracy as a relatively autonomous mode of analysis, it should consist of a set of activities in which universal concepts and standards of governance are neatly applied to, as distinct from produced or re-produced in African contexts and conditions. Even at the level of application alone, it is largely overlooked that international models may enter politics and societies in Africa through a proliferation of programmes and mechanisms that hinder the growth of open and effective transition process; thus retarding the development of indigenous democratic-system experience and capacity. Whether democracy in Africa is defined in terms of individual freedom or collective rights, government policy or citizen action, private value or public norm, the upshot of the relative inattention to problems of articulation of open democratic systems and processes in itself makes democracy at once the most concrete of idea systems.
Within current projects of political reform, democracy is either conventionalised or sterilized on terrain of theory and often vacuously formalized on the ground of practice. It enters African politics and society in relatively abstract and plain form, yet is expected to land itself to immediate and vital African polity’s socio-political experience. It suggests itself, seems within reach only to elude, and appears readily practicable only to resist realization. Hence, the growth of foreign interventions seems in marked contrast to the limited thought and effort exerted by democratisers of African polity to put the interventions in coherent theoretical or strategic perspective. The following questions could be posed in this regard: What is the overall rationality or significance of the great traffic of international programmes and projects of democratisation and development in Africa, the proliferating activities that seem to show little regard for economy of coordination. How far and in what ways do various international agencies, programmes, mechanisms, forms of knowledge and technical assistance feed on one another in helping set the boundaries of democratic reform in Africa?

The important issues that these questions suggest are not sufficiently addressed, or even raised, in much of the current discussion of political transitions. Insofar as the activities of external agencies in Africa are not understood and engaged in, their democratic (and developmental) impact may diminish with their proliferation. This can mean little more than a weakly coordinated multiplication of programmes and projects which have immediately recognizable or measurable effects in limited areas, but which seem to suspend rather than serve the ultimate goals of democratisation of African political systems. In order to determine whether a democratic transition had occurred, we need to document whether effective political practices have been broadened to allow more participation, competition, accountability, transparency and predictability. Often this will involve the imposition of formal rules in a situation where personal discretion has been the order of the day. A transition to democratic governance in part involves the acceptance by all participants to subordinate their political behaviour to an agreed upon set of written rules.

In the above review, the attempt has been to identify some of the impediment for the consolidation and preservation of democracy. The reality of initiating such a process in a continent with a limited democratic experience is indeed tantalising. The passage to democracy in Africa is a political development problematic not merely because of the challenges of balancing the desire for an immediate transition; but it was bound to have shortcomings that stem in part from historical and structural conditions marked by authoritarian for a good part of its history. Thus, politically there exist almost insurmountable obstacles to the flourishing of democratic governance. However, other nations with identical historical features, have managed to install and maintain multi-party democratic
systems and hence, there is no reason to believe that democracy is doomed in Africa. A skilled and committed civic and party leadership can mitigate conditions that are hostile to a pluralist society.
THE ARAB UPRISINGS:
IMPLICATIONS FOR SELF DETERMINATION AND GOOD GOVERNANCE IN THE AFRICAN UNION

Anthony Chima Dialla*

ABSTRACT

The right to self determination is a fundamental principle of international law that has aided many African countries to secure independence. Its post-colonial history, however, dwelt on secessionist bids, not good governance. This history changed in November 2010 when mass uprisings erupted in Algeria, Tunisia, Libya, and Egypt. These uprisings pose serious challenges for the African Union regarding its non-interventionist policy in the domestic affairs of states. This paper examines the implications of the Arab uprisings on governance-based struggles for self determination in Africa by positing that human rights are the flipside of legitimate resistance. Further, it justifies the uprisings as an emerging struggle approach to good governance and, attempts to identify the elements required to legitimate future struggles. It suggests that the AU’s relevance will be undermined by its non-interventionist approach unless its peace and security system is structured to accommodate future uprisings.

1. INTRODUCTION

The right to self determination is a fundamental principle of international law that is traceable to the international community’s decolonisation efforts. It seeks to ensure that all peoples have the right to freely determine their political status, pursue their economic, social and cultural development, and dispose of their natural wealth and resources. Its development has helped nearly 200 territories to emerge from colonialism since the formation of the United Nations (UN) in 1945. In Africa, it was championed by newly independent states with remarkable success in places such as...
as Angola, Mozambique, Guinea-Bissau, Mauritania, Zimbabwe, Namibia and South Africa. Since the collapse of apartheid in South Africa, however, its application has been largely restricted to secessionist bids. Whenever it is discussed, the dominant question is usually whether it applies also to minority groups within a state. This dominant question did not initially attract much attention as it lacked political urgency. Accordingly, the right to self determination did not feature in agitations for good governance or better socio-economic conditions until late 2010.

In December 2010, a young fruit vendor, Muhammad Bouazizi, set himself on fire in the Tunisian town of Sidi Bouzid. His self-immolation ignited mass uprisings in several North African states. These uprisings, which were motivated by widespread grievances over economic, social, and political inequalities, have led to regime changes in Tunisia, Libya, and Egypt. Other states such as Algeria, Morocco, Chad and Niger have been forced to adopt measures aimed at improving good governance or curtailing similar uprisings. The uprisings pose serious challenges for the African Union (AU) regarding its non-interventionist policy in the domestic affairs of states. These challenges require a re-examination of the AU’s peace and security structure, especially Article 4 (h) of its Constitutive Act. This provision recognizes the AU’s right “...to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”

The Constitutive Act does not define war crimes, genocide and crimes against humanity. However, the Rome Statute of the International Criminal Court (ICC) contains definitions that support the widespread view that the brutal repression of Libyan citizens by late Muammar Al-Qadhafi’s regime represented a classic case of ‘grave circumstances.’ How did the AU respond to these grave circumstances?

As it did in the Darfur crisis, the AU failed to enforce the provisions of its Constitutive Act. Initially, it prevaricated over the legitimacy of the uprisings. Eventually, Nigeria, South Africa, and Gabon, as non-permanent UN Security Council members, voted in favour of Resolution 1973 of 17 March 2011, which called for a no-fly zone over Libya in order to protect Libyan citizens from Al-Qadhafi’s air force. However, as western bombs began to rain on Tripoli, Nigeria and South

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2 While the struggles in Angola, Mozambique, Guinea-Bissau, Mauritania, Zimbabwe, and Namibia were aimed at political independence, the South African struggle was aimed at terminating apartheid, a systematic policy of racial segregation by white minority groups against the majority black population.


4 Articles 6 (genocide), 7 (crimes against humanity), and 8 (war crimes) of the Rome Statute of the International Criminal Court, 17 July 1998, CN.177.2000.TREATIES 5.

5 Security Council Resolution 1973 of 17 March 2011 found that Qaddafi’s widespread and systematic attacks against civilians constitute crimes against humanity.
Africa joined Uganda and other AU states to condemn regime change in Libya. This paper examines the implications of the Arab uprisings on governance-based struggles for self determination in Africa. It justifies the uprisings on an emerging struggle approach to good governance and suggests that the AU’s relevance will be undermined if its peace and security system is not structured to accommodate future uprisings. Section one of the paper sets out the philosophic justifications of a struggle approach to good governance. By positing that human rights are the flipside of legitimate resistance to dictatorship, it argues that Article 4 (h) of the AU’s Constitutive Act provides a platform for the articulation of a struggle theory of good governance in Africa. Section two examines the ambit of the right to self-determination in the context of a struggle approach to governance. Part three examines the AU’s attitude to humanitarian intervention in grave circumstances. Part four proffers some of the elements required to legitimize a governance-based struggle for self-determination. It concludes by highlighting the implications of the AU’s non-intervention policy on its relevance as a regional power.

2. PHILOSOPHIC FOUNDATIONS OF A STRUGGLE THEORY OF GOVERNANCE

The earliest major work on a struggle theory of good governance may be attributed to Locke. He argued, inter alia, that the lives, liberties, and estates of the people should be the primary obligation of states and that the failure to discharge this obligation constitutes a breach of trust. Thus, the state cannot wield absolute power in contravention of citizens’ welfare. To do so would amount to a forfeiture of the power the people have entrusted to it. Accordingly, the people have the right to withdraw or take back their entrusted mandate whenever the exercise of state power contravenes their welfare. Locke’s work provided a solid basis for agitations for self-determination from the 17th century onwards. It particularly played a decisive role in the formulation of the American Declaration of Independence, which avers that a government is instituted for the welfare of citizens and the people reserve the right “to alter or abolish it” whenever it becomes “destructive” of this end. However, Locke was not the only early proponent of a struggle theory of governance.

What may be termed as extreme forms of a struggle theory resonate in Marxist works produced between the 17th and 19th century. Of these works, Rousseau,
Marx and Hegel are especially noteworthy. Rousseau, in particular, did not mince words in advocating popular insurrection as the means of combating despotism. Just as Locke, he proposed the establishment of a social contract to enforce good governance. According to him,

“...the contract of government is so completely dissolved by despotism that the despot is master only so long as he remains the strongest; as soon as he can be expelled, he has no right to complain of violence. The popular insurrection that ends in the death or deposition of a Sultan is as lawful an act as those by which he disposed, the day before, of the lives and fortunes of his subjects. As he was maintained by force alone, it is force alone that overthrows him.”

2.1 Contemporary Exposition

The contemporary exposition of a struggle theory may be attributed to Heyns. According to him, human rights and legitimate resistance are two sides of the same coin. This implies that behind human rights claims, there is the possibility, in the absence of reasonable alternatives, of resorting to self-help. Conversely, for self-help to be legitimate, it must be the only option to protect human rights. Heyns believes that perceptions of human rights should reflect empirical assessments of “...values so central to human existence that people across the borders of time and space...” have taken, and would not hesitate to “...take matters into their own hands...” should these core values not be protected. According to the struggle approach, human rights are not just rallying points to action; they are also triggers of resistance to illegitimate use of power, particularly state power. Just as Austin theorized that “...law is a command of a sovereign, backed by a threat...”, a struggle theory posits that human rights claims are demands of citizens, backed by a threat; the threat of self-help. Does this then mean that a struggle theory belongs to the anarchist tradition? In other words, does a struggle theory encourage disdain for the rule of law?

Heyns utilises history to oppose this contention. According to him, history shows that after periods of rebellion, revolution, civil war and other forms of social strife, people ask themselves:

1) What went wrong?
2) How can we prevent this from happening again?

Such questions ultimately lead them to come full circle and embrace the concept of human rights. In this light, a struggle approach to human rights does not

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11 C. Heyns, ibid 172.
12 Ibid.
13 Ibid 174.
challenge the existence of the state as an institution; in fact it endorses the state, but claims that the protection of human rights is a primary obligation of the state for which the state must be held accountable. Thus, to the extent that the state woefully fails in its obligation to protect rights, the duty to obey it lapses. Human rights thus challenge the illegitimate use of power and not the institution of the state as such. Viewed from a struggle approach therefore, human rights are not dependant on recognition by a sovereign. Contrariwise, they are the ultimate guarantor of sovereignty as well as springboards of agitations for self determination. What then is the ambit of the right to self-determination in the context of a struggle approach to governance?

3. THE AMBIT OF SELF-DETERMINATION IN CONTEMPORARY INTERNATIONAL LAW

Initially, self-determination was barely recognized as a legal principle in international law.\textsuperscript{14} States preferred to enforce it through means that were less disruptive of territorial integrity, such as the monitoring regimes of treaty bodies and international tribunals. Today, it arguably qualifies as customary international law,\textsuperscript{15} largely because of its codification in treaties, UN General Assembly resolutions, and decisions of international tribunals.\textsuperscript{16} The key element in the provision for this right is people’s freedom to determine their political status. Article 1 common to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides as follows:

“All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.”

Article 20 of the Banjul Charter affirms this right by providing that “...all peoples shall have the right to existence...” and “...the unquestionable and inalienable right to self-determination...” \textsuperscript{17} More importantly, it provides that “colonized or oppressed peoples shall have the right to free themselves from the bonds

\begin{itemize}
  \item \textsuperscript{14} J. Crawford, The Creation of States in International Law, (2nd ed 2006, Oxford: Clarendon Press) 111.
  \item \textsuperscript{15} A. Cassese, Self-Determination of Peoples: A Legal Reappraisal (1998, Cambridge University Press) 142-145.
  \item \textsuperscript{17} African Charter on Human and People’s Rights, 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58.
\end{itemize}
of domination by resorting to any means recognized by the international community.”

3.1 Classifications of the Right

Self-determination is generally classified into external and internal self-determination. The distinction between ‘internal’ and ‘external’ self-determination was articulated in the Reference Re Secession of Quebec.18 In this case, the Canadian Supreme Court defined ‘internal’ self-determination as “...a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state...”. It contrasted this with ‘external’ self determination, which it defined as:

“... the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people ...”

Going by the court’s explanatory efforts above, external and internal self determination seem to be dependent on their ultimate political aim. Put differently, while the aims of external self determination appear clear-cut, internal self determination is not so clear. This has led to the question of the applicability of self determination to independent states.

3.1.1 Does the Right Extend to Self-Governing Territories?

There is no consensus opinion on the question of how far the right to self-determination applies to the citizens of an independent state.19 One view, which the AU subscribes to, holds that the concept is applicable only to non-self-governing territories and peoples.20 In other words, as soon as a territory gains independence, the right ceases to apply to it. Thus, this view links self-determination to the doctrine of uti possidetis21 and treats them as aspects of the same entitlement. This restrictive view of self-determination is supported by Shaw. According to him:

“...the exercise of self-determination must occur ... within colonial boundaries, which would remain sacrosanct unless the people as a whole within those boundaries freely elected to change them by integrating with another State.”22

It may be argued that the AU’s support for this view is borne from pragmatism. This pragmatism was demonstrated by the International Court of Justice in the Frontier Dispute case between Burkina Faso and Mali, where it stated inter alia:

19 A. Cassese, op cit note 15.
20 For example Shaw and Murswiek, op cit, note 22 & 27.
21 Sanctity of the state’s territorial integrity.
"...the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by the peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice ... [this] has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the self-determination of peoples."\(^23\)

In any case, proponents of the restrictive view of self-determination admit that under certain circumstances, usually involving grave breaches of human rights, there is a universal right of self-determination outside the process of decolonisation.\(^24\) The better view is that the right is a dynamic and fundamental principle applicable to all peoples regardless of whether they belong to a non-self governing territory or a fully independent state. This is perhaps why it has been recognized in many international instruments without distinction as to colonial or non-colonial peoples.\(^25\) It is also affirmed by experts. In the words of Cristescu:

"Recognition of the right of peoples to self-determination as one of the fundamental human rights is bound up with recognition of the human dignity of peoples, for there is a connection between the principle of equal rights and self-determination of peoples, on the one hand, and respect for fundamental human rights and justice on the other ..."\(^26\)

In solidarity, Murswiek argues that "...territorial integrity [must] stand behind the right of self-determination ... if a State deprives a people of its right to internal-determination."\(^27\) Cassese, however, perceives ambivalence in the application of this right to self-governing territories. To him, "...self-determination is attractive so long as it has not been attained ... Once realized, enthusiasm dies fast, since henceforth it can only be used to undermine perceived internal and external stability."\(^28\)

Notwithstanding how ambivalent the application of the right to self-determination is, there is little argument about its invocation in cases of serious human rights abuses. The African Commission on Human and People’s Rights\(^29\) has recognized

\(^{25}\) For example, Article 20 of the African Charter and Article 1(a) VIII of the Final Act, Conference on Security and Co-Operation in Europe, Helsinki, 1 August 1975.
\(^{28}\) A. Cassese, Self-Determination of Peoples, op cit note 15, 5-6.
\(^{29}\) Hereinafter the Commission.
in the Katangese Peoples’ Congress v. Zaire that grievous abuses of human rights or preventing people from participating in governance constitute legitimate grounds for exercising this right. As the Commission put it:

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

Previously, agitations for self-determination were limited to secessionist quests, which presented awkward problems for the AU because they affected the territorial integrity of African states. The same, however, cannot be said for the uprisings that have swept through Tunisia, Algeria, Egypt and Libya since 2010. Rather than struggles for territorial independence or secession, these uprisings aim at political accountability and good governance. As they do not contravene the uti possidetis principle per se, what do they portend for the AU’s non-interventionist stance?

4. THE AU’S NON-INTERVENTION STANCE

The AU’s recognition of the necessity for intervening in a member state in “grave circumstances” deviates from the traditional conception of state sovereignty. However, its handling of the Arab uprisings, particularly its volte face on Resolution 1973, reveals its unwillingness to embrace this deviation in practice. The initial AU attitude to the uprisings was befuddled indecision. During the ministerial meeting of the 275th Session of the Peace and Security Council, Rwanda’s Foreign Affairs Minister stated in this regard:

“We are all in agreement that ... we shall never tolerate a Head of State that intentionally takes lives of its own people. Despite all this, why has the African Union not responded timely and take (sic) a leadership role to put in place practical steps to stop this? ... Why has the African Union, in such grave situations prevailing ... in member States, not called for an extraordinary urgent conference of Heads of State and Governments for prompt deliberations and actions?”

31 Traditional sovereignty, as championed by Jean Bodin, is founded on the state’s authority over its territory and nationals. This view has, however, attracted much scholarly attention. See L. Bartelson, “The Concept of Sovereignty Revisited” (2006) European Journal of International Law, vol. 17 no. 2, 463-465.
The AU preferred dialogue with the late Al-Qadhafi, even when it was apparent that dialogue was no longer a feasible option for solving the Libyan crisis. The AU’s overall handling of the Libyan uprising is a continuation of its peacekeeping failure in Darfur, where it showed that “...the norm of non-interference continues to trump human rights concerns.” In view of Africa’s colonial history, the AU’s excessive deference to state sovereignty is understandable. However, AU leaders ought to know that sovereignty no longer enjoys the inviolability status it possessed in the preceding century. Historical conflicts in Uganda, the Democratic Republic of the Congo, Liberia, Sierra Leone, Sudan, and Libya show that though international law still protects sovereignty, it is the people’s sovereignty that it protects, not the sovereign’s authority.

International law, under the responsibility to protect doctrine, permits states to intervene forcefully in the affairs of another state in order to uphold citizens’ struggles for democracy and the rule of law. In fact, “...no serious scholar still supports the contention that internal human rights are ‘essentially within the domestic jurisdiction of any state’ and hence insulated from international law”. In this respect, the Arab uprisings demonstrate the continued expansion of the principle of self-determination towards struggles for democratic governance. This expansion flows from tremendous progress in the human rights movement. As Charney and Prescott rightly noted, “...human rights law has developed to the point that states are no longer considered to be ends in themselves but, instead, to exist to serve their populations.”

As more and more Africans become better educated, awareness of human rights has increased, as well as increased demand for accountability from political leaders. The emergence of social networking tools has also aided in the increased awareness of human rights. This perhaps explains why the Arab uprisings were spear-headed by educated, unemployed youths, lower working class people, and trade unions with shared grievances over unequal economic and political structures in their

36 The responsibility to protect doctrine emerged from the need to obviate the obstacles placed against humanitarian intervention by traditional conceptions of sovereignty. It reconceived a right to intervene to the more acceptable and less controversial responsibility to protect. See International Commission on Intervention and State Sovereignty, ‘The Responsibility to Protect’ (December 2001) available at http://responsibilitytoprotect.org/ICISS%20Report.pdf (Last accessed 17 September 2012).
countries. Using social media, they built alliances with the middle and upper classes, human rights groups and civil society organisations (CSOs), as well as an internet-savvy diaspora. This is unlike previous protests in Africa. Unfortunately, AU leaders appear not to appreciate this change in Africa’s political accountability dynamics. A brief analysis of their response to the Arab uprisings is instructive.

In Uganda, the ‘Walk to Work’ demonstrations that followed the February 2011 elections were quickly suppressed. In Zimbabwe, Mugabe’s security arrested and tortured civil activists for organising a meeting to discuss the Arab uprisings. Angolan president, Eduardo dos Santos, reacted swiftly to efforts to instigate demonstrations against his 32-year rule by arresting 17 protesters on 7 March 2011. In the tiny Kingdom of Swaziland, a pro-democracy rally on 12 April 2011 intended to emulate the Arab uprisings was crushed by security forces. On 20 and 21 July 2011, police violently dispersed thousands of protesters in the Malawian capital, Lilongwe, with President Bingu wa Mutharika claiming that the protesters were “led by Satan”. Burkina Faso president, Blaise Compaoré, crushed street protests from students in February 2011, as well as wage-related riots by his presidential guards on 14 April 2011. In Sudan, anti-government protests by students of Khartoum University were crushed on 30 January 2011. Protests in Mauritania were similarly suppressed. Only Zambian president, Rupiah Banda, extolled the importance of responding to citizens’ needs and cautioned his regional colleagues to refrain from repressing their people in order to avoid Arab-like uprisings in Southern Africa.

The above incidents demonstrate the attitude of individual AU leaders towards their people’s attempts to exercise the right to self-determination. This attitude obviously

42 Mail and Guardian “Swaziland pro-democracy protests met by teargas and water cannon” (12 April 2011) www.guardian.co.uk/world/2011/apr/12/swaziland-riot-police-attack-democracy-protesters (Accessed 17 August 2012).
flows from institutional principles that affirm both interference and non-interference in the affairs of member states, thereby compromising the effectiveness of the AU’s peace and security regime. In the remainder of this paper, the implication of the AU’s non-interventionist stance on its relevance as a regional body is highlighted.

5. IMPLICATIONS OF THE ARAB UPRISINGS ON THE AU’S RELEVANCE

5.1 Article 4(h) of the AU Constitutive Act creates an Intervention Obligation

The AU’s non-interventionist attitude contradicts its peace and security structure, especially Article 4(h) of its Constitutive Act. The key problem is that the AU does not view Article 4(h) as obligatory; it instead treats it as discretionary. The framing of Article 4 is instructive. It begins with the mandatory words, “The Union shall function in accordance with …” before proceeding to the AU’s right to “intervene in a member state … in respect of grave circumstances.” Thus, adopting a mandatory interpretation of Article 4(h) provides a better approach to self-determination struggles for good governance. This is in line with the emerging principle of states’ responsibility to protect their citizens. As shown in the Darfur crisis, dialogue sometimes proves ineffective in ensuring that states refrain from committing international crimes. The language of Article 4(h) therefore bestows on the AU an obligation to protect human rights. What it requires is how to determine whether a state’s response to popular uprisings amounts to the type of grave circumstances that would trigger the AU’s responsibility to protect.

5.2 Determining the Authenticity of Mass Uprisings

The justification for mass uprisings is that human rights represent a countervailing force to state power. As the conferment of democratic authority on political leaders is aimed at promoting human welfare, citizens have the right to retrieve their mandate whenever the mandate holders seriously abuse it. This is the essence of a struggle approach to good governance. Although uprisings such as the ones witnessed in North Africa should be treated on a case by case basis, four elements ought to be present in order to justify a governance-based struggle for self-determination. These elements, which are distilled from some features of the Arab uprisings, include the following:

48 Article 4(h) is supported by the Solemn Declaration on the African Common Defence and Security Policy of February 2004, and art 13 of the Peace and Security Protocol, which provides for an African Standby Force. Article 13(3) (c) of the Protocol provides that one of the Force’s mandates shall be intervention in a member state in such grave circumstances as provided by Article 4(h) of the Constitutive Act.
1) There must be in existence weak democratic institutions and structures, which leave citizens with no effective mechanisms for resolving their grievances or enforcing political accountability from their leaders;

2) The uprisings must possess a democratic character that cuts across all social classes.\textsuperscript{51} They must express popular aspirations and demand for a reformed political and socio-economic structure, in contra distinction with mere political party-based agitations;\textsuperscript{52}

3) In order not to contravene the Constitutive Act’s proscription of unconstitutional changes of government, the uprisings must not amount to a military coup d’etat; and

4) The uprisings must not have been instigated by external influences.\textsuperscript{53}

The above elements are by no means exhaustive. It is suggested that whenever they are present in a mass uprising, the AU ought to ensure that the concerned state is prevented from subjecting its citizens to brutal repression.

6. CONCLUSION

The Arab uprisings present an entirely different dimension to the right to self-determination. For the first time, instead of independence struggles or secessionist bids, self-determination was applied to good governance. With growing awareness of human rights, struggles for good governance will only increase in Africa. The AU has developed several institutional principles on good governance, peace and security. The Arab uprisings give it no better alternative than to abandon its non-interventionist policy and implement these principles. It should establish guidelines on how to determine the legitimacy of popular uprisings so as to enable it to adopt clear and effective response mechanisms. It should outline remedial or punitive measures for serious deficiencies in member states’ compliance with norms on democracy, accountability and protection of human rights. It should also enhance its monitoring mechanisms, especially its peer-review system and its coordination with the African Commission and the African Court on Human Rights. These measures would help in curbing good governance-based struggles in Africa. The decisive western intervention in Libya demonstrates the recognition of a struggle approach to good governance. Accordingly, it poses a serious challenge to the AU’s non-interventionist attitude. Specifically, it implies that if in future, AU leaders fail to invoke Article 4(h) of its Constitutive Act and intervene in grave circumstances; western nations will do it for them. Such a scenario will contradict the objectives of the AU’s founding fathers and probably undermine the AU’s efforts against neo-colonialism.

\textsuperscript{52} The Egyptian Muslim Brotherhood showed that political parties may form part of struggles for good governance.
\textsuperscript{53} As seen in Libya, external forces may, on invitation, come to the aid of the struggle.
CONSTITUTIONAL ENTRENCHMENT AS AN EFFECTIVE AND SUSTAINABLE BASIS FOR ATTACKING AFRICA’S ENDEMIC CORRUPTION

Charles Manga Fombad*

ABSTRACT

Endemic corruption in Africa and the failure since independence to seriously control it poses one of the greatest threats to peace and security on the continent and casts doubts about the prospects for economic recovery and development. The fight against corruption is not simply about occasional campaigns designed to catch a few crooks and people who are corrupt; it is about laying down a robust and sustainable legal framework that will improve overall governance, accountability and transparency. The main contention in this paper is that only a constitutionally entrenched framework of measures and institutions, protected by certain entrenched principles can provide a solid basis on which an effective and sustainable fight against Africa’s troubling endemic corruption can be brought under control. Such an approach will make corruption a high risk and unprofitable activity for everybody regardless of his or her status in society.

1. INTRODUCTION

Corruption today poses one of the biggest threats to peace and stability in Africa. Not only does its deleterious effects casts an ominous dark shadow over the future political, economic, and social progress on the continent but it also threatens to undermine the faltering efforts to establish a culture of constitutionalism, democracy, respect for the rule of law and good governance. Over the years, particularly in the last two decades, there has been considerable pressure on African governments from donor governments and international financial institutions to clean up corruption. Many of these governments have at various stages, especially from 1995 when Transparency International (TI) started naming and shaming countries

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based on their corruption perception level, enacted legislation and established bodies to fight against corruption. Most of these measures have been inadequate and ineffective. The anti-corruption measures never really went to the root of the problem, nor were they sufficiently robust to render corruption a high risk activity in which the chances of being caught and subjected to severe punishment acts as a strong deterrent. In most African countries, corruption has become so endemic that it is considered as a way of life and the stigma usually attached to it is almost non-existent. For example, in Nigeria and Cameroon, bribes are requested openly as if it were a right. It is almost irrational in many African countries today to be honest and straight. The regular corruption scandals that dominate the headlines on television and in newspapers no longer shock or embarrass anybody.

The main contention in this paper is that only constitutionally entrenched measures and institutions, protected by certain entrenched fundamental principles can provide a solid bedrock on which to launch any effective and sustainable anti-corruption strategy. It is not just a question of trying to catch a few crooks and corrupt individuals but rather one of establishing a permanent foundation to promote good governance, accountability and transparency.

The first section of the paper will provide an overview of corruption in Africa and the abortive attempts at clean-ups in the past. Section two will briefly provide the rationale for adopting a constitutionally entrenched anti-corruption framework. The third section will examine the nature and scope of the constitutionally entrenched framework. The final section will provide the concluding remarks. What this paper proposes is a radical but robust and effective novel constitutional approach which aims to change the present situation where corruption is a highly lucrative low risk activity that does not only guarantee wealth but has enabled politicians and their cronies to capture power, keep others out whilst making a farce of democracy, rule of law, good governance and accountability. This constitutionalist response will render corruption a high risk activity to all, regardless of their status, and make the risk of being caught and punished a potent deterrent.

2. OVERVIEW OF CORRUPTION IN AFRICA AND PAST STRATEGIES

Corruption is an exceedingly complex phenomenon in terms of its definition, form and manifestation. For our purposes here, it will suffice to note that, in a general sense, corruption arises where an individual or group of individuals

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1 These ideas are fully developed in another study by C.M. Fombad and M.C. Fombad, “Rethinking anti-corruption strategies in Africa: Constitutional entrenchment as a basis for credible and effective anti-corruption clean-ups,” (forthcoming).

abuse a position of trust in which they are placed or find themselves, subverting existing rules whether legal or extra-legal, and generate undeserved benefits for themselves. Some of the common activities that are considered to amount to acts of corruption include bribery, embezzlement, patronage, nepotism and cronyism, conflict of interest, influence peddling, kickbacks, electoral fraud and unholy alliance.

A number of classifications have been made over the years in the attempts to understand the different types of corruption and determine how best to tackle them. Two of these are worth noting. The first of these categorisations distinguishes between grand and petty corruption. Grand corruption, which is often regarded as political corruption, although the two are not necessarily the same, reflects not the amount of money involved but rather the high level of the corruption. It is often associated with political corruption because it refers to acts committed at the highest level of government where policies and rules are formulated. By contrast, petty corruption or bureaucratic corruption as it is usually referred to, is small scale everyday corruption that takes place at the implementation end. Because it often involves small sums, it is also sometimes referred to as low level or street level corruption. Where petty corruption is extensive, it gives rise to another form of corruption covered by the second classification.

This second classification distinguishes between three types of corruption: incidental (individual), institutional, and systemic (societal or endemic) corruption. Incidental corruption, which is also known as individual or sporadic corruption, is where corruption occurs irregularly or is confined to a few instances of malfeasance on the part of individual politicians or public officials in a manner that does not threaten the functioning of the administration or the economy of the country. On the other hand, institutional corruption is where corruption pervades particular institutions or sectors of activity. The third form, endemic, societal, entrenched or systemic corruption, as the names suggest, is the worse type of corruption. It describes a situation where corruption is virtually an integral and essential part of national life because it is all-pervasive; it has become commonplace and is accepted by all. Such corruption pervades all aspects of economic, social and political life.

Based on the classifications examined above, it can be said generally that corruption is endemic or deeply entrenched in most African countries. Almost

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3 For a discussion of some of the different definitions of corruption, see for example, J.M. Mbaku, Bureaucratic and Political Corruption in Africa. The Public Choice Perspective, (2000, Krieger Publishing) 9.
all the voluminous literature on corruption in Africa concludes that it poses the greatest challenge to development on the continent.  

In TI’s Corruption Perception Index (CPI) for 2011, all but four Sub-Saharan countries fall in the lower half with a score below 5. Four of the ten most corrupt countries in the world (Libya, Equatorial Guinea, Sudan and Somalia) are from Africa, with Somalia having had the dubious reputation of being the most corrupt country in the world for the last five years. It is particularly problematic because Africa is the poorest and least developed continent in the world and generally has the lowest aggregate level of human development. The negative consequences of corruption on economic, political, social and cultural development on the continent add to the numerous other problems such as disease and drought that afflict the continent.

Kofi Annan, the former Secretary General of the UN, in lamenting about the destructive effects of corruption in developing countries said:

“Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key factor in economic underperformance and a major obstacle to poverty alleviation and development.”

One of the main victims of corruption today in Africa has been democracy, good governance and constitutionalism. The great optimism that followed the wave of democratisation and the political and constitutional reforms that went with it in the early 1990s with the apparent opening up of political space for competitive elections has now been neutralized by the corruption of the electoral process by African leaders.


7 See generally, J.M. Mbaku, op cit, at note 3.


Corruption is also a major obstacle to the efforts, since the 1990s, to establish credible, independent and effective judiciaries. Judges all over the continent are reasonably well paid and receive salaries and pensions well above that of the average civil servants. Yet, after the police, the judiciary is generally considered to be the most corrupt institution in Africa. Many Africans now openly wonder why they should bother to hire a lawyer when they can buy the judges. Justice in most countries no longer depends on the merits of the case but rather on who is able to pay the judge more.

It is perhaps the economic consequences of corruption in Africa that are particularly debilitating on the continent. Generally, corruption hurts the poor and marginalized more than any other groups in society because it restricts their access to basic services such as water, education, health care and many other crucial services necessary for survival. It is the poor who are vulnerable to extortion of bribes by public officials, especially the police. Generalized petty corruption hurts the poor most because they are forced to pay bribes for most of the essential services which are designed to lift them out of poverty. Payment of little bribes here and there eats into their meagre earnings and often makes apparently free social services more expensive.

Corruption also causes enormous damage by distorting national priorities and diverting public expenditures away from less lucrative sectors such as health, education and other labour-intensive activities which traditionally employ the poor into capital-intensive projects which generate larger kickbacks. Corruption usually distorts the public tendering system and as a result, the companies who win public contracts hardly ever have the requisite experience, equipment or expertise to deliver the quality of services for which they are often paid inflated amounts. The inefficiency and high cost of doing business combined with the unpredictability of legal outcomes that has been provoked by corruption has made investment in Africa a very risky undertaking. Corruption has also increased considerably the cost of government borrowing money.

Most African governments have over the years adopted diverse strategies to bring corruption under control. They have also signed and ratified a number of international and regional anti-corruption treaties.10 These anti-corruption measures have not worked. The diverse approaches could conveniently be summarized under four main broad headings viz, the establishment of appropriate legal framework to

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10 At the global level, there is the UN Convention against Corruption (UNCAC) of 2004; and the UN Convention against transnational organized crime of 2003. At regional level, there is the African Union Convention on Preventing and Combating Corruption of 2006. At sub-regional level, there is the Southern African Development Community (SADC) Protocol against Corruption of 2005 and the Economic Community of West African States (ECOWAS) Protocol for the Fight against Corruption 2001.
combat corruption, the use of specialized anti-corruption agencies, the use of purges or crack-downs and other possibilities centred around the economic liberalisation and democratisation processes.

The first approach through the enactment of a wide range of legislation not only criminalized corruption but also provided other measures such as the protection of whistleblowers and witnesses, provision of access to information to ordinary citizens, and the establishment of a variety of anti-corruption agencies (ACAs). South Africa probably has one of the most comprehensive anti-corruption legal frameworks on the continent. The foundation for this is laid down in chapter 9 of the 1996 constitution. In Nigeria\textsuperscript{11} and Ghana,\textsuperscript{12} multiple progressive anti-corruption laws have been enacted. In some countries, the law requires public officials to declare their income, assets and liabilities before assuming office, and again when they leave office or even in some cases, on an annual basis.\textsuperscript{13}

In spite of the impressive array of legislation to combat corruption, there are a number of problems that have made them ineffective. The first and main problem is that most of Africa’s endemic corruption has as its main source the leadership. Once the leadership itself is tainted with corruption, they will lack the will, moral authority and credibility to lead any effective fight to control corruption. The second problem is the non-implementation of anti-corruption legislation. In many countries, the law requires the president, ministers and other public officials to declare their income, assets and liabilities before assuming office or annually when in office and after the leave office. In most cases, these declarations are never made, or done in secret so that the public have no opportunity to access the information and check its accuracy. Third, the legislation adopted does not often go far enough to address the problem at its source. For example, although it has been noted that many African countries have ratified UN and AU anti-corruption conventions, the commitment in many instances has remained formal and symbolic rather than substantive because few of these countries have actually domesticated the conventions.

\textsuperscript{11} For example, the Money Laundering Prohibition Act, 2004; Public Procurement Act, 2007; Fiscal Responsibility Act, 2007; Code of Conduct Act, 1989; Independent Corrupt Practices Commission Act, 2000; and the Economic and Financial Commission Act, 2004. The latter two laws establish and empower the two major anti-corruption institutions in the country.


\textsuperscript{13} This is the case in Ghana, under the Public Office Holders (Declaration of Assets and Disqualification) Act, 1998; in Tanzania under the Leadership Code of Conduct; in Uganda under the Leadership Code of Ethics Act (No. 13), and in Nigeria under the Code of Conduct Bureau and Tribunal Act.
The second method of combating corruption has been through the use of anti-corruption agencies (ACA). Examples of these institutions are the Ombudsman, Public Service Commission, Parliamentary Accounts Committee and Judicial Service Commission. There have also been specialized stand-alone ACAs established in some countries to deal specifically with issues of corruption. A 2007 study has suggested that there are about 18 stand-alone and six integrated ACAs operating in Africa.\textsuperscript{14}

A number of studies of some of the African ACAs show that they have had rather limited success.\textsuperscript{15} Four main problems appear to have plagued African ACAs. First, they have suffered from serious design faults that have limited their independence and therefore exposed them to manipulation by politicians. The main form of this interference has usually come through the politicisation of the appointment of the head and other senior officials of the ACAs. Second, the record of these ACAs in bringing those responsible for corruption has been less than impressive. Inevitably, because of the overbearing control exercised by the politicians, many of whom owe their positions to various forms of corrupt practices, the ACAs turn to avoid confrontation with their political masters by investigating only “safe” cases. Many ACAs have thus operated more like toothless bulldogs that protect the rich, powerful and well-connected wrongdoers but raise a storm about petty offenders who should ordinarily and routinely be dealt with by the police.\textsuperscript{16} Third, some of the heads and senior staff of the ACAs use their positions to also extort money from people that they are investigating. Finally, many of the ACAs do not have sufficient powers to target corrupt activities or even to instigate “own motion” investigations. The scope of their powers is often narrowly defined and they can only investigate matters reported to them and can do no more than recommend that a particular person be prosecuted.

The third anti-corruption strategy that has been tried in many African countries has been through periodic populist measures such as purges or crack-downs. Since the 1970s, Nigeria has seen many purges as part of anti-corruption campaigns under

\textsuperscript{14} B. De Maria“African Anti-Corruption Agencies- Frolics in Failure,” www.benafrica.org/downloads/demaria_africa_anticorrupt.pdf. (Accessed on 5 August 2012). Stand-alone or free standing ACAs refers to those agencies that have distinct organisational identities separate from the normal state bureaucracy as opposed to the integrated ACAs which are part of departmental structures within the normal bureaucracy.


various slogans such as “War Against indiscipline,” “War Against Corruption,” and “Operation Purge the Nation.” In Ghana, during one of Jerry Rawlings sojourns as a military leader, he ordered the execution of three former military leaders and five other senior military officers in June 1979 as part of a campaign to root out corruption. In Cameroon, L’Opération Epervier (Operation Sparrowhawk) has been in place since 2004 and has led to the arrest, trial and imprisonment of several prominent politicians including a former Prime Minister and a number of politicians. Nevertheless, in spite of the purges and crack downs, the looting of public property in most African countries has continued unabated. This strategy has proven as ineffectual as a long term and credible anti-corruption strategy as the others for a number of reasons.

First, purges and crack-downs have often been used by military leaders as a public relations exercise designed to assuage public or international revulsion at the overthrow of a democratically elected government. Second, most of these campaigns are simply a reaction either to a scandal or series of scandals or to strong external pressure from donors. This is often the case where the government itself is deeply involved in the corruption. Through purges and crack-downs, it can go through the motions and ensure that it never really puts the right persons to do the job or commit the necessary resources required. Third, in many countries, anti-corruption crusades of this nature have been used by governments to carry out a witch hunt of their opponents or to divert attention from more pressing problems. An excellent example of the former is Cameroon’s L’Opération Epervier. Unlike most anti-corruption operations, it has netted lots of big fish but there is a growing perception by analyst that it has only been successful in neutralising any opposition to Biya by those who have benefitted from his largesse over the last 30 years and yet had the imprudence to nurse ambitions to replace him. Finally, purges and crack-downs do not often succeed in providing a sustainable solution, especially where corruption is deeply embedded in the fabric of society because there is the perception of it as something imposed from the top.

Finally, it had been hoped by analysts that the wave of democratisation and economic liberalisation that swept through the African continent from the 1990s contained the elements necessary for bringing corruption on the continent under

control. For example, some political scientists argue that corruption is a function of the lack of durable political institutions and political competition and a weak and underdeveloped civil society.\textsuperscript{20} They posit that political liberalisation has the potential to create an open, transparent and accountable system which will discourage corruption because of the potential for closer scrutiny of actions of politicians and government officials by citizens, the media and NGOs. However, the emerging evidence after more than two decades of democratisation in Africa is that corruption does not only co-exist with the so-called democratic or quasi-democratic regimes on the continent but actually fuels them.\textsuperscript{21} Similarly, economists and public choice theorists have argued that economic liberalisation and downsizing the size of the state will reduce the avenues for corruption.\textsuperscript{22} This view was strongly supported by the World Bank which in promoting deregulation and the expansion of markets, argues that markets generally discipline participants more effectively than the public sector can. However, deregulation through the privatisation of state enterprises has led to massive corruption as politicians sold many state enterprises such as water and electricity bodies to their associates at far below market values and made hefty profits. At the end of the day, democratisation and economic liberalisation, as potentially useful anti-corruption strategies have in many African countries instead become a new source of corruption. With all these failures in mind, there is therefore need for a radically new approach.

3. THE RATIONALE FOR A CONSTITUTIONALLY ENTRENCHED ANTI-CORRUPTION FRAMEWORK

The main argument in this paper is that only principles and institutions which are entrenched in a constitution can provide the basis for an operational framework from which to gain a firm foothold to begin serious and effective anti-corruption work, build capacity behind an anti-corruption strategy and enhance the sustainability of such a strategy over time. The concept of constitutional “entrenchment” in this context refers to the incorporation in the constitution of provisions which contain legally enforceable obligations.\textsuperscript{23} This therefore excludes provisions which are essentially declaratory and hortatory in nature. Four main reasons can be given for arguing that only constitutionally entrenched principles and institutions can effectively curb and bring Africa’s endemic corruption under control.

\textsuperscript{20} The different arguments are discussed in Mark Robinson, op. cit. at note 4 at 4.
\textsuperscript{21} Ibid 146-149.
\textsuperscript{22} Ibid at 5, 8, 142, 144-148,150; J.M. Mbaku, op cit, at note 3; and R. Theobald, Corruption and Underdevelopment (1990, Duke University Press) 156-158.
\textsuperscript{23} For further discussion of this, see C.M. Fombad and M. C. Fombad, “Rethinking anti-corruption strategies in Africa: Constitutional entrenchment as a basis for credible and effective anti-corruption clean-ups” op cit, at note 1.
First, Africa’s written constitutions are explicitly or implicitly stated to be the supreme law of the land. As such, all other laws derive their validity from it and will be declared invalid to the extent to which they are inconsistent with the constitution. Constitutions are meant to endure and are often protected from careless, casual or arbitrary amendments by transient majorities or opportunistic leaders trying to promote a selfish political agenda. From this perspective, the advantage of constitutional entrenchment is that it provides a greater sense of durability, certainty and predictability than is the case with ordinary legislation.

Second, to the extent to which robust anti-corruption principles and institutions are given a constitutional status, they impose obligations on both the legislature and executive in a manner that will limit their scope of action or inaction. If this is reinforced by a positive obligation to act, rather than a mere discretion to act when possible, it opens the way for an action for violation of the constitution where the alleged “violation” consists of a failure to fulfil a constitutional obligation. This may therefore result in a declaration of unconstitutionality for the omission to carry out a constitutional obligation. In this way, pressure can be brought to bear on both the legislature and executive, to take effective anti-corruption measures. It will no longer lie within the exclusive and absolute discretion of these two branches of government to decide either when to act or how to act. The courts will have the power to invalidate any legislation which fails to comply with the obligations imposed by the constitution.

A third advantage of constitutional entrenchment of anti-corruption measures is that the nature of the action to be taken will no longer depend on the whims and caprices of opportunistic majorities who may want to arbitrarily change the law at any stage to suit their political agenda. The courts have the powers to invalidate any legislation that goes against the constitution. Besides this, most constitutions usually provide a special procedure for amending their provisions to ensure that any amendments are sufficiently difficult and require special majorities and sometimes, confirmation through a referendum. In this way, self-serving legislation by dominant parties or transient majorities can be avoided.

24 See an example of such an obligation in section 2 of the South African constitution of 1996 which states in section 2 that, “this constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” (emphasis added).


The fourth advantage of constitutional entrenchment is that, it may in some respects, provide individuals or a group of individuals with an opportunity to take direct action against those who are needlessly inflicting hardship and suffering on them through the looting of state resources. *Locus standi* rules could be expanded, as has happened under some constitutions, to make this possible.\(^27\) The prosecution of those responsible for embezzlement and other corrupt activities would no longer depend exclusively on the discretion of the state prosecuting authorities but is open to the public. Constitutional entrenchment will substantially address one of the major problems of past anti-corruption measures in Africa – the problem of non-enforcement of anti-corruption laws.

Ultimately, the significance of constitutional entrenchment will depend, on amongst other factors, the exact nature and scope of the rights recognized and incorporated in the constitution.

4. THE NATURE AND SCOPE OF CONSTITUTIONALLY ENTRENCHED ANTI-CORRUPTION FRAMEWORK

Three important issues must be covered by any constitutional provisions designed to prevent and control corruption for them to be effective: first, they must define the basic principles which provide a framework within which anti-corruption measures must be taken, second they must specify the nature of legislation that is necessary and finally they must spell out the institutions that are needed to implement these.

The starting point is that of laying down the fundamental anti-corruption principles. One of the major weaknesses of anti-corruption measures, even when these appear in the constitution is that they fail to address the matter in a comprehensive manner or where they do, their enforcement depends, for the most part, on the very officials who are responsible for promoting the corruption. They thus have little incentive to take action against other corrupt officials because they themselves are corrupt. The purpose of constitutional provisions that spell out the general principles underlying the fight against corruption is to ensure that effective enforcement, whether in the form of enacting legislation or taking action against corrupt individuals will not depend on the good will of certain individuals or institutions. The general constitutional principles that are absolutely necessary can be succinctly summarized under the following points:\(^28\)

1. The need to criminalise corruption and define it in a manner that will cover all forms, and the diverse manifestations of corruption. No person or his

\(^{27}\) In this regard, Article 22(2) of the Kenyan Constitution of 2010.

\(^{28}\) These are discussed in some details in C.M. Fombad and M.C. Fombad, “Rethinking anti-corruption strategies in Africa: Constitutional entrenchment as a basis for credible and effective anti-corruption clean-ups,” *op cit*, at note 1.
relatives, friends or other associates should be allowed to benefit whether directly or indirectly from the proceeds of corruption or any corrupt activities;

2. The second principle will require integrity and transparency from all public officers whether occupying an elective political office or an appointive position in the civil service. For both positions, those who have been found guilty of corruption should be barred from holding any public office for a period of 10-15 years depending on the gravity of the offence;

3. The principle that recognises a right of individual and collective action for the removal from office, trial and prosecution of any public official alleged to be involved in corruption or corrupt activities. This should also extend to a right to take action to request the blacklisting of any person or businesses that have been associated with corrupt activities. This needs to be reinforced by an obligation imposed on all individuals and institutions to promptly comply with court orders or directions. The right of public interest action is a necessary response to the growing disenchantment with the ability and willingness of public institutions, such as the prosecuting authorities and other anti-corruption agencies to secure and defend the public interest against the predatory activities of public officials; 29

4. The principle that excludes all persons convicted of corruption or corrupt activities from the benefit of any pardons or amnesties and the principle that statutes of limitations shall not apply to any person alleged to have been involved in corruption or corrupt activities; 30

5. The principle of reward and punishment. This will seek to encourage and protect those who report corruption and punish not only those who are engaged in it but also those who negligently or deliberately refuse to report acts of corruption. All persons whose information led to the recovery of public funds that were illegally misappropriated through corrupt activities should be entitled to 3-10% of the monetary value of the assets forfeited. All such persons should be protected from persecution or any form of victimisation by law;

6. There should be a duty to examine the assets of public officials who appear to be living beyond their means on grounds of suspicious wealth. Where the officials cannot satisfactorily explain such wealth, it should be confiscated by the state. The onus should be on the official to prove that the wealth was acquired in a legitimate manner; and,

29 There should be no requirement of a personal interest for the action to be brought. See Bamford-Addo JSC in the Ghanaian case of Sam (No. 2) v Attorney-General [2000] SCGLR 305 at 314.

30 A proposed amendment to the 1991 Benin constitution will, inter alia, make economic crimes imprescriptible.
7. Finally, members of the judiciary, the police service, the armed forces and custom services, from whom the highest standards of integrity is expected must be given a higher penalty than ordinary offenders, for any offence involving corruption and corrupt activities that they commit.

As noted above, the problem in Africa has not been the absence of anti-corruption legislation but rather their lack of effectiveness. The main advantage of constitutionalising the basic principles stated above is to ensure that all the pieces of legislation enacted conform to the basic principles, failing which, their constitutional validity can be impugned. Examples of important pieces of legislation needed to implement the basic principles and effectively deal with corruption are as follows:

1. Whistle blower protection law to encourage the reporting of cases;
2. Conflict of interest laws;
3. Freedom of information laws which gives citizens the right to demand the disclosure of information regarding government activities; and,

There is also need for enforceable code of conduct for public servants and politicians. This is not meant to be an exhaustive list of all legislation that can combat corruption. What is important is that the list of relevant legislation must be specified in the constitution to ensure that any legislative enactment conforms to the general principles discussed above.

The third arm of this constitutionalist approach is the constitutional entrenchment of the institutions that are needed to enforce the different pieces of anti-corruption legislation. As noted above, there are two types of ACAs. Both types of institutions will be more effective when they are specifically spelt out in the constitution and protected from being captured and manipulated by politicians. The main ACAs, some of which feature in one form or another in many modern African constitutions are:

1. Public Service Commission;
2. Public Accounts Committee of Parliament;
3. Special Parliamentary Committee on Governance and Accountability;\(^{31}\)
4. Ombudsman; and,
5. Specialized anti-corruption agency.

Two preliminary comments are in order here. The first is that one of the most important institutions; the judiciary is not mentioned or discussed. Nevertheless, it must be made clear that no constitutional framework, however comprehensive or well-crafted, can function properly without an efficient and competent

\(^{31}\) This is a novelty whose rationale is explained below.
judiciary that is independent and has integrity. All what is said about the merits of constitutionally entrenched anti-corruption framework therefore depends on a fully functional and efficient judiciary that is ready to act as defender and enforcer of constitutional justice without fear or favour. The second point to note is that the Special Parliamentary Committee on Governance and Accountability mentioned above does not appear in any modern African constitution. It is however considered as an important body to receive quarterly reports from all the constitutional ACAs, monitor their activities and ensure accountability. All the ACAs should report to it rather than to the executive. The constitution should expressly determine how it is to be constituted.

Many African constitutions provide for the establishment of some of the above-mentioned institutions, especially ombudsman, public service commissions and judicial service commissions, but they have hardly been able to operate effectively because of political interference in one form or another. The key to their success is therefore to insulate them against this. Five principles need to be constitutionally entrenched to protect these institutions from external interference and to ensure that they can function efficiently and effectively. The best example of shielding ACAs from external interference appears in chapter 9 of the South African Constitution dealing with a number of “state institutions supporting democracy.” The four fundamental guiding principles provide that:

1. These institutions are independent and subject only to the constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

2. Other organs of state, through legislative and other measures, must assist and protect these institutions, to ensure the independence, impartiality, dignity and effectiveness of these institutions.

3. No person or organ of state may interfere with the functioning of these institutions.

4. These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.32

A fifth and critically important principle that needs to be entrenched should state that any legislation, action, measures or mechanisms introduced to regulate any of these institutions, which undermines the essential purpose of combating corruption and ensuring accountability and transparency shall be declared null and void by the courts.

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32 See, section 181(1), (2), (3) and (4) of the South African constitution.
The advantage of so many ACAs is threefold. First, each of these institutions will deal with different types (for example, bribery, gerrymandering of electoral constituencies, graft, and nepotism) and the diverse forms (for example, petty and grand corruption), and different avenues (for example, electoral corruption and corruption in the public service) through which corruption takes place. Their combined effect is to provide a comprehensive and holistic approach which will enable the institutions in their diverse ways not only to investigate and initiate the prosecution of corrupt persons but also to prevent corruption through education. This will also ensure that the institutions can be both proactive and reactive to issues of corruption and good governance. Second, the variety of institutions will enable them to be accessible to all, especially the poor and marginalized in society. For instance, ombudsmen and specialized anti-corruption institutions are often decentralized and have offices in many parts of the country where they can be easily accessed by the poor. Third and perhaps most importantly, the five principles will provide a powerful bulwark against the persistent problem of political manipulation. If courts are willing and able to rigorously enforce the five guiding principles, there is every likelihood that ACAs will be able to bring corruption under control.

5. CONCLUSION

Although corruption can never be entirely eradicated, it can nevertheless be brought under control and its deleterious effects limited. In spite of all the hype about fighting corruption and the regular noisy anti-corruption campaigns by African governments, it remains the single most serious obstacle to the eradication of poverty and inequality. It discourages foreign investment by creating an unstable and unpredictable investment environment.

Given the gravity of Africa’s endemic corruption and the devastating effect it is having on the distressed and fragile economies already weakened by years of economic crisis and political instability, it has been argued in this paper that there is need for a radical, innovative and holistic anti-corruption strategy. This novel approach is based on a framework for a constitutionally entrenched anti-corruption strategy built around three main pillars. First, a number of fundamental principles designed

33 Three important South African cases illustrate how the Constitutional Court had relied on the chapter 9 guiding principles to protect the anti-corruption institutions from political interference. These are: Independent Electoral Commission v. Langeberg Municipality, 2001 (9) BCLR 883 (CC); New National Party of South Africa v. Government of the Republic of South Africa and Others, 1999 (3) SA 191; and Glenister v President of the Republic of South Africa, [2011] ZACC 6. The Constitutional Court held that an amended Chapter 6A of the South African Police Service Act introducing a new corruption fighting unit was inconsistent with the constitution and invalid to the extent that it failed to provide for an adequate degree of independence for the unit that it sought to establish.
to criminalise corruption and ensure that everybody or institution, regardless of status who get involved in corrupt activities must be investigated, prosecuted and severely punished. Second, a comprehensive legislative agenda which imposes an obligation on the legislature, not merely to enact laws but ensure to that these laws sufficiently deal with the problem of corruption. And finally, a number of different anti-corruption agencies designed to ensure that they are able to deal with the different forms of corruption.

Corruption inflicts needless and intolerable hardship on the voiceless poor and marginalized some of whom are forced to live as destitutes or die from hunger and disease simply because the funds meant to remedy their situation and improve their lives have been siphoned off by powerful politicians and their associates. It is therefore argued that people who loot government funds and in doing so deprive others of the basic necessities of life such as access to basic health facilities, drinking water, housing and food must be severely punished; any assets and other benefits attributable to their corrupt activities should also be confiscated by the state. By constitutionalising the obligation to curb corruption, the duty to legislate as well as to take action against corrupt individuals would no longer depend on the convenience of the legislature or executive but would be spelt out in a legally enforceable manner in the constitution. Perhaps the main virtue of the new constitutional approach is that all persons involved in corrupt activities, regardless of their status in society are open to prosecution or legal action by the state as well as at the behest of individuals and civil society organisations.
THE PREDICAMENT OF AFRICAN REGIONAL COURTS:
LESSONS FROM THE SOUTHERN AFRICA DEVELOPMENT COMMUNITY TRIBUNAL

Phazha Jimmy Ngandwe*

ABSTRACT

The demise of the Southern African Development Community’s (SADC) Tribunal has aroused a valid and relevant discourse on the future of other similarly placed African regional tribunals or courts. It goes without saying that the suspension of the operations of the Tribunal has marked one of the lowest points in the vehicle of regional integration in Africa in general and in the SADC in particular. This research aims to examine the lessons that other African regional tribunals can learn from the demise of the Tribunal. The gravamen of this research is that the Tribunal was suspended for strategic and political reasons, that the tribunal also lacked popular legitimacy from the general SADC citizenry and institutional support by the SADC member states. Lastly, the Tribunal’s jurisprudence was heavily inclined on pursuing principle at all cost without a dose of pragmatism and that seriously imperilled its very existence. One of the main prospective findings of this research will be that regional tribunals such as the SADC Tribunal, the COMESA Tribunal and EAC Tribunal and the African Court on Human and People’s Rights are amongst the most vulnerable regional institutions because they generally lack popular legitimacy and institutional support. Unlike domestic courts, regional tribunals are most of the time, saddled with the mammoth task of presiding over cases involving sovereign states and their nationals. Like domestic courts they have to temper principle with pragmatism in order to muster the popular legitimacy and institutional support needed to secure the existence of any court of law or tribunal both within the nation states and on the international plane.

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1. INTRODUCTION

The Tribunal of the Southern African Development Community (SADC)\(^1\) is one of the recently established international courts. It was created through the Treaty establishing the Southern African Development Community in 1992 but only came to existence over a decade later with the coming into force of the Protocol of the SADC Tribunal in August 2005.\(^2\) The mandate of the Tribunal is to *inter alia*, ensure that SADC laws are adhered to by member states and SADC Treaty organisations.\(^3\)

There are burgeoning opinions and belief amongst legal practitioners, politicians and opinion makers that the Tribunal was suspended for strategic and political reasons. The Tribunal lacked popular legitimacy from the general SADC citizenry and institutional support by the SADC member states. Further, the Tribunal’s jurisprudence was heavily inclined on pursuing principle at all cost without a dose of pragmatism in arriving at its decisions and that seriously imperilled its very existence.\(^4\) Hence some of its decisions did not find favour with some if not all of the members constituting the SADC Summit.\(^5\)

Trollip is of the view that the suspension of the operations of the Tribunal by the SADC Summit was done in order to ensure that the Tribunal will not sit to hear the controversial cases concerning the conduct of the Zimbabwean government, thereby protecting the interests of the Mugabe administration indefinitely.\(^6\) Further, he argues that the move by the Summit echoes and is congruent to the African Union’s (AU) regressive decision in the past to instruct its member states not to assist the International Criminal Court (ICC) to arrest indicted Sudanese President Omar al-Bashir for genocide in Dafur.\(^7\)

Another commentator, Sasman, contends that the South African-based conglomerate, Swissbourgh Group, claims that the governments of Lesotho, South Africa and Zimbabwe spearheaded the SADC’s decision to, for all intents and purposes, suspend the SADC Tribunal.\(^8\) This stems from a case in which the Swissbourgh Group filed a case against the Kingdom of Lesotho for compensation and damages suffered following the

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1 Hereinafter the Tribunal.
2 Hereinafter the Protocol.
4 The principled jurisprudential approach of the tribunal is discernible from the tribunal’s decision in the case of Mike Campbell (Pty) Ltd et al v The Republic of Zimbabwe No. SADC (T):2/07,11/08 AND 01/10.
5 This refers to its landmark decision in the case *Mike Campbell (Pty) Ltd et al v The Republic of Zimbabwe*.
6 A. Trollip is Democratic Alliance parliamentary leader. The interview was covered on the (10 August 2010) by the Pretoria News newspaper (Pretoria, South Africa) 11.
7 Trollip op cit.
expropriation of its mineral rights in the execution of the Lesotho Highlands Water Project (LHWP).\textsuperscript{9} The financial claims against Lesotho alone are estimated to exceed N\$8 billion. The suspension of the SADC Tribunal brought to a halt the mammoth case of the Swissbourgh Group and the appeal of the late Zimbabwean commercial farmer, Mike Campbell and 77 others after the Zimbabwean government was found in breach of the Tribunal’s orders to stop the eviction and harassment of the farmers.\textsuperscript{10}

The most contentious issue regarding the suspension of the Tribunal is what set it apart from other regional tribunals. That issue concerns the right of direct access to the tribunal by the individual or natural persons. This means that the individual citizen of the SADC member states has direct \textit{locus standi} to appeal before the tribunal in disputes between them and their home state or any other state party or individual.\textsuperscript{11} The SADC member states as the Summit of Heads of States and governments sitting in August 2012 at Maputo, Mozambique were not amiable to this situation and decided that a new Protocol on the Tribunal should be negotiated in order to review the powers of the Tribunal, that the right of individual direct access to the tribunal should be curtailed or limited with the effect that the mandate of the Tribunal should be confined and limited to the interpretation of the SADC Treaty and Protocols relating to disputes between Member States.\textsuperscript{12}

The Protocol makes provision for the basis of jurisdiction and access to the Tribunal in Article 14 of the Protocol.

The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and the Protocol which relate to:

(a) the interpretation and application of the Treaty;  
(b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community;  
(c) all matters specifically provided for in any other agreements that Member States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.\textsuperscript{13}

The Protocol further provides for the scope of the Tribunal’s jurisdiction in the following terms:

\textsuperscript{9} Swissbourgh Group filed has also made an application on 25th of January 2011 with the Tribunal to set aside the SADC Summit decision to suspend the Tribunal. 
\textsuperscript{10} Mike Campbell (PVT) Ltd et al v The Republic of Zimbabwe Case No. SADC (T):2/07,11/08 AND 01/10. 
\textsuperscript{11} See Article 15 of the Protocol on the SADC Tribunal. 
\textsuperscript{12} See the remarks of the Director of the Southern Africa Litigation Centre (SALC) Nicole Fritz’s on the SADC Summit’s deplorable decision. Available online at http://www.southernafricalitigationcentre.org/. (Accessed 27 August 2012). 
1. The Tribunal shall have jurisdiction over disputes between Member States, and between natural or legal persons and Member States.

2. No natural or legal person shall bring an action against a Member State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.

3. Where a dispute is referred to the Tribunal by any party the consent of other parties to the dispute shall not be required.

4. An appeal before the Tribunal pursuant to Article 20A shall be limited to issues of law and legal interpretations developed or covered in the report of a panel established in terms of the relevant.\textsuperscript{14}

It will appear that the sore point about the Tribunal in the eyes of the SADC political executive mainly pertains to the fact that it allows natural persons to bring action against a member state including their own home states on condition that they shall have exhausted available domestic remedies before doing so.\textsuperscript{15} This proviso is universal with almost all the protocols on regional and international tribunals as it is intended to differ to and to allow states to settle their internal disputes without undue external interference.\textsuperscript{16}

This emanates from the well established international law principle of state sovereignty, some of which most African States especially, are reluctant to relinquish.\textsuperscript{17} The main reason that the SADC Summit decided to call for a review of the Protocol on the Tribunal and specifically the jurisdiction of the Tribunal is because of the embarrassment that the governments invariably suffer when their citizens take them to the Tribunal and when the subsequent decisions do not favour them. Governments felt that they were losing some of their political hegemony on their citizenry and that the days of wholesale human rights violations were over. This is clear from Tanzanian President Jakaya Kikwete’s frustration with the Tribunal when he lamented that “...we have created a monster that will devour us all.”\textsuperscript{18} His statement crisply captures the regions displeasure with the manner in which the Tribunal discharged its functions and particularly its unfettered jurisdiction and the \textit{locus standi} of the natural persons.

\textbf{1.1 The Tribunal’s Decisions}

Before its suspension, all of the cases heard by the Tribunal were brought by natural persons in terms of Article 15 (a) and (b) and the following cases are instructive in this regard as they are argued to have had a serious bearing on the

\begin{itemize}
  \item Article 15 of the Protocol on the SADC Tribunal.
  \item Article 15 (1).
  \item Article 15 (2).
  \item “Killed off by Kings and Potentates” (19-25 August 2011) Mail and Guardian (South Africa).
\end{itemize}
demise of the tribunal as per the views of different parties to this discourse as mentioned earlier in this research.\textsuperscript{19}

1.1.1  \textit{Ernest Mtingwi v SADC Secretariat}

In 1997, the Tribunal heard its first and groundbreaking case of \textit{Ernest Mtingwi v SADC Secretariat}.\textsuperscript{20} The respondent advertised the vacancy for the position of senior programme manager, customs cooperation and modernization. The Applicant responded to the advertisement and his application was successful. By a letter dated 1 December 2005, the Respondent offered him the job and he was advised that the letter, together with the SADC Administration Rules and Procedures Handbook, constituted the contract of employment.\textsuperscript{21} The Applicant was further advised that the Respondent was anxious to have the position filled by 1 January 2006, at the very latest.

The Applicant responded by signing on the letter of offer and forwarding it together with his own letter dated 20 February 2006 to the Respondent. He further informed the Respondent that he was ready to report for duty on the 6 March 2006. There was no further communication between the parties until 5 April 2006 when the Applicant sent an electronic mail to the Respondent informing the Respondent that he would no longer be able to report for duty on the agreed date as he had been charged with the offence of perjury and had to wait until the matter was finalized and that he would report for duty on 7 May 2006 instead.

On 6 April 2006 the government of the Republic of Malawi wrote to the Respondent and informed the latter that they would like to formally withdraw the Applicant’s candidature for possible consideration for the position in question. The Respondent then notified the Applicant of its wish to abide by the decision of the government of the Republic of Malawi and advised him that it could not employ him against the will of the government of the Republic of Malawi. The Applicant was aggrieved by the Respondent’s decision and as a result commenced legal proceedings contending that the termination of his employment was unlawful and unfair.

The contention was based on the grounds that the Respondent’s decision violated principles of natural justice in that:

1. The Applicant was not accorded the opportunity to be heard and that no reasons were given for the termination;

2. The Respondent had no obligation to abide by the decision made by the Government of the Republic of Malawi, and that both that decision and

\textsuperscript{19} See the perspectives of different opinion makers, politicians and legal experts such Cathrine Sasman, Athol Trollip and Nicole Fritz, op cit.
\textsuperscript{20} SADC T 1/2007.
The Respondent’s decision were illegal, arbitrary, capricious, unreasonable, made in bad faith, and therefore *ultra vires* and *void ab initio*; and,

3. The Respondent’s decision constituted unfair industrial or labour practices under the International Labour Organization’s (ILO) Termination of Employment Convention of 1982.\(^2\)

The Respondent opposed the application by denying any wrongdoing or liability and instead made a counter claim relating to costs incurred by it on account of the Applicant’s failure to report for duty. The Applicant contested the counter claim arguing that he was prevented from reporting for duty because of an unforeseen event which was a criminal charge against him in Malawi. He argued that the unforeseen events did not arise out of his negligence and that in any event he quickly informed the Respondent about the event. As a result, the Respondent ought to have made contingency plans to deal with the unforeseen events and emergencies.

The Tribunal therefore had to deal with the legal questions whether there was a contract of employment between the parties; whether the Respondent unlawfully terminated the contract and whether the remedies sought were available to the parties. According to Justice, Mwita Werema:

> “The common denominator of all these concepts is that there must be an agreement by which the employee must make his services available to the employer for a determined period and that the employer must provide remuneration. The agreement to render services and to remunerate for the services rendered is central to a contract of employment. We also observe that control of an employee by an employer through supervision is a requirement in a relationship between an employee and employer. These are reciprocal obligations which are necessary in any effective contract of employment. With this in mind, the question arises whether it can be concluded in the present case that a contract of employment existed between the applicant and the respondent.”\(^2\)

Whereas the Tribunal correctly found that there was consensus regarding the offer of employment and acceptance thereof, it held that this did not constitute an employment contract as there were other conditions attached to the agreement such as reporting for duty and other conditions contained in Rule 14.2.6 of the Handbook. The Tribunal held that the contract thus concluded was a pre-contract to conclude a future employment contract. It was, therefore, a conditional contract of employment and the Applicant’s act of reporting for duty would have effected the contract. Despite the fact that the Tribunal decided the case in favour of the SADC Secretariat and the Malawi government, it is not inconceivable to discern that the latter and the former were embarrassed to face litigation against an individual citizen.


\(^2\) SADC T 1/2007.
1.1.2 *Mike Campbell (PVT) Ltd et al v The Republic of Zimbabwe*\(^{24}\)

On 11 October 2007, Mike Campbell (Pvt) Limited and William Michael Campbell filed an application with the Tribunal challenging the acquisition by the Respondent of agricultural land known as Mount Carmell in the District of Chegutu in the Republic of Zimbabwe. Simultaneously, they filed an application in terms of Article 28 of the Protocol on Tribunal, as read with Rule 61 (2) – (5) of the Rules of Procedure of the SADC Tribunal,\(^{25}\) for an interim measure restraining the Respondent from removing or allowing the removal of the Applicants from their land pending the determination of the matter.

On 13 December 2007, the Tribunal granted the interim measure through its ruling which in the relevant part stated as follows:

“The Tribunal grants the application pending the determination of the main case and orders that the Republic of Zimbabwe shall take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by orders, to evict from or interfere with the peaceful residence on, and beneficial use of, the farm known as Mount Carmell of Railway 19, measuring 1200.6484 hectares held under Deed of Transfer No. 10301/99, in the District of Chegutu in the Republic of Zimbabwe, by Mike Campbell (Pvt) Limited and William Michael Campbell, their employees and the families of such employees and of William Michael Campbell.”

Zimbabwe subsequently refused to comply with the judgment and the Tribunal referred the matter to the SADC Summit in accordance with Article 32 (5),\(^{26}\) to take appropriate action in June 2009. In July 2010 the Tribunal again made a request to the SADC Summit to take appropriate action against Zimbabwe in the light of the existence of further acts of non-compliance with the decision of the Tribunal by Zimbabwe. The SADC Summit in August 2010, on the recommendation of the Council of Ministers, decided to defer action against Zimbabwe and to order a review relating to the role, responsibilities and terms of reference of the Tribunal by an independent consultant, Dr Bartels.\(^ {27}\)

From the foregoing discussion, it is clear that the Summit was reluctant or uncomfortable to confront Zimbabwe in order for the latter to comply with the decision of the Tribunal. In August 2009, the Zimbabwean Government issued a legal opinion which challenged the legality of the SADC Tribunal and disputed its power to enforce decisions. Furthermore, the Zimbabwean Government announced its withdrawal from any legal proceedings involving the Tribunal until

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25 Hereinafter the Rules.
26 Article 32 (5) of the SADC Protocol on the Tribunal.
27 Address by the former President of the Southern African Development Community Tribunal, Justice Ariranga Govindasamy Pillay on the occasion of the discussions on the suspension of the SADC Tribunal of the held in Sandton, Johannesburg on the 11th July 2011.
The Protocol on Tribunal and the Rules were ratified by at least two-thirds of the bloc’s membership. Hence, the SADC Council of Ministers recommended the review of the role, functions and terms of reference of the Tribunal.

The Summit bought into Zimbabwe’s tactics, hence the decision to commission the review. It is contended that the government of Zimbabwe should have raised the issue as a *point in limine* at the beginning of the proceedings in Tribunal instead of subjecting itself to the jurisdiction of a tribunal whose legitimacy it questioned. By allowing the legal opinion of Zimbabwe to sway the matter from compliance with the decision of the Tribunal to an enquiry on its legitimacy is to allow Zimbabwe to benefit from the best of both worlds. It is safe to say that Zimbabwe would not have questioned the legitimacy of the Tribunal had the decision been in the former’s favour. Only upon the realization that it had lost the case did Zimbabwe come up with a “scape-goat” in questioning and disputing the legality of the Tribunal and its power of enforcement of its decisions, thus ensuring, whatever the outcome the government of Zimbabwe benefitted.

1.1.3 *The Van Zyl or Swissbourgh Case involving the Kingdom of Lesotho*[^28]

In this case a South African national, Josiah van Zyl and Others, sought to challenge the cancellation and expropriation of five mineral leases in the Lesotho courts. These leases were previously allocated to and held by them. The allocation was legally made by the government of Lesotho. When this proved unsuccessful the Applicants petitioned the South African authorities to provide diplomatic protection in relation to the dispute.

The government of South Africa declined to do so because the president of South Africa was advised that the government was under no obligation to afford diplomatic protection to the Appellants because:

1. Any decision to intervene would involve a policy and not a legal decision;
2. Such a decision is the sole prerogative of the government;
3. That the dispute between the Appellants and the government of Lesotho had been decided by the Lesotho courts;

[^28]: This is a case *pendente lite*, hence I am not certain about its citation. The Applicants in this case also made applications in South African Courts for diplomatic protection. (i.e., action by one state against another state in respect of an injury to the person or property of a national of the former state that has been caused by an international delict that is attributable to the latter state), in order to reverse the Lesotho Government’s decision to expropriate the five mineral leases held by the South African Applicants. The Appellants requested the government of the RSA to provide them with diplomatic protection against the government of Lesotho. The international delict on which they relied was the cancellation and revocation of five mineral leases that had been granted by the government of Lesotho. The cases were recorded and cited as follows in South Africa; *Van Zyl and Others v Government of Republic of South Africa and Others* (170/06) [2007] ZASCA 109; [2007] SCA 109 (RSA); [2008] 1 All SA 102 (SCA); 2008 (3) SA 294 (SCA).
4. That mediation or intervention by the government would imply a lack of faith in the judicial system of a sovereign state; and,

5. That diplomatic intervention would set an unhealthy precedent.

The President refused to accede to the Appellants’ request and they were informed that they were not, in the circumstances of the case, entitled to diplomatic protection.\(^{29}\)

After losing in the domestic courts of Lesotho and South Africa, the Applicants brought claims for expropriation and denial of justice against South Africa and Lesotho to the Tribunal in June 2009. It is these latter claims that it is perceived by some form the basis for the political reasons for the suspension and review of the Tribunal by the SADC Summit. For instance, in a communication with Investment Arbitration Reporter, Mr. Josiah van Zyl, the first Applicant in the case warned that certain governments are seeking to neuter the tribunal in an effort to avert massive financial claims resulting from their international law violations.\(^{30}\)

As earlier mentioned it is argued herein that whatever might have been the motive and rationale for the suspension of the Tribunal as well as the merit or lack thereof, the SADC Summit only succeeded in doing so because of the lack of political will to enforce the Tribunal’s decisions by the states parties coupled with the general lack of legitimacy\(^{31}\) and support for the Tribunal by the broader SADC citizenry. This is a challenge which generally faces other regional tribunals.

The Registrar of the Tribunal Justice Mkandawire correctly pointed out that:

> “Any court would be concerned with noncompliance of its decisions. It is not just about Zimbabwe. International law enforcement depends on the political will of the member states...and that sits with the SADC Summit. They have to monitor the enforcement mechanism. Even as the tribunal, our eyes are toward the Summit. We have done our part and we cannot enforce our own decisions.”\(^{32}\)


\(^{31}\) Roux T. posits that “The political science sense of the term ‘legitimacy’, of course, is not the same as the legal sense. When political scientists talk of constitutional courts building their legitimacy what they typically mean is some combination of public support and institutional security.” Available online at http://csic.academia.edu/CarlosClosa/Papers/1511192/The_Lisbon_Treaty_and_National_Constitutions_Europeanisation_and_Democratic_Implications. (Accessed on the 12th August 2012).

Unlike the SADC Tribunal, other tribunals such as the African Court on Human and People’s Rights, the COMESA Tribunal and EAC Tribunal do not allow natural persons access and in the event they do, it is on the proviso that member states against whom the case is brought should first give a consent for the Tribunal to hear the case. This means that the perpetrator is given the prerogative to decide whether or not they may be taken to the court by its victim. This situation is suitably described by Scalia J (as he then was) who was of the opinion that “....freedom of political association that must await the Government’s favourable response to a ‘Mother, may I?’ is not freedom of political association at all.”  

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In casu, it appears that the Protocol favours state parties over and above individual citizens whose human rights are violated by their states. The Tribunal was sui generis in that it did not require the consent of the other parties involved in the case for it to exercise its jurisdiction.  

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2. JURISDICTIONAL ISSUES OF OTHER AFRICAN REGIONAL TRIBUNALS  

2.1 The African Court of Justice and Human Rights  

The Protocol on the Statute of the African Court of Justice and Human Rights (ACHPR) provides that the Court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with its Statute which relates to:  

(a) The interpretation and application of the Constitutive Act;  

(b) The interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity;  

(c) The interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned;  

(d) Any question of international law;  

(e) All acts, decisions, regulations and directives of the organs of the Union;  

(f) All matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court;  

(g) The existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; and,  

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Article 15 (3).
(h) The nature or extent of the reparation to be made for the breach of an international obligation.\(^{35}\)

The Protocol also makes provision for certain entities which have *locas standi* to submit cases to the Court on any issue or dispute provided for in Article 28 as follows:

1. The following entities shall be entitled to submit cases to the Court on any issue or dispute provided for in Article 28:
   - (a) State Parties to the present Protocol;
   - (b) The Assembly, the Parliament and other organs of the Union authorized by the Assembly;
   - (c) A staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union;

2. The Court is not open to States, which are not members of the Union. The Court also has no jurisdiction to deal with a dispute involving a Member State that has not ratified the Protocol.\(^{36}\) Lastly, the Protocol makes provision for other entities to submit their cases on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the States Parties concerned as follows;
   - (a) State Parties to the present Protocol;
   - (b) the African Commission on Human and Peoples’ Rights;
   - (c) the African Committee of Experts on the Rights and Welfare of the Child;
   - (d) African Intergovernmental Organizations accredited to the Union or its organs;
   - (e) African National Human Rights Institutions; and,
   - (g) Individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol.\(^{37}\)

2.2 *The Common Market for Eastern and Southern Africa Court of Justice*


\(^{36}\) Article 29 of the Protocol.

\(^{37}\) Article 30 of the Protocol.
directive, regulation or decision made. Natural persons are also permitted to sue a member State in the COMESA Court regarding the legality under the Treaty of any act, directive, regulation or decision of such member state. In the event that a member state’s court is reviewing the application or interpretation of the Treaty or determining the legality of an act, directive, regulation or decision of the Common Market, it may request the Court’s opinion on the matter. If the national court is a court from which there is no appeal or remedy, the Court is required to refer the question to the COMESA Court. As national remedies must be exhausted before a person can bring a matter to the court, the result is that it is only in the unlikely event that a court of final instance fails to fulfil its obligation to refer a matter of Treaty interpretation or application in connection with a member State act that the right of persons to bring suit in the Court could be exercised.  

The commonalities of this Court’s jurisdiction and that of the SADC tribunal are glaring since the natural persons have locus standi and can approach the Court once local remedies have been exhausted. This therefore means that the COMESA Court’s existence is imperilled by the same natural person’s locus standi before it.

2.3 The East African Court of Justice

Historically, the Court can trace its roots to the Court of Appeal for Eastern Africa which was established in 1909. The territorial jurisdiction then covered Aden, Kenya, Seychelles, Somalia, Tanganyika, Uganda and Zanzibar. In the course of time, only four countries remained, namely; Kenya, Tanganyika, Uganda and Zanzibar, and the Court was renamed the Court of Appeal for East Africa. With the collapse in 1977 of the East African Community the said Court ceased to exist. The Court was created by the Treaty for the Establishment of the East African Community (the Treaty) and was inaugurated on the 30th November, 2001.

The court for East African Community, the East African Court of Justice also makes provision for the natural person’s access to it. The East African Community Treaty provides that subject to the provisions of Article 27, any person who is resident in a Partner State may refer for determination by the Court, the legality of any

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39 See in this regard Article 15 (2) OF THE SADC Tribunal Protocol which in no unequivocal terms states that “No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction”. See also http://en.wikipedia.org/wiki/COMESA_Court_of_Justice. (Accessed on the 23 of August 2012).
41 Justice Harold R. Nsekela, President, East African Court of Justice. A Paper for Presentation During the Sensitisation Workshop on the Role of the EACJ in the EAC Integration, Imperial Royale Hotel, Kampala, Uganda, 1st – 2nd November, 2011.
Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty. That such proceedings shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be; The Court shall have no jurisdiction where an Act, regulation, directive, decision or action has been reserved under the Treaty to an institution of a Partner State.

Article 30 of the EAC Treaty grants individual natural persons locus standi similar to the COMESA Court and the SADC Tribunal. Article 30(2) provides that The legal and natural persons shall institute such proceedings within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be. This is a problematic provision because it is too restrictive on the complainants and may serve as deterrence from approaching the court in the similar manner as a doctrine of prescription. The adverse effect of this provision came to light in the case of Attorney General of the Republic of Kenya v Independent Medical Legal Unit where the both the court a quo and the Appellate Division held that IMLU filed the Reference out of the prescribed time and consequently, the Reference was time-barred for not complying with the amended provision of Article 30(2).

Furthermore, the Justices of the EAC Court of Justice like those of the SADC Tribunal are not appointed on a permanent basis which means that the judges do not enjoy security of tenure. The real challenge facing the Court is the dire resource constraints. The plight of these tribunals is therefore comparable as they in many respects mirror each other in terms of their legal framework and the manner in which they are constituted.

3. OTHER CHALLENGES FACING REGIONAL TRIBUNALS

3.1 The Legitimacy of the Tribunal

Since access to justice through the courts or tribunals is one of the basic human rights requirements in democratic systems under the rule of law such is the case on the African continent, the legitimacy of judicial functions, in casu the Tribunal, needs no further justification or discussion in this context. Gone are the days when the judiciary’s legitimacy was unquestionable. It was then that the judiciary was perceived as an infallible institution. But today, things have changed substantially that the legitimacy of both domestic and international courts and tribunals does not go without saying.

42 Article 30 of the Treaty for the Establishment of the East African Community.
44 Ibid.
45 Appeal NO. 1. of 2011, East African Court of Justice Appellate Division.
This is perhaps due to the fact that, *inter alia*, the public now understands its own role within a democratic space. The late Chief Justice of Zimbabwe, the Honourable Justice Dumbutshena, expressed himself eloquently as follows on the subject of judicial legitimacy:

“It is up to judges to make the legal system legitimate. Judges too must prove their legitimacy. In order to be legitimate, judges should see through their own eyes the conditions of the ordinary people. When sitting on their high benches in the splendour of their robes, judges should look out through the window in order to see what is going on outside there, where their judgments have an effect.”

On the same breath, the people on whom these judgments have an effect should *mutatis mutandis*, identify with and embrace the existence of the tribunal in order for it to enjoy popular legitimacy. This was not the case with the SADC Tribunal as many, including those in the legal fraternity and human rights arenas where the Tribunal is needed within the sub-region are oblivious to its existence, let alone its function. The survival of the other African international tribunals depends on their legitimacy. Like the SADC Tribunal, they lack the much needed legitimacy within their citizenry and governance. It is evident that the justices of the African Court are alive to this predicament as they have made efforts in the past year to visit several African countries in order to create awareness on the African citizenry of the existence of the court and its mandate. This is a step in the right direction as these tribunals need the buy-in of the natural persons for their legitimacy.

As regards the legitimacy of the Tribunal in its function, it rests essentially on the following interrelated factors which are discussed bellow:

1. Independence of the Tribunal;
2. The ability of the Tribunal to perform its tasks; and,
3. Public awareness and perception of how the Tribunal functions.

### 3.2 Independence of the Tribunal

Independence of the Tribunal in this regard comprises individual or decisional independence of its judges on the one hand, and institutional independence on the other hand. In a wider sense it also comprises the personal integrity and impartiality of judges. Independence is a necessary pre-requisite for a properly functioning court or tribunal. Hence it is crucial for the legitimacy of the tribunal.

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46 Dumbutshena C J; “Judicial Transformation” (paper presented at the Judges Symposium held at Benoni on the 16th July 2003).

47 See Pampalone’s op cit.

Unless tribunals are independent from both state parties and their political branches of governments and non-state parties alike, they can neither fulfil their tasks efficiently nor sustain and inspire the confidence of the African populace which they serve. If individuals do not have open access to independent regional tribunals for the enforcement of their rights, it would be easy for the states parties and their political branches of government to provide rights on their domestic legislation and in their regional legal instruments while diluting or disregarding them in practice. The Zimbabwean farmer’s case is the case in point.49

As already mentioned, the first basic element of judicial independence is the independence of individual judges, often referred to as decisional independence. Individual independence is guaranteed by the appointment procedure and, above all, by the guarantees of life tenure and the right to remain in office. These guarantees for individual judges also form the basis of decisional independence for the tribunal as a whole.50 In casu, judges of the SADC Tribunal do not have security of tenure since they are not appointed on a full time basis. With Regards to the appointment and tenure of office of the judges, the Tribunal’s rules of procedure provide that:

1. The Members shall be appointed for a term of five (5) years and may only be re-appointed for a further term of five (5) years. However, of the Members initially appointed, the terms of two (2) of the regular and two (2) of the additional Members shall expire at the end of three (3) years. The Members whose term is to expire at the end of three (3) years shall be chosen by a lot to be drawn by the Executive Secretary immediately after the first appointment.

2. Subject to paragraph 3 of this Article, the Tribunal shall sit when required to consider a case submitted to it. The Members shall, therefore, not be appointed on a full-time basis.51

The foregoing creates a fertile ground for a successful theoretical contention therefore that the Tribunal lacks the necessary decisional independence due to lack of security of tenure of office. However, this theoretical contention is assailable because despite the lack of security of tenure, the Tribunal was still able to arrive at activist and robust decisions such as that of the Zimbabwean farmers’ case. It is because of these provisions that the previous justices of the tribunal terms of office ended and were deliberately not subsequently renewed. Article 4 of the Protocol on the Statute of the ACJHR shows that the justices of the erstwhile ACHPR lack the security of tenure as it clearly shows that their tenure will come to an end following

49 Mike Campbell (PVT) Ltd et al v The Republic of Zimbabwe Case No. SADC (T):2/07,11/08 AND 01/10.
51 Article 6 (1) and (2) of the Protocol respectively.
the election of the Judges of the African Court of Justice and Human Rights. In terms of the EACJ Treaty, Article 24(2), Judges of the EACJ have a maximum of a seven years non-renewable term. In terms of the same Treaty, Article 140(4), the Judges are only appointed on an ad hoc or part-time basis. It is only the Registrar and the other Court staff who are employed on a full-time basis. The Registrar is responsible for the day to day administration of the Court.

Institutional independence is a somewhat broader concept. It involves matters that affect the operation of the judicial system as a whole, that is, as one branch of the constitutional structure of government, in casu, the SADC or EAC sub-regional structure of governance. The arrangements regarding institutional independence vary. Generally, however, the institutional independence of the judiciary has at least one weak point, namely the fact that the resources available to the courts or tribunals are determined by the other branches of government, that is, by the political executive and/or by parliament. In this regard the tribunals’ budgets are made available by the member states through the regular budgets. This inherent weakness exists in all legal systems, national and supra-national because all governance expenditure must ultimately be in the hands of the specifically designated organs and not the courts or tribunals.

The particular arrangements for decisions concerning the funding of the courts or tribunals vary. The manner in which the decision-making process is organized can, however, have a major impact on whether the weak point is just a potential one, an inevitable structural feature despite which the institutional independence and the proper functioning of the judicial system are preserved and safeguarded, or whether it is real weakness and thus an actual threat to the institutional independence of the Tribunal.

It is suggested that is that tribunals should be fairly independent of the individual member states and perhaps. Despite the lack of security of tenure as the judges of the SADC Tribunal were appointed for a particular and limited tenure, they were independent enough as demonstrated in the bold and unwavering pronunciation on the draconian land redistribution programme in Zimbabwe. It is contended below...

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52 See Article 4 of the protocol on the statute of the African Court of Justice and Human Rights. The new court came about as a result of the merger of the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union in order to establish a single court.

53 Article 140(4) of the East African Court of Justice. See also Justice H.R. Nsekela “An Overview of the East African Court of Justice” (A Paper for Presentation during the Sensitisation Workshop on the Role of the EACJ in the EAC Integration, Imperial Royale Hotel, Kampala, Uganda, 1–2 November, 2011).

54 See Justice H.R.Nsekela ibid.

55 Article 6(1) of the Rule of Procedure of the SADC Tribunal provides for tenure of office of members the tribunal/judges that members shall be appointed for a term of five (5) years and may only be re-appointed for a further term of five (5) years.

56 Mike Campbell (PVT) Ltd et al v The Republic of Zimbabwe, op cit.
that it could be one of the reasons that the Tribunal’s ardently principled decision as opposed to pragmatism in the Zimbabwean farmers case led to its demise.

3.3 The Ability of the Tribunal to Perform its Task

The Tribunal’s ability to perform its task presupposes independence, but, is also dependent upon factors such as:

1. Professional competency;
2. Soundness of the systemic framework;
3. Adequacy of resources provided; and,
4. Proper accountability under a system that is effective while preserving independence.

A judge who is independent but incompetent is unacceptable. In this regard, there is very little doubt if any at all that any court which is endowed with the legal acumen of the former jurists of the Tribunal such as Mauritian Chief Justice Ariranga Govindasamy Pillay and Justice Dr. Luis Antonio Mondlane of Mozambique should not excel at their mandate.57

How well the Tribunal performs its tasks is of course vital for its legitimacy. In this regard, an important issue arises and it has to do with the fact that the people’s rights are supposed to be protected by in *casu*, an independent tribunal. However, in the end the ability of the courts to protect the people does not depend entirely on the courts *per se*, but on the other branches of government which have to assist the courts with the enforcement of their judgments and funding. These are the same branches from which the courts ought to be independent. Therefore the independence of the Tribunal in this instance ought to be qualified because it is not an absolute independence but rather functional independence.

For instance, whereas the Tribunal made a landmark ruling against the Zimbabwean government in the Zimbabwean farmers’ case, enforcement of such a decision remained elusive; thus the challenge lies with regard to decisions of international

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57 These are jurists with impeccable experience in the judiciary and other legal fields. Chief Justice Ariranga Govindasamy Pillay was the Chief Justice of Mauritius until 2007, when he was succeeded by Y. K. J. Yeung Sik Yuen. He was called to the Bar at Lincoln’s Inn in 1972 and is the Chairman of the Judicial and Legal Service Commission of Mauritius. In November 2001, he was elected as an Honourary Bencher of Lincoln’s Inn, London. He has held numerous appointments among others Principal Crown Counsel, Assistant Solicitor General and Parliamentary Counsel at the Attorney General’s office and Ministry of Justice. Chief Justice Pillay was appointed Puisne Judge and later, Acting Senior Puisne Judge of the Supreme Court of Mauritius from 1987 – 1996. He is also a member of the United Nations Committee on Economic, Social and Cultural Rights as well as the appointed Adviser to the Governing Council of the African Centre for Democracy and Human Rights Studies. Justice Dr. Luis Antonio Mondlane is well accomplished legal scholar as he lectured law at the University of Eduardo Mondlane and he was a judge of the Supreme Court of Mozambique for substantial number of years.
tribunals. Unlike in domestic legal systems, there is no executive branch to enforce the decisions of international tribunals on an international plane, a challenge highlighted by the Registrar of the SADC Tribunal. The African regional law jurisprudence is replete with instances where decisions of international tribunals have met unfavourable attitudes against enforcement by member states. The most poignant example is the AU’s condemnation of the International Criminal Court’s (ICC) decisions to indict Sudanese president Al Bashir and the now deceased former president of Libya, Muammar Gaddafi.

3.4 Public Awareness and Perception of How the Tribunal Functions

All of these factors are interlinked. Formal independence will not ensure legitimacy unless the tribunal is free from corruption and other forms of mischief. A formally independent tribunal is not robust if other branches of government undermine its position by interfering unduly or by failing to provide a proper organization or financing for the judicial system. Hence the SADC Protocol provides that:

1. The law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State in which the judgment is to be enforced shall govern enforcement;

2. States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal;

3. Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned.

4. Any failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned; and,

5. If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action.  

As earlier mentioned, popular legitimacy presupposes that the community is aware of the existence of the Tribunal and embraces it. As Justice Bosielo meticulously opined, the community should not ask the embarrassing question “…who are those people and where do they come from?”, when referring to the court and its judges.

Furthermore, it is always easier to legislate and add demands on the tribunals than to provide them with required resources. And even if the system functions as it should, it may not be perceived as legitimate unless the public is sufficiently informed to understand what it does, why and how. Regional courts and tribunals have to make themselves visible to the citizenry in order for the public to be aware of their existence and in order to identify with them as explained earlier in relation to the African Court’s visitation around the to African continent educate the people about the Court.

58 Justice Charles Mkandawire.
59 Article 32(1), (2), (3), (4) and (5) of the Protocol.
The SADC Summit breached the Protocol with impunity by failing or rather deliberately omitting to heed the peremptory responsibility to take “...all necessary measures to ensure the execution of the Tribunal’s decisions.” In doing so, it capitalized on the fact that the SADC populace is largely oblivious of the existence of the Tribunal and therefore lacks popular legitimacy. It got away with murder because the community cannot protest and protect that which it is not privy to. The Tribunal to a greater extent existed in oblivion. Even though the Registrar made an emphatic plea to the Summit to support the Tribunal, the real support of the Tribunal could have only come from the SADC citizenry. By his own admission, the Registrar has pointed out as late as December 2009 that the Tribunal still needed to develop relations with universities and outreach human rights and legal groups.

The central argument of this article is therefore that whereas the Tribunal was suspended for strategic reasons aimed at serving the interests of certain important role players within SADC such as Zimbabwe, Lesotho and South Africa, it was only possible because the Tribunal per se, generally lacked the popular legitimacy and support of the member states and the citizenry.

Having outlined the predicament of regional tribunals, the natural question that arises is: Can tribunals avoid the problems that befell the SADC Tribunal? The Tribunal had the possibility of avoiding its predicament by adopting a more pragmatic stance in arriving at its decision in the Zimbabwean farmers’ case instead of sticking to principle. It is suggested here that courts and tribunals in new democracies should, where necessary, circumvent principle in favour of pragmatism. According to this viewpoint, judges should not pursue principle at all costs, but rather, take into account the likely consequences of every case that they decide, and adjust their decision so as to promote the interests of their community in a pragmatic way. However, the danger with pragmatism is that it in most instances it places human rights in jeopardy. The leading proponent of this approach is Posner, who interpreted the decision of the United States Supreme Court decision in *Bush v Gore* as having been justified by the need to avert a constitutional crisis.

On the other side, there is the viewpoint as put forward by Dworkin who does not deny the role of pragmatism in his theory of adjudication, but limits judges’ pragmatic discretion to compromise on principle where this is required to achieve

**60** Article 32 (2).


the support of other judges. His theory is antithetical to pragmatism, which he disapprovingly associates with activism.

“....An actual justice must sometimes adjust what he believes to be right as a matter of principle, and therefore as a matter of law, in order to gain the votes of other justices and to make their joint decision sufficiently acceptable to the community so that it can continue to act in the spirit of a community of principle at the constitutional level.”

I therefore submit that whereas the dangers of pragmatism lie in compromising on human rights protection and the letter of the law, where a pragmatic decision of the court will not gravely prejudice the individual rights and promote harmony, the court should give it utmost consideration. This will involve a balancing act of weighing the conflicting interests of the parties before the court. Another of the many dangers with this approach is the lack of legal certainty by which legal systems and courts earn their legitimacy.

4. CONCLUDING REMARKS

Regional tribunals are generally under threat for the reasons detailed above. The threat is mainly political and is primarily based on the fact that open access by natural persons to tribunals threatens sacrosanct international law principles such as state sovereignty and the right to self determination. Some African States have always taken refuge behind the principle of state sovereignty whenever incidents of Human Rights violations are raised against them. In the interest of human rights protection, natural persons need open access to these tribunals more than states parties since it is individual persons who feel the real pinch of human rights violations.

These tribunals should be human rights centered and the natural persons should be allowed access without the requirement to first secure the consent of the State party to the dispute, the perpetrator. The SADC Tribunal pioneered the natural persons’ access to the tribunal and that has led to its unfortunate suspension and review of its jurisdiction. This clearly shows that the political leadership in the continent has not really committed to human rights promotion and protection except on paper.

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DRAFTING A PROTOCOL TO EXTEND THE JURISDICTION OF THE EAST AFRICAN COURT OF JUSTICE

Alex Obote-Odora*

ABSTRACT
The article examines the imperatives for extension of the jurisdiction of the East African Court of Justice. It advocates for the creation of a criminal division for the prosecution of core international crimes. The article recognizes the limited jurisdictional capacity of the Court and limited access to victims and argues for a comprehensive Protocol with expansive definitions of territorial, personal, temporal and subject-matter jurisdiction with unfettered access. The article further submits that for an effective functioning of the EACJ, the Protocol should provide for Partner States to contribute to the EACJ, on an annual basis, a percentage of their respective gross national products to provide financial independence and security to the Court.

1. INTRODUCTION
Article 27(2) of the East African Community Treaty,1 authorizes the Council of Ministers2 to extend jurisdiction of the East African Court of Justice (EACJ) to include such other original, appellate, human rights and other jurisdiction as it deems necessary at a suitable subsequent date.3 And, article 27(1) limits the jurisdiction of the Court to interpretation and application of the Treaty. However, the Court’s jurisprudence, particularly the Kenya4 and Rwanda5 Appeals Division judgments, have further limited victims’ access to Court.6

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1 Hereinafter the Treaty. The EAC
2 Hereinafter the Council.
3 The EACJ was established in November 2001.
4 Attorney General of the Republic of Kenya (Appellant) v Independent Medical Legal Unit (Respondent), (Appeal No.1 of 2011).
5 The Attorney General of the Republic of Rwanda (Appellant) and Plaxeda Rugumba (Respondent), (Appeal No. 1 of 2012).
6 The judgments and their impacts are discussed in section three.
The article, in section two, examines territorial, personal, temporal and subject-matter jurisdiction of the Court with respect to extension of the Court’s criminal division for the prosecution of serious international crimes. These issues, as well as the case law of the International Criminal Court (ICC), International Criminal Tribunal Yugoslavia (ICTY), International Criminal Court for Rwanda (ICTR), Special Court for Sierra Leone (SCSL) and the Extraordinary Chamber of the Courts of Cambodia (ECCC), and the question of granting to the EACJ retroactive jurisdiction, are discussed in section three. Section four addresses challenges in adopting a Protocol to extend EACJ jurisdiction, followed by the conclusion in section five.

2. JURISDICTION OF THE EAST AFRICAN COURT OF JUSTICE AND ACCESS BY VICTIMS TO THE COURT

Article 9 (1) (e) of the Treaty designates the EACJ as a judicial organ of the Community with jurisdiction to ensure the adherence to law in the interpretation and application of and compliance with the Treaty. The Court’s activities are regulated by Articles 23 to 47 of the Treaty. It consists of a First Instance Division and an Appellate Division. The First Instance Division has jurisdiction to hear and determine, at first instance, subject to a right of appeal to the Appellate Division under Article 35A, any matter before the Court in accordance with the Treaty.

While Article 23 limits the jurisdiction of the Court, such jurisdiction may be extended pursuant to Article 27(2). Paragraph 2 provides:

“The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalize the extended jurisdiction.” [Emphasis added.]

Article 27(2) suggests that only one protocol may be adopted to operationalize the extended jurisdiction of the Court. Currently the Secretariat is working on a draft protocol to operationalize the extended jurisdiction of the Court to cover trade disputes. However, since the Draft Protocol is still under discussion, it is speculative.

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7 The extension of EACJ jurisdiction will require establishment of the Office of the Prosecutor (OTP) and subsequently appointment of the Prosecutor and his staff. Issues relating to OTP, appointment of the Prosecutor and his staffs, the conduct of investigation and prosecution and their financial implications including providing legal defence funds for indigent accused and protection of defence and prosecution witnesses are beyond the scope of this article.
8 Article 23(1) of the Treaty.
9 Article 23(2) of the Treaty.
10 Article 23(3) of the Treaty. Note that Article 35 A on appeals provides as follows: “An appeal from judgment or any order of the First Instance Division of the Court shall lie to the Appellate Division on: a. points of law; b. grounds of lack of jurisdiction; or c. Procedural irregularity.
to envision what the final version will encompass. But if it were adopted, without incorporating serious international crimes, no additional protocol may be adopted without a subsequent amendment of article 27(2) of the Treaty.

2.1 Jurisdiction of the Court

The EACJ has primary jurisdiction over the interpretation and application of the Treaty, provided that the Court’s jurisdiction to interpret the Treaty does not include the application of any interpretation to jurisdiction conferred by the Treaty on organs of Partner States.\textsuperscript{12} It has also jurisdiction over disputes between the Community and its employees. Further, the Court has the mandate to give advisory opinions upon request by the Summit, the Council or a Partner State,\textsuperscript{13} including the jurisdiction to arbitrate on matters arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party to; or a dispute between the Partner States regarding the Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or an arbitration clause contained in a commercial contract in which the parties have conferred jurisdiction on the Court.\textsuperscript{14} However, the Court has no jurisdiction over all criminal matters.

Access to Court is granted to legal and natural persons resident in a Partner State, subject to the provision of Article 27 of the Treaty. They may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the ground that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty.\textsuperscript{15} The period within which the matter may be referred to the Court for determination is limited to within two months of the act or omission, or in the absence thereof, of the day in which the act or omission came to the knowledge of the complainant.\textsuperscript{16} However, the court has no jurisdiction on matters that are reserved under the Treaty to an institution of a Partner State.\textsuperscript{17}

Natural persons who can make reference to the Court are the Secretary-General, on behalf of the Community,\textsuperscript{18} employees of the Community but only with respect to disputes between the Community and its employees,\textsuperscript{19} and individuals whose rights are violated under Article 30 of the Treaty, subject to him or her being resident in a Partner State. A Partner State, as a legal entity, may refer another Partner State or an organ or institution of the Community to the Court if she

\textsuperscript{12} Article 27(1) of the Treaty.
\textsuperscript{13} Article 36 of the Treaty.
\textsuperscript{14} Article 32 of the Treaty.
\textsuperscript{15} Article 30(1) of the Treaty.
\textsuperscript{16} Article 30(2) of the Treaty.
\textsuperscript{17} Article 30(3) of the Treaty.
\textsuperscript{18} Article 29 of the Treaty.
\textsuperscript{19} Article 31 of the Treaty.
considers that a Partner State has failed to fulfil an obligation under the Treaty. A Partner State can also refer for determination by the Court, the legality of any Act, regulation, directive, decision or action on the ground that it is *ultra vires* or unlawful or an infringement of the provisions of the Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power.\(^\text{20}\)

The overview of the EACJ jurisdiction exposes the very limited jurisdiction the Treaty extends to the Court. Other than employees of the Community, the majority of citizens and residents of East Africa are excluded from, or have limited access to, the Court. Second, the provisions of the Treaty are ambiguous with respect to the law applicable. An overview of the applicable law and its impact on access to Court is provided below.

### 2.2 The Law Applicable and Access to EACJ

It is problematic to determine what the EACJ applicable law is because there is no common penal code or case law across the Partner States in criminal law and procedure. At the national level, applicable laws range from civil law, common law, Islamic law, customary law, treaty law to statutory law. In Burundi, for example, national courts apply civil law. In Kenya the law applicable is common law. In Kenya the law applicable is common and Islamic law. In Rwanda the courts apply both civil and common laws; while Uganda’s legal system is common law. Zanzibar, which until 1964 was ruled by the Sultan, who was ousted by the self-declared Field Marshal; John Okello, had applied only Islamic law. However, after the union with Tanganyika; the United Republic of Tanzania\(^\text{21}\) now applies common and Islamic law. Of the laws applicable in the five Partner States, Rwanda’s laws are currently the most progressive in the region.\(^\text{22}\)

Although Article 23 of the Treaty does not expressly state the EACJ applicable law, Article 6 makes reference to the “Fundamental Principles of the Community” which appear to incorporate universal norms as well as principles of the African Charter on Human and Peoples’ Rights (ACHPR). By reference to the ACHPR, the Treaty tacitly suggests that the law applicable by the EACJ may include general

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\(^{20}\) Article 28 of the Treaty.


principles of international law, as well as customary international law. While the law applicable by the EACJ is not expressly provided in the Treaty, the Court has found guidance from precedents and case law of other international tribunals and courts as an international court itself.

Access to the EACJ is limited by law as stipulated in Article 27(2) and by the Court’s case law as well. In the case of Attorney General of the Republic of Kenya v Independent Medical Legal Unit, the Appeals Division held that the Court has no jurisdiction to hear cases of violations of human rights. The impact of the judgment is to deny victims of human rights violations access to Court. In the second case, namely, the Attorney General of the Republic of Rwanda (Appellant) and Plaxeda Rugumba (Respondent), the Appeals Division (a differently composed Chamber) held that while the Court has no jurisdiction to hear cases of human rights violations, it can nonetheless hear cases on whether the governments of Partner States adhere to human rights and principles of good governance. The two judgements are discussed below.

In the Attorney General of the Republic of Kenya v Independent Medical Legal Unit, at the First Instance Division, the Claimant submitted that the Government of Kenya failed to take measures to prevent, investigate or punish those responsible for executions, acts of torture, cruelty, inhuman and degrading treatment of over 3,000 Kenyans resident in Mount Elgon District. The human rights violations, the Claimant submitted, were carried out by employees or agents of the Government of Kenya in violation of several international human rights conventions, the Kenya Constitution as well as the EAC Treaty. The Attorney General of Kenya objected and submitted that the reference was time-barred as it did not comply with Article 30(2) of the Treaty. The said Article provides:

A general principle of law is a third principal source of public international law listed in article 38(1) of the Statute of the International Court of Justice. It is stated as “general principle of law recognised by civilised nations.” The language is archaic, and a more acceptable and contemporary formulation of essentially the same concept appears in article 21(1) (c) of the Rome Statute: “a general principle of law is derived by the Court from national laws of legal systems of the world.” Evidence of general principles is not located primarily in international practice but rather in national legal systems. See, W A Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, (2006, Cambridge University Press) 102-107.

Customary law is defined by Article 38(b) of the Statute of the International Court of Justice as “international custom, as evidence of general practice accepted as law.”


Attorney General of the Republic of the Republic of Kenya (Appellant) and Independent Medical Unit (Respondent), op cit, at note 4.

Attorney General of the Republic of Rwanda (Appellant) and Plaxeda Rugumba (Respondent) op cit, at note 5.
“The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.”

After reviewing the submission of both parties, the First Instance Division held:

“...it is our considered view that the matters complained of are failures in a whole continuous chain of events from when the alleged violations started until the Claimant decided that the Republic of Kenya had failed to provide any remedy for the alleged violations. We find that such action or omission of a Partner State cannot be limited by mathematical computation of time.”

The Attorney General of Kenya appealed. In reversing the decision of the First Instance Division, the Appeals Division opined:

“The Treaty limits References [over violations of human rights by government employees and its agents] to two months after the action or decision was first taken or made, or when the Claimant first became aware of it...the Treaty does not grant this Court any express or implied jurisdiction to extend the time set in the article above”

The EACJ Appeals Division elaborated further that the Court is limited by Article 30(2) to hear references only filed within two months from the date of action or decision complained of, or the date the Claimant became aware of it. According to the Appeals Division, the two-month period must be strictly adhered to because there is no enabling provision in the Treaty to disregard the time limit set by Article 30(2). Moreover, the Article, the Appeals Division reasoned, does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant; nor is there any power to extend that time limit. Furthermore, the Appeals Division opined that no such intention can be ascertained from the ordinary and plain meaning of the said Article or any other provision of the Treaty. According to the Appeals Division, “...the reason for this short time is critical – it is to ensure legal certainty among the diverse membership of the Community.”

The Appeals Division effectively ruled out millions of East African from access to the EACJ. It could have creatively interpreted Article 30(2) of the Treaty in a manner that permitted it to consider whether it had inherent or residual jurisdiction to adjudicate on human rights issues notwithstanding the Treaty provision, but opted not to do so. The mechanical application of the law denied victims their right to have their case heard on its merits.

28 Independent Medical Unit (Claimant) v The Attorney General of the Republic of Kenya & Others, (Reference No.3 of 2010).
30 Ibid, at p.17.
31 Ibid.
The Court’s endorsement of the two-month limitation period to initiate proceedings also fails to recognize that the majority of the people of East Africa do not have easy access to lawyers. Individuals who can access lawyers are often financially constrained and are thus unable to retain lawyers to represent them. Additionally, poor infrastructure also hinders communication between victims and their lawyers. The failure of the Court to recognize the grim social and economic conditions under which many poor East Africans live suggests that the Court is not in touch with the ordinary person. This failure is particularly troublesome as governments in East Africa continue to fail to take measures to prevent, investigate or punish those responsible for executions, acts of torture, cruelty, inhuman and degrading treatment in the Partner States.

The second case, while premised on unlawful detention without trial, the case is really about victims’ access to court. In that case, the Attorney General of the Republic of Rwanda (Appellant) and Plaxeda Rugumba (Respondent), at the First Instance Division, the Claimant who is a natural sister of Lieutenant Colonel Seveline Rugigana Ngabo\(^{32}\) submitted that her brother, Lt. Col. Ngabo was unlawfully detained by agents of the Government of Rwanda. According to the Claimant, his next of kin, including his wife and children, were not informed of his whereabouts. Up to the time the reference was filed, he had neither been formally charged before any court of law in Rwanda, nor had it been disclosed by the government what offence he allegedly committed. It was further submitted that Lt. Col. Ngabo had neither been visited by his family doctor nor a member of the Red Cross and was being held incommunicado in violation of Articles 6(d) and 7(2) of the Treaty.

The First Instance Division ruled in favour of the Applicant stating that it had jurisdiction to hear and determine the reference; that the reference was filed within the time prescribed by the Treaty; that the Reference was not barred by the rule of exhaustion of local remedies and thereafter concluded that Rwanda was in breach of articles 6(d) and 7(2) of the Treaty.\(^{33}\) Rwanda appealed.

In its Memorandum of Appeal, Rwanda listed five grounds. Three of the grounds related to jurisdiction and access to Court, namely:

(a) That the Court could not entertain the Reference because local remedies had not been exhausted;

(b) That the Court had no jurisdiction over abuse of human rights; and

(c) That the Reference was time-barred as it was in breach of Article 30(2) of the Treaty.

However, during the Scheduling Conference, Rwanda abandoned most of the grounds retaining two. Rwanda’s revised first ground is that while the First Instance Division

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\(^{32}\) Hereinafter Lt. Col. Ngabo.

\(^{33}\) Ibid.
Division had jurisdiction, it went beyond its interpretative mandate, an event which clouded and erased its jurisdiction over the matter. The second ground is that since the matter in issue relates to human rights, the Reference was ill-conceived and it ought not to have been entertained by the Court, as Article 27(1) of the Treaty specifically limits the jurisdiction of the Court only to the interpretation and application of the provisions of the Treaty.

The Respondent advanced two legal arguments. First, that Lt. Col. Ngabo had no legal obligation to exhaust local remedies in Rwanda before filing the present Reference because the special jurisdiction conferred on EACJ to interpret the Treaty cannot be assumed by any local court in a Partner State and in the instant case, the remedy can only be granted by the EACJ and not any local court in Rwanda. Second, that the Reference was filed within time because, whereas Article 30(2) of the Treaty limits the time for filing proceedings to two (2) months after the cause of action has arisen, in the instant case, Lt. Col. Ngabo was arrested on or about 20 August 2010 while the Reference was filed on 8 November 2010. The Respondent further explained that the detention whose legality is the subject of this Reference continued up to 28 January 2011, when Lt. Co. Ngabo was put in preventive detention by an order of court as provided by the Laws of Rwanda, hence, by the time the Reference was filed, the cause of action was still subsisting and Article 30(2) of the Treaty could not apply to bar the present proceedings. The Court, the Respondent argued, had jurisdiction.

In its judgment, the Appeals Division pointed out that, based on EACJ precedent; the Court has no jurisdiction to entertain human rights disputes per se, because it awaits the coming into force of a Protocol under Article 27(2). However, the Court clarified that the cause of action flowing from the Treaty is different and distinct from human rights violations. Therefore, the legal linkage and basis for the Court’s jurisdiction is separate and distinct from human rights violations. The Court concluded that it had jurisdiction, not because human rights were violated, but because there is a generic duty to protect human rights and good governance under the Treaty.

On exhaustion of local remedies, the Court conceded that the obligation to exhaust domestic remedies forms part of customary international law, recognized as such in the case law of the International Court of Justice (ICJ). However, the Appeals Division observed that the EAC Treaty does not have any express provisions requiring

34 Ibid at para. 20.
35 Ibid at para. 22.
36 The Attorney General of the Republic of Rwanda (Appellant) and Plaxeda Rugumba (Respondent), op cit, note 5, at para.10.
37 Ibid at para.11.
38 James Katabazi & 21 Others v EAC Secretary General and the Attorney General of Uganda (Reference No.1 of 2007).
40 Ibid at para.35.
exhaustion of local remedies and concluded that “...though the Court could be flexible and purposeful in the interpretation of the principle of the local remedy rule, it must be careful not to distort the express intent of the EAC Treaty”\(^{41}\). Therefore, unlike other legal regimes, the EAC Treaty provides no requirement for exhaustion of local remedies as a condition for accessing the EACJ.

As to when time begins to run for the purpose of instituting proceedings before the EACJ, the differently composed Appeals Division noted that the Respondent could not file any Reference in Court concerning the arrest of her brother unless and until she had knowledge of the detention, namely: when, where, why and by whom the brother had been detained.\(^{42}\) In rejecting Rwanda’s submission that the Respondent knew all the facts, and that she did so right from the day of the arrest of her brother (i.e. 20 August 2010), and further that she could have known the facts through foreign media as the BBC, the Court observed that:

“To contend that they should have known of the detention through such foreign media as the BBC is, with great respect, untenable since these are not State or official organs for informing the citizens of Rwanda about official affairs of the State – and, particularly so, regarding information touching the security affairs of the State.”\(^{43}\)

The Court elaborated that the acts of holding a citizen in preventive detention without lawful authority and in breach of the laws of the State of Rwanda; depriving him of his liberty for a period of five (5) months; failing to inform him or his family of the reason(s) for detention, are in breach of the principles set out in the EAC Treaty to which the Republic of Rwanda is a signatory.\(^{44}\) This decision is a step in the right direction but still falls short of giving full access to victims of human rights violations, however, the failure of the Court to unequivocally rule that victims of human rights violations have unfettered access to the Court is a disappointment.

The case law of the EACJ, as discussed above, is deficient. The question of access to EACJ is closely linked to the other components of jurisdiction such as territorial, personal, temporal and subject-matter jurisdiction. Jurisdictional issues are discussed in the next section.

### 3. THE EACJ’S JURISDICTION

Extending the Court’s jurisdiction to incorporate core international crimes involves addressing the scope of territorial, personal, temporal and subject-matter jurisdiction of the Court. An overview of the four aspects of the jurisdiction is provided below.

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41. Ibid.
42. Ibid, at para.37.
43. Ibid.
44. Ibid, at para.29.
3.1 Territorial Jurisdiction

Territorial jurisdiction gives authority to a state to exercise criminal law jurisdiction over crimes committed on its sovereign territory. This includes land, sea and air space. However, determining territorial jurisdiction of an international court is problematic. The determination of the ICTR territorial jurisdiction is a good example on how to address the problem.

The ICTR's territorial jurisdiction gives it jurisdiction over persons responsible for serious violations of international humanitarian law (IHL) committed in the territory of Rwanda, and Rwanda citizens responsible for such violations in the territory of neighbouring states. Article 7 extends ICTR territorial jurisdiction to include “...land surface, airspace and territorial waters...” of Rwanda and that of neighbouring states. In adopting this broad definition, it is contended that the Security Council (SC), prima facie, violated the territorial integrity of neighbouring states to Rwanda, namely, Uganda, DRC and Tanzania.

In extending the ICTR’s territorial jurisdiction beyond Rwanda, the SC was concerned about the security of Rwanda refugees living in neighbouring states. According to Johnson, the SC defined the ICTR’s territorial jurisdiction broadly because the “...Council envisaged mainly the refugee camps in Zaire (DRC) and other neighbouring countries.” According to Karhuhlo, the ICTR’s jurisdiction was apparently extended beyond Rwanda because in the aftermath of the 1994 genocide, when the extremist Hutu militia and Habyarimana government forces had been driven from Rwandan territory, they continued to kill and intimidate civilians in refugee camps close to Rwanda’s border. These reasons suggest that extension of the ICTR’s territorial jurisdiction beyond Rwanda’s territorial borders was due to exceptional circumstances and may not be construed as a binding precedent to be applied in all future situations. Overall, extension of territorial jurisdiction beyond the territorial boundary of a given state must therefore be considered on a case-by-case basis.

There was no surprise therefore that Uganda and DRC objected to what they perceived as the ICTR’s infringement of their respective territorial sovereignty. At the SC meeting in 1994, Uganda argued that “...its judicial system has primary and supreme jurisdiction and competence over any crime committed on Uganda’s territory.” Accordingly, Uganda and DRC challenged the ICTR’s territorial jurisdiction in the SC and the International Court of Justice (ICJ).

45 Art 1 of the ICTR Statute.
46 L D Johnson, “The International Criminal Tribunal for Rwanda”, (1996) 67 International Review of Penal Law 211, at 222. The argument is that the inclusion of the territory of neighbouring states was necessary because there were many Hutu refugees in the DRC, Tanzania, Burundi and Kenya. These ‘refugees’ continued to terrorise the civilian population who wished to return to Rwanda and were being detained in the camps against their will. It was therefore necessary that the territorial jurisdiction of the court cover serious crimes the ‘Hutu refugees’ continued to commit against their fellow refugees at the United Nations protected camps in DRC, Tanzania and Burundi.
territory by its citizens or non-citizens, at any particular time.”48 Uganda stated that it would accept language in the draft statute limiting the jurisdiction and competence of the proposed ICTR territorial jurisdiction to Rwanda territory and the territory of those member states which expressly declare acceptance of such jurisdiction.49 Uganda was therefore not willing to share its territorial sovereignty with other States, international tribunals or courts without its express consent.

The DRC also objected to the ICTR’s draft statute extending jurisdiction of its territory. Instead she proposed that the phrase “territory of neighbouring states” be replaced by the larger concept of “territory of State Members of the United Nations.”50 The DRC noted that the draft statute implied that neighbouring states would be required to concede jurisdiction to the Tribunal, and that it could not accept the provision “…unless the obligation to waive jurisdiction in favour of the International Tribunal is imposed on all States Members of the United Nations and is not limited only to neighbouring States....”51 The DRC eventually accepted a language which directed all member states of the United Nations to cooperate with the ICTR but not the extension of territorial jurisdiction to all member states of the United Nations.

The interesting point is that, while other members of the SC supported the expansive notion of ICTR territorial jurisdiction and to extend jurisdiction to neighbouring territories of Uganda, DRC and Tanzania, the same members of the SC, particularly the United States, opposed similar expansive jurisdiction for the ICC which would have covered its sovereign state. During the ICC preparatory talks for example, the United States lead negotiator, David Scheffer, opposed any proposal that would have extended the ICC jurisdiction to the territory of the United States without its prior consent.52 Similarly, Nicholas Rostow, General Counsel of the United States Mission to the United Nations in New York, made a statement before the UN General Assembly, Sixth Committee (Legal Committee) on a debate on the ICC and argued that there are legal impediments to the ICC exercising territorial jurisdiction over nationals of non-Party States.53

49 Ibid.
51 Ibid.
52 On the restrictive interpretation of temporal jurisdiction adopted by the United States and other Western powers during the ICC preparatory negotiations, see D Scheffer, All the Missing Souls: A Personal History of War Crimes Tribunals, (2012, Princeton University Press, Princeton & Oxford). Prof David Scheffer was the lead US negotiator during the ICC preparatory negotiations in New York and Rome.
The need for national governments to protect their territorial integrity, while important, does not arise directly with respect to the ICTR because under the Charter of the United Nations, all resolutions adopted under its Chapter VII are binding on all states. To that extent, short of a SC veto, Uganda, DRC and Tanzania had no option but to accept the expanded ICTR jurisdiction pursuant to SC Resolution 955 (1994) and the ICTR Statute annexed thereto. On the other hand, a Protocol to the EAC Treaty that extends EACJ jurisdiction beyond the territories of the Partner States may be contested by the affected neighbouring states although such extension may be favourable when events in Somalia are considered. The crisis of Somalia is of serious concern to the Community. The Al-Shabaab, a militia group fighting in Somalia, has been active in Kenya and Uganda and has committed serious international crimes. However, despite possible objections from Somalia, criminal law jurisprudence and case-law covers this type of responsibility under the concept of “effects jurisdiction”. The criminal justice system of most states accept jurisdiction not only when a crime is committed on the territory of the state but, in some cases, when it is committed outside the territory but produces effects within the territory. In practice, effects jurisdiction is an extension of territorial jurisdiction. The EACJ jurisdiction will be able to capture consequences of acts that are committed outside the territory of the Community by incorporating “effects jurisdiction” in its law.

3.2 Personal Jurisdiction

The ICTY, ICTR, SCSL, ECCC and the ICC are all international tribunals or courts established for the purpose of prosecuting persons responsible for serious violations of IHL. Article 5 of the ICTR Statute for example, provides that the Tribunal shall have jurisdiction over natural person. The Article proceeds to explain that “natural persons” excludes corporate bodies or organisations. Additionally, article 6(1) of the ICTR statute (and article 7(1) of the ICTY statute) makes reference to persons who planned, instigated, ordered, committed or otherwise aided and abetted. While the prosecution of corporate bodies or organisations are permitted under many national systems of criminal justice, the exclusion of legal persons from the

54 Al Shabaab is a militia group in Somalia fighting to establish an Islamic State. Under the African Union (AU), armed forces from Burundi, Kenya and Uganda are in Somalia fighting alongside the Somali army to defeat Al Shabaab militia.
56 Ibid.
58 The Report of the United Nations Secretary General on the draft statute of the SCSL provides no explanation as to why this provision was not included. This is rather surprising given that the SCSL Statute is undoubtedly modelled on the ICTR Statute. See UN Doc.S/RES/1385 (2001). Absent the specific reference to ‘natural persons’ it seems reasonable to presume that the SCSL could in fact prosecute corporate entities, such as a transnational corporation. Despite this possibility, SCSL prosecution have been confined to natural bodies.
Court’s jurisdiction is essentially for practical reasons. Just as many national systems of criminal justice provide for criminal prosecution of legal persons, there are equally many states that do not. To provide for prosecution of legal persons would have created an asymmetric situation where the ICC principle of complementarity would only apply to prosecutions in states with criminal jurisdiction over legal persons.\(^{59}\)

In drafting the EACJ Protocol, the question whether the Court should have jurisdiction over legal persons is relevant, particularly with respect to corporate entities that supply arms to non-state actors, smuggle drugs and engage in human trafficking. It is also relevant to consider whether the EACJ should have jurisdiction to prosecute oil and gas executives, mercenary organisations and private contractors.\(^{60}\)

### 3.3 Temporal Jurisdiction

Articles 1 and 8 of the ICTY Statute permit the Tribunal to prosecute crimes that were committed prior to the establishment of the Tribunal. It back-dates the temporal jurisdiction of the Court to 1991 notwithstanding that the Tribunal was established in 1993. The Statute, annexed to SC Resolution 827, states that the ICTY is established to prosecute offences committed between “...1 January 1991 and a date to be determined by the Council upon the restoration of peace...”\(^{61}\) In contrast, although the ICTR statute also permits it to prosecute crimes that were committed prior to its establishment, it does not go back to 1 October 1990 when the armed conflict commenced. Instead, Article 7 limits temporal jurisdiction to a period beginning on 1 January 1994 and ending on 31 December 1994.

In the case of the ICTR, during the SC debates leading to the adoption of Article 7, there was disagreement over the scope of temporal jurisdiction, focusing on the start date, but not the end date. Rwanda considered the time frame to be too narrow, arguing that jurisdiction begin on 1 October 1990, a date when the civil war broke out between the Government of Rwanda and the Rwanda Patriotic Front (RPF). According to the RPF, “...the genocide the world witnessed in April 1994 was the result of a long period of planning during which pilot projects for extermination were successfully tested...”\(^{62}\) The RPF further argued that an international tribunal

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which refuses to consider the causes of the genocide in Rwanda and its planning cannot be of any use because it will not contribute to eradicating the culture of impunity or creating a climate conducive to national reconciliation.63

The then President of Kenya, Daniel arap Moi, issued a statement urging that the terms of reference of the ICTR be widened to include investigations into who was responsible for downing the Rwandese president’s aircraft in April 1994, and into who was responsible for the invasion of Rwanda prior to the assassination of both Presidents of Rwanda and Burundi. Moi stated that if these two aspects were not addressed, he could not see how Rwandese, who felt aggrieved by the invasion of their country, could possibly trust the tribunal.64

The majority SC members were of the view that jurisdiction of the ICTR would only be justified from 8 April 1994, when the plane crash that killed the Presidents of Rwanda and Burundi brought an end to the ceasefire between the RPF and the Rwanda Armed Forces (RAF). However, a compromise was reached, whereby the Tribunal had jurisdiction from 1 January 1994, in order to capture the planning stage of the crimes.65

The temporal jurisdiction of the ECCC extends from 17 April 1975 to 6 January 1979. The dates were arrived at over the objection of Prime Minister Hun Sen. The Hun Sen government preferred the temporal jurisdiction to commence from January 1970, so as to capture the period the United States conducted intense carpet bombings on Cambodian territory causing mass civilian death and destruction of private and public property. The United States negotiators were successful in excluding that period.66

The drafters of the EACJ Protocol have a duty to agree on how far back the temporal jurisdiction of the Court should commence. Possible start dates of temporal jurisdiction are 1967, a date when the first Community was established; 1977, a date when the Community collapsed; 1999 a date when the current Community was re-established; and a future date when a Protocol extending the jurisdiction of the Court will be adopted.

### 3.4 Subject-Matter Jurisdiction

The subject-matter jurisdiction, or jurisdiction *ratione materiae*, are crimes a court has jurisdiction over. The ICC has jurisdiction over four categories of crimes: genocide, crimes against humanity, war crimes and aggression.67 The ICTY and ICTR have jurisdictions over genocide, crimes against humanity and war crimes. The SCSL

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63 Ibid.
67 Article 5 of the ICC Statute.
on the other hand, has jurisdiction over crimes against humanity, war crimes, other serious violations of IHL and crimes under Sierra Leonean law.\textsuperscript{68} The Sierra Leone/UN treaty also criminalizes conscription or enlistment of children under the age of 15 years into armed forces or groups or the use of them to participate actively in hostilities. Also proscribed under Sierra Leone Law is abuse of girls, wanton destruction of property, and setting fire to dwelling or public buildings. The ECCC statute provides for the prosecution of specific national and international crimes (homicide, torture, and religious persecution) as set forth in Cambodia’s 1956 Penal Code, genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and crimes against humanity as defined in the UN-Cambodia Treaty.\textsuperscript{69} The UN-Cambodia Treaty describes crimes against humanity as is defined in the 1998 Rome Statute of the ICC.\textsuperscript{70} Crimes which fall under the jurisdiction of all the five international tribunals and courts are crimes against humanity and war crimes. Other than the SCSL, all the other ad hoc tribunals and the ICC have jurisdiction over crimes of genocide.

The subject-matter jurisdiction of each tribunal or court is tailored to suit its unique historical and political background, its armed conflicts, including the circumstances and political context under which the crimes were committed. These differences also tend to explain some of the discrepancies in the definition of crimes in the various statutes. For example, there is a difference between the ICC and the ICTY governing law on the requirement of a nexus with armed conflict with respect to the prosecution of crimes against humanity. The ICTY crimes against humanity provisions require a nexus with international or non-international armed conflict. On the other hand, the ICC as well as the ICTR, SCSL and ECCC statutes do not require a nexus with armed conflict in the prosecution of crimes against humanity but the more generic term of “widespread or systematic attack”. As regards war

\textsuperscript{68} See For crimes against humanity Article 2; violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, Article 3; other serious violations of international humanitarian law, Article 4 and crimes under Sierra Leonean law, Article 5 of the SCSL Statute.

\textsuperscript{69} The UN-Cambodian Treaty is an Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the period of the Democratic Kampuchea. The negotiations between the United Nations and the Royal Government of Cambodia were conducted pursuant to the United Nations General Assembly Resolution 57/228 of 18 December 2002. The Resolution recalled that the serious violations of Cambodia and international humanitarian law during the period of Democratic Kampuchea from 1975 to 1979 continue to be matters of vitally important to the international community as a whole. In the same resolution the General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security. The UN-Cambodia treaty was done at Phnom Penh on 6 June 2003 and signed by Hans Corell, Under-Secretary-General for Legal Affairs for the United Nations and Sok An, Senior Minister in Charge of the Council of Ministers, for the Royal Government of Cambodia. Also, see Document Center of Cambodia, “Chronology,” http://www.dccam.org/Archives/Chronology/Chronology.htm (Last visited 3 September 2012).

\textsuperscript{70} Ibid.
crimes, the ICC and ICTY have jurisdictions over crimes committed in international and non-international armed conflict. The ICTR, SCSL and ECCC, on the other hand, can prosecute only crimes committed in a non-international armed conflict. In all the above statutes, there is no hierarchy of crimes.

What emerges is that the subject-matter jurisdiction of international tribunals and courts cover most serious international crimes. The exclusion of genocide in the SCSL’s Statute may be explained by the fact that although widespread and systematic attacks took place, there was no credible evidence to prove genocidal intent of the perpetrators, that is, the specific intent to destroy any specific group of persons in Sierra Leone, in whole or in part.

Crimes prosecuted in all the jurisdictions examined above are crimes against humanity and war crimes. It is reasonable for the EACJ to consider including these two serious international crimes. Whereas only the SCSL omits crimes of genocide, the fact that an international tribunal has judicially pronounced that genocide has been committed in East Africa, makes it imperative to consider extending the EACJ jurisdiction to cover the crime of genocide as well.

The drafters of the EACJ Protocol are urged to examine closely the SCSL statute, particularly the crimes of abuse of girls, wanton destruction of property, and setting fire to dwelling or public buildings, crimes alongside other core international crimes.  

3.4 Retroactive or Ex-Post Facto Prosecution

Legal scholars have debated and disagreed over the years on whether retroactive laws offend the principles of nullum crimen sine lege. There are persuasive legal basis for criticisms of retroactive laws or ex-post facto legislation in criminal prosecution. However, there are also exceptional reasons why its proponents argue that it may be applied in prosecuting persons who commit serious acts that did not exist at the time acts were committed as long as the acts are crimes under customary international law. In this section, the application of retroactive laws in international criminal law.

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71 Article 5 of the Special Court for Sierra Leone on Crimes under Sierra Leonean Law provides: The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leone law: (a) Offences relating to abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap.31); i. Abusing a girl under 13 years of age, contrary to section 6; ii. Abusing a girl between 13 and 14 years of age, contrary to section 7; iii. Abduction of a girl for immoral purposes, contrary to section 12. (b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861; i. Setting fire to dwelling-houses, any person being therein, contrary to section 2; ii. Setting fire to public buildings, contrary to sections 5 and 6; iii. Setting fire to other buildings, contrary to section 6.
prosecutions by the International Military Tribunal (IMT), ICTY, ICTR, SCSL and ECCC will be examined.

At the IMT, the retroactive provision applied in criminal prosecution of the Nuremberg Charter is in Article 6(c), which reads:

‘6. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.’

(Emphasis mine)

The phrase “whether or not in violation of the domestic law of the country where perpetrated” functions to create “new crimes” which at the time the alleged acts were committed was not a crime at customary international law. When the trial of the alleged perpetrators commenced on charges of committing crimes against humanity, the defendants objected to being prosecuted under the new laws on the ground that the IMT had no jurisdiction because Article 6(c) of the Nuremberg Charter imputed individual criminal responsibility for some acts which, at the time they were committed, were not punishable, either under customary international law or under any national law. The defendants further argued that the inclusion of those acts in Article 6(c), prima facie, violated general principle of law that no persons should be prosecuted for contravening a law which did not exist at the time he or she is alleged to have done. Both parties did not contest the fact that some of the acts and omissions with which the defendants were charged under Article 6(c) were not criminal at the time they were committed.

The legal basis for opposing retroactive laws lies in the theory of illegality of the former legal system. The theory assumes that the former legal system did not criminalize the acts with which the accused is charged, or at best, a distorted non-law and therefore all rights, duties and obligation, and generally every relationship created by that legal system could not be, and need not be,

72 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, 59 Stat.1544, 82 UNTS 279. The Charter of the International Military Tribunal was annexed to this agreement.
73 Ibid.
75 For further discussion, see A Obote-Odora, The Judging of War Criminals: Individual Criminal Responsibility Under International Law (1997, Stockholm University), 75-78.
76 Ibid 75.
regarded in the “...new lawful system as legally valid.” Therefore, an act whose performance depended upon, or was legally justified by, the old legal system would not constitute a valid legal defence on a charge based on doing an act which results in causing harm or injury to any person, even if the performance of the criminal act was in compliance with the letter and spirit of the old law.

On the other hand, where no law existed, or if it existed, it was silent on the subject-matter, the performance of the act, which a reasonable man or woman would have considered harmful, would constitute a criminal offence even if the old law did not expressly prohibit it. Thus, the new legal order may, unrestricted by law, change, modify, terminate and, or create new legal rights and responsibilities at its discretion. In sum, the effect of the application of ex-post facto law is to cause norms of a legal order which were valid at a certain time and place to be regarded, from a certain date on, as not having been valid at all. This legal fiction permits certain facts and acts, at least, to be retrospectively re-qualified. Thus, legal problems faced by courts are not necessarily the application of retroactive laws per se, but rather, the admissibility in evidence of retroactive laws. To that extent, ex-post facto laws, by definition, are backward looking in time. They are not necessarily intended to change radically the legal order, but to change the legal system. Based on the above legal reasoning, the IMT was able to prosecute the accused persons for crimes against humanity, a crime that was not codified at the start of the war. Some legal scholars have faulted the IMT reasoning.

The disagreement on the application of retroactive laws is more engaging between the positivist and naturalist law theorists. Positivists reject the application of ex-post facto laws. Natural law theorists, on the other hand, defend it on the ground that what is law is that which can destroy, legally, the specific legal validity of any positive law contrary to natural law. In other words, what is positive law, but inconsistent with the basic requirements of natural law, is not merely bad law, it is no law at all. Natural law theorists consider an unjust law as non-law and

79 A Obote-Odora, The Judging of War Criminals, op cit, at note 75, at 77.
therefore void ab initio. Both positivist and naturalist law theorists agree that ex-post facto law does not relate to the legal order, but only to the legal system of the State.\textsuperscript{81} Natural law theorists justify ex-post facto non-recognition of the legality of certain laws in the legal order following the one in which it was of full legality because, in their submission, an unjust law is fundamentally flawed.\textsuperscript{82}

Contemporary jurisprudence has provided more understanding on the application of ex-post facto law, also known as principle of legality or the Latin maxim nullum crimen sine lege. The Universal Declaration of Human Rights, for example, clarifies the principle of legality by stating that:

\begin{quote}
"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed."
\end{quote}\textsuperscript{83}

However, international human rights law makes an exception to this general prohibition. It permits trials and punishment of any person for acts or omission which, at the time of commission, was criminal according to the general principles of law recognized by the community of nations.\textsuperscript{84} The Nuremberg Principles as adopted by the General Assembly recognizes the principle of legality as enunciated in the International Covenant on Civil and Political Rights (ICCPR).\textsuperscript{85}

In 1993 when the ICTY was established by the SC, it was given jurisdiction over crimes before 1993. Similarly, the ICTR, established in November 1994 was given jurisdiction over crimes committed from 1 January 1994. In his report to the SC on the establishment of the ICTY, the Secretary General insisted that the Tribunal would only prosecute offences that were unquestionably recognized under customary international law.\textsuperscript{86} In other words, the Secretary General’s Report ruled out the application of any retroactive law unless it was beyond doubt part of customary international law at the time the accused was alleged to have violated it. The ICTY Appeals Chamber agreed with the Secretary General’s Report when it held that:

\begin{quote}
"...the only reason behind the stated purpose of the drafters that the International
\end{quote}

\textsuperscript{83} GA Res.217 A (III), UN Doc.A/810, Article 11 (2).
\textsuperscript{84} International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, Article 15(2).
\textsuperscript{85} Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary, (2005, 2nd rev.edn, Kehl: NP Engel), 368.
Tribunal should apply customary international law was to avoid violating the principle of nullum crimen sine lege in the event that a party to the conflict did not adhere to a specific treaty.”

However, on the Rwanda Tribunal, the Council took a more expansive approach with respect to the application of nullum crimen sine lege principle. The Secretary General, in his Report, issued subsequent to the adoption of the ICTR statute, explained:

“...the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, for the first time criminalizes common article 3 of the four Geneva Conventions.”

[Emphasis mine]

And, according to the International Commission of Inquiry on Darfur, the fact that no member of the SC objected to the “expansive approach” recommended by the Secretary General, suggest that the recognition by the SC that violations of Common Article 3 and Additional Protocol II of 1977 to the four Geneva Conventions of 1949 are punishable, is in itself sufficient to push these two categories into the realm of customary international law.

89 Acting under Chapter VII of the Charter of the United Nations, the SC, on 18 September 2004, adopted Resolution 1564 requesting, inter alia, that the Secretary-General ‘rapidly establish an International Commission of Inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights in Darfur (Darfur Commission), to determine also whether or not acts of genocide have occurred and identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable’. The Commission was given three months to complete its work and on 25 January 2005 the Commission submitted its Report to the Secretary General. In its report to the Secretary General, in recommending that war crimes were committed in Darfur by all parties to the internal armed conflict, the Darfur Commission referred to the Secretary General’s Report on the establishment of the ICTR (UN Doc.S/1995/134, para.11-12) when the Secretary General recommended an ‘expansive approach’ in the application of the law of war in internal armed conflict when determining whether war crimes have been committed.
Both the ICTY and ICTR have taken a relatively casual approach to the *nullum crimen sine lege* principle. In Tadic, for example, Judge Sidhwa, in his Separate Opinion, observed that all ‘would-be’ accused were on notice, through Resolutions of the SC, to refrain from committing such crimes. If they chose to do so, they cannot complain of a statute that now pursues their heinous action. In other words, Judge Sidhwa appears to have opted to accept the “expansive approach” in Secretary General’s Report on Rwanda and to that extent, is willing to accept that an accused at the ICTY may also be prosecuted for acts or omissions which, at the time they were committed, did not form part of customary international law, contrary to the Secretary General’s Report on the former Yugoslavia.

The provisions in the ICTR, SCSL and ECCC statutes on subject-matter jurisdictions are, however, different from that of the ICTY. Not all acts and omissions incorporated in the three statutes of the ad hoc tribunals are universally accepted as statements of customary international law. But, the ICTR has regularly confirmed that serious violations of Common Article 3 of the four Geneva Conventions of 1949, and Additional Protocol II of 1977, which are codified in Article 4 of the ICTR statute (and in Article 3 of the SCSL statute), were applicable in Rwanda in 1994 as a matter of customary law. The SCSL in its judgments reached a similar conclusion. Overall, precedents from the ICTY, ICTR, SCSL and ECCC on retroactivity do not conclusively settle the contentious issues. However, the ICTY Appeals Chamber, in Tadic, expressed what perhaps the more practical alternative is. The Appeals Chamber opined:

“...it is open to the Security Council – subject to respect for peremptory norms of international law (jus cogens) – to adopt definitions of the crimes in the statute which deviate from customary international law.”

In other words, it is open to the drafters of a protocol to extend the EACJ jurisdiction to determine whether all or some aspect of retroactivity should be incorporated and thus deviate from customary international law.

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93 *Brima et al v The Prosecutor*,(Case No.SCSL-04-16-PT), Written Reasons for the Trial Chamber’s Oral Decision on the Defence Motion on Abuse of Process Due to Infringement of Principles of *nullum crimen sine lege* and Non-Retroactivity as to Several Counts, 31 March 2004, at para.33.

94 Pursuant to the *Tadic* decision, in the case of the EACJ, standing in for the Security Council, it would be the drafters of the Statute and the Presidents of the Partner States who will approve the law applicable. *Dusko Tadic v The Prosecutor*, (Case No.IT-94-I-A), Judgement, 15 July 1999, at para.296.
4. ADOPITION OF A PROTOCOL TO EXTEND EACJ JURISDICTION: THE CHALLENGES

Extension of EACJ jurisdiction poses many challenges, ranging from managing expectation of victims in adopting a robust protocol, creating an effective OTP with supporting investigators and other professional staff and an effective mechanism for protection of prosecution and defence witnesses, and, providing protection and legal representation to detainees or accused persons. Further challenges include compensation to victims and the management of funds to do so. However, this section is limited to discussing challenges relating to amendment of EACJ jurisdiction.

As discussed in section three, a major challenge is whether to extend the EACJ jurisdiction to the territory of neighbouring states. The target neighbouring states are South Sudan, Somalia and DRC because these states have close political, economic and military links with the EAC. The drafters of the Draft Protocol must consider also whether to adopt the wider concept of “territory of neighbouring states” and thereby extend jurisdiction to incorporate Mozambique, Malawi, Zambia (states that share borders with Tanzania) and Ethiopia (which share border with Kenya).

The more complex issue is whether to incorporate the principle of universal jurisdiction in the Protocol and give jurisdiction to the court to investigate and prosecute foreign nationals. It may be recalled that attempts by foreign states to investigate, arrest and prosecute citizens of Partner States have been made under the principle of universal jurisdiction. In November 2006, a French Judge, Jean-Louise Bruguiere, after briefly investigating the shooting down of the Habayarimana plane, controversially came to the conclusion that President Paul Kagame ordered the shooting down of the plane and his senior aides were responsible for carrying out that order. Judge Bruguiere then went on to sign an international indictment against nine other senior Rwandan officials. According to Judge Bruguiere, there was no indictment against President Kagame because of presidential immunity.

Similarly, a Spanish Judge, Mr. Fernando Andreas, issued indictments against forty Rwandan military officers. The allegations against the Rwandans are in three categories. First, the Spanish judge charged the Rwandans officials for crimes perpetrated against nine Spanish nationals who were living in Rwanda at the time the crimes were alleged to have been committed; second for crimes allegedly committed against Rwandan citizens and Congolese at a time when Rwanda was reported to have invaded the DRC and Congo at a time when Rwanda was reported to have invaded the DRC and Congolese at a time when Rwanda was reported to have invaded the DRC and Congolese at a time when Rwanda was reported to have invaded the DRC and Congolese at a time when Rwanda was reported to have invaded the DRC and Congolese at a time when Rwanda was reported to have invaded the DRC and Congolese at a time when Rwanda was reported to have invaded the DRC and Congolese at a time when Rwanda was reported to have invaded the DRC and Congolese at a time when Rwanda was reported to have invaded the DRC and Congolese at a time when Rwanda was reported to have invaded the DRC and Congolese at a time when Rwanda was reported to have invaded the DRC and Congolese at a time when Rwanda was reported to have invaded the DRC. The indictments cover acts or omission committed by Rwanda between 1990 and 2002.

Both the French and Spanish indictments are grounded on the application of the principle of universal jurisdiction. While the Spanish indictment led to no arrests, the Rwanda former Chief of Protocol was arrested pursuant to the French
Indictment. The case was, however, thrown out of court for lack of evidence. What is relevant here is the fact that foreign states have relied on universal jurisdiction to indict citizens of a Partner State and possible future indictments on citizens of other Partner States may not be ruled out. It is in that context that it becomes relevant to consider whether to incorporate the principle of universal jurisdiction in the Protocol extending EACJ jurisdiction.

The drafters of the Draft Protocol may also consider incorporating “effects” jurisdiction as it permits the Court to exercise jurisdiction over serious international crimes committed outside the EACJ jurisdiction but have consequences on the territory of one or more Partner States.

A challenge to personal jurisdiction may arise were the Draft Protocol to give jurisdiction to the Court to prosecute foreign individuals who are either officials of governments, of private or public companies, including members of political parties, the armed forces, local and foreign militias who aid and abet local parties in armed conflicts. The drafters of the Draft Protocol may further consider whether to extend jurisdiction to the Court to prosecute legal persons that aid, abet or render substantial support to combatants and non-combatants by providing and distributing legal and illegal arms, directly and indirectly provide financial support, or send military “advisors” to train local soldiers and militias. France in particular is known to have rendered such support to the Habyarimana regime before and during the 1994 Rwanda genocide, and yet no French national was ever prosecuted by the ICTR. What lessons must be learned from the ICTR non-prosecution of foreign personnel who aid and abet one party to an internal armed conflict?

Although the ICTR did not prosecute any French “military advisors” for aiding and abetting the Habyarimana’s notorious armed forces, in principle, there are no legal impediments to holding foreign “military advisers”, mercenaries or other legal persons, criminally responsible for acts or omissions committed in the name of their respective corporations, companies or organisations. Similarly, there is no legal impendiment to holding none-state actors, for example, members of the militia, rebel groups or unregistered organisations criminally responsible for their individual acts or omission.

In Nigeria’s Niger Delta, since the discovery of oil, there have been conflicts, including armed confrontations, between the local populations on the one hand, and the oil companies (Shell and BP) and the Federal Government soldiers on the other. The armed confrontations have resulted in the injury and death of many civilians. The causes of the conflicts are many, but the immediate ones are the oil spills which have resulted in contaminating crops and destroying fishing and

agricultural land in the Niger Delta region. In order to protect their interests, the local population formed militias that are heavily armed. The Niger Delta is, for all practical purposes a ‘war zone’.96

Poor management of the oil sector and the criminal elements that play a big role in it in the Niger Delta region should make the drafters of the Protocol concerned that a similar situation can arise in this region. For example, in East Africa, reports of oil being discovered, or of exploration that are close to discovery oil or gas is regularly reported. The current stand off between Tanzania and Malawi over the ownership of Lake Malawi has a lot to do with oil exploration and not fish.97 The continued friction between Tanzania main land and Zanzibar is believed to be about oil and other resources. In Kenya oil has been discovered and there are already concerns on how the oil wealth will be re-distributed between the oil companies, the government and the population.98 In Uganda, oil is reported to have been discovered in Bunyoro in Western Uganda.99 There is a rush by the wealthy and politically connected to buy lands in the area in the hope that if oil is indeed available underneath the soil, in future, they will re-sell the land at exorbitant prices and make handsome profit. The local population is outrage. The government has now, without addressing the issue of land ownership with the local population, sent in the army allegedly to ‘guarantee security’. The local population believe that the army is not there for their security but for the security of the oil companies and government officials who seek to loot their land. At Amuru district in northern Uganda, report of oil having been found has resulted in a stampede to buy land in the area, notwithstanding that all lands in the area are governed by customary law and individuals cannot sell without the collective consent of the community. The army, business men and women including civil servants are now tracking to northern Uganda to buy land while the local population continue to protest and resist. Overall, the events unfolding in East Africa may become a recipe for violent conflicts.

Overall, as oil and gas explorations take root in East Africa, lessons learned from Nigeria’s Niger Delta and elsewhere in which oil production has not only destroyed the environment but caused untold pain and suffering to the local population, it becomes necessary to adopt a robust legal framework to address these challenges. To criminalize aspects of oil and gas explorations and productions, particularly acts that destroy the environment, contaminate fishing areas and pollute agricultural land

is the right thing to do. Additionally, imposing individual criminal responsibility on leaders of corporations, companies or organisation who aid and abet combatants or degrade the environment through irresponsible oil and gas exploration is consistent with the opinion of Judge Sidhwa.\footnote{Dusko Tadic v The Prosecutor, Case No. IT-94-I-AR72, “Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction”, 2 October 1995, at para.72.}

This leads to a decision on dates for temporal jurisdiction. A date when jurisdiction of the court commences must be spelt out in the Protocol. Recognizing that the principle of retroactivity is neither illegal nor unlawful, the drafters of the Protocol are at liberty to agree on a date that covers serious international crimes committed prior to the adoption of the EAC Treaty. This approach is consistent with the temporal jurisdiction provisions adopted by the ICTY, ICTR, SCSL and ECCC. The most informative provision which can assist the drafters of the Protocol is that of the ECCC. In 2005 the Government of Cambodia adopted a UN/Cambodia Agreement after Secretary-General Kofi Annan notified Prime Minister Hun Sen that the legal requirements for entry into force by the United Nations had been complied with. The UN/Cambodia Agreement entered into force determining the temporal jurisdiction of the court to cover the period from 17 April 1975 to 6 January 1979.\footnote{Kofi Annan, United Nations Secretary-General “Letter to Hun Sen, Prime Minister of Cambodia,” April 25, 2005. Cambodia Tribunal Monitor, http://www.cambodia tribunal.org/images/CTM/eccc%20chronology%201994-may%202009.pdf? (Last accessed on 15 July 2012).} The temporal jurisdiction of the ECCC was therefore back-dated to events that took place 36 years earlier. The back-dated temporal jurisdiction permitted the Court to prosecute serious international and national crimes committed between 1975 and 1979.\footnote{For the gravity of crimes committed by the Pol Pot regime, see D Chandler, Voices from S-21: Terror and History in Pol Pot’s Secret Prison, (1999 University of California Press, Berkeley, Los Angeles, London).}

Based on the ICTY, ICTR, SCSL and ECCC precedents, the drafters of the Protocol to extend the EACJ jurisdiction have the legal authority to back-date temporal jurisdiction to cover crimes that were part of customary international law at the time they were committed as well as crimes that were not generally recognized as criminal acts at customary international law. In that context, the drafters of the Protocol can back-date the temporal jurisdiction as far back as common sense and good faith permit.

Subject-matter jurisdiction is the core provision determining the crimes that the Court has jurisdiction to prosecute. The definition of the crime of genocide is exhaustively provided in the 1948 Genocide Convention. The genocide provisions in the statutes of the ICC, ICTY, ICTR and ECC are modelled on the 1948 Genocide Convention.

While the crimes against humanity provisions are drafted differently in the ICTY, ICTR and SCSL Statutes, the crimes against humanity provisions in the ICC and the ECCC are identical. Of all the crimes against humanity provisions, the first

to be adopted is Article 5 of the ICTY statute. It is modelled on Article 6(c) of the Nuremberg Charter. Being the first codification of crimes against humanity, Article 5 of the ICTY statute defines crimes against humanity as “crimes when committed in armed conflict whether international or internal in character and directed against a civilian population.” Thus where an armed conflict falls short of the required definition in the statute, for instance the absence of nexus, mass killings that may result would not necessarily be characterized as crimes against humanity.

During the Nuremberg trials, evidence about the pre-1939 persecution of the Jews, Communists, homosexuals, gypsies and others were ignored by the IMT because they occurred prior to the outbreak of the war and therefore had no nexus with armed conflicts. The Nuremberg precedent on crimes against humanity persuaded the Secretary-General in his Report\textsuperscript{103} to recommend that such a limitation in the prosecution of crimes against humanity was imposed by customary international law, and that to prosecute crimes against humanity in the absence of armed conflict would violate the maxim \textit{nullum crimen sine lege}.\textsuperscript{104} The ICTY Appeals Chamber rejected this jurisdictional limitation.\textsuperscript{105}

The crimes against humanity provision in Article 3 of the ICTR statute presents an identical list of punishable acts, but in its introductory paragraph differs from article 5 of the ICTY. The word “directed against any civilian population” is replaced with “as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.” Article 3 eliminates reference to “armed conflicts whether international or internal in character” but adds another requirement, namely, that “the attack be committed on national, political, ethnic, racial or religious grounds.” In the ICTR text, nexus to armed conflict is not an element of crimes against humanity.

The preliminary paragraph in the SCSL’s crime against humanity provision is essentially the same as Article 3 of the ICTR statute, except that reference to “national, political, ethnic, racial or religious grounds” has been deleted in keeping with contemporary case law. However, the SCSL also makes two important changes to its list of punishable crimes. The crime against humanity provision in Article 2

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\textsuperscript{103} In response to the Report of the Secretary General, on 25 May 1993, the Security Council adopted Resolution 827 establishing the Yugoslav Tribunal with crimes against humanity provision excluding crimes committed before the start of the war, or has no nexus with armed conflict, consistent with the crimes against humanity provision in the Nuremberg Charter. See U.N. Doc.S/RES/827 (1993).

\textsuperscript{104} See, the Secretary-General’s report: ‘Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.’ Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808(1993), UN Doc.S/25704 (1993), at para.47.

of SCSL’s statute includes in its punishable acts “rape”, and adds to a list of other gender crimes “sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence.” The paragraph on “persecution” adds the word “ethnic” to the three grounds, and replaces “and” with “or.” Both of these changes reflect the language used in Article 7 of the Rome statute. The same approach is adopted in the ECCC’s statute.

The subject-matter jurisdiction provisions in the ICTY, ICTR, SCSL and ECCC statutes criminalize acts committed in times of armed conflicts. Each of the four tribunals was established to deal with atrocities committed during time of armed conflict. However, the four statutes do not refer to war crimes but use the generic term of “serious violations of international humanitarian law.” According to the ICTY Appeals Chamber jurisdictional decision:

“The expression ‘violations of the laws or customs of war’ is a traditional term of art used in the past, when the concepts of ‘war’ and ‘laws of warfare’ still prevailed, before they were largely replaced by two broader notions: (i) that of ‘armed conflict’, essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of ‘international law of armed conflict’, or the more recent and comprehensive notion of ‘international humanitarian law’, which has emerged as a result of the influence of human rights doctrines on the law of armed conflict.”

The ‘grave breaches’ provisions of the four Geneva Conventions of 1949 and Additional Protocol 1 of 1977 were considered to apply only to international armed conflicts. The statutes of the four ad hoc tribunals extended the reach of international law dealing with war crimes to cover internal armed conflicts. By this extension, Common Article 3 provisions of the four Geneva Conventions of 1949 and Additional Protocol II of 1977 is the applicable law in internal armed conflict or non-international armed conflict.

Based on contemporary jurisprudence, for a successful prosecution of a person charged with war crimes, the Prosecutor must prove beyond reasonable doubt that (a) there was an armed conflict; (b) there is a link or nexus between the impugned act and the conflict and (c) the accused must be shown to have had knowledge of the armed conflict.

The existence of an armed conflict is therefore a mandatory element in the prosecution of war crimes. However, not all civil conflicts or disturbances meet the threshold of an armed conflict. In Rutaganda, the ICTR Appeals Chamber explained that:

“An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between government authorities and organized 106 Dusko Tadic v The Prosecutor, (Case No.IT-94-I-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, at para.87. 107 For further discussion, see A W Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, op cit, note 23, 226-285.
armed groups or between such groups within a State. International humanitarian law applies from initiation of such armed conflicts and extends beyond cessation of hostilities... in the case of internal conflicts, a peaceful settlement is reached.”

Schabas correctly argues that the existence of an armed conflict might be viewed as a contextual element for the prosecution of war crimes. Unlike the case of crimes against humanity and genocide, where it must be shown that there is a qualitative or quantitative dimension to the acts setting them apart from “ordinary crimes” of violence, no such threshold exists with respect to war crimes. Thus, a single and quite an isolated act may be a war crime subject to the jurisdiction of the court if the three elements (existence of armed conflict, nexus, and knowledge) are proved by the Prosecutor.

Based on the case law of the ICTY, ICTR and SCSL, the drafters of the Protocol may consider a subject-matter jurisdiction of those tribunals and incorporate crimes of genocide, crimes against humanity and war crimes in the Protocol. Further, the drafters of the Protocol may also take the position that there is no hierarchy of crimes similar to the position taken by the ad hoc tribunals. A major challenge to the drafters of the Protocol, however, is whether to include other equally serious international crimes, for example, terrorism, aggression, oil and gas crimes. Criminalizing acts or omissions related to oil and gas exploration and drilling provide opportunity and a challenge in addressing similarly serious international crimes as have been committed in the Niger Delta in Nigeria by international oil and gas companies.

Second, armed conflicts have been used to resolve disagreements over oil and gas explorations or drilling, including dispute over ownership and sharing of oil and gas benefits Africa. Similar conflicts may happen in East Africa. Law must be put in place to pre-empt it, or once the crimes are committed, the law is in place to prosecute perpetrators. Third, in the past, armed conflicts have been conducted in Great Lakes Region for no apparent strategic or national interests other than resource extraction and plunder. That armed conflicts will take place in the Great Lakes Region in the future for similar reasons is possible. Acts or omissions related to resource extraction and plunder needs to be criminalized in the Draft Protocol.


5. **CONCLUSION**

Investigation and prosecution of serious international crimes is a noble aim of society regardless of the context under which the crime was committed or whether a court has a limited temporal jurisdiction. Even if only a small number of perpetrators are prosecuted, as a starting point, that would be a positive move and the Court can build on it. East Africa must, at some point, begin to seriously fight impunity. To meet this challenge, the EACJ needs to streamline its laws, specifically, harmonize its criminal law and procedure. To that extent, the EACJ’s applicable law must be codified and provide victims with unfettered access to the Court.

The EACJ must be victim-focused. The case law of the EACJ demonstrates that the Court has failed to protect victims of human rights violations or provide compensation. The lessons of the ICTR teach us that the establishment of a Trust Fund, and protective measures for victims and witnesses took an inordinate amount of time to put in place. The EACJ must therefore seek to address these challenges at the earliest possible opportunity.

The cases of the four accused Kenyans\(^\text{112}\) which sparked off the debate on the EACJ jurisdiction also reminds us of the possible tension between protecting senior politicians from justice and acting in the best interests of victims. This tension may blur the line between justice and politics. Additionally, there may be underlying tensions between the Summit, the Council and the EALA as political organs of the Community, on the one hand, and the EACJ as an independent judicial organ of the same, on the other. This places a heavy burden on the EACJ, particularly as the political organs of the Community are responsible for appointment and removal of judges and other senior personnel as well as for funding. With overt and covert pressure from governments or other sources, the EACJ must nonetheless avoid selectivity in the cases it decides to investigate and prosecute. Similar allegations have consistently been made against the ICC, particularly with respect to case selection. Based on lessons learned from the ICTR, the exercise of prosecutorial discretion and case selection are complex matters but can still be addressed fairly, openly, impartially and in a transparent environment.\(^\text{113}\)

\(^{112}\) See *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* (Case No. ICC-01/09-01/11); *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* (Case No. ICC-01/09-02/11).

The EACJ, like other international courts and tribunals, is not a perfect institution. Nevertheless, due to emerging consensus between all stakeholders, perpetrators of serious international crimes may no longer enjoy unlimited impunity. It is hoped that the Court will receive the support of all stakeholders in the course of implementing its mandate.
A CRITICAL ANALYSIS OF ARTICLE 14(1) (E) OF THE AFRICAN WOMEN’S PROTOCOL:
DUTY TO DISCLOSE ONE’S HIV STATUS TO A SEXUAL PARTNER

Ngcimezile Mweso*

ABSTRACT

This paper provides a detailed discussion on factors to be considered in implementing both the right and duty and the possible impact on the fight against HIV and women who bear the greatest burden. The study has chosen to focus on women specifically in recognition of the feminisation of HIV and AIDS pandemic due to gender inequality, low socio-economic status of women and gender-based violence. This paper argues that the creation of a legally enforceable duty may not be the best approach in ensuring that HIV prevention, treatment and care are achieved. States must put in place measures that encourage individuals who have a positive serostatus to take up the responsibility to inform their sexual partners of their status on a voluntary basis.

1. INTRODUCTION

The HIV and AIDS pandemic continue to bring about unparalleled havoc especially in Africa where the largest number of deaths and new infections in the whole worldwide are registered. Sub-Saharan Africa remains the most heavily affected region with 68% of all people living with HIV and accounting for 70% of new HIV infections in 2010.1 In the past decade, global response to HIV has resulted in to decline in new infections and AIDS-related deaths.2 Behavioural change has been hailed as the cause of the decline in the number of new infections and the expansion of access to antiretroviral therapy in reducing AIDS-related deaths. However there continues to be large number of new HIV infections up to 2.7 million in 2010.3

HIV disclosure or partner notification (PN) over the last decade has received a lot of attention as a preventative measure to HIV. It has been considered that

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2 Ibid.
3 Ibid.
the principles of confidentiality and informed consent that accompany HIV testing and disclosure contribute to the spread of HIV as they allow people who test positive to keep their status confidential and refuse to share it with their partners. This has resulted into policies or laws that make disclosure compulsory by creating a legal duty on people who test positive to disclose their HIV status to sexual partners or allowing breach of confidentiality by health care providers through PN.

Article 14 (1) (e) of the Protocol to the African Charter on Human and People’s Rights (ACHPR) on the Rights of Women in Africa provides for the right to be informed on the health status of one’s partner if affected with sexually transmitted infections including HIV/AIDS. The Article provides as follows:

‘States parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

(e) the right to be informed on one’s health status and on the health status of one’s partner, particularly if affected with sexually transmitted infections including HIV/AIDS, in accordance with internationally recognised standards and best practices...’

This Article creates not only the right to know one’s sexual partner’s HIV status but also a duty on persons who have tested positive or alternatively health care providers to disclose such status to their sexual partners. The above article is however vague and unclear on how exactly states are to enforce the right and duty created. This paper will look at the possible interpretations and implementation methods that a state may adopt in accordance with internationally recognised standards and best practices. This will be in light of the special context of Africa and specifically as regards the disposition of women in the HIV and AIDS pandemic. Any successful programme to reverse the spread of HIV must address the needs of the most affected and vulnerable groups among which women top the list. The paper aims to contribute to literature on promoting enjoyment of women’s rights and ultimately gender equality in line with the objectives of the Women’s Protocol.


5 This is usually through criminalising HIV exposure or transmission while accepting consent as a defence to the offence. See L Gable et al Legal aspects of HIV/AIDS: A guide for policy and law reform (2007; The International Bank for Reconstruction and Development/The World Bank) at 13.

2. WOMEN’S VULNERABILITY TO HIV AND AIDS

HIV infection rates among women remain alarmingly high at 59% in Africa.\(^7\) Violence, negative social values, discriminatory laws, harmful cultural practices, poverty and inequalities are some of the factors that increase women’s vulnerability to HIV.\(^8\) The protection of the rights of women and girls in Africa and especially Sub-Saharan Africa is essential to turning around the continent’s AIDS crisis.

The Women’s Protocol is a milestone as it is the first human rights instrument to address HIV and its underlining societal factors that increase risk and vulnerability.\(^9\) This African born initiative is a landmark step in enhancing the promotion and protection of women’s human rights.\(^10\) It provides a good legal framework that advances gender equality, women socio-economic empowerment and prevention of gender based violence (GBV) and or violence against women (VAW) which are priorities for scaling up access to HIV prevention, treatment and care measures.\(^11\)

VAW is severe and pervasive throughout the world causing physical, sexual, psychological, and economic harm. This is usually perpetuated by intimate partners in private;\(^12\) however during conflict situations sexual violence has become systematic and rampant as deliberate instrument of war.\(^13\) VAW increases the risk of contracting HIV up to three fold through exposure or

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\(^11\) All these factors contribute to the HIV and AIDS pandemic.

\(^12\) C Garcia-Moreno et al WHO Multi-country study on women’s health and domestic violence against women: initial results on prevalence, health outcomes and women’s responses (2005 WHO) at 27.

transmission during or through sexual violence and by setting off a cascade of behavioural responses that translate into increased sexual risk-taking by girls during adolescence if exposed to early sexual trauma. Such behaviour includes having multiple partners and being two or three times more likely to engage in transactional sex. They are also less likely able to negotiate safe sex even when aware that their partner is promiscuous.

Social-economic exclusion and deprivation makes women economically dependent, powerless and of inferior status in a relationship and thus they fail to negotiate for protection. Divorce and property laws and customary practices that disadvantage women who try to escape abusive marriages compound the problem. In such a context a woman is willing to risk contracting HIV as sex is a duty and bearing children a survival mechanism to ensure continued relevance. GBV is both a consequence and cause of gender inequality.

The protocol addresses all these by guaranteeing enforceable rights that protect women in marriage, divorce, or widowhood, inheritance, health and as regards property. It also prohibits harmful traditional views and practices that take shape into stereotypes, customs and norms which, in turn, give rise to a multitude of legal, political and economic constraints on the advancement of women. In Africa as in many societies, cultural traditions and law conspire to

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14 As a result of trauma, vaginal lacerations, and abrasions that occur when force is used with an infected partner without any protection.

15 Garcia-Morenol WHO Multi-country study on women’s health op cit, at note14 at 53. RK Jewkes et al. “Intimate partner violence, power inequity, and incidence of HIV infection in young women in South Africa: a cohort study” (2010) 376:41 The Lancet, – This study suggests that nearly one in seven cases of young women acquiring HIV could have been prevented if the women had not been subjected to intimate partner violence.


20 See also Declaration on the Elimination of Violence Against Women, ( UN Declaration on VAW) adopted by the UN General Assembly on 20 December 1993, UN DOC. A/RES/48/104 Para 1 General Recommendation 19 of the Committee on the Elimination of All Forms of Discrimination Against Women.

21 See Arts 1, 4, 5-7, 14, 20–21 See also KSA Ebeku “A new hope for African women: Overview of Africa’s protocol on women’s rights” (2004) 13: 3 Nordic Journal of African studies 267

marginalize women and girls making them more vulnerable to HIV.\textsuperscript{23} Examples include:

\textit{“...polygamy, the precarious position of widows (through wife inheritance or practices allowing for sex with a widow by the deceased’s brother), early marriages, initiation practices (allowing for sexual initiation for girls), and female genital mutilation (FGM)”}.\textsuperscript{24}

Implementation of the Women’s Protocol offers great opportunity to women in Africa who suffer abuse and infringement of their rights in these areas and for holding African governments accountable towards the improvement of women’s status.

3. THE RIGHT TO KNOW

Under Article 14(1) (e) member states to the Women’s Protocol are obliged to ensure that women’s right to be informed of their health status and of the health status of their partner is respected especially where infected with HIV. The purpose of such information is to arguably enable women and their partners to protect themselves from HIV infection. This section will explore ways of ensuring the enjoyment of both the right to information and the right to know in combating HIV.

3.1 HIV and AIDS Education and Information

HIV and AIDS information, education and communication (IEC) powerful, cost effective tool for promoting awareness about the causes, modes of transmission, consequences, and modes of prevention and management of the pandemic.\textsuperscript{25}

This forms the basis for successful HIV prevention programmes and helps reduce widespread discrimination and stigma against those who are infected. The IEC must be accompanied with the appropriate prevention technologies including condoms, lubricants, sterile injection equipment, antiretroviral medicines that prevent mother-to-child transmission.\textsuperscript{26} All this must be done along with empowerment of the marginalized and most vulnerable to HIV by addressing human rights abuses and societal factors that accelerates the spread of the virus.

\begin{thebibliography}{99}
\bibitem{ibid2} Ibid at 596.
\bibitem{sadc} SADC Parliamentary Forum Model Law on HIV adopted on 24 November 2008, the 24th Plenary Assembly of the SADC Parliamentary Forum. The Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases para 10.
\end{thebibliography}
3.2 HIV Testing and Counselling (HTC)

HTC provides information and support that leads to HIV prevention, care and treatment services.\(^{27}\) It is also an important entry point for intervention that prevents HIV infection to infants and young children. It also contributes to normalization of the reduction of HIV related stigma and discrimination.\(^{28}\)

HTC may be voluntary or mandatory. Voluntary counselling and testing (VCT) is when an individual submits himself or herself, out of free will and consent to undergo the HIV test. The client-initiated HTC may be anonymous or name-based.\(^{29}\) Anonymous testing is a way of encouraging more people to undergo the process without the risk of being discovered by others if tests HIV positive.

There is also routine testing which is provider-initiated where HIV test is made part of the custom services a person gets once in contact with a health system just like any other test a health provider may recommend or as a standard component of medical care.\(^{30}\) This has been widely promoted as a way of ensuring that more people know their HIV status and access treatment promptly where available. It however implicates human rights for many who cannot “opting out” and feel coerced by virtue of the relationship of patient and health care provider.\(^{31}\) This may also result in people avoiding visiting health service providers.\(^{32}\)

Mandatory or compulsory testing does not require the consent of the individual. This may be done for immigration, non-citizen employment and military personal to assess fitness. WHO and UNAIDS do not support mandatory or coercive HIV testing.\(^{27}\) Viljoen *International Human rights law in Africa* op cit, at note 24 at 602. AU progress report on the implementation of the commitments of the May 2006 Abuja Special Summit on HIV/AIDS, Tuberculosis and Malaria (ATM) Assembly/AU/4(XI) 11. However HTC has proven to reduce risk behavior in people who test positive but less so in HIV negative people. See UNAIDS “Points for response to “reassessing HIV prevention” in science: Only does not work for HIV prevention” www.unaids.org/en/KnowledgeCentre/Resources/FeatureStories/archive/2008/20080605_UNAIDS_webPosting_Points_for_response_to_Reassessing_HIVprev_in_Science.asp  (Last accessed on 14 June 2012).

\(^{28}\) Viljoen *International Human rights law in Africa* op cit, at note 24 at 603.


\(^{31}\) AIDS and Human Rights Research Unit *Human rights protected? Nine Southern African county reports on HIV/AIDS and the law* (2007, Pretoria University Law Press) at 19. In Botswana less than 5 % of people involved in routine testing opted out in 2005 and this raised concerns of whether free and full consent is really exercised in such an approach.

\(^{32}\) Ibid. See also Tarantola “HIV testing; Breaking the Deadly Cycle” op cit, at note 31 at 39.
testing. VCT is thus strongly supported and encouraged as the best way however to increase access HTC, and treatment, routine testing is also recommended. Routine testing must however be carried out with the patient’s full consent and “opt-out” approach where the patient having been equipped to make an informed and voluntary decision to be tested may refuse to do so.\footnote{WHO/UNAIDS “Guidance on provider-initiated HIV testing and counselling in health facilities” op cit, at note31 at 6.}

3.3 The Right to be Informed of the Health Status of One’s Partner

This right creates a duty of disclosure where a person tests HIV positive and it is grounded in the obligation to “do no harm” to others and the partner’s “right to know” about the risks they may face.\footnote{Gable Legal aspects of HIV/AIDS: A guide for policy and law reform op cit note 6 at13} This may be implemented through PN or shared confidentiality.

PN also known as patient referral is a process whereby a person who has tested positive is asked to disclose this fact to their sexual partners. If the patient is unable or unwilling to do so, health care providers are authorized to do so where it is considered that there is potential risk of infection.\footnote{See Lesotho National HIV and AIDS policy 2006 as quoted in AIDS and Human Rights Research Unit Human rights protected? Op cit, at note 33 at 59 See also South African Medical Association’s Guidelines on Human Rights and Ethical guidelines on HIV.} This is called provider referral or contract tracing and involves gathering of information from the person newly diagnosed with HIV in order notify persons who are possibly at risk to contracting HIV. This is done with or without the patient’s consent.\footnote{Pottker-Fishel “Improper bedside manner: why state partner notification laws are ineffective in controlling the proliferation of HIV” op cit, at note 30 at 153.}

Internationally accepted standards and best practices in advancing public health goals especially as regards HIV demand that voluntariness be promoted. UNAIDS and WHO encourage voluntary disclosure between partners and the provision of professional counselling for both the HIV-infected client and their partner.\(^{39}\) However where the patient is unable or unwilling to notify his or her partner and it is considered necessary to inform the partner this must be done after weighing the harms and benefits of all parties. It is therefore recommended that ‘public health legislation should authorize, but not require that health care professionals decide, on the basis of each individual case and ethical considerations, whether to inform their sexual partners of the HIV status of their patient.’\(^{40}\)

### 3.2.1 Enforcing the Duty to Disclose: Use of Criminal Law

It is not practical that the state may guarantee this right without relying on individuals themselves as the use of health care providers is limiting in both human and financial resource capacity. Therefore, the states may adopt law that requires the infected party to disclose his or her status to their sexual partners.\(^{41}\) The use of criminal law has widely been adopted in implementing this duty.\(^{42}\)

Criminal law and public health may differ in focus but share the same goal of preventing harm through the spread of HIV. Public health focuses on the community wide basis to prevent harm before it occurs, while criminal law focuses on the

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39 UNAIDS/WHO “Opening up the HIV/AIDS epidemic” op cit, at note 38.
40 Ibid at 13.
41 Public health law may also be used to enforce the duty to disclose by requiring health care providers to notify third parties who are considered at risk of contracting HIV from a patient or HTC client. According to UNAID the major difference with criminal law is that public health law is tailor made to an individual’s circumstances and its coercive interventions are preferable to and more effective than the former. However public law will not from part of the discussion in paper because criminal law is the tool widely used to enforce the duty to disclose and most states are considering HIV specific legislation with criminal sanctions.
individual through sanction after violation occurs.\textsuperscript{43} The main functions of criminal law are incapacitation, deterrence, rehabilitation and retribution and these achieved through imprisonment of a person who wilfully or negligently exposes others to the infection.\textsuperscript{44}

To ensure that the duty to disclose is enforced, HIV specific statutes and not traditional criminal law offences must be enacted with narrowly defined prohibited acts or behaviour that are based on medically proven modes of transmitting HIV.\textsuperscript{45} It must not require specific intention to bring about infection neither should it require actual harm to occur.\textsuperscript{46} Informed consent to exposure must be provided as a defence. These and all other negative consequences need to be considered against the positives that come as a result of right to information of the HIV status of one’s partner.

3.2.2 Ethical Considerations

The requirement of mandatory HIV status disclosure, whether through criminalizing HIV exposure or PN without the patient’s consent implicates the patient’s rights to privacy, dignity, autonomy and security.\textsuperscript{47} Privacy may be limited to secure the rights of others, collective security, morality and common interest.\textsuperscript{48} In Media Rights Agenda and others v Nigeria, the African Commission stated that the reasons for possible limitations must be found in legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary with advantages which are to be obtained.\textsuperscript{49}

Disclosure of a partner’s HIV status may translate into behaviour change resulting into prevention of HIV transmission. It may also lead to increased VCT and access

\begin{itemize}
\item \textsuperscript{43} Wolf & Vezina “Crime and punishment: Is there a role for criminal law in HIV prevention policy?” op cit, at note 43 at 837.
\item \textsuperscript{44} Ibid at 838. See “Criminalization of HIV Non-Disclosure, Exposure and Transmission” (14 – 15 February 2012) Norway High-Level Policy Consultation Issue paper.
\item \textsuperscript{46} J Mosiello “Why the intentional sexual transmission of Human Immunodeficiency Virus(HIV) should be criminalized through the use of specific HIV criminal statutes” (1999) XV N.Y.L. Sch. Hum. Rts. 595 at 611.
\item \textsuperscript{47} Although the African Charter does not guarantee this right it is a well established right that exists based on other rights recognized in the Charter like the right to dignity, and right to liberty and security which entail protection of self-wealth and integrity. See arts 5, and 6. Prince v South Africa (2004) AHRLR 105 (ACHPR 2004), see also arts12 of the Universal Declaration on Human Rights (UDHR), 17 of the International Covenant on Civil and Political Rights (ICCPR).
\item \textsuperscript{48} Art 27 African Charter & art 29 UDHR.
\end{itemize}
to treatment and support where tests positive. Such results would mean that the limitation of an individual’s privacy is justifiable. However, the evidence from PN’s efficacy is inconclusive and remains doubtful as of yet to significantly reduce HIV infection rates in a given population. UNAIDS has on record that only 10-12% of the people infected with HIV in Africa are aware of their status and as such the resultant prevention that is hoped for will not be significant even if every HIV positive came out with their serostatus.\footnote{UNAIDS, “Consultative meeting on HIV testing and counselling in the Africa region’ Johannesburg South Africa” (15-17 November 2004) at 15 data.unaids.org/UNA-docs/consultativemeetinghivtesting-counsellingafricareport_1104.pdf (Last accessed on 31 August 2012).}

Further, the objective is not reasonable as it disproportionately passes a greater responsibility on persons who have known their status to ensure prevention of transmission when in fact this must be a responsibility of each individual who engages in sexual acts. The mandatory duty and prosecution of who fail to discharge it might bring a false hope of security to people that only partner’s whose HIV status is known to be positive pose potential risk while the others are thereby presumed ‘safe’. More people may also be reluctant to come forward know their status due to the implications of such a disclosure.

3.2.3 Practical considerations

Disclosing a positive serostatus may cause psychological, verbal and violent abuse, abandonment, stigma and discrimination.\footnote{UNAIDS policy brief: Criminalization of HIV transmission http://data.unaids.org/pub/BaseDocument/2008/20080731_jc1513_policy_criminalization_en.pdf (accessed on 9 September 2008) 5. UNAIDS Policy Brief: The Greater involvement of people living with HIV (GIPA) http://data.unaids.org/pub/BriefingNote/2007/JC1299_Policy_Brief_GIPA.pdf (accessed on 4 October 2008).} Although many women infected are as a result of a single partner usually a husband,\footnote{M Latigo ‘Marriage laws’ (2005) at 2. http://ocw.mit.edu/NR/rdonlyres/Special-Programs/SP-253Spring-2005/B7165652-1EE7-4128-98C8-475C29BC728E/0/melissa_latigo.pdf (8 October 2008).} it is women rather than men, who are most likely to be blamed as vectors of the pandemic and stigmatised as promiscuous for contracting the disease.\footnote{See UNAIDS “Criminalization of HIV Transmission” (2008) Policy Brief at 5, http://data.unaids.org/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf (Last accessed 31 August 2012).} This is because they are usually the first to know their status and presumed to have contracted the virus first. Stigma and discrimination further fuel transmission by creating major barriers to prevention, treatment and care of HIV and AIDS.\footnote{Ibid at 4.} Sigma is a dynamic process of devaluation that significantly discredits an individual in the eyes of others.\footnote{Ibid.} Internalised stigma
includes shame, fear of disclosure, withdrawal from social and intimate contact, and self exclusion from services or opportunities for fear of being discovered. Discrimination results as an external manifestation of stigma whereby a person experiences arbitrarily distinction, exclusion, or restriction based confirmed or suspected HIV-positive.

A 2004 review paper published by the World Health Organization (WHO) found that of 31 studies reporting on outcomes of disclosure 26 mentioned negative outcomes but for the most part these affected a small percentage of respondents. Positive results include receiving understanding and acceptance especially those who were previously in trusting and loving relationship.

PN procedures for women’s partners must place women’s safety as a paramount consideration for otherwise such a program might aggravate violations to their rights and undermine public health goals by scaring them away from health facilities. These and all other negative consequences need to be considered against the positives that come as a result of right to information of the HIV status of one’s partner. In the light of less intrusive alternatives of ensuring disclosure it is unreasonable and unjustified to make PN mandatory.

4. CONCLUSION AND RECOMMENDATION

The right to be informed on the HIV status of one’s partner is grounded on the principle ‘not to do harm’ to others however such a right has less public health value when implemented in a coercive or mandatory framework. States must put in place measures that encourage individuals who have a positive serostatus to

56 Ibid.
59 Ibid at 20.
take up the responsibility to inform their sexual partners of their status and ensure that safer sex is practiced. Where the individual himself or herself is unable to do so, a healthcare provider must with the consent of the patient carry out such a responsibility. States must implement Article 14(1) (e) on the right to information on the status of one’s partner HIV status through measures that do not create a mandatory enforceable duty of disclosure. Where a state party opts to create a legally enforceable duty of disclosure, with punitive sanctions, self-defence be considered as a defence to exonerates any individual able to show that disclosure would have resulted into substantial hardship or harm.

Due to the feminization of HIV and AIDS in Africa as a result of gender inequality, low socio-economic status of women and GBV, scaling up universal access to prevention, treatment, care and support should prioritize gender equality, women social and economic empowerment and prevention of GBV. It is extremely difficult if not impossible for individuals alone to change the socio-economic, legal, cultural and political institutions which perpetrate gender inequalities hence the state has a critical role play in this. The African Commission has a big role in monitoring the implementation of the Women’s Protocol.
### PALU POLICY BRIEF NO. 1:

**Matrix of Key Implementation Organs, Institutions and Mechanisms Under The AU System**

*(Establishing Act/Convention/Treaty)*

<table>
<thead>
<tr>
<th>1. The Assembly of Heads of State and Government of the African Union</th>
<th>(Constitutive Act of the African Union*)</th>
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<tbody>
<tr>
<td><strong>•</strong> Supreme Organ and highest decision making body of the African Union;</td>
<td></td>
</tr>
<tr>
<td><strong>•</strong> Composed of the Heads of State and Government of the AU or their duly appointed representatives;</td>
<td></td>
</tr>
<tr>
<td><strong>•</strong> Meets twice a year in ordinary session (previously once), but can also meet in extraordinary session (when the Chairperson of AU or any member states calls for it with consent of two-thirds of all Member States);</td>
<td></td>
</tr>
<tr>
<td><strong>•</strong> The powers and functions of the Assembly are stipulated in Article 9 of the Constitutive Act of the African Union.</td>
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</tbody>
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<tr>
<th>1b. Office of the Chairperson of the African Union</th>
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<tr>
<td><strong>•</strong> Heads the Assembly of Heads of State and Government;</td>
</tr>
<tr>
<td><strong>•</strong> Chairs meetings of the Assembly of Head of States and Government and guides proceedings;</td>
</tr>
<tr>
<td><strong>•</strong> Between sessions, he or she represents the AU both within Africa and on the international stage, and may assist in conflict resolution initiatives or other matters;</td>
</tr>
<tr>
<td><strong>•</strong> Serves a one year term.</td>
</tr>
</tbody>
</table>

| 2. The Executive Council of Ministers of the African Union  |
|---|---|
| (Constitutive Act of the African Union) |
| **•** Composed of Ministers of Foreign Affairs or such other Ministers or authorities as are designated by the governments of the Member States;  |
| **•** Chaired by the Minister of Foreign Affairs of the same Member State as the Chairperson of the AU;  |
| **•** Meets twice a year in ordinary session, but can also meet in extraordinary session at the request of any Member State and upon approval by two-thirds of all Member States;  |
| **•** Responsible to the Assembly;  |
| **•** The functions of the Executive Council are stipulated in Article 13 of the Constitutive Act of the African Union. |

*This Act, which was adopted on 11th July 2000 in Lome, Togo and which came into force on 26th May 2001, abrogated and replaced the OAU Charter, which had been signed in Addis Ababa, Ethiopia on 25 May 1963.*
3. The Pan African Parliament of the African Union (PAP)
(Is established as one of the organs of the AU under the Constitutive Act; its detailed operations are provided by the Protocol to the 1991 Abuja Treaty establishing the African Economic Community.)

- Inaugurated on 18 March 2004;
- Is presided over by a Bureau headed by a Chairperson and four Vice Chairpersons;
- Has ten permanent Committees responsible for different thematic issues and the management of the Parliament’s business;
- Holds sessions in November and March each year at its Secretariat in Midrand South Africa;
- Reports to the Assembly;
- Exercises advisory and consultative powers;
- The functions of the PAP are stipulated in the Protocol establishing the PAP.

4. The African Court of Justice
(Is established as one of the organs of the AU under the Constitutive Act; its detailed operations are provided by the Protocol of the African Court of Justice)
Will be replaced by the African Court of Justice and Human Rights (ACJHR)

- The merging with the African Court on Human and Peoples’ Rights was done during the African Union Summit of Heads of State and Government on 1 July 2008 in Sharm El Sheikh, Arab Republic of Egypt;
- The Court shall frame rules for carrying out its functions and generally for giving effect to this Protocol.

5. The African Union Commission (AUC)
(Constitutive Act of the African Union)

- The Commission acts as the Secretariat of the AU and has its seat in Addis Ababa.
- It is entrusted with the Executive functions of the AU;
- Composed of a Chairperson (Dr Nkosazana Dhlamini Zuma), a Deputy (ies) and Commissioners, and staff;
- The Chairperson of the AU Commission reports to the Executive Council of Ministers;
- The Commission executes its functions through eight main portfolios, i.e. Departments headed by Commissioners. These are: Peace and Security; Political Affairs; Trade and Industry; Infrastructure and Energy; Social Affairs; Rural Economy and Agriculture; Human Resources, Science and Technology and Economic Affairs;
- The functions of the AUC are determined by the Assembly;
- Based in Addis Ababa.
5a. Office of the AUC Chairperson

- The bureau of the Chairperson exists to assist the Chairperson in discharging his or her responsibilities as Chief Executive and legal representative of the Union and in organising and managing schedules of internal meetings, ceremonies, audiences and travels.

6. The Permanent Representatives Committee (PRC)
(Constitutive Act of the African Union)

- Composed of Permanent Representatives of Member States accredited to the Union;
- One of the most influential organs of the AU accredited to the AU in Addis Ababa;
- Chaired by the Permanent Representative of the same Member State as the Chairperson of the AU;
- The PRC may set up such ad-hoc Committees and temporary working groups, as it deems necessary;
- Meets at least once a month, usually at the AU headquarters in Addis Ababa;
- Carries out any other functions that may be assigned to it by the Executive Council.

7. Specialized Technical Committees of the Executive Council
(Constitutive Act of the African Union)

- Answers to the Executive Council;
- Composed of Ministers or other senior officials responsible for sectors falling within their respective areas of competence;
- Currently there are seven Committees as stated in the Constitutive Act whose membership is unlimited; These are: Committee on Rural Economy and Agricultural Matters; Committee on Monetary and Financial Affairs; Committee on Trade, Customs and Immigration Matters; Committee on Industry, Science and Technology, Energy, Natural Resources and Environment; Committee on Transport, Communications and Tourism; Committee on Health, Labour and Social Affairs; and the Committee on Education, Culture and Human Resources;
- Functions of the Specialized Technical Committees are stipulated in Article 15 of the Constitutive Act.

8. The Peace and Security Council
(Protocol Relating to the Establishment of the Peace and Security Council of the AU)

- The Council operates at three levels: Heads of State/Government; Ministerial Representatives and Permanent Representatives;
- A 15-member standing, decision-making organ for prevention, management and resolution of conflicts. To be supported by: The African Union Commission; A Panel of the Wise; A Continental Early Warning System and An African Standby Force; A Special Fund;
- Is responsible for implementation of the Non-Aggression and Common Defence Pact adopted in 2005, among whose commitments are that ‘State Parties undertake to prohibit and prevent genocide, other forms of mass murder as well as crimes against humanity’;
- Based in Addis Ababa.
9. The Financial Institutions,
The African Central Bank; The African Monetary Fund; The African Investment Bank. (Constitutive Act of the African Union)

- The Constitutive Act provides for the AU to have three financial institutions: an African Central Bank, African Monetary Fund; and African Investment Bank;
- The African Central Bank was created following the 1991 Abuja Treaty and reiterated by the 1999 Sirte Declaration that called for the speeding up of the implementation process;
- The African Monetary Fund (AMF) is stipulated in the Abuja Treaty in the Constitutive Act of the African Union, Article 19, in a bid to facilitate the integration of African economies, through the elimination of trade restrictions and enhance greater monetary integration;
- The African Investment Bank is one of the three financial institutions planned for in the Constitutive Act of the African Union. The mandate of the African Investment Bank was envisioned to aid in fostering economic growth and accelerating economic integration in Africa in line with the broad objective of the African Union;
- No financial institution is yet in place.

10. The Economic, Social and Cultural Council (ECOSOCC)
(Is established as one of the organs of the AU under the Constitutive Act; its detailed operations are provided by the Statutes of ECOSOCC)

- An advisory organ of the African Union;
- There are ten clusters that are established as the operational mechanisms of ECOSOCC: Peace and Security; Political Affairs; Infrastructure and Energy; Social Affairs and Health; Human Resources, Science and Technology; Trade and Industry; Rural Economy and Agriculture; Economic Affairs; Women and Gender; Cross-cutting Programmes;
- Composed of Civil Society Organisations from a wide range of sectors including labour, business and professional groups, service providers and policy think tanks, both from within Africa and the African Diaspora;
- These CSOs include but are not limited to the following: Social groups such as those representing women, children, the youth, the elderly and people with disabilities and special needs; Professional groups such as associations of artists, engineers, health practitioners, social workers, media, teachers, sport associations, legal professionals, social scientists, academia, business organizations, national chambers of commerce, workers, employers, industry and agriculture as well as other private sector interest groups; Non-governmental organizations (NGOs), community-based organizations (CBOs) and voluntary organizations; Cultural organizations;
- The functions of ECOSOCC are stipulated in Article 2 of the Statute of ECOSOCC;
- ECOSOCC Secretariat is based in Addis Ababa.
Institutions of the African Union

11. **The African Court on Human and Peoples’ Rights**
   *(The Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.)*

- Complements the protective mandate of the African Commission on Human and Peoples’ Rights established under the Charter;
- Receives cases from Member States, the Commission and NGOs with observer status before the Commission of Human and Peoples Rights;
- Has 11 judges;
- Based in Arusha Tanzania;
- A decision to merge this Court with the Court of Justice of the African Union and establish a combined African Court of Justice and Human Rights was taken at the June 2004 Summit;
- A further series of decisions commencing January 2009 may see the jurisdiction of the merged Court eventually expanded to incorporate international crimes.

12. **African Commission on Human and Peoples’ Rights (ACHPR)**
   *(The African Charter On Human And Peoples’ Rights)*

- Established in 1986 in accordance with the provisions of the African Charter on Human and Peoples’ Rights;
- Its Secretariat is located in Banjul, Gambia;
- Composed of 11 Commissioners, who are nominated by Member States but serve in their personal capacity, meet in ordinary session twice a year but can also call extraordinary sessions;
- Reports to the Executive Council at each Summit, and its Decisions on individual complaints are not public until they have been adopted by the Council and Assembly.

   *(African Charter on the Rights and Welfare of the Child)*

- Established in 2001;
- It usually meets twice a year to consider Reports from Member State governments on the implementation of the Charter, and has only recently activated its contentious Applications procedure;
- Has a small Secretariat in Addis Ababa, based at the AU Commission.
(Statute of the African Union Commission on International Law although a decision had been made to establish AUCIL in the African Union Non-Aggression And Common Defence Pact as early as 2004)

- Consists of eleven (11) members of recognised competence in international law, who are nationals of Member States and who shall serve in their personal capacities;
- Based in the Office of the Legal Counsel of the African Union, in Addis Ababa;
- The functions of the AUCIL are stipulated in Article 4 of the Statute of the Commission on International Law.

15. The New Partnership for Africa’s Development (NEPAD)

- The NEPAD governance structures are: The Assembly of the African Union (AU); The NEPAD Heads of State & Government Implementation Committee (HSGIC); The NEPAD Steering Committee (SC) and The NEPAD Agency;
- NEPAD manages a number of programmes and projects in six theme areas: Agriculture and Food Security; Climate Change and National Resource Management; Regional Integration and Infrastructure; Human Development; Economic and Corporate Governance; Cross-cutting Issues, including Gender, Capacity Development and ICT.

15a. The NEPAD Secretariat

- Secretariat is based in Midrand, South Africa;
- Reports to the NEPAD Heads of State and Government Implementation Committee.

16. The African Peer Review Mechanism

- Initially established as part of the NEPAD initiative, the APRM now operates independently under a Memorandum of Understanding signed by Member States on a voluntary basis;
- Has a Panel of Eminent Persons and provisions for Country-level and regional Secretariats/organs;
- The APRM has three main bodies at the continental level: APR Forum (Is a Committee of Participating Heads of States and Government of the Member States of the African Union that have voluntarily acceded to the APRM); APR Panel (The Panel of Eminent Persons); APR Secretariat (Currently based in Midrand/ Johannesburg (South Africa)).
17. **Advisory Board on Corruption**  
*(African Convention on Preventing and Combating Corruption)*

- The Board comprises of 11 members elected by the Executive Council from among a list of experts of the highest integrity, impartiality, and recognized competence in matters relating to preventing and combating corruption and related offences proposed by State Parties;
- The first members were elected in 2009;
- Members serve in their personal capacity;
- Appointed for a period of two years renewable;
- The functions of the Advisory Board on Corruption are stipulated in Article 22 of the African Convention on Preventing and Combating Corruption;
- The Secretariat of the African Union Advisory Board on Corruption will be established in Arusha, the United Republic of Tanzania.

18. **African Union ad hoc Administrative Tribunal**  
*(Statute of the Administrative Tribunal of the AU)*

- Composed of three (3) Judges designated by Member States nominated in an alphabetical order by the Executive Council of the African Union for a term of four (4) years;
- According to Article 2 of the Statute of the Administrative Tribunal, the Tribunal has the competence to adjudicate disputes between staff members or their beneficiaries and the organization;
- Only body vested with competence to address employment relations matter between the Union and its staff members.

19. **Committee on Coordination of relations between the AU and Regional Economic Communities (RECs)**  
*(Protocol on Relations between the African Union and the Regional Economic Communities (RECs))*

- Composed of the Chairperson of the African Union Commission, the Chief Executives of the RECs, the Executive Secretary of the United Nations Economic Commission for Africa (UNECA); President of the African Development Bank, the Chief Executives of the Financial Institutions of the Union;
- The functions of the Committee on Coordination are stipulated in Article 7 (2) of the Protocol on Relations between the African Union and RECs.
## PALU Policy Brief No. 2:

### Matrix of African Intergovernmental Courts and Tribunals

<table>
<thead>
<tr>
<th>Establishing Body</th>
<th>Court/Tribunal or Other Created</th>
<th>Establishing Treaty &amp; Provision</th>
<th>Year of Operationalization/Establishment</th>
<th>Jurisdiction of the Court</th>
<th>States Parties</th>
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<th>Level of Activity</th>
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<tbody>
<tr>
<td>African Union (AU)</td>
<td>African Economic Community Court of Justice (AECCJ)</td>
<td>Article 18 of the Treaty Establishing the African Economic Community</td>
<td>The Court is not yet operationalized</td>
<td>The Court is mandated to ensure compliance with the law in the interpretation and application of the Treaty Establishing the African Economic Community including jurisdiction over the actions by a Member State or by the Conference of Heads of State and Government Summit which violate the provisions of the Treaty; decisions, regulations, or abuse of power by an Organ or Authority of a Member State at the request of the Conference or the Executive Council. The Court also has the jurisdiction to render advisory opinions on any legal matter.</td>
<td>49 countries have ratified the Treaty. The following have not: Djibouti, Eritrea, Somalia and South Sudan.</td>
<td>Not yet determined</td>
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<td>The Court is yet to commence operations.</td>
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<td>African Union (AU)</td>
<td>African Commission on Human and Peoples’ Rights (ACHPR)</td>
<td>Article 30 of the African Charter on Human and Peoples’ Rights</td>
<td>The Charter came into force in 1986 and the Commission held its first session in 1987.</td>
<td>All cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned</td>
<td>All 53 Member States of the African Union except South Sudan.</td>
<td>The Commission comprises of 11 African members of high repute, who serve in their personal capacity</td>
<td>The Secretariat of the Commission is in Banjul, The Gambia. The Commission may hold its sessions in any other African country upon invitation of such country.</td>
<td>The Commission is the most vibrant regional quasi-judicial body. It has regular bi-annual sessions during which state party reports are considered, communications heard and deliberations on various aspects of human rights in the region are undertaken. Since its establishment, the Commission has received about 400 communications and adopted 48 resolutions covering 24 States.</td>
<td>31 Bijilo Annex Layout, Kombo North District, Western Region PO Box 673, Banjul - Gambia Tel: (+220) 441 05 05/441 05 06 Fax: (+220) 441 05 06 Email: <a href="mailto:au-banjul@african-union.org">au-banjul@african-union.org</a> <a href="http://www.achpr.org">www.achpr.org</a></td>
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<td>African Union (AU)</td>
<td>African Court on Human and Peoples’ Rights (AfCHPR)</td>
<td>Article 1 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights</td>
<td>The Protocol came into force in January 2004 and the Court was inaugurated in 2006.</td>
<td>All cases and disputes concerning interpretation and application of the African Charter (Article 3 of Court Protocol). The Court can also render advisory opinions on any legal matter relating to the African Charter or other human rights instruments ratified by Member States of the African Union (Article 4 of Court Protocol). The jurisdiction may be invoked by the African Commission on Human and Peoples’ Rights, African Intergovernmental Organisations, State Parties, individuals or non-governmental organisations with observer status before the Commission. Individuals and Non Governmental Organisations (NGOs) may only access the Court if the State against whom the claim is brought has issued a Declaration allowing direct access under Article 34(6) of the Court Protocol. To date, only 5 countries have made the declaration namely Burkina Faso, Ghana, Malawi, Mali and Tanzania</td>
<td>26 countries have ratified the Protocol. These are Algeria, Burkina Faso, Burundi, Côte d’Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia, and Uganda.</td>
<td>The Court consists of eleven judges of high moral standing, and of recognised practical, judicial or academic competence and experience on human and peoples’ rights (Article 11(1). The judges are drawn from nationals of member states.</td>
<td>Arusha, Tanzania</td>
<td>The Court received its first case in 2009 and to date has received 22 cases, It has also received 3 requests advisory opinions.</td>
<td>Dodoma Road P.O Box 6274 Arusha/ Tanzania Tel: (+255) 732 979 506/9 Fax (+255) 732 979 503 Email : <a href="mailto:registrar@african-court.org">registrar@african-court.org</a> <a href="http://www.african-court.org">www.african-court.org</a></td>
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<td>African Union (AU)</td>
<td>African Committee of Experts on the Rights and Welfare of the Child (ACERWC)</td>
<td>Article 32 of the African Charter on the Rights and Welfare of the Child</td>
<td>The Charter entered into force in 1999, the Committee was inaugurated in July 2001 and held its first session in 2002.</td>
<td>The Committee has the mandate to promote and protect the rights enshrined in the Charter; interpret the provisions of the 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. In monitoring implementation, the Committee receives periodic reports of the states in the implementation of the Charter, and gives concluding observations on these. In exercise of the protective mandate, the Committee receives communications on violations of the rights of children.</td>
<td>46 States have ratified the Protocol. The following have not: Central African Republic, Côte d’Ivoire, Congo, Djibouti, Democratic Republic of Congo, Gabon, Guinea Bissau, Liberia, Mauritania, Sahrawi Arab Democratic Republic, Somalia, Sao Tome and Principe, South Sudan, Sudan, Swaziland, Tunisia and Zambia.</td>
<td>The Committee comprises of 11 members of high moral integrity and competence in matters of child rights and welfare who serve in their personal capacity.</td>
<td>The Secretariat of the Committee is in Addis Ababa, Ethiopia. The Committee may hold its sessions in any Member States that offers to host it.</td>
<td>The Committee has received 2 Communications to date and has finalised 1.</td>
<td>Commission of the African Union African Union Headquarters Social Affairs Department P.O.Box 3243, W21 K19 Addis Ababa, Ethiopia Tel: (+251) 1 551 35 22 Fax: (+251) 1 553 57 16 <a href="http://www.acerwc.org">www.acerwc.org</a></td>
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<td>African Union (AU)</td>
<td>African Court of Justice (ACJ)</td>
<td>Article 18 of the Constitutive Act of the African Union and the Protocol on the Court of Justice of the African Union</td>
<td>The operationalization of the Court was suspended following the decision to merge the African Court of Justice and the African Court on Human and Peoples’ Rights.</td>
<td>Interpretation and application of the Constitutive Act, the interpretation, application or validity of African Union Treaties and all subsidiary legal instruments adopted within the Union; any questions about the international law, all acts, decisions, regulations and directives of the organs of the Union in all matters under any other agreement that States Parties may conclude among themselves or with the Union and which empowers the Court to adjudicate over, the existence of any fact which, if established, would constitute a breach of an obligation to a State Party or the Union, the nature or extent of reparation for the breach of an undertaking (Article 19 of the Protocol). The Court of Justice can also give advisory opinions on any legal question at the request of any Organs of the African Union or a Regional Economic Community under Article 44 of the Protocol.</td>
<td>16 countries have ratified the Protocol. These are Algeria, Comoros, Egypt, Gabon, Gambia, Lesotho, Libya, Mali, Mozambique, Mauritius, Niger, Rwanda, South Africa, Sudan, Tunisia and Tanzania.</td>
<td>The Court consists of 11 judges drawn from nationals of Member States. The court sits in full except when sitting as a chamber, in which case a quorum of at least 7 judges is required.</td>
<td>Not established.</td>
<td>The operationalization of the Court was suspended following the decision to merge the African Court of Justice and the African Court on Human and Peoples’ Rights.</td>
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<td>African Union (AU)</td>
<td>African Court of Justice and Human Rights (ACJHR)</td>
<td>Article 2 of the Protocol on the Statute of the African Court of Justice and Human Rights</td>
<td>The Court is not yet operationalized. The Protocol has only received 5 of the required 15 ratifications for it to come into force.</td>
<td>The Court has jurisdiction over interpretation and application of the Constitutive Act and related African Union treaties. Its may review acts, decisions, regulations, directives of the organs of the African Union, any question of international law and the existence of any fact which, if established, would constitute a breach of an obligation to a State Party of the African Union and the nature or extent of reparations to be made for the breach of an international obligation. The jurisdiction of the ACJHR may be invoked by States Parties, AU Organs and Institutions, African Intergovernmental Organizations, staff of the AU on appeals arising from labour disputes and African National Human Rights Institutions. Individuals or NGOs accredited to the AU or its Organs may also approach the Court subject to a declaration made by a Member State accepting the Court’s competence.</td>
<td>5 countries have ratified the Protocol. These are Benin, Burkina Faso, Congo, Libya and Mali.</td>
<td>The Court consists of 16 judges drawn from nationals of Member States. The Protocol also requires geographical balancing of the appointed judges with each region entitled to 3 seats except the Western Region which shall have 4 seats.</td>
<td>The seat of the Court is yet to be determined though Article 25 of the Protocol provides that the seat of the Court shall be the same sear as the African Court on Human and Peoples’ Rights which is currently situate in Arusha, Tanzania.</td>
<td>The Court is yet to commence operations.</td>
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<td>African Intellectual Property Organization (AIPO)</td>
<td>High Commission of Appeal</td>
<td>Articles 19, 27 and 33 of the Bangui Agreement Relating to the Creation of an African Intellectual Property Organization</td>
<td>The Commission commenced operations in 2000</td>
<td>The Commission has jurisdiction to rule on appeals from a rejection of applications for protection of industrial property, the rejection of applications for continuation or extension of the term of protection, the rejection of applications for restoration in decisions about opposition. The Commission may be approached by natural and legal persons who are nationals of States Parties to the Bangui Agreement.</td>
<td>15 Members: Benin, Burkina Faso, Cameroon, Chad, Congo, Côte d’Ivoire, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Central African Republic, Sénégal, and Togo.</td>
<td>The Commission is composed of 6 members, 3 members and 3 alternates selected by lot from among the judges of Member States with at least 10 years experience, and with good knowledge of intellectual property issues. At any meeting, the Commission shall be composed of at least three members, at least one regular member.</td>
<td>Yaoundé, Cameroon</td>
<td>Commission was established in 2000 and held its first session in the same year. Since then it meets regularly in sessions to discuss and settle disputes.</td>
<td>BP 887, Hippodrome Yaoundé, Yaoundé, Tel: (+237) 220 57 00/220 39 11 Fax: (+237) 220 57 27/220 57 21 <a href="http://www.oapi.wipo.net">www.oapi.wipo.net</a></td>
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<td>African Regional Industrial Property Organization (ARIPO)</td>
<td>Board of Appeal</td>
<td>Article 4bis of the Harare Protocol on Patents and Industrial Designs within the Framework of the African Regional Industrial Property Organization</td>
<td>The Board commenced operations in 2000</td>
<td>The Board has jurisdiction to hear appeals on intellectual property rights and to review any final administrative decision of the Office in relation to the implementation of the provisions of the Harare Protocol, the Banjul Protocol on Marks or any other Protocol within the framework of ARIPO.</td>
<td>17 Members: Botswana, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sierra Leone, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.</td>
<td>Board consists of 5 members who are experienced in intellectual property matters 2 of whom are examiners. The quorum of the Board is three members. Members of the Board serve on a two year term renewable once.</td>
<td>Harare, Zimbabwe</td>
<td>The Board has heard two appeals to date.</td>
<td>11 Natal Road, Belgravia Harare, Zimbabwe <a href="mailto:mail@aripo.org">mail@aripo.org</a> (+263) 4794065-68, (+263) 4794072/3, (+263) 773559987 <a href="http://www.aripo.org">www.aripo.org</a></td>
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<td>Common Market for East and Southern Africa (COMESA)</td>
<td>COMESA Court of Justice (COMESA - CJ)</td>
<td>Article 7(1) of the Treaty Establishing the Common Market for Eastern and Southern Africa</td>
<td>The first judges of the Court were appointed in 1998.</td>
<td>The Court has jurisdiction to adjudicate all matters referred to it under the COMESA Treaty. The Court can receive references from Member States, the Secretary General or from legal and natural persons resident in the Member States concerning the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of the Treaty. The Court may also have jurisdiction over other agreements between Member States that confer it with such jurisdiction. The Court also has jurisdiction to render advisory opinions on questions of law arising from the provisions of the Treaty affecting the Common Market upon the request of the Authority, the Council or a Member State.</td>
<td>All 20 Member States of COMESA: Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, South Sudan, Sudan, Swaziland, Uganda, Zambia and Zimbabwe</td>
<td>The Court comprises of 7 judges appointed by the Heads of States and Government of Member States. The Judges are chosen from among persons of impartiality and independence who fulfill the conditions required for the holding of high judicial office in their respective countries or are jurists of recognised competence.</td>
<td>Khartoum, Sudan</td>
<td>The Court has received at least 15 cases since inception.</td>
<td>COMESA Centre Ben Bella Road P.O Box 30051 Lusaka – Zambia Tel: (+260) 211 229725/32 Fax: (+260) 211 225107 Email: <a href="mailto:webmaster@comesa.int">webmaster@comesa.int</a></td>
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<td>East African Community (EAC)</td>
<td>East African Court of Justice (EACJ)</td>
<td>Article 9 of the Treaty Establishing the East African Community</td>
<td>The Court was inaugurated in 2001.</td>
<td>The Court is mandated to ensure adherence to law in the interpretation, application of, and compliance with the EAC Treaty. The Court has jurisdiction over Labour disputes between the Community and its employees arising from the terms and conditions of employment or the interpretation and application of the staff rules and regulations; disputes between the Partner States regarding the Treaty if the dispute is submitted to it under a special agreement; disputes arising out of an arbitration clause contained in a contract or agreement which confers arbitral jurisdiction to the Court. The jurisdiction of the Court may be extended to human rights at a suitable date to be determined by the Council</td>
<td>All 5 Member States of the EAC; Burundi, Kenya, Rwanda, Tanzania and Uganda.</td>
<td>The Court is currently comprised of 10 judges though the Court may be composed of up to 15 judges, three from each member state. It has two chambers; the First Instance Division (up to 10 judges) and the Appelate Division (5 judges). The judges serve on an ad hoc basis with exception of the President and Principal Judge of the Court.</td>
<td>The Court is currently situates in Arusha, Tanzania pending the determination of its permanent seat by the Summit.</td>
<td>The Court was inactive for a relatively long period after its establishment. It has however experienced an increasing volume of activity since 2007.</td>
<td>Leopard Tours Co. Ltd. Building 1st &amp; 3rd Floor, Along Moshi/Arusha Road P. O. Box 1096 Arusha, Tanzania Telephone: (+255) 27 2506093 Fax: (+255) 27 2509493 Email: <a href="mailto:eacj@eachq.org">eacj@eachq.org</a></td>
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<td>Economic Community of West African States (ECOWAS)</td>
<td>Arbitration Tribunal of the Economic Community of West African States</td>
<td>Article 16 of the Revised Economic Community of West African States Treaty</td>
<td>The Court is not yet operationalized</td>
<td>The Treaty provides that the status, composition, powers, procedures relating thereto are to be established in a Protocol. The Protocol is yet to be adopted.</td>
<td>13 Member States of ECOWAS have acceded to its jurisdiction while Benin and Burkina Faso have not.</td>
<td>Not yet determined</td>
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<td>The Court is yet to commence operations.</td>
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<td>Economic Community of West African States (ECOWAS)</td>
<td>ECOWAS Community Court of Justice (ECOWAS CCJ)</td>
<td>Article 2 of the Protocol to the Treaty of the Economic Community of West Africa States on the Community Court of Justice and the Supplementary Protocol Amending Protocol Relating to the Community Court of Justice</td>
<td>The Court was operationalized in 2002</td>
<td>The Court is mandated to ensure the observance of law and the principles of equity in the interpretation and application of the principles of the ECOWAS Treaty. It has jurisdiction over the interpretation and application of the Treaty, Conventions and Protocols of the Community, the subsidiary instruments of the Community, determination of the legality of regulations, directives, decisions and other instruments adopted by the community, failure of member states to honor their obligations under the instruments of the Community, non-contractual liability of the community, and to determine cases of violation of human rights in any of the member states. The Court may also issue advisory opinions at the request of Institutions of the Community or Member States.</td>
<td>All 15 Member States of ECOWAS; Benin, Burkina Faso, Cap Verde, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.</td>
<td>The Court is composed of 7 independent judges elected and nominated by the Member States, and who are persons of high moral integrity and are qualified to fill the highest judicial offices in their respective countries or are jurisconsults of recognized competence.</td>
<td>Abuja, Nigeria</td>
<td>The Court is the most vibrant sub-regional court, having received over 30 cases in its period of operation.</td>
<td>The ECOWAS Commission, 10 Dar Es Salaam Crescent, Off Aminu Kano Crescent, Wuse II, Abuja, Nigeria. Tel: (+234) 9 5240781 Fax: (+234) 9 6708210 Email: <a href="mailto:information@courtecowas.org">information@courtecowas.org</a> <a href="http://www.courtecowas.org">www.courtecowas.org</a></td>
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<tr>
<td>Establishing Body</td>
<td>Court/Tribunal or Other Created</td>
<td>Establishing Treaty &amp; Provision</td>
<td>Year of Operationalization/ Establishment</td>
<td>Jurisdiction of the Court</td>
<td>States Parties</td>
<td>Composition/ Structure</td>
<td>Seat of the Court/ Tribunal</td>
<td>Level of Activity</td>
<td>Address/Contact</td>
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<tr>
<td>Economic Community of Central African States (ECCAS)</td>
<td>ECCAS Court of Justice (ECCAS - CJ)</td>
<td>Articles 7 and 16-18 of the Treaty establishing the Economic Community of Central African States</td>
<td>Not Yet operational</td>
<td>The Court has jurisdiction to ensure adherence to the rule of law in the interpretation and application of the Treaty ECCAS, and to adjudicate disputes in which it can be seized under the provisions of the Treaty. The Court can review and interpret the legality of decisions, directives, regulations and institutions of the Community for incompetence, abuse of power, breach of essential provisions of the Treaty made by a State Party or by a member of the Conference of Heads of Stat. It also has jurisdiction to issue advisory opinions on any legal question at the request of the Conference or Council.</td>
<td>11 Members: Angola, Burundi, Cameroon, Congo, Central African Republic, Chad, Democratic Republic of Congo, Gabon, Equatorial Guinea and Sao Tome and Principe.</td>
<td>Not Yet operational</td>
<td>Not yet determined</td>
<td>The Court is yet to commence operations.</td>
<td>Not established</td>
</tr>
<tr>
<td>Economic and Monetary Community of Central Africa (EMCCA)</td>
<td>Economic and Monetary Community of Central Africa Community Court of Justice</td>
<td>Articles 10 and 48 of the Treaty of 16 June 1994 in Yaoundé revised June 25, 2008, Convention Governing the Court of Justice of the CEMAC adopted January 30, 2009 in Libreville.</td>
<td>The Court commenced operations in 2000</td>
<td>The Court has jurisdiction over interpretation and application of the EMCCA Treaty and subsequent agreements. The Court may be approached by Member States, EMCCA, specialised institutions of the Community, officials of Community institutions and natural or legal persons who are nationals of Member States. The Court also has jurisdiction to issue advisory opinions.</td>
<td>6 Members: Cameroon, Central African Republic, Chad, Congo, Equitorial Guinea and Gabon.</td>
<td>The Court is composed of 6 independent judges elected and nominated by the member states,</td>
<td>N’djamena, Chad</td>
<td>Court became operational on 10 February 2000, with the appointment of its first members. It has been reformed in 2008, but which still has not come into force</td>
<td>B.P: 5780 N’djamena Chad Tel: (+235) 252 08 27 Fax: (+235) 252 05 92</td>
</tr>
<tr>
<td>Establishing Body</td>
<td>Southern Africa Development Community (SADC)</td>
<td>Court/Tribunal or Other Created</td>
<td>Treaty &amp; Provision</td>
<td>Article 9(8) of the Treaty of the Southern Africa Development Community (SADC) on Tribunal and Protocol on the Rules of Procedure Thereof</td>
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<tr>
<td>Composition/Structure</td>
<td>15 Members: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.</td>
<td>Level of Activity</td>
<td>Before its suspension in 2010 the Tribunal had heard over 17 cases.</td>
<td>The Tribunal consists of not less than 10 members appointed from nationals of the Member States. The Tribunal has 5 regular members and 5 alternate members. The quorum of the Tribunal is 3 members for a panel.</td>
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<tr>
<td>States Parties</td>
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</tr>
<tr>
<td>Year of Operationalization/Establishment</td>
<td>The Tribunal was inaugurated in 2005 but its activities were suspended in 2010.</td>
<td>Address/Contact</td>
<td>PO. Box 40624, Cn Bahnhoff Str and Robert Mugabe Avenue, Turnhalle Building, Windhoek, Namibia. Tel: (+264) 61 383600 Email: <a href="mailto:registrar@sadc-tribunal.org">registrar@sadc-tribunal.org</a></td>
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<tr>
<td>Seat of Court/ Tribunal</td>
<td>Windhoek, Namibia</td>
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</tbody>
</table>

The Tribunal was suspended in 2010 before its inauguration in 2005. The Tribunal has jurisdiction in relation to the interpretation and application of the SADC Treaty, Protocols and subsidiary instruments of the Community. The Tribunal also has jurisdiction over disputes between Member States, and between natural or legal persons and Member States. In August 2012 the Annual Summit of SADC Heads of State and Government decided that a new Protocol on the Tribunal should be negotiated and its mandate confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States. The Tribunal consists of not less than 10 members appointed from nationals of the Member States. The Tribunal has 5 regular members and 5 alternate members. The quorum of the Tribunal is 3 members for a panel.

The Tribunal has jurisdiction in relation to the interpretation and application of the SADC Treaty, Protocols and subsidiary instruments of the Community. The Tribunal also has jurisdiction over disputes between Member States, and between natural or legal persons and Member States. In August 2012 the Annual Summit of SADC Heads of State and Government decided that a new Protocol on the Tribunal should be negotiated and its mandate confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States.
<table>
<thead>
<tr>
<th>Establishing Body</th>
<th>Court/Tribunal or Other Created</th>
<th>Establishing Treaty &amp; Provision</th>
<th>Year of Operationalization/Establishment</th>
<th>Jurisdiction of the Court</th>
<th>States Parties</th>
<th>Composition/Structure</th>
<th>Seat of the Court/Tribunal</th>
<th>Level of Activity</th>
<th>Address/Contact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organization for the Harmonization of Business Law (OHADA)</td>
<td>Common Court of Justice and Arbitration (CCJA)</td>
<td>Article 3 of the Treaty on Harmonization of Business Law in Africa</td>
<td>The Court was inaugurated in 1997</td>
<td>The Court has jurisdiction over the interpretation and application of the Treaty of Port Louis, its implementing regulations and OHADA Uniform Acts. Its jurisdiction can be invoked by all natural or legal persons of States Parties to the Treaty of Port-Louis, the States Parties and the Council of Ministers. The Court also has jurisdiction to render advisory opinions.</td>
<td>17 Members: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d’Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal and Togo.</td>
<td>The Court is composed of 7 judges elected for a term of 7 years renewable once.</td>
<td>Abidjan Côte d’Ivoire</td>
<td>As to date the Court has rendered 18 advisory opinions on various issues affecting the OHADA law as well as issued 173 decisions and 23 orders.</td>
<td>B.P. 8702 Abidjan 01, Côte d’Ivoire Tél.: (+225) 20 33 60 51 / 225 20 33 60 52 Fax : (+225) 20 33 60 53 E-mail: <a href="mailto:ccja@ohada.org">ccja@ohada.org</a></td>
</tr>
<tr>
<td>West African Economic Monetary Union (WAEMU)</td>
<td>The Court of Justice of WAEMU (CJ-WAEMU)</td>
<td>Article 16, 38 and 39 of the WAEMU Treaty and Additional Act No. 10/96 of 05 May 1996 on the Statutes of the Court of Justice of WAEMU</td>
<td>The Court was inaugurated on 27 January 1985</td>
<td>The Court has jurisdiction over remedies for breach by Member States of any regulations, directives and decisions of bodies of the Union, claims between Member States relating to the Treaty of WAEMU submitted under a compromise agreement and references on preliminary rulings. The Court also has jurisdiction to issue advisory opinions at the request of the WAEMU Commission, the Council of Ministers or the Conference of Heads of State and Government.</td>
<td>8 Members: Benin, Burkina Faso, Côte d’Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo.</td>
<td>The Court is composed of members appointed for a term of 6 years by the Conference of Heads of State and Government. They are chosen from persons whose independence is beyond doubt and with the requisite legal expertise necessary to exercise the highest judicial offices.</td>
<td>Ouagadougou, Burkina Faso</td>
<td>To date the Court has seven pending cases and two requests for advisory opinions.</td>
<td>Court of Justice of WAEMU 01 01 BP 543 Ouagadougou – Burkina Faso Tél: (+226) 50 31 88 73 - 76 Fax: (+226) 50 31 88 72 <a href="http://www.uemoa.int">www.uemoa.int</a></td>
</tr>
</tbody>
</table>
PALU Policy Brief No. 3:

Tabulation of Cases Filed or Concluded before the African Court on Human and Peoples’ Rights (AfCHPR) from Inception till 31st August 2012

<table>
<thead>
<tr>
<th>No.</th>
<th>Application No.</th>
<th>Case Title</th>
<th>Referred cases</th>
<th>Decision Made</th>
<th>Separate/ Dissenting Opinion</th>
<th>Date Filed</th>
<th>Date Concluded/ Finalised</th>
<th>Time elapsed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Application No. 001/2008</td>
<td>Michelot Yogogombaye v. the Republic of Senegal</td>
<td>Referred cases</td>
<td>Judgment</td>
<td>Separate Opinion by Judge Fatsah Ouguergouz</td>
<td>29 Dec 2008</td>
<td>15th Ordinary Session-15 Dec 2009</td>
<td>11 months, 2 weeks &amp; 3 days</td>
</tr>
<tr>
<td>3</td>
<td>Application No. 002/2011</td>
<td>Soufiane Ababou v. People's Democratic Republic of Algeria</td>
<td>Court to Commission</td>
<td>Decision: Court held that it had no Jurisdiction to hear the matter</td>
<td></td>
<td>20 Feb 2011</td>
<td>21st Ordinary Session-16 June 2011</td>
<td>3 months, 3 weeks &amp; 4 days</td>
</tr>
<tr>
<td>4</td>
<td>Application No. 003/2011</td>
<td>Urban Mkandawire v. Malawi</td>
<td>Referred cases</td>
<td>Matter Pending</td>
<td></td>
<td>13 March 2011</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No.</td>
<td>Application No.</td>
<td>Case Title</td>
<td>Referred cases</td>
<td>Decision Made</td>
<td>Separate/ Dissenting Opinion</td>
<td>Date Filed</td>
<td>Date Concluded/ Finalised</td>
<td>Time elapsed</td>
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<td></td>
<td></td>
<td></td>
<td>Order: extension of time for the Respondent to file its Reply</td>
<td></td>
<td>18 May 2011</td>
<td>21st Ordinary Session-8 June 2011</td>
<td>3 weeks &amp; 1 days</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Order: extension of time for the Applicant to file its Rejoinder</td>
<td></td>
<td>28 June 2011</td>
<td>22nd Ordinary Session-2nd Sept 2011</td>
<td>2 months &amp; 5 days</td>
</tr>
<tr>
<td></td>
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<td></td>
<td>Order: second extension of time for the Applicant to file its Rejoinder</td>
<td></td>
<td>7 October 2011</td>
<td>24st Ordinary Session- 30th March 2012</td>
<td>5 month, 3 weeks &amp; 4 days</td>
</tr>
<tr>
<td></td>
<td></td>
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<td></td>
<td>Order: Pan African Lawyers Union (PALU) admitted as Amicus Curiae</td>
<td></td>
<td>13 June 2011</td>
<td>24th Ordinary Session- 30th March 2012</td>
<td>9 months, 2 weeks &amp; 4 days</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Matter Pending</td>
<td></td>
<td>16 March 2011</td>
<td></td>
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</tr>
<tr>
<td>6</td>
<td>Application No. 005/2011</td>
<td>Daniel Amare &amp; Mulugeta Amare v. Republic of Mozambique &amp; Mozambique Airlines</td>
<td></td>
<td>Decision: Court held that it had no Jurisdiction to hear the matter</td>
<td></td>
<td>16 March 2011</td>
<td>21st Ordinary Session- 16 June 2011</td>
<td>3 months</td>
</tr>
<tr>
<td>No.</td>
<td>Application No.</td>
<td>Case Title</td>
<td>Referred cases</td>
<td>Decision Made</td>
<td>Separate/ Dissenting Opinion</td>
<td>Date Filed</td>
<td>Date Concluded/ Finalised</td>
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<tr>
<td>7</td>
<td>Application No. 006/2011</td>
<td>Association Juristes d’Afrique pour la Bonne Gouvernance v. Republic of Cote d’Ivoire</td>
<td>Court to Commission</td>
<td>Decision: Court held that it had no Jurisdiction to hear the matter</td>
<td></td>
<td>4 May 2011</td>
<td>21st Ordinary Session-16 June 2011</td>
<td>1 month, 2 weeks</td>
</tr>
<tr>
<td>8</td>
<td>Application No. 007/2011</td>
<td>Youssef Ababou v. The Kingdom of Morocco</td>
<td></td>
<td>Decision: Court held that it had no Jurisdiction to hear the matter</td>
<td></td>
<td>18 May 2011</td>
<td>22nd Ordinary Session-2 Sept 2011</td>
<td>3 Months &amp; 2 weeks</td>
</tr>
<tr>
<td>9</td>
<td>Application No. 008/2011</td>
<td>Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria</td>
<td>Court to Commission</td>
<td>Decision: Court held that it had no Jurisdiction to hear the matter</td>
<td>Dissenting Opinion by Judge Fatsah Ouguergouz</td>
<td>20 May 2011</td>
<td>22nd Ordinary Session-23 Sept 2011</td>
<td>4 months &amp; 4 days</td>
</tr>
<tr>
<td>10</td>
<td>Application No. 009/2011</td>
<td>Tanganyika Law Society and Legal and Human Rights Centre v. The United Republic of Tanzania</td>
<td></td>
<td>Judgment Pending (Ref also No. 12 below)</td>
<td></td>
<td>2 June 2011</td>
<td></td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Application No. 10/2011</td>
<td>Efoua Mbozo'o Samuel v. Pan African Parliament</td>
<td></td>
<td>Decision: Court held that it had no Jurisdiction to hear the matter</td>
<td>Separate Opinion by Judge Fatsah Ouguergouz</td>
<td>6 June 2011</td>
<td>22nd Ordinary Session-30 Sept 2011</td>
<td>3 months &amp; 3 weeks</td>
</tr>
<tr>
<td>No.</td>
<td>Application No.</td>
<td>Case Title</td>
<td>Referred cases</td>
<td>Decision Made</td>
<td>Separate/Dissenting Opinion</td>
<td>Date Filed</td>
<td>Date Concluded/ Finalised</td>
<td>Time elapsed</td>
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<td></td>
<td>Application No. 009/2011 &amp; 011/2011</td>
<td>The Tanganyika Law Society and the Legal and Human Rights Centre\textsuperscript{7} and Reverend Christopher Mtikila\textsuperscript{8} v. the United Republic of Tanzania\textsuperscript{9}</td>
<td></td>
<td>Order: Joinder of Applications 009 &amp; 011</td>
<td></td>
<td>10 June 2011</td>
<td>22nd Ordinary Session - 22 September 2011</td>
<td>3 months &amp; 2 weeks</td>
</tr>
<tr>
<td>13</td>
<td>Application No. 12/2011</td>
<td>National Convention of Teachers Trade Union v. The Republic of Gabon</td>
<td></td>
<td>Decision: Court held that it had no Jurisdiction to hear the matter</td>
<td>Separate Opinion by Judge Fatsah Ouguergouz</td>
<td>3 August 2011</td>
<td>23rd Ordinary Session-15 Dec 2011</td>
<td>4 months &amp; 2 weeks</td>
</tr>
<tr>
<td>15</td>
<td>Application No. 014/2011</td>
<td>Atabong Denis Atemnkeng\textsuperscript{10} v. African Union</td>
<td></td>
<td>Matter Pending</td>
<td></td>
<td></td>
<td></td>
<td>1 December 2011</td>
</tr>
<tr>
<td>No.</td>
<td>Application No.</td>
<td>Case Title</td>
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<td>Decision Made</td>
<td>Separate/ Dissenting Opinion</td>
<td>Date Filed</td>
<td>Date Concluded/ Finalised</td>
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<tr>
<td>17</td>
<td>Application No. 002/2012</td>
<td>Delta International Investments S.A., Mr and Mrs A.G.L. De Lange v. Republic of South Africa</td>
<td></td>
<td>Decision: Court held that it had no Jurisdiction to hear the matter</td>
<td>Separate Opinion by Judge Fatsah Ouguergouz</td>
<td>8 February 2012</td>
<td>24th Ordinary Session-30 March 2012</td>
<td>1 month &amp; 3 weeks</td>
</tr>
<tr>
<td>18</td>
<td>Application No. 003/2012</td>
<td>Peter Joseph Chacha¹¹ v. United Republic of Tanzania</td>
<td></td>
<td>Matter Pending</td>
<td></td>
<td>13 February 2012</td>
<td></td>
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</tr>
<tr>
<td>19</td>
<td>Application No. 004/2012</td>
<td>Emmanuel Joseph Uko and Others v. Republic of South Africa</td>
<td></td>
<td>Decision Court held that it had no Jurisdiction to hear the matter</td>
<td>Separate Opinion by Judge Fatsah Ouguergouz</td>
<td>20 February 2012</td>
<td>24th Ordinary Session-30 March 2012</td>
<td>1 month, 1 week &amp; 2 days</td>
</tr>
<tr>
<td>20</td>
<td>Application No. 005/2012</td>
<td>Amir Adam Timan v. Republic of Sudan</td>
<td></td>
<td>Decision: Court held that it had no Jurisdiction to hear the matter</td>
<td>Separate Opinion by Judge Fatsah Ouguergouz</td>
<td>25 February 2012</td>
<td>24th Ordinary Session-30 March 2012</td>
<td>1 month &amp; 4 days</td>
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<tr>
<td>No.</td>
<td>Application No.</td>
<td>Case Title</td>
<td>Referred cases</td>
<td>Decision Made</td>
<td>Separate/Dissenting Opinion</td>
<td>Date Filed</td>
<td>Date Concluded/Finalised</td>
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<tr>
<td>22</td>
<td>Application No. 007/2012</td>
<td>Baghdadi Ali Mahmoudi v. The Republic of Tunisia</td>
<td></td>
<td>Decision: Court held that it had no Jurisdiction to hear the matter</td>
<td>Separate Opinion by Judge Fatsah Ouguergouz</td>
<td>1 June 2012</td>
<td>25th Ordinary Session- 26 June 2012</td>
<td>3 weeks &amp; 5 days</td>
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**Advisory Opinions**

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<thead>
<tr>
<th>No.</th>
<th>Request No.</th>
<th>Request From</th>
<th>Status</th>
<th>Date Filed</th>
<th>Date Concluded/Finalised</th>
<th>Time elapsed</th>
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<tbody>
<tr>
<td>1</td>
<td>001/2011</td>
<td>Republic of Mali</td>
<td>Withdrawn</td>
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<td>2</td>
<td>002/2011</td>
<td>The Great Socialist Peoples’ Libyan Jamahiriya</td>
<td>Struck out for lack of authorisation</td>
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</tr>
<tr>
<td>3</td>
<td>001/2012</td>
<td>Socio-Economic Rights and Accountability Project (SERAP)</td>
<td>Pending</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Summary**

Judgment: 2  
No jurisdiction: 11  
Pending: 8
Endnotes

1 Himself.

2 Mr. Abdoulaye Dianko - State Legal Officer; Mr. Mafall Fall - State Legal Department, Ministry of Economy & Finance; His Excellency Mr. Cheikh Tidiane Thiam – Ambassador; Mr. Mamadou Mboj - Legal and Consular Affairs Department, Ministry of Foreign Affairs; Mr. Moustapha Ka - Criminal and Mercy Affairs Department, Ministry of Justice.

3 Representing himself.

4 Mr. Bahame Tom Nyanduga, Advocate; Mr. Bright Mando, Legal Officer, Office of the Legal Counsel, African Union Commission.

5 Mr. Abebe Hailu, Advocate.

6 For Amicus Curiae: Dr. Chidi Anselm Odinkalu; Mr. Ibrahima Kane; Mr. Donald Deya, CEO, Pan African Lawyers Union.

7 Mr. Clement Mashamba; Mr. James Jesse; Mr. Donald Deya, CEO, Pan African Lawyers Union.

8 Prof. Roland Adjovi.

9 Mr. George M. Masaju - Deputy Attorney General; Mr. Mathew Mwaimu - Director of Constitutional Affairs and Human Rights; Mrs. Irene Kasyanju - Assistant Director and Head of Legal Affairs Unit, Ms. Sarah Mwaipopo-Senior State Attorney, Mrs. Alesia Mbuya-Senior State Attorney, Mr. Benedict Msuya-Second Secretary/Legal Officer.

10 Mr. Ibrahima Kane.

11 Under its legal aid mandate, the Court appointed the Pan African Lawyers Union (PALU) to assist the Applicant, who was previously representing himself.
## PALU Policy Brief No. 4:

### Tabulation of Cases Filed or Concluded Before the East African Court of Justice (EACJ) from Inception till 31st August 2012

<table>
<thead>
<tr>
<th>No.</th>
<th>CASE</th>
<th>APPLICANT</th>
<th>RESPONDENT</th>
<th>DECISION</th>
<th>DATE OF FILING</th>
<th>DATE OF DECISION</th>
<th>TIME ELAPSED</th>
</tr>
</thead>
</table>
| 1   | REFERENCE NO. 1 OF 200 | 1) CALIST ANDREW MWATELA¹  
2) LYDIA WANYOTO MUTENDE  
3) ISAAC ABRAHAM SEPETU² | EAST AFRICAN COMMUNITY³ | JUDGMENT | 7 DECEMBER 2005 | OCTOBER 2006 | 10 MONTHS & 3 WEEKS |
|     | TAXATION. REFERENCE NO. 1 OF 200 | CALIST ANDREW MWATELA & 2 OTHERS | EAST AFRICAN COMMUNITY | RULING | | 1 NOVEMBER 2007 |
| 2   | REFERENCE NO. 1 OF 2006 | 1) PROF. PETER ANYANG’ NYONG’O  
2) ABRAMAH KIBET CHEPKONGA  
3) FIDELIS MUEKE NGULI  
4) JOSEPH KAMOTHO  
5) MUMBI NGARU  
6) GEORGE NYAMWEYA  
7) JOHN MUNYES  
8) DR. PAUL SAOKE  
9) GILBERT OCHIENG MBEO  
10) YVONNE KHAMATI  
11) ROSE WARUHIU⁴ | 1) ATTORNEY GENERAL OF KENYA  
2) CLERK OF THE EAST AFRICAN LEGISLATIVE ASSEMBLY  
3) SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY⁵ | JUDGMENT | 9 NOVEMBER 2006 | 30 MARCH 2007 | 4 MONTHS & 3 WEEKS |
<p>|     | REFERENCE NO. 1 OF 2006, ARISING FROM EACJ REF. NO. 1 OF 2006 | PROF. PETER ANYANG’ NYONG’O &amp; 10 OTHERS | ATTORNEY GENERAL OF KENYA &amp; 5 OTHERS⁶ | RULING | | 27 NOVEMBER 2006 |</p>
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<th>No.</th>
<th>CASE</th>
<th>DATE OF FILING</th>
<th>DATE OF DECISION</th>
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<th>TIME ELAPSED</th>
<th>RESPONDENT</th>
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<td>19 DECEMBER 2008</td>
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**APPLICATION NO. 5 OF 2007, ARISING FROM EACJ REF. NO. 1 OF 2006**

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<th>DATE OF DECISION</th>
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**APPLICATION NO. 04 OF 2009**

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**APPLICATION NO. 2 OF 2010 (Appellate Division)**

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**APPLICATIONS:**

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**RESPONDENTS:**

1) SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY
2) ATTORNEY GENERAL OF UGANDA (Sued in representative capacity)
3) SAM K. NJUBA
4) ELECTORAL COMMISSION OF UGANDA

**APPLICANTS:**

1) EMMANUEL MWAKISHA MJAWASI & 748 OTHERS
2) INDEPENDENT MEDICO-LEGAL UNIT (IMLU)

**CASES:**

1) ATTORNEY GENERAL OF KENYA
2) MINISTER FOR INTERNAL SECURITY OF KENYA
3) CHIEF OF GENERAL STAFF OF THE ARMED FORCES OF THE REPUBLIC OF KENYA
4) COMMISSIONER OF POLICE OF KENYA
5) SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY
<table>
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| 12  | REFERENCE NO. 6 OF 2010       | ALCON INTERNATIONAL LIMITED         | 1) STANDARD CHARTERED BANK OF UGANDA  
2) ATTORNEY GENERAL OF UGANDA  
3) REGISTRAR OF THE HIGH COURT OF UGANDA | RULING   |                |                  |                    |
|     |                               |                                    | APPEAL NO. 2 OF 2011                              |          | ALCON INTERNATIONAL LIMITED | STANDARD CHARTERED BANK OF UGANDA & 2 OTHERS | JUDGMENT | 16 MARCH 2012      |
|     |                               |                                    | TAXATION REFERENCE NO. 1 OF 2012                 |          | ALCON INTERNATIONAL LIMITED | STANDARD CHARTERED BANK OF UGANDA |          |                    |
| 13  | REFERENCE NO. 7 OF 2010       | 1)MARY ARIVIZA  
2) OKOTCH MONDOH | 1) ATTORNEY GENERAL OF KENYA  
2) SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY | JUDGMENT | 13 SEPTEMBER 2010 | 30 NOVEMBER 2011 | 1 YEAR, 2 MONTHS & 2 WEEKS |
<p>|     |                               |                                    | APPLICATION NO. 3 OF 2010, ARISING FROM REFERENCE NO. 7 OF 2010 |          | MARY ARIVIZA &amp; ANOTHER | ATTORNEY GENERAL OF KENYA &amp; ANOTHER | RULING | 1 DECEMBER 2010    |
|     |                               |                                    | APPLICATION NO. 3 OF 2010, ARISING FROM REFERENCE NO. 7 OF 2010 |          | MARY ARIVIZA &amp; ANOTHER | ATTORNEY GENERAL OF KENYA &amp; ANOTHER | RULING | 23 FEBRUARY 2011   |</p>
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PENDING APPLICATION NO. 4 OF 2011, ARISING FROM REFERENCE NO. 04 OF 2011

APPLICATION NO. 4 OF 2011, ARISING FROM REFERENCE NO. 04 OF 2011

APPLICATION NO. 1 OF 2012

APPLICATION NO. 4 OF 2011, ARISING FROM REFERENCE NO. 04 OF 2011

APPLICATION NO. 1 OF 2012

APPLICATION NO. 5 OF 2011
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<td>PROFESSOR NYAMOYA FRANCOIS</td>
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**ADVISORY OPINIONS**

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<td>CASE STATED NO. 1 OF 2011</td>
<td>1) SAIDA ROSEMARY (ON BEHALF OF THE SUBJECT: CHRISTOPHER MAGONDU a.k.a IDRIS MAGONDU) 2) HASSAN ELIJUMA AGADE (ON BEHALF OF THE SUBJECT: HUSSEIN HASSAN AGADE)</td>
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Endnotes

1 Mr. Daniel Wandera Ogalo.
2 Professor Edward Frederick Ssempebwa, Mr. Daniel Wandera Ogalo, Mr. Mabere Marando, Mr. Med S. Kaggwa, Mrs. Sarah. N. Bagalaaliwo.
3 Mr. Wilbert Kaahwa (Counsel to the East African Community), Ms Isabelle Waffubwa (for EAC); Ms Makena Muchiri, Mr. S. N. Tuimising (for AG Kenya).

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5 Mr. Wilbert T. K. Kaahwa (Counsel to the EAC); Ms. Isabelle Waffubwa.

Amicus Curiae: (East Africa Law Society): Mr. Bahame Tom Nyanduga, Mr. Alex Mgongolwa, Mr. Don Deya.
6 Mr. Wekesa, Mr. Macharia, Mr. Nyaoga.
7 Mr. Daniel Wandera Ogalo.
8 Mr. Mutula Kilonzo SC.
9 Mr. Tom J. Kajwang’.
10 Mr. Anthony Oteng’o Ombwayo, Senior Principal Litigation Counsel (for AG Kenya).
11 Mr. Tom J. Kajwang’, Ms Judith Sijeny of Kilonzo & Co. Advocates.
12 Mr. George Ng’ang’a Mbugua Advocate of Ngatia & Associates.
13 Mr. Daniel Ogalo Wandera.
14 Mr. Colman Ngalo; Mr. Wilbert T. K. Kaahwa, Counsel to the EAC.
15 Mr. Henry Oluka, Mr. George Kalemera, Ms. Caroline Bonabana.
16 Mr. Geoffrey Komakech.
17 Mr. Henry Oluka.
18 Mr. Audax Kahendaguza Vedasto.
19 Mr. Matthew Mwaimu, Mr. Joseph Ndunguru, Mr. Paul Ngwembe.
20 Mr. Wilbert T. K. Kaahwa, Counsel to the EAC.
21 Prof. Edward Fredrick Ssempebwa, Mr. Alex Mgongolwa, Mr. Donald Deya.
22 Mr. Anthony Ombwayo.
23 Mr. Joseph Ndunguru.
24 Mr. Henry Oluka.
25 Mr. Wilbert T. K. Kaahwa, Counsel to the EAC.
26 Mr Paul Muite, SC.
27 Mr Geoffrey Imende.
28 Mr. Wetangula.
29 Mr. S. A. Sang’ka.
30 Mr. S. A. Sang’ka.
31 Mr. Geoffrey Imende.
32 Mr. Chris J. Bakiza, Mr. Justine Semuyaba.
33 Mr. Wilbert Kaahwa, Counsel to the EAC.
34 Ms. Christine Kaahwa, Mr. Eric Sabiiti.
35 Mr. Daniel Wandera Ogalo.
36 Ms. Christine Kaahwa, Mr. Eric Sabiiti.
37 Ms. Kethi Kilonzo.
38 Ms. Teresia Gathagu (AG Kenya).
   Amicus Curiae: (Kenyan Section of the International Commission of Jurists): Mr. Donald Deya, Mr. Selemani Kinyunyu.
39 Mr. Fred Athuak.
40 Mr. Barnabas Tumusingize.
41 Ms. Patricia Mutesi.
42 Wilbert T.K. Kaahwa (Counsel to the EAC), Mr. Mathews Nderi Nduma, Dr. Anthony Kafumbe.
43 Ms Wanjiku A. Mbiyu, Mr. Kepha Onyiso (AG Kenya).
44 Mr. Rwakafuuizi.
45 Mr. Amuga.
46 Mr. Muturi Kigano.
47 Mr. Edwin Okello.
48 Ms. Patricia Mutesi.
49 Mr. Agaba Stephen.
50 Mr. Mbugua Mureithi wa Nyambura, Mr. Donald Deya, Mr. Selemani Kinyunyu.
51 Mr. Justine Semuyaba.
52 Mr. Kaahwa.
53 Ms. Christine Kaahwa.
54 Mr. Daniel Wandera Ogalo.
55 M/s Margaret Nabakooza, Mr. Kasibayo Kosia.
56 Mr. Mbugua Mureithi wa Nyambura, Mr. Donald Deya, Mr. Selemani Kinyunyu.
57 For the EAC: Mr. Wilbert T.K. Kaahwa.
   For the Amicus Curiae (East Africa Law Society): Mr. Donald Deya; Ms. Alice Nayebare.
58 Mr. Mbugua Mureithi wa Nyambura, Mr. Donald Deya, Mr. Selemani Kinyunyu.